

# Contracts Under Grants-in-Aid—An Aspect of United States Federal-State-Local Relations

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## I. Introductory Observations

A recent President of the United States bespoke the “New American Revolution,” by which he apparently meant a renaissance of influence and power on the part of state and local political units in the governmental structure of the United States.<sup>1</sup> More commonly, this has been called the “New Federalism.” The means for bringing about the renaissance was clear: state and local governments were to receive seminal payments from the Federal treasury, which had in turn collected them from citizens in the states and localities.<sup>2</sup> This indirection in the distribution of funds might seem somewhat difficult to justify,

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1. “In my State of the Union Address nearly two years ago, I outlined a program which I described as a ‘New American Revolution’—a peaceful revolution in which power [is] turned back to the people. . . .” Statement by President Richard M. Nixon upon signing the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1221 (1976), 8 WEEKLY COMP. OF PRES. DOC. 1534 (Oct. 23, 1972).

2. The State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1221 (1976), provides for the return by the federal government to the states and localities of some federal revenues as a way of shoring up state and local independence; hence, the name “revenue-sharing.” In his 1971 State of the Union Message, President Nixon reiterated earlier domestic legislative goals but also laid new stress on welfare reform and environmental issues. He placed emphasis on delivery of health care and erected a new goal post related to his other goals of strengthening state and local governments. He called for enactment of a “plan of revenue sharing historic in scope and bold in concept.” 7 WEEKLY COMP. OF PRES. DOC. 89, 92 (Jan. 25, 1971). Revenue-sharing was to redistribute federally collected funds to state and local governments to enable them to (a) have substantial, unrestricted funds to use as they saw fit (Mr. Nixon requested \$5 billion), and (b) make available to them a sizeable amount (he requested \$11 billion) to use as they saw fit in aid of six broad programs: urban development, rural development, education, transportation, job training and law enforcement. Rev-

except for the generally presumed fact that the federal revenue collection system is awesomely efficient for its purposes. It produces enormous income for the federal government, which can redistribute the income among the states and localities on a basis of equality, in some proportion to need, or on another basis selected by the central government.<sup>3</sup>

State and local governments have their own tax revenues, of course, but the increased resort to supplements from federal sources stemmed from a belief that they would help rivitalize flagging energies of the states and localities. Money can, however, mean both dependence and independence: dependence on the source of the money and independence from alternative sources. During the Civil War, for example, President Lincoln ensured a measure of independence for Gov-

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enue-sharing grants, which are generally computed by formula, are not within the scope of this article.

The term "new federalism" seems generally to be applied to federal programs supporting state and local governments in their discharge of functions by means such as federal grants. The emphasis of President Nixon's "new federalism" was to strengthen the grantees' control over administration and management of their functions.

It is far from clear whether the "new federalism" has been effective in achieving its purpose of bolstering state and local governments vis-a-vis the federal government; indeed, the question arises whether, if Nixon's "new federalism" has been truly successful, this article could have been written. One of the more helpful studies is ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, IMPROVING FEDERAL GRANTS MANAGEMENT, THE INTERGOVERNMENTAL GRANT SYSTEM: AN ASSESSMENT AND PROPOSED POLICIES (1977).

3. The power of the federal government to provide grants-in-aid is based on U.S. CONST. art. I, § 8: "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." In *United States v. Butler*, 297 U.S. 1 (1936), the Supreme Court declined to give precise definition to the phrase "general Welfare of the United States," recognizing only that the words "were intended to limit and define the granted power to raise and expend money." *Id.* at 65. Later the same Term and again without delimiting the parameters of the federal government's power to distribute funds, the Court reiterated that Congress may spend money "in aid of the 'general welfare.'" *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

Grants-in-aid have never been held unconstitutional. In 1923, the Court observed that "the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject." *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923) (dictum).

*Cf.* *National League of Cities v. Usery*, 426 U.S. 833 (1976) (U.S. CONST. art. I, § 8, cl. 3 held not to enable Congress to displace directly states' freedom to structure "integral operations in areas of traditional governmental functions"). Note particularly Justice Brennan's dissent, in which he claims that the decision results in a "catastrophic judicial body blow at Congress' power under the Commerce Clause. Even if Congress may nevertheless accomplish its objectives—for example, by conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards. . . ." 426 U.S. at 880 (Brennan, J., dissenting). See generally Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereign Redivivus*, 46 *FORDHAM L. REV.* 1115, 1129-32 (1978).

ernor Oliver Morton of Indiana by providing money to help field Indiana regiments for the armies of the United States.<sup>4</sup> Morton's legislature had refused to vote funds and the Governor resorted to both private and federal sources to enable him to act independently. Independence of this sort is the other side of the coin of dependence—deny the coin and the donee will accept conditions imposed by the donor.<sup>5</sup>

The conditions imposed on grantees accepting federal grants-in-aid represent one interface defining the federal-state balance of power. As such, the increased reliance by the federal government on the use of conditions attached to grants-in-aid to achieve certain policy goals bears on the functional rather than formal constitutional outline of American Government. Nonetheless, since the division between state and federal spheres has, at least to some degree, been blurred with the diversion of funds from federal coffers to the states, it raises important questions regarding the evolving nature of the nation's constitutional framework.

This article will not attempt to identify or resolve all of the consti-

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4. 3 J.G. RANDALL, LINCOLN, THE PRESIDENT, 247-50 (1953).

5. Putting it another way: "You know aid is like opium. There are withdrawal pains when you remove it." Attributed to John Foster Dulles in another context. L. MOSLEY, DULLES, 329 (1978). Federal grants have long been substantial and conditions have long been placed on them. A number of commentaries are useful: COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, A REPORT TO THE CONGRESS ON FEDERAL & STATE RELATIONS, H.R. DOC. NO. 140, 81st Cong., 1st Sess. (1949) (The First Hoover Commission); Ervin, *Federalism and Federal Grants-in-Aid*, 43 N.C.L. REV. 487 (1965); Furman, *Impact of Federal Subsidies on State Functions*, 43 A.B.A. L.J. 1101 (1957) [hereinafter cited as Furman]; Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 GEO. WASH. L. REV. 159 (1978). Special mention ought to be made of COMMISSION ON INTER-GOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS (June, 1955) (the Kestnbaum Commission). The Advisory Commission on Intergovernmental Relations is in the course of publishing seriatim a number of useful and relevant studies. Among them are: IMPROVING FEDERAL GRANTS MANAGEMENT, ACOR A-53; and THE INTERGOVERNMENTAL GRANT SYSTEM AS SEEN BY LOCAL, STATE, AND FEDERAL OFFICIALS, ACIR A-54 (Washington, D.C., 1977).

A number of writers have assumed the constitutionality of conditions on grants. See, e.g., Furman, *supra*, at 1145-46. There may, however, be some question as to Congress' power to impose conditions which may interfere with states' ability to function effectively within the federal system. See *National League of Cities v. Usery*, 426 U.S. 833 (1976), where the Court struck down provisions of the Fair Labor Standards Act of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974), imposing wage and hour regulations on state employees. See generally Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L. J. 35 (1977).

Cf. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947), wherein the Court rejected the state's claim that federal funds could not be conditioned on the state's compliance with the Hatch Act: "[the United States] does have the power to fix the terms upon which its money allotments to states shall be disbursed." *Id.* at 143.

tutional implications which can be drawn from the growing federal involvement in state and local government. Rather, the thrust of the present discussion will be to highlight some of the more important means by which federal strings come to be attached to grants and to less powerful grantees. Specific attention will be directed to the Environmental Protection Agency (EPA) as a representative federal agency involved in matters affecting state and local governments.

Following an initial overview of the functioning structure of the American system of federal government, and a look at the various means by which federal funds are disbursed, the article will continue with a brief discussion of the origins and basic nature of both grants awarded by the Environmental Protection Agency (EPA) and the directives issued by the Office of Management and Budget (OMB) with respect to federal grants-in-aid. The article will then examine specific regulations imposed on recipients of federal grants-in-aid. In particular, the focus will be on: (1) the Office of Management and Budget Circular A-102, which provides examples of typical grant conditions; and (2) regulations established by the EPA itself. The directives and requirements to be highlighted include those dealing with financial management systems, contract assurances, resolution of disputes, cost and price considerations and investigation of grantee performance. The article concludes with an observation of a continuing slide toward greater centralism in the United States and a suggestion that such an increase in central power is properly attained only pursuant to some central decision and direction from the President, the Congress and the States.

#### A. The Federal System: A Functional Overview

The states composing the federation are generally regarded as residual sovereigns on the theory that the federal government is one of delegated powers, the non-delegated powers remaining in the states and the people.<sup>6</sup> Local governments are usually regarded as subordinate creations of the states.<sup>7</sup> States have constitutions adopted

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6. This theory is embodied in the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

7. Local government units such as cities and counties owe their existence to the state and do not exist independently of it. In California, for example, the State Constitution provides for counties which are "legal subdivisions of the State." CAL. CONST. art. XI, § 1(a). City formation is provided for in CAL. CONST. art XI, § 2(a). Local government powers are often shared with a variety of other political subdivisions, such as irrigation districts, school districts, and others.

by their voters, and these constitutions are supreme for state affairs except where issues of federal supremacy predominate.<sup>8</sup> States, together with their local government units, perform the largest number of governmental functions so far as direct impact on the citizen is concerned.<sup>9</sup> To support their functions, states impose a variety of taxes: income taxes,<sup>10</sup> sales and use taxes,<sup>11</sup> as well as corporate franchise taxes.<sup>12</sup> In addition, states usually authorize their local governments to impose one form or another of the general property tax<sup>13</sup> to provide support for local government activities.

The seeming supremacy of the state governments in their own sphere, however, is not unalloyed; in some states the citizens are guaranteed the right by state constitution to initiate and adopt constitutional and statutory provisions of their own devising, willy-nilly the

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8. U.S. CONST. art VI, § 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *See generally*, *Twining v. New Jersey*, 211 U.S. 78, 90-91 (1908); *Ex parte Virginia* 100 U.S. 339, 346-47 (1879).

9. A few examples taken from personal experience will make this clear: cars are licensed by state authority and drivers' licenses are issued by the state; houses are acquired under state law and the terms and conditions of real estate transactions are similarly governed; building inspections are carried out by local officers; fire and police services are provided by local government; lower schools are locally or privately provided, as are intermediate schools; higher education is furnished by states or by private organizations; cars are driven on streets and highways built and maintained by states and localities; even births and deaths are certified by local officials. Many of these functions may be assisted by federal funds and conducted under some form of federal regulation, including "conditions on grants," but the agents are the state and local governments. Sometimes acts of the federal government do directly affect the citizen: for example, granting him protection when he is out of the country, granting him access to the court system, providing certain benefit payments such as aid to the aged, and taking him into military service. But most citizens have less contact with the federal than the state and local systems; the most common awareness by the citizen of his contact with the federal government occurs when he files and pays his federal income tax.

10. *See, e.g.*, CAL. CONST. art. XIII, § 26; CAL. REV. & TAX CODE, §§ 17001-19452 (West 1970 & Supp. 1979).

11. *See, e.g.*, CAL. REV. & TAX CODE, §§ 6001-7176 (West 1970 & Supp. 1979).

12. *See, e.g.*, CAL. CONST. art. XIII, § 27; CAL. REV. & TAX CODE, §§ 23001-26481 (West 1970 & Supp. 1979).

13. *See e.g.*, CAL. CONST. art. XIII, §§ 1, 2; CAL. REV. & TAX CODE, §§ 101-5801 (West 1970 & Supp. 1979). Sometimes state delegations of authority to tax receive ultra-latitude interpretations. *See Weekes v. City of Oakland*, 21 Cal. 3d 386, 579 P2d 449, 146 Cal. Rptr. 558 (1978) (upholding Oakland's imposition of a license tax fee on the privilege of engaging in any business, trade, occupation or profession as an employee despite the provision of CAL. REV. & TAX CODE § 17041.5 (West 1970) that cities, whether or not they are chartered, may not impose a tax on the income of any persons, resident or otherwise).

state legislature. This right may extend to tax provisions.<sup>14</sup> Injection of federal money into the purses of state and local governments will increase their power to establish and maintain necessary as well as merely beneficial programs. Federal funds can be provided to aid schools, highway construction, environmental protection, poverty relief and other objectives. Subventions for such purposes can only be regarded as helpful by state and local governments facing increased demand for services. Inquiry has to be made, however, as to what strings are attached to the "aprons of helpfulness."<sup>15</sup>

It should be noted that there are many dissimilarities among the governmental methods employed by federal, state and local systems, despite the fact that there is adherence in both federal and state systems to the "republican" model:<sup>16</sup> three-part division and delegation of

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14. See, e.g., CAL. CONST. art. II, §§ 8-11, which provides for the so-called "initiative." In substance, if the prescribed number of electors subscribe a petition to that effect, the Secretary of State places before the voters at the next general election—or at a special statewide election held before the next general election—a proposed statute or constitutional amendment. The text of this measure is prepared by those seeking its adoption; it does not pass through the Legislature. If the majority of the votes cast on an initiative statute or constitutional amendment is in favor of it, it goes into effect the day after the election unless the measure provides otherwise; neither the Legislature nor the Governor need act. The right of constitutional amendment by initiative permits a majority of the voters to alter seemingly entrenched aspects of government, including established systems of taxation.

In the June, 1978 elections California voters adopted by a very large margin an initiative constitutional amendment (popularly known as "Jarvis-Gann" after its principal proponents or "Proposition 13" after its position among the propositions on the ballot) which altered the provision of CAL. CONST. art. XIII A, §§ 1-6 in a substantial way. The principal immediate effect of the adoption was to reduce the legal ability of local government to impose certain property tax rates. The short term effect was a certain amount of governmental hysteria, a result no doubt within the contemplation of many of the electors who approved the initiative.

The constitutionality of Proposition 13 was upheld against a number of different challenges brought under both state and federal Constitutions in *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 577 P2d 1026, 145 Cal. Rptr. 686 (1978). An issue related to Proposition 13 was also presented in *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 591 P2d 1, 152 Cal. Rptr. 903 (1979), in which the court struck down employee pay increase prohibitions in a state legislative enactment of "bail out" funds (for localities affected by Proposition 13) where the pay increase limitations had the effect of impairing the obligation under existing collective bargaining agreements for pay increases. Employees not covered by such collective bargaining agreements were also within the protection of the decision.

15. See generally *Furman*, *supra* note 5. The author views the direct impact on state governments of federal subsidies, and in particular grants-in-aid, as taking three major forms: (1) impact on the nature of the functions performed by state governments; (2) impact on the size of the programs carried out by the states; and (3) impact on the manner in which state functions are administered. *Id.* at 1103.

16. U.S. Const. art. IV, § 4 provides: "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." The meaning of "Republican" as

power to more or less independent executive, judicial and legislative branches. In contrast, local governments often depart from this format.<sup>17</sup> It should also be kept in mind that the federal government, despite the great age and endurance of its three branches, has grown to its presently vast size only in rather recent times, since 1930 or so.<sup>18</sup> This growth reflects in part the demand for support of social services, economic activities and defense machinery. It also reflects the efficiency of the federal revenue-gathering system and the willingness of the federal government to redistribute throughout the Republic the wealth so gathered.<sup>19</sup> Major portions of the federal governmental machinery within

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used in the Constitution remains imprecise. *See generally*, Baker v. Carr, 369 U.S. 186, 218-32 (1962).

17. For example, a city may be governed by a mayor and council, all elected; executive functions may be devolved on the mayor and legislative ones on the council. Under some systems the mayor's actual powers may be very nominal; under others he may have substantial power and head a "branch" of the city government. A city may also be governed by an elected commission of relatively few members who share executive and legislative powers, or it may be governed by an elected council which appoints a city manager. 22 ENCYCLOPEDIA BRITANNICA 708 (15th ed. 1968). *See generally*, E. MCQUILLAN, MUNICIPAL CORPORATIONS 3 §§ 12.39-44, 4 §§ 13.01-.21. (3rd ed. rev. 1973). The court system, however, may be created by the state and organized under its constitution, as in California. CAL. CONST., art. VI, § 1 provides: "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All except justice courts are courts of record." Art. VI, § 5 authorizes the State Legislature to provide for the organization and prescribe the jurisdiction of municipal and justice courts.

18. U.S. SEN. COMM. ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, ORGANIZATION OF FEDERAL EXECUTIVE DEPARTMENTS AND AGENCIES 80TH CONG., 2D SESS. 2 (Comm. print 1948) provides figures for the rise in Federal government employees:

1913	469,879
1932	621,636
1936	843,995
1945	3,769,646
1948	1,994,752

The difference in the 1945 and 1948 figures was accounted for by the contraction of the government following the conclusion of hostilities in 1945. The U.S. SEN. COMM. ON GOVERNMENTAL AFFAIRS, ORGANIZATION OF FEDERAL EXECUTIVE DEPARTMENTS AND AGENCIES, 95TH CONG., 1ST SESS. (1977), lists, as of January 1, 1977, 2,791,710 executive branch employees, not including military officers and enlisted personnel. The Environmental Protection Agency, which will be discussed *infra* with respect to grants, housed 11,428 employees as of that date.

19. Units of the federal Executive Branch may be called "department," "agency," "administration" or "commission," although by and large the actual powers of the unit do not depend on its title. "Department" seems to be the most prestigious label. The term is the only one used in the U.S. Constitution to refer to the components of the Executive Branch. *See* U.S. CONST. art. II, § 2, cl. 1. The heads of the major departments are recognized in statute as forming the President's cabinet. 5 U.S.C. § 101 (1976); 36 OP. ATT'Y GEN. 12 (1929). *See generally* Whelan, *Law of Public Administration: Need for Legal Study*, 53 GEO. L.J. 953, 966-69 (1965). The salient aspects of a unit of the Executive Branch seem to be that its chief officials—for example, the "Secretary," the "Assistant Secretary," or the "Adminis-

the Executive Branch are of recent construction, though basic designs may be old.

State and local systems, or many of them, tend to have grown earlier than the federal system because the states and localities have for a longer time been handling and financing many of the major burdens of government, such as education, health, road maintenance and other services. Until relatively recent times—again, since approximately 1930—American government at any level tended to be relatively unobtrusive when compared to some European systems. Nonetheless, so far as the functions of government were borne in those days, more of them fell into the state and local sphere than into the federal one. And it must be said that, with a few exceptions, the greatest number of the functions of delivering essential governmental services to the citizen or user are still in state and local hands.<sup>20</sup> There is, however, a noteworthy addition of late vintage: federal funds are now used to support states and localities in making the delivery.<sup>21</sup> Without essaying an ex-

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trator”—will be nominated and appointed by the President with the advice and consent of the U.S. Senate. Echelons of the department or agency below these topmost “political” appointees will be manned by members of the federal Civil Service. Political appointees are relatively easy to remove from the federal service; civil servants are less so.

The more important units of the Executive Branch function independently of one another and are directly responsible to the President. Such major units usually have their own statutory charters—for example, acts of Congress outlining their powers and purposes. Very often their appropriations are provided in separate annual acts. Normally, such units have a close liaison with congressional committees or subcommittees charged with surveillance of them. With respect to the Department of State, *see* 22 U.S.C. §§ 2651-2690 (1976). 22 U.S.C. § 1680(b) (1976) provides that the Department of State “shall keep the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives fully and currently informed with respect to all activities and responsibilities within the jurisdiction of these committees.”

20. *See* note 9 *supra*.

21. *Id.* Federal assistance consists of over one thousand different programs administered by over fifty different federal agencies. This is exclusive of federal revenue-sharing programs, government contracts administered under the procurement laws, or indirect assistance resulting from federal operations. The Office of Management and Budget publishes an annual Catalog of Federal Domestic Assistance (OMB Circular A-89) covering these programs and setting out the type of assistance available by agency, function, popular name, and subject. As one would suspect, the Catalog is massive, fully 1,500 pages. It obviously serves as a useful compendium for state and local governments.

Federal grants-in-aid have risen from \$7.0 billion in fiscal year 1960 to \$80.3 billion in fiscal year 1978. BUREAU OF NAT'L AFFAIRS, FEDERAL CONTRACTS REPORT NO. 721 at A-8, A-9 (March 6, 1978). Estimated fiscal year 1979 (October 1, 1978 through September 30, 1979) outlays for grants-in-aid to state and local governments is \$85.020 billion, \$6.852 billion of which is for general revenue-sharing. Most of the balance is for the sort of grants-in-aid discussed in this article. *See* OMB, SPECIAL ANALYSES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1979, SPECIAL ANALYSIS H, TABLE H-7, at 187 (1978) [hereinafter BUDGET ANALYSES]. Special Analysis H, “Federal Aid to State and Local Gov-



haustive catalogue or attempting any rigorous precision, it can be said that defense, foreign affairs, postal services and some other delivery functions are conducted under exclusively federal management. Education, health, road maintenance, police and fire departments and other services are largely in state and local hands with major federal assistance in the form of money, planning, and other support.<sup>22</sup>

## B. Disbursing Federal Funds

Whatever the state or local program and whatever the unit of government carrying it out, federal funds are useful. A prime point of inquiry then becomes: how shall the funds be provided? An outright gift, with no strings attached and no accounting asked, would be from a donee's point of view, ideal. Yet even the most open-hearted, charitable donor might find the propriety of such a gift questionable. So strings there will be. The amount of funds involved suggests that conditions would be desirable from the federal donor's point of view: recent figures indicate that the total federal aid to state and local governments exceeded \$80 billion in 1978.<sup>23</sup>

Federal aid is available in several forms, a common one being "contracts." The basic nature of the bilateral contractual undertaking is clear enough: mutual promises which furnish legal consideration. The question is how many promises will be exacted by the paying con-

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ernments," is a part of the budget documents published each year by the U.S. Government Printing Office, Washington, D.C.

22. To avoid confusion, excluded from this list of federal and state services are those activities such as communications (other than the mails), transportation of people and goods, and some educational and health activities which are conducted by private persons and organizations. They are presently, however, subject to a fair amount of government regulation, sometimes including regulation by all three levels of government. For example, private airlines will fly in and out of airports, some of which may be operated by municipalities and governed by their regulations and, in addition, the regulations of the state. Air traffic control is provided by the Federal Aviation Administration, Department of Transportation. For example, San Francisco International Airport in California is operated as a city function. CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO § 93. *See also* CAL. GOV'T CODE §§ 50470-50478 (West 1966 & Supp. 1979). The Division of Aeronautics, State Department of Transportation, will exercise related functions and jurisdictions in areas outlined by statute—such as licensing procedures, acquisition of property for airport use and inspection of facilities—jointly with political subdivisions of the State. *See* CAL. PUB. UTIL. CODE § 21248 (West Supp. 1979); CAL. GOV'T. CODE §§ 14007-14010 (West Supp. 1979).

The Federal Aviation Administration air traffic controllers are governed by 49 U.S.C. § 1348(c) (1976) and 14 C.F.R. §§ 91.75-.77 (1979).

23. The Advisory Commission on Intergovernmental Relations estimates over \$80 billion in fiscal 1978. *See* BUREAU OF NAT'L AFFAIRS, FEDERAL CONTRACTS REPORT NO. 721 at A-8, A-9 (March 6, 1978). BUDGET ANALYSES, *supra* note 21 at 175, estimates an even higher figure for fiscal year 1979.

tractor from the contractor who is to perform. The promises made by federal contractors are legion, whether made by the federal contractor who contracts to build a tank or an airplane,<sup>24</sup> or by the federal contractor who builds a dam which is primarily for the benefit of a locality, state or region.<sup>25</sup> Federal assistance is also provided by "grants,"<sup>26</sup> a term that somehow sounds less ponderously promissory than "contract," but, as this article will attempt to show, may not accurately reflect a difference in substance. Finally, "cooperative agreements" are used where performance and payment are contributed by both sides (the federals and the states or localities). The Commission on Government Procurement has suggested clarification of all these terms,<sup>27</sup> and a

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24. The major clauses required for such a supply contract will easily reach several dozen in number. The contract would include U.S. Standard Form 32, 41 C.F.R. §§ 1-16.901-.932 (1978) (25 clauses) and, if the contract were with the Department of Defense or one of its military departments, such other clauses as would be required by the Armed Services Procurement Regulation for such contracts. *See*, 32 C.F.R. 7-103.2 to .29; 7-104.1 to .96 (1976).

25. Federal construction contract clauses are provided in U.S. Standard Form 23A, 41 C.F.R. 1-16.901 to .932A (1978) (31 clauses). For additional required or permitted clauses, *see also* Armed Services Procurement Regulation, 32 C.F.R. 7-602.7 to .52; 7-603.1 to .57 (1976).

26. The terms "grant" and "grant-in-aid" are not altogether meaningful and do not seem to have had any stable meaning in statutes or usage until recent times. Some of the uncertainty surrounding one form of "grant" was explored in Whelan, *Public Law 85-934: New Federal Support for Basic Scientific Research*, 8 J. PUB. L. 462, 470-85 (1959) [hereinafter cited as Whelan, *Public Law 85-934*]. In any event, "grant" seems not intended to cover exactly the same ground as "contract." Whether or not grants may involve legal obligations is a difficult question. The Commission on Government Procurement remarked on the confusion in meaning and usage among, "grant," "grant-in-aid," and "contract" in 3 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 156-59 (1972). The term "grant" has, however, been given a statutory significance by reason of the enactment of The Federal Grant and Cooperative Agreement Act, 41 U.S.C.A. §§ 501-509 (Supp. 1979), discussed *infra*, notes 28-29.

27. 3 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 161-68 (1972). The need for clarification is rather cogently attested to by a situation disclosed in testimony by Ralph Tabor given to the U.S. Senate Committee on Government Operations: "I would like to describe the situation faced by Dade County, Florida, which has a full-time inter-governmental coordinator in the county manager's office. Metropolitan Dade County receives approximately \$250,000,000 in Federal assistance each year. This year Dade County was required by a Federal agency to submit a listing of all handicapped persons employed in county programs receiving financial assistance through Federal contracts. This was necessary because a new Federal law requires a separate affirmative action program for the handicapped on all Federal contracts. It took the county's affirmative action staff several months of telephone calls and letters to Federal officials asking what Federal assistance was through contracts. The basic answer given was that they did not know which of the programs were in the contract mode. And, in fact, the county is still trying to make the determination so that they will be in compliance with the new law. This lack of understanding about the different types of aid has meant that local governments such as Dade County are being subjected to unnecessary administrative requirements that are both time consuming and re-

recently enacted statute has laid down a functional scheme<sup>28</sup> which should be of assistance in that it clarifies certain of the terms and conditions to be imposed on "contractors," "grantees," or makers of "cooperative agreements."<sup>29</sup>

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sult in no apparent improvement in program performance." *Federal Grants & Cooperative Agreement Act of 1976: Hearings Before the Subcomm. on Federal Spending Practices, Efficiency, and Open Government and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 94th Cong., 2d Sess. 19-20 (1976)* (statement by Ralph Tabor).

28. 41 U.S.C.A. § 505 (Supp. 1979). The Federal Grants and Cooperative Agreements Act does not define "grant" but instead describes the circumstances under which grants should be used. Section 504 provides: "Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

- (1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and
- (2) no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity."

29. *Id.* section 503 describes when "contracts" should be used: "Each executive agency shall use a type of procurement contract as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient—

- (1) whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or
- (2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate."

Section 505 describes when "cooperative agreements" should be used: "Each executive agency shall use a type of cooperative agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

- (1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and
- (2) substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity."

Section 508 of the Act authorizes the Director of the Office of Management and Budget to issue "supplementary interpretative guidelines" concerning contracts, grants, and cooperative agreements "as defined" in the Act so as to promote their consistent and efficient use. Wisely enough, the Act does not undertake a classification of contracts, grants and cooperative agreements from the standpoint of their enforceability. The structure and wording of the Act seem, however, to suggest that all three arrangements import legal obligation.

After submitting its ideas to public comment, the Office of Management and Budget published its final set of guidelines as "OMB Guidance to Agencies for Implementing the Federal Grant and Cooperative Agreement Act" at 43 Fed. Reg. 36,861-65 (1978). (The

By far the most interesting of these three instruments, because of the dramatic expansion of its employment by the federal government as a vehicle for aid in the last dozen or so years, is the so-called "grant." Wallick and Montalto suggest that "grants" used by the federal government as aid vehicles fulfill the ordinary meaning of "contracts."<sup>30</sup> They are not "contracts" as the federal government understands that term.<sup>31</sup> But certainly some federal "grants" seem to embody the requirements of offer, acceptance and consideration: the federal government offers the grant of money aid and in return exacts an acceptance replete with statements of obligation assumed by the grantee.<sup>32</sup> The point has some significance: to the extent grants are contracts, executory obligations should be enforceable. So far as the federal government's contract obligations are concerned, the Court of Claims has jurisdiction to render judgments based upon an "express or implied contract" with the

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Federal Register publication does not indicate classification to the Code of Federal Regulations.)

30. Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 GEO. WASH. L. REV. 159, 165-69 (1978).

31. Normal usage of "contract" signifies, in the federal system, that the agreement has been made pursuant to the statutes relating to contracts. *See, e.g.*, the Armed Services Procurement Act, 10 U.S.C. §§ 2301-2314 (1976 & Supp. I 1977); Title III, the Federal Property and Administrative Services Act, 41 U.S.C. §§ 251-260 (1976). Normal usage also signifies that the agreement complies with the requirements of the lengthy procurement regulations. *See e.g.*, the Armed Services Procurement Regulation, 32 C.F.R. Pts. 1-39 (1976), or the Federal Procurement Regulation, 41 C.F.R. Pt. 1 (1976).

Malcolm Mason offers some interesting comparisons: "As I see it, procurement contracts have a classic quality in that they create a cold and formalized impersonal relation while grants have a romantic quality creating a hot and enthusiastic relation. Contracts are abstract in the sense that they tend to deal with what can be counted impersonally: so many desks, of such and such dimensions and specifications. Grants are concrete in the sense that they deal with what cannot merely be counted: people with names, faces, ages, needs; services to people and concerns about them." Mason, *Current Trends in Federal Grant Law—Fiscal Year 1976*, 35 FED. B. J. 163, 187 (1976). Certainly, most lawyers would not confuse a "federal grant" with a "federal contract." *But see* the example from Dade County in note 27 *supra*; the temptation to say that they would not fail to confuse a "federal grant" with an ordinary "contract" is strong. While lawyers' usage of "federal grant" and "federal contract" has maintained a distinction, one cannot but perceive the utility of 41 U.S.C.A. §§ 503-505 (Supp. 1979), *quoted in* notes 28 and 29 *supra*.

32. It would appear that in most cases the federal government either promises to make a grant or, in making its grant, promises to make serial payments of money and, in return, the state or local government unit promises to abide by the conditions of the grant. (The subject of grantees' "assurances" is discussed *infra*.) This exchange seems to form the traditional "promise for a promise" consideration; *see* 1A CORBIN, CONTRACTS § 142 (1963). Alternatively, the federal government could be said to pay over money as a grant and the grantee, in return, promises (among other things) to abide by grant conditions. *See id.* §§ 122-23. Further, the transaction seems to justify characterization that it is "instinct with an obligation," to follow Justice Cardozo's thought in *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

United States. This grant of jurisdiction does not seem to mandate that such "contracts" be the product of the procurement process.<sup>33</sup>

A major purpose of this paper will be to examine one of the major areas of federal grants and to see how the grant is encumbered with obligations and how such obligations may affect the structure of the republic. Particular attention will be paid to the grantee's obligations with respect to making contracts with businesses or other entities for the purpose of implementing grant objectives. The federal grant practices of the Environmental Protection Agency (EPA), under the authority of a group of statutes authorizing it to make grants,<sup>34</sup> can serve as exemplars of the "grant" as a federal aid instrument. The reader must be cautioned: the article speaks of only one of the many federal agencies which make grants, and that agency is not the most beneficent grantor.<sup>35</sup> There are differences among grantor departments and agen-

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33. The statute is the so-called "Tucker Act," 28 U.S.C. § 1491 (1976) (as amended), which confers jurisdiction on the U.S. Court of Claims no matter what the amount of the claim. The same jurisdiction, but limited to claims not exceeding \$10,000 in amount, is conferred on the U.S. District Courts by 28 U.S.C. § 1346(a)(2) (1976).

The present day confusion among "grant," "contract," and "cooperative agreement," sought to be eliminated by the Federal Grants and Cooperative Agreements Act, *supra* note 28, probably was not foreseen when the Tucker Act first came into effect in the late nineteenth century. Nonetheless, the author believes that it would be a wholesome step for the Court of Claims and District Courts to house the sort of federal grants discussed in this paper within their contracts jurisdiction. If one concluded that federal "grants" as the term is used in this article really embrace a bundle of contractual obligations, it would not appear too difficult for the Court of Claims to hear and determine claims by grantees. However, the Court has not done this. In cases where claims are presented by contractors of grantees, the Court seems to have been reluctant to allow suits by the contractors either on real party in interest grounds, *D.R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505 (Ct. Cl.), *cert. denied*, 389 U.S. 835 (1967), or on third party beneficiary grounds, *Housing Corp. of America v. United States*, 468 F.2d 922 (Ct. Cl. 1972). Why could not the Court, in the case of contractors under grantees, follow its line of cases allowing prime contractors to present subcontractors' claims? *E.g.*, *J.L. Simmons Co. v. United States*, 304 F.2d 886 (Ct. Cl. 1962); *Blount Bros. Constr. Co. v. United States*, 348 F.2d 471 (Ct. Cl. 1965). Under these authorities it could be persuasively argued that a state or local government grantee (like a prime contractor) could present its contractors' claims in the Court of Claims on their behalf. This assumes, of course, the willingness of the state or local entity to do so.

Whether and how complaints arising under grants can be given judicial scrutiny under the Federal Administrative Procedure Act is another question. That Act, 5 U.S.C. §§ 701-706 (1976), allows judicial review of agency action. The sweep of the Act was recently enlarged by Pub. L. No. 94-574, 90 Stat. 2721 (1976) (codified in 5 U.S.C. §§ 702 & 703 (1976)).

34. These statutes are listed in the text beginning as note 36 *infra*.

35. It appears from BUDGET ANALYSES, *supra* note 21, at 183 that the EPA is handily outstripped by the Department of Health, Education and Welfare (1979 estimate \$31.811 billion), the Department of Labor (1979 estimate \$11.766 billion), and the Department of Transportation (1979 estimate \$10.380 billion). EPA has been used, even though it is not the "biggest pocketbook," because its programs lend themselves conveniently to analysis in

cies, but the EPA can be regarded as typical enough to provide some generalizations about the impact of grants on federal relationships.

## II. Grants in an Environmental Setting

A number of different statutes authorize the EPA to assist state and local governments, including: the Federal Water Pollution Control Act;<sup>36</sup> the Clean Air Act;<sup>37</sup> the Solid Waste Disposal Act;<sup>38</sup> the Safe Drinking Water Act;<sup>39</sup> the Public Health Service Act;<sup>40</sup> and the Federal Insecticide, Fungicide, and Rodenticide Act.<sup>41</sup> The general purposes of these statutes are fairly well indicated by their titles. Total EPA grant-in-aid outlays for fiscal 1977 are stated to have been \$3.7 billion, outlays for fiscal 1978 are estimated to have been \$4.3 billion and those for fiscal 1979 are estimated to be \$4.9 billion.<sup>42</sup>

Many federal grant programs call for matching funds to be provided by states or localities. For example, the waste treatment construction grant program, conducted under the Federal Water Pollution Control Act,<sup>43</sup> involves large grants of federal funds matched by states in varying amounts, in most cases substantial ones.<sup>44</sup> It can be expected that the transmission of these funds through the federal-state-

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more or less familiar terms, because its objectives can be concretely understood, and because the subject of the environment is such a popular one.

36. 33 U.S.C. §§ 1251-97 (1976 & Supp. I 1977).

37. 42 U.S.C. §§ 7401-06, 7544 (Supp. I 1977) (amending 42 U.S.C. §§ 1857-58 (1976)).

38. 42 U.S.C. §§ 6901-87 (1976 & Supp. I 1977).

39. 42 U.S.C. §§ 300f-300j-4 (1976).

40. 42 U.S.C. §§ 241, 242b, 243, 246 (1976).

41. 7 U.S.C. §§ 135-36y (1976).

42. BUDGET ANALYSES, *supra* note 21 at 183. The figures are the total for EPA and include, but are not distributed among, the programs under the statutes listed in the text at notes 36-41 *supra*. Nonetheless, those programs must account for a substantial part of the EPA total figure.

43. 33 U.S.C. § 1288(f)(2) (Supp. I 1977). A report on the waste treatment construction grant program (conducted under the Federal Water Pollution Control Act Amendments of 1956), U.S. GENERAL ACCOUNTING OFFICE, REP. NO. CED 77-113 at 42 (Sept. 12, 1977) included statistics showing the degrees of state participation, for example, was 12.5%, Pennsylvania's participation was zero, New Hampshire's was 20%, and American Samoa's was 25%.

44. The grants are "matched" in the sense that states and localities provide money in addition to the federal funds. Such sums do not necessarily equal the federal outlay. *See* 33 U.S.C. § 1288(f)(2) (Supp. I 1977), allowing the EPA to expend no more than 75% of the costs of developing and operating a waste treatment management program. The U.S. General Accounting Office report cited in note 43 *supra*, puts federal obligations for the waste treatment construction program at about \$19.9 billion from fiscal year 1957 through March 31, 1977. *Id.* at 1. The fiscal year 1978 budget recommended a ten year funding plan of (4.5 billion a year for the program. *Id.* States' participation varies; *see* note 43 *supra*.

Such matching may be allocated based on function. *See, e.g.*, 42 U.S.C. § 7405 (Supp. I

local economy can produce significant governmental results. The very existence of programs for expenditure of such sums has led to the enactment and adoption of controls in the form of statutes—as we have seen—and regulations—as we shall see.

Our governmental structure operates through the use of more or less explicit rules of conduct: enactments by legislatures and implementation of such enactments by executive agency regulations. All of them tend to be legalistic in form, and most tend to be extensive in scope and length. Furthermore, there are strata of such statutes and regulations—federal predominate over state and local—and there may even be layers within the various governmental segments.<sup>45</sup> This article will examine these regulatory impediments from a formal and legal standpoint, deferring to others an examination of the actual impact of such regulations on the behavior of the government employees and civil servants who are supposed to comply with them.<sup>46</sup>

Another point as to the structure of federal grants-in-aid programs should be made clear. Much will be made later of conditions placed on federal grants to states and localities. Such conditions can be derived from acts of Congress, Executive Orders of the President, or from regulations adopted by officials throughout the departments and agencies

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1977), which specifically directs the grantee to supply one-half of maintenance funds and one-third of research funds for air pollution control programs.

The existence of matching funds raises another federalism issue: has the federal funding of such projects relieved the states and localities of a large portion of expenditures that they would otherwise have had to make on their own, or has the availability of a federal program with large funding induced the states and localities to enter into programs and projects and undertake expenditures that they might not have otherwise done? Furman, *Impact of Federal Studies on State Functions*, *supra* note 5, refers to this problem. Solid facts seem hard to come by, but diversion of state funds from state programs in order to provide funds to “match” federal grants must have occurred.

45. *See, e.g.*, the circulars of the Office of Management and Budget in notes 79-87 and accompanying text *infra*.

46. It is always tempting to assume that statutes and regulations are complied with and obeyed. Yet such unvarying compliance and obedience is not the case even with criminal laws which have serious sanctions against disobedience. No such serious sanctions seem to exist in the area of grants, particularly when it involves the duties of individuals to comply with grant regulations. Penalties for false statements exist, of course, *see* 18 U.S.C. § 1001 (1976); and one presumes that fraud and other criminal offenses committed in connection with grants will be punishable under the general criminal law of the United States or the several states. Many related and intriguing issues remain unanswered, however. Absent sanctions such as the criminal ones for noncompliance with regulations such as those discussed in the text (regulations dealing with administration of grants and the making of contracts under grants), what is the record of compliance? Further, where there has been compliance, how has this affected the performance of government functions at state or local government levels?

making up the federal Executive Branch.<sup>47</sup> For example, a section of the Solid Waste Disposal Act requires that grants contain assurances of compliance by grantees' contractors and sub-contractors with the wage rate provisions of the Davis-Bacon Act.<sup>48</sup> Examples also exist of conditions originating in Presidential orders.<sup>49</sup> Sufficient examples will be given to indicate the importance of agency-imposed conditions. It seems that most conditions owe their provenance to departmental, agency or Office of Management and Budget action.

### III. The Grants Machinery

A myriad of legal, political and social considerations are involved in the process of distributing federal grants-in-aid. Due to the significant amounts of money involved and the importance of the state and local programs dependent upon such funds, the federal grants system is of interest to all levels of government. President Carter, in a recent message of concern regarding federal grants, expressed his goals for improving the present distribution system.<sup>50</sup>

He indicated that reform would be wrought in five separate areas: (1) by reducing the paperwork requirements involved with grants; (2) by extending the application of federal financial management practices; (3) by extending the use of federal audit procedures; (4) by simplifying the language used in drafting the regulations; and (5) by streamlining various federal requirements in the areas of civil rights, citizen participation in the governmental process, and the protection of environmen-

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47. Congressional enactments, Presidential Orders and agency regulations are the main possible sources of such grant conditions. It is possible that grant conditions might also be imposed by the federal official actually superintending the making of the grant agreement between the federal government and a state or local government entity. The degree to which this is done is unknown. The conditions emanating from Congress and the agencies of the Executive Branch are the most visible and common ones in grants. There is, of course, a deeper issue: whether any federal government officer, branch, or agency has authority to impose conditions on grants which can affect the integrity of state sovereignty. This is a troubling issue and there seems to be no clear, generally applicable answer. *See generally* National League of Cities v. Usery, 426 U.S. 833 (1976), discussed in note 5 *supra* and note 24 *infra*.

48. 42 U.S.C. § 6979 (1976). The Davis-Bacon Act is found at 40 U.S.C. § 276a-276a-5 (1976).

49. *See, e.g.*, OMB Circular A-102, Attachment O, ¶ 4 (c), 42 Fed. Reg. 45,890 (1977), discussed *infra*, which directs that contracts awarded by grantees shall contain clauses requiring compliance with the "Equal Employment Opportunity" policy established by Exec. Order No. 11,246, *as amended by* Exec. Order No. 11,375 and *supplemented in* 41 C.F.R. ch. 60 (1978) (Labor Dept. regulations).

50. 13 WEEKLY COMP. OF PRES. DOC. 1311 (Sept. 9, 1977). The President's statement was made when he announced a program for reform of the grant system.



tal quality.<sup>51</sup>

The President's fourth reform objective is particularly pertinent to our discussion: what are the regulations and from whence do they come? The following section of this article discusses the extent and nature of the Office of Management and Budget's involvement in the federal grants-in-aid program.

#### A. Office of Management and Budget

One of the most significantly powerful entities among the bastions of the federal bureaucracy is the Office of Management and Budget. OMB, as it is known, is the successor to the former Bureau of the Budget. It forms a part of the Executive Office of the President,<sup>52</sup> and performs many important regulatory functions with respect to grants-in-aid assistance to state and local governments and other organizations.<sup>53</sup> OMB is able to take a critical view of the activities of all government granting agencies because of its proximity to the President and because of its supervisory powers over the business of federal budget preparation and appropriation apportionment.<sup>54</sup> Whether it is so well

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51. *Id.*

52. The "Executive Office of the President" seems to owe its origin to Presidential Reorganization Plans I and II of 1939, 3 C.F.R. 1288 (1938-1943 compilation) *reprinted in* 53 Stat. 1423. The components of the Executive Offices are numerous and their influence considerable. The number of officers and employees, although fluctuating from President to President, is never very large. Recent figures indicate about 1740 employees are in the Executive Office. The principal components include: The White House Office (the President's immediate staff and attachés); the Office of Management and Budget (long service government employees, many staying on from administration to administration); the Council of Economics Advisers; the National Security Council; and a number of other "Councils" advising the President on important issues of foreign and domestic policy. Power fluctuates, of course, but OMB and the White House Office appear to control major corridors of power.

The Bureau of the Budget, to which OMB is the successor, was created by the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, (codified in scattered sections of 31 U.S.C.). It was transferred to the Executive Office of the President from the Treasury Department in 1939 by Reorganization Plan I, 1939, *supra*. Reorganization Plan No. 2, of 1970, 3 C.F.R. 1070 (1966-1970 compilation) *reprinted in* 31 U.S.C. § 16 at 1197 (1976), effective July 1, 1970, established OMB; and by Exec. Order No. 11,541, 3 C.F.R. 939 (1966-1970 compilation) *reprinted in* 31 U.S.C. § 16 at 1200 (1970), a number of important functions were transferred to OMB.

53. Two of the more important statutes containing statements of federal objectives requiring implementation by regulations are: (1) the Joint Funding Simplification Act of 1974, 42 U.S.C. §§ 4251-4261 (1976), principal functions under which were transferred back to OMB from the General Services Administration by Exec. Order No. 11,893, 3 C.F.R. 1069 (1971-1975 Compilation) *reprinted in* 42 U.S.C. § 4252 at 1714 (1976); and (2) the Intergovernmental Cooperation Act of 1968, 42 U.S.C. §§ 4201-4244 (1976). OMB discharges responsibility under the latter Act by reason of 42 U.S.C. § 4233 (1976) *as amended by* Reorganization Plan No. 2 of 1970, *supra* note 52.

54. Its functions with respect to budget preparations derive from the Budget and Ac-

positioned to receive information from grantees and bring that information to bear in evaluating grantors is quite another matter; one tends to believe it is not so well positioned. Research has suggested, in any event, that comments and complaints from grantee states and localities are fragmentary and ill-coordinated. So far as can be determined, the federal agency most attuned to the state and local view on grants is the Advisory Commission on Intergovernmental Relations.<sup>55</sup>

Pursuant to its powers, OMB has issued a number of directives which relate to grants-in-aid.<sup>56</sup> For present purposes, the analysis of one of them, OMB Circular A-102, "Uniform Administrative Require-

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counting Act, 31 U.S.C. §§ 11-16 (1976). The Anti Deficiency Act, 31 U.S.C. § 665 (1976), provides its authority with respect to apportionment of appropriations.

55. Act of Sept. 24, 1959, 42 U.S.C. §§ 4271-4279 (1976).

56. A few of these directives merit mention at this point: (a) OMB Circular A-85, "Consultation with Heads of State and Local Governments in Development of Federal Regulations;" (b) OMB Circular A-89, "Catalog of Federal Domestic Assistance," *supra* note 21; (c) OMB Circular A-95, "Evaluation, Review and Coordination of Federal and Federally Assisted Programs and Projects (*see infra*); (d) OMB Circular A-102, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments;" and (e) OMB Circular A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-profit Organizations."

In note 44 *supra*, reference was made to the fact that OMB had received back from the General Services Administration (GSA) under Exec. Order No. 11,893, 3 C.F.R. 1069 (1971-1975 Compilation), reprinted in 42 U.S.C. § 4252 (1976), important functions relating to grants-in-aid. Along with these functions came certain grant regulations issued by the GSA and still applicable pending supervision by newer OMB directors. Included among these "Federal Management Circulars" (FMC) was, for example, FMC 73-8, December 19, 1973, "Cost Principles for Educational Institutions." As of March, 1978, OMB had proposed a revision of the terms of FMC 73-8. 43 Fed. Reg. 9896 (1978). When the proposal is adopted, the directive will become OMB Circular A-21, "Principles for Determining Cost Applicable to Grants, Contracts, and Other Agreements with Educational Institutions." Other FMCs will, presumably, be similarly overhauled and re-named.

OMB Circular A-89, the "Catalog of Federal Domestic Assistance" (known as CFDA) deserves special mention. That Circular lays down policies for the promulgation of the Catalog, which is a thick compendium of all forms of domestic assistance, including grants, except the so-called "Revenue-sharing" program— *see* note 2 *supra*, contracts subject to procurement laws and regulations, and certain foreign programs. CFDA is issued annually and is a necessary reference document for studying grants.

OMB Circular A-95, "Evaluation Review and Coordination of Federal and Federally Assisted Programs and Projects," is an important attempt to articulate grant-in-aid and other federal assistance programs. It sets up a comprehensive system to achieve such articulation and coordination. A keystone of this system is the establishment of state, area and metropolitan clearinghouses. State, local and federal offices are intended to use the "Clearinghouse" system to facilitate the orderly administration of grants-in-aid.

For the interested reader, "Administrative Policies and Information Sources Relating to Federal Domestic Assistance Programs," a periodically revised survey of documentation published by the Intergovernmental Relations and Regional Operations Division, OMB, is invaluable. *See also* "OMB Guidance to Agencies for Implementing the Federal Grant and Cooperative Agreement Act," *supra* note 29.

ments for Grants-in-Aid to State and Local Governments,"<sup>57</sup> will provide some indication of the type of requirements for grants-in-aid which have been imposed on federal agencies, including the Environmental Protection Agency.<sup>58</sup>

## B. Circular A-102

Circular A-102 is a hefty document. Its principal standards are set forth in a series of "Attachments," fifteen in number,<sup>59</sup> dealing with such subjects as the deposit of cash advances made under federal grants, grantees' financial management systems, and the use of standard forms in connection with grants. Some points should initially be made about OMB A-102's general applicability and coverage. The Circular, although issued by OMB, is not intended to be carried out by OMB but, rather, by those agencies of the federal government that make the grants to which the Circular applies. Following the usual federal practice, such agencies are responsible for issuing appropriate regulations to implement Circular A-102.<sup>60</sup> In certain cases, federal agencies may impose needed additional requirements on grantees, such as where an applicant/recipient has a history of poor performance, is financially unstable, or where its management system fails to meet the standards prescribed in the Circular.<sup>61</sup> Except for such cases, the allowance of deviations from the requirements of the Circular is reserved

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57. Promulgated August 24, 1977, 42 Fed. Reg. 45,827-91 (1977). See note 61 *infra*. OMB Circular A-102 supersedes the earlier FMC 74-7, dated September 13, 1974.

58. Examination of OMB Circular A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-profit Organizations," 41 Fed. Reg. 32,015 (1976), would also be useful, but this examination will be limited to the former Circular; there are substantial parallels between the two Circulars, and Circular A-102 bears more directly on state and local governments. It ought to be noted that Circular A-110, insofar as it bears upon educational institutions and nonprofit organizations, will have an impact on governmental functions in the states and localities. For example, the University of California, with an enrollment of over 100,000 students, is a state governmental utility created under CAL. CONST. art. IX, § 9. Hospitals are maintained not only by states, but even more frequently by counties and cities as well as private organizations.

59. These attachments are lettered: A-Cash depositories, B-Bonding and insurance, C-Retention and custodial requirements for records, D-Waiver of "single" state agency requirements, E-Program income, F-Matching share, G-Standards for grantee financial management systems, H-Financial reporting requirements, I-Monitoring and reporting program performance, J-Grant payment requirements, K-Budget revision procedures, L-Grant closeout procedures, M-Standard forms for applying for Federal assistance, N-Property management standards and O-Procurement standards. OMB Circular A-102, ¶ 8, 42 Fed. Reg. 45,829 (1977).

60. *Id.*, ¶ 11.

61. *Id.*, ¶ 10. This provision also requires written notice to such applicants as to: (a) why the additional standards are imposed, and (b) corrective action needed.

to OMB.<sup>62</sup> One important feature of the Circular is that it has its own definition of "grant," a definition which is quoted to depict the complexity of government prose:

The term "grant" or "grant-in-aid" means money, or property in lieu of money, paid or furnished by the Federal Government to a State, local or federally recognized Indian tribal government under programs that provide financial assistance through grant or contractual arrangements. The term does not include technical assistance programs which provide services instead of money or other assistance in the form of general revenue sharing, loans, loan guarantees, insurance, or contracts which are entered into and administered under procurement laws and regulations.<sup>63</sup>

A sampling of requirements drawn from the provisions of the Circular offers a sense of the scope of its requirements and suggests the impact they will have on another governmental system, the system of a state or local government grantee.

*1. Attachment C: Retention and Custodial Requirements for Records*

Attachment C of Circular A-102 requires grantees to retain "[f]inancial records, supporting documents, statistical records, and all other records pertinent to a grant" for a period of three years.<sup>64</sup> One can grasp in a general way the usefulness of such record retention requirements; but a question is raised as to the extent and cost of the managerial and storage burden imposed on the state or locality. One also is inclined to ask how often such records are actually used within the three year (or other) period. Another provision of Attachment C provides that: "the head of the Federal grantor agency and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any pertinent books, documents, papers and records of grantees and subgrantees to make audits, examinations, excerpts and transcripts."<sup>65</sup> Again, it is rather easily seen that

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62. *Id.*, ¶ 9.

63. *Id.*, ¶ 7(a), 42 Fed. Reg. 45,828 (1977). *But see*, OMB Circular A-89, "Catalog of Federal Domestic Assistance" (1977), *supra* note 21, as to the full extent of federal assistance programs.

64. OMB Circular A-102, Attachment C, ¶ 2, 42 Fed. Reg. 45,829-30 (1977). There are some exceptions: litigation, claims or audit records (to be retained until resolution of the litigation, claim or audit), certain property records, and records transferred to or maintained by the federal agency involved.

Paragraph 3 provides that the three year period starts with the submission of the final expenditure report of the grantee, except in cases where grants are renewed annually, when the annual financial status report date commences the three year period.

65. *Id.*, ¶ 6, 42 Fed. Reg. 45,830 (1977).

verification of grantee claims and investigation of grantee performance is needed and reasonable. The possible scope of examination and investigation is not so clearly restricted except by the word "pertinent"; hopefully the paragraph will not become the starting point for a fishing expedition. Although similar provisions are quite common in federal government procurement contracts where private businesses are the contractors,<sup>66</sup> still the examination and investigation which could be mounted under Attachment C delves into the affairs of governmental entities, including "sovereign" states.

Paragraph 7 of Attachment C contains a provision relating to public access to grantees' records.<sup>67</sup> It is apparently intended to allow imposition of restrictions on access to records by grantors when confidentiality can be shown to be necessary and when the records would have been exempted from disclosure under the federal Freedom of Information Act (FOIA).<sup>68</sup> This Act, as amended, is representative of the general movement towards openness by government in the United States which has been particularly pronounced in the last dozen or so years.<sup>69</sup> The Freedom of Information Act applies to records and other federal agency papers. Paragraph 7 of Attachment C poses an uneasy hypothetical question: if the grantees' records were records of a federal agency, would they have been exempt from disclosure under the somewhat enigmatic tests of FOIA? The grantees' records, however, are not federal records. In the framework of our discussion, such records of grantees are those of state or local governments which may have their own "open records" regulation. California, for example, has two such statutes, one pertaining to records of the state legislature, another to the records of state and local government agencies.<sup>70</sup> The fed-

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66. See clauses required by 10 U.S.C. §§ 2306(b), 2306(f) (1976); 41 U.S.C. § 254(c) (1976), and Federal Procurement Regulations (FPR) found in 41 C.F.R. 1-3.814-2 (1977). The Comptroller General of the United States, as head of the General Accounting Office, is one of the more important federal officials. See 31 U.S.C. §§ 41, 43 (1976). Generally, the Comptroller General and the General Accounting Office (GAO) are regarded as part of the Legislative Branch, not the Executive Branch. For a further discussion, see WHELAN & PASLEY, *FEDERAL GOVERNMENT CONTRACTS* 140-57 (1975).

67. Unless otherwise required by law, no federal grantor agency may place restrictions on grantees which will limit public access to the records of grantees pertinent to a grant, except when the agency can demonstrate that such records must be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1976), if the records had belonged to the grantor agency. OMB Circular A-102, ¶ 7, 42 Fed. Reg. 45,830 (1977).

68. 5 U.S.C. § 552 (1976) (amending the Federal Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946)).

69. See, e.g., 5 U.S.C. § 552(b) (1976).

70. For provisions relating to the state legislature, see Legislative Open Records Act,

eral and state rules are not identical and one speculates uneasily as to which rules are incumbent on the grantee state or local official in the possible case of a conflict.

### 2. *Attachment G: Standards for Grantee Financial Management Systems*

Because the grantees are state or local government agencies, one would expect each of them to have in existence some sort of financial management system; certainly such systems seem a common part of the equipment of American governments. Such systems were undoubtedly developed without regard to the particular needs of federal grants; presumably, they were instead developed in light of the general responsibility of the governmental unit to its citizens. Despite these existing systems, paragraph 2(f) of Attachment G<sup>71</sup> requires grantees to establish procedures "for determining the reasonableness, allowability and allocability of costs in accordance with Federal Management Circular 74-4", and paragraph 2(h) requires that grantee audits should be made in accordance with generally accepted auditing standards, including those published by the U.S. General Accounting Office as "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions."<sup>72</sup> This federal requirement would seem to involve the possibility of redundant cost and audit standards; a question is raised as to whether the added cost is necessary.

### 3. *Attachment M: Standard Forms for Applying for Federal Assistance*

Several of the forms found in Attachment M require that applicants for grants give certain assurances as part of their applications. One of these forms, exhibit M-3, "Application for Federal Assistance (Nonconstruction Programs),"<sup>73</sup> serves as an example. Part V of the form contains "Assurances;" one need not discuss details to derive some general sense of their impact on states and localities. Assurances include:

- (1) that the applicant will comply with stated provisions of the Federal Civil Rights Act;<sup>74</sup>

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CAL. GOV'T CODE §§ 9070-9079 (West Supp. 1979); as to state and local government agencies, see Public Records Act, CAL. GOV'T CODE §§ 6250-6261 (West Supp. 1979).

71. OMB Circular A-102, 42 Fed. Reg. 45,831 (1977).

72. *Id.*

73. *Id.* at 45,853-65.

74. *Id.* at 45,864. Assurances 2 and 3 relate to the requirements of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), which apply to a program or activity receiving federal financial assistance. This would include grants as discussed in this article. Authority for these "Assurances" is codified at 42 U.S.C. § 2000d-1 (1976); see also Exec. Order No. 11,764, 3 C.F.R. 849 (1971-1975 Compilation).

- (2) that the applicant will comply with stipulated provisions of the Uniform Relocation Assistance and Real Property Acquisitions Act of 1970;<sup>75</sup>
- (3) that the applicant will establish safeguards "to prohibit employees from using their positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business, or other ties;"<sup>76</sup> and
- (4) that the applicant will "comply with all requirements imposed by the Federal sponsoring agency concerning special requirements of law, program requirements, and other administrative requirements."<sup>77</sup>

Other assurances are required, but the above samples serve to illustrate their widespread reach. Note especially the broad wording and reach of the last quoted assurance.

#### 4. Attachment O: Procurement Standards

A short precis of Attachment O to OMB Circular A-102<sup>78</sup> will serve to underline the following themes: the intrusion of federal regulation into areas of state and local government operation, the possibility of duplication of functions, and the apparent costliness of federal administrative requirements.

Attachment O is entitled "Procurement Standards." Its general purpose is to provide guidelines for state and local governmental grantees who must acquire (primarily by contract) supplies, services or construction with federal grant funds. Such acquisition programs necessarily bring third parties into the grant arena: the contractors or other providers of such supplies, services and construction. Attachment O disavows federal responsibility for contracts; it places contractual responsibility for the making, administration and settlement of contracts on the grantee.<sup>79</sup> This pattern is similar to the federal government's position with respect to subcontracts under its own prime contracts—

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75. OMB Circular A-102, Assurance 4, 42 Fed. Reg. 45,864 (1977). See 42 U.S.C. § 4601 (1976). See particularly 42 U.S.C. §§ 4621-4638, 4651-4655 (1976).

76. OMB Circular A-102, Assurance 7, 42 Fed. Reg. 45,864 (1977).

77. *Id.*, Assurance 9.

78. On December 6, 1978, the Office of Management and Budget announced that it was proposing a revision of Attachment O to OMB Circular A-102, which is discussed *infra*. 43 Fed. Reg. 57,201 (1978). The proposals were adopted effective October 1, 1979. 44 Fed. Reg. 47,874 (1979). They are not discussed here because they do not affect the main point made with respect to former Attachment O: that it represents considerable federal intrusion on state or local procurement or acquisition procedures and practices. The revisions reflect some shifts of emphasis and changes in requirements, but they do not eliminate federal involvement.

79. OMB Circular A-102, Attachment O, ¶ 2, 42 Fed. Reg. 45,889-45,890 (1977).

the prime contractor bears the responsibility for subcontracts and subcontractors, and the federal government is insulated from the subcontractors by the wall of "privity".<sup>80</sup>

In this contractual scheme the government hires prime contractors who, in turn, may find it useful to employ subcontractors to produce the bargained-for result. The federal government also makes grants to states and localities to enable them to perform existing or new functions appropriate to those branches of government. To the extent that states and localities find it necessary to employ contractors to achieve grant objectives, the states and localities should bear the burdens and derive the benefits of the contractual relationship. The federal government should, in general, be insulated from direct responsibility to such contractors. There are two considerations behind this: (1) assumption of responsibility by the federal government lowers resistance to the temptation to control, and (2) if the federal government does not assume responsibility, it does not intrude on state and local government functions. Both considerations recognize the danger in fundamentally altering the existing federal system or the Constitution.

Paragraph 3 of Attachment O permits state and local grantees to use their own laws, rules and regulations,<sup>81</sup> but it sets certain minimum requirements which are applicable to procurements made with federal grant funds. In addition to the federal minimum requirements, states and localities may be presumed to have their own rules for making procurement contracts. California, for example, has a rather elaborate set of statutes regulating state contracts.<sup>82</sup> A potential for conflict exists: are state civil servants obliged to follow their own rules or, in case of conflict, should the standards set out in Attachment O, paragraph 3,

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80. Subcontracts and contracts under grants bear other similarities. It would seem that through OMB Circular A-102 and the particular agency regulations, the Government has insured a "flow-down" to the grantee of many, if not all of its public policies, e.g., non-discrimination in employment, standard and fair work hours and wages, and preference for United States products. See the discussion in the text accompanying notes 73-87, particularly, the discussion of Attachment M, Part V, "Assurances," and Attachment O, "Procurement Standards." This unilateral wall of privity is perhaps appropriate; in any event, it is solid enough. In fact, the government agencies have insulated themselves from suits by a contractor under grant through their regulations. See e.g., 40 C.F.R. § 33.140 (1978): "Neither EPA nor [sic] the United States shall be a party to *any* subagreement, . . ." (emphasis added).

81. OMB Circular A-102, 42 Fed. Reg. 45,890 (1977).

82. See e.g., the State Contract Act, CAL. GOV'T CODE §§ 14250-14258 (West 1963 & Supp. 1979) (applying principally to construction projects); CAL. GOV'T CODE §§ 14780-14784 (West Supp. 1979) (supply purchase and services); The Small Business Procurement and Contract Act, CAL. GOV'T CODE §§ 14835-14843 (West Supp. 1979); and the California State University and College Contract Law, CAL. EDUC. CODE §§ 90100-90274 (West 1978).



be regarded as mandatory for procurements involving federal grant funds? The number of these standards is sizeable. For example, paragraph 3 consists of three principal subparagraphs, one of which is divided into 9 major subparagraphs. Samples of the total coverage of paragraph 3 include: (1) a mandate for a code of standards or conduct applicable to state or local officers making contracts with grant funds;<sup>83</sup> (2) requirements that positive efforts be made to use small business and minority owned sources of supplies and services;<sup>84</sup> (3) standards covering the method of contract pricing (fixed-price, cost-reimbursement, or other), including a prohibition of the use of the cost-plus-a-percentage-of-cost method of contract pricing;<sup>85</sup> (4) rules relating to the methods by which contracts may be made (by formal advertising and bid or by negotiation);<sup>86</sup> and (5) a requirement that contracts be made only with

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83. OMB Circular A-102, Attachment O, ¶ 3(a), 42 Fed. Reg. 45,890 (1977). It is worth noting that this requirement may parallel or overlay state laws. *E.g.*, California has a "Political Reform Act," an immensely long initiative measure (*see* note 12 *supra*) adopted by the voters in 1974 and codified in CAL. GOV'T CODE §§ 81000-91014 (West 1976 & Supp. 1979), several major portions of which deal with subjects such as ethics, conflicts of interests and pertinent sanctions.

84. OMB Circular A-102, Attachment O, ¶ 3(c)(3), 42 Fed. Reg. 45,890 (1977). This seems to reflect rules applicable to the federal government's own procurement practices. For example, a small business preference found in the Small Business Act, 15 U.S.C. § 631(a) (1976): "It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation."

A preference for minority, small business contractors is based on the Small Business Act, 15 U.S.C. § 637(a) (1976), and Exec. Order No. 11,458, 3 C.F.R. 779 (1966-1970 Compilation) *superseded by* Exec. Order No. 11,625, 3 C.F.R. 616 (1971-1975 Compilation).

85. OMB Circular A-102, Attachment O, ¶ 3(c)(4), 42 Fed. Reg. 45,890 (1977). Pricing policies couched in similar language can be found in 10 U.S.C. § 2306 (1976) and 41 U.S.C. § 254 (1976), applicable to procurement by the federal government. The cost-plus-a-percentage-of-costs prohibition is applicable to federal government contracts. 10 U.S.C. § 2306(a) (1976) and 41 U.S.C. § 254(b) (1976). The federal statutory requirements just cited are far more elaborate than paragraph 3(c)(4) of the federal regulations implementing them. *See, e.g.*, 41 C.F.R. § 1-3.4 (1978), "Types of Contracts" and § 1-3.8 (1978), "Price Negotiation Policies." The question suggests itself: What could be more natural for federal administrators, called upon to assess state or local compliance with Attachment O, ¶ 3(c)(4), than to look to the federal models from which ¶ 3(c)(4) is apparently distilled?

86. OMB Circular A-102, Attachment O, ¶¶ 3(c)(5) & (6), 42 Fed. Reg. 45,890 (1977). Comparison of these rules with 10 U.S.C. § 2304(a) (1976) and 41 U.S.C. § 252(c) (1976), governing federal contracting, suggests their origin. Again, the Attachment O rules are less numerous and complex, but the comment made at the end of note 85 *supra*, is equally valid here.

“responsible” contractors as that term is defined.<sup>87</sup>

### C. The Role of the EPA

The position now becomes clearer. It is subject to the mandates, conditions and limitations placed upon it by the Congressional statutes under which it acts; it is subject to Presidential control and must be cognizant of Presidential objectives; and when it makes grants to state and local governments, it is subject to the provisions of OMB Circular A-102. What of EPA's own implementation of all of these requirements? As noted previously, Circular A-102 directs further agency implementation.<sup>88</sup> EPA's regulations pertinent to this article are published in Title 40, Code of Federal Regulations. Specifically, Part 30, “General Grant Regulations and Procedures,” and Part 33, “Subagreements,” will be examined.<sup>89</sup>

A summary discussion of a few striking portions of these regula-

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87. *Id.*, ¶ 3(c)(7). “Responsibility” of prospective contractors would seem to be a key and necessary characteristic. In the case of federal contracting, *see, e.g.* 41 U.S.C. § 253(b) (1976) and 41 C.F.R. 1.1203-2, .1203-3 (1978). Under these provisions prospective contractors must have: (a) a satisfactory record of ethics, integrity and performance; (b) adequate financial resources or the means to obtain them; and (c) ability to furnish the required performance. “Responsibility” as used in federal government contracting is an extremely complicated definition. With regard to small businesses, there are special regulations in 41 C.F.R. § 1-8.708 (1978) which limit much of the discretion of the contracting office. Also, Attachment O, ¶ 4 requires grantees to include a substantial number of clauses in all contracts and subgrants. These are included in nine subparagraphs and range from a requirement that certain contracts contain provisions allowing termination by the grantee, *see* ¶ 4(b), to requirements that certain federal employment policies be followed, *see* ¶¶ 4(c), (d), (e), and (f), 42 Fed. Reg. 45,890-45,891 (1977).

The termination provision would parallel the “Termination for Convenience” (of the government) in federal contracts. *See, e.g.* 41 C.F.R. § 1-8.701 (1978), as well as “Termination for Default” (of the contractor), 41 C.F.R. § 1-8.707 (1978). Paragraph 4(b) also stipulates a clause allowing termination for circumstances beyond the control of the contractor.

With respect to requirements of adherence to certain federal employment policies, the federal policies are based on statutes or Executive Orders and originate in federal contracting practice. Included are: (1) ¶ 4(c), the Equal Employment Opportunity Policy, Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 compilation) *as amended by* Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 compilation); (2) ¶ 4(d), the Copeland Anti-Kick Back Act, 18 U.S.C. § 874 (1976), a prohibition against requiring employees to give up part of their compensation, usually for the purpose of obtaining continuance of employment; (3) ¶ 4(e), the Davis-Bacon Act, 40 U.S.C. §§ 276a to a-7 (1976), *as amended*, relating to minimum wages (although ¶ 4(e) specifies that this requirement is to be used where required by pertinent federal grant legislation); and (4) ¶ 4(f), the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-330 (1976), where applicable.

88. OMB Circular A-102, ¶ 11 *supra* at note 57.

89. Other regulations might be mentioned: For example, 40 C.F.R. Pt. 40 (1978) “Research and Development Grants”; 40 C.F.R. Pt. 21 (1978) “Small Business”; 40 C.F.R. Pt. 15 (1978) “Administration of the Clean Air Act and the Federal Water Pollution Control Act With Respect to Federal Contracts, Grants or Loans” (dealing with ineligibility for

tions constitutes the remainder of this article. This discussion cannot be viewed as a thorough analysis of those regulations; their sheer bulk precludes such treatment. Moreover, the technique of sampling which was followed above in examining OMB Circular A-102 must be even more eclectic with regard to the EPA regulations. Within those limitations, however, the following comments will yield further illustration of a theme which has become apparent: the scope and pervasiveness of the federal regulations which accompany grants to states and localities.

*1. 40 C.F.R. Part 30: General Grant Regulations and Procedures*

This group of regulations is applicable to all grants made by EPA, but it is principally directed to those EPA employees who must implement grant programs and comply with all the pertinent regulations.<sup>90</sup> As a matter of general principle, federal officers and employees can bind the government only within the scope of their actual authority as determined by statute, regulation, and delegation—without regard to concepts of apparent or ostensible authority or estoppel.<sup>91</sup> Part 30 also applies to EPA grantees, although it seemingly does not purport to “bind” them legally of its own force. Nonetheless, the regulations constrain EPA employees, and therefore grantees will find a fair number of their own rights conditioned, and their expectations circumscribed, by the provisions of Part 30.

Some of those provisions are noteworthy. Among them is section 30.210, which states in part: “An award of a grant shall be deemed to constitute a public trust.” The general equity notions which govern the accountability and responsibility of trustees are well known; it is questionable whether they would be invoked against a government acting as “trustee” and if so, how. Sections 30.235 and 30.320 deal with the disclosure of information furnished to EPA and, in general, indicate that

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contracts, grants or loans as reflected in the “List of Violating Facilities”); 40 C.F.R. Pt. 3 “Employee Responsibilities and Conduct” (meaning principally EPA employees).

Part 33 on “Subagreements,” is effective only to a limited extent. Although it was originally promulgated in early 1977, 42 Fed. Reg. 8090 (1977), 43 Fed. Reg. 10342 (1978); 44 Fed. Reg. 10504, its effective date has been deferred several times. Presently it is applicable to grants that contain special stipulations requiring compliance with 40 C.F.R. Pt. 33 (1978) and to grants made under the Federal Water Pollution Control Act, 33 U.S.C. § 1288 (1976).

90. After an initial group of Definitions, Pt. 30 is organized into the following major subparts: A. Basic Policies, B. Application and Award, C. Other Federal Requirements, D. Patents, Data and Copyrights, E. Administration and Performance of Grants, F. Project Costs, G. Grantee Accountability, H. Modification, Suspension and Termination, I. Deviations and J. Disputes.

91. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *see also Whelan & Duni-gan, Government Contracts, Apparent Authority and Estoppel*, 55 GEO. L.J. 830 (1967); 4 YEARBOOK OF PROCUREMENT ARTICLES 799 (1967).

such information when furnished by grantees is subject to the disclosure requirements of the federal Freedom of Information Act (FOIA).<sup>92</sup> Although the applicability of FOIA sounds innocuous enough, it bears on the complicated area of trade secrets and proprietary data and should therefore serve as a warning to grantees and their contractors or to others who make confidential business information known to them.<sup>93</sup>

Another striking set of provisions, subpart J, is entitled "Disputes" and is clearly derived from the "Disputes" clause in federal procurement contracts.<sup>94</sup> These provisions are intended to set up rules governing the resolution of "any dispute arising under a grant" and to provide for initial decisions by the EPA Grant Approving Official or Project Officer.<sup>95</sup> Such decisions may be appealed to the EPA Administrator or his designee. In such a case, the grantee is entitled to the full panoply of procedural rights, including the opportunity to be heard, to be represented by counsel, to offer evidence and testimony, and to

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92. 5 U.S.C. § 552 (1976); *see also* note 67 *supra*, concerning restrictions on federal granting agencies with respect to limitations on public access to records of grantees.

93. Specific provisions in grants may protect confidentiality, *see* 40 C.F.R. § 30.235(c) (1978); in addition, a grantee may assert a right to protective treatment, 40 C.F.R. § 30.235(b) (1978), by using appropriate labels or legends on information. *See also* 40 C.F.R. §§ 30.500-.540; and 40 C.F.R. Pt. 30, App. C (1978).

94. The text of the "Disputes" provisions required by 40 C.F.R. App. A, ¶ 8 is as follows: "(a) Except as otherwise provided by law or regulations, any dispute arising under this grant agreement shall be decided by the grant approving official or the Project Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the grantee. Such a decision shall be final and conclusive unless, within thirty (30) days from the date of receipt, the grantee mails or otherwise delivers to EPA (generally to the Project Officer) a written appeal addressed to the Administrator.

(b) The decision of the Administrator or his duly authorized representative for the determination of such appeal shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent or capricious, or arbitrary, or so grossly erroneous as to imply bad faith, or not supported by substantial evidence.

(c) In connection with an appeal proceeding under this article, the grantee shall be afforded an opportunity to be heard, to be represented by legal counsel, to offer evidence and testimony in support of any appeal, and to cross-examine Government witnesses and to examine documentation or exhibits offered in evidence by the Government or admitted to the appeal record (subject to the Government's right to offer its own evidence and testimony, to cross-examine the appellant's witnesses, and to examine documentation or exhibits offered in evidence by the appellant or admitted to the appeal record). The appeal shall be determined solely upon the appeal record, in accordance with the applicable provisions of Subpart J of Part 30 of Title 40 CFR.

(d) This "Disputes" article shall not preclude consideration of any question of law in connection with decisions provided for by this article; *Provided*, That nothing in this grant or related regulations shall be construed as making final the decision of any administrative official, representative, or board, on a question of law."

For discussion of contract "Disputes" *see* notes 99-102 and accompanying text *infra*.

95. 40 C.F.R. § 30.1100 (1978).

cross-examine witnesses.<sup>96</sup> Decisions of the Administrator or his designee are final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, so grossly erroneous as to imply bad faith, or not supported by substantial evidence.<sup>97</sup> Questions of law can be decided by the Administrator, but decisions are not to be attributed finality by the language contained in the grant agreement or related regulations.<sup>98</sup>

This group of provisions is derived from the "Disputes" practice in government procurement contracting.<sup>99</sup> Although "Disputes" provisions were required conditions in government contracts by regulatory mandate, with only *recognition* in statute,<sup>100</sup> a recent Congressional enactment, the so-called Contract Disputes Act of 1978, has now preempted the field.<sup>101</sup> The statute operates without any apparent dependence on the contractor's consent to its procedures for administrative and judicial resolution of contract disputes.<sup>102</sup> It will make many changes in government contract claims procedures, but it does not appear to have any intended impact on *grants or contracts under grants*. The disputes handling practices for grants outlined in the preceding discussion will presumably be unaffected.

The appearance of "contract" given to grants by the provisions of Appendix A to 40 C.F.R. Part 30 is very striking in that it clearly evidences the creeping identification of grants with contracts. Appendix A is entitled "General Grant Conditions" and must be intended to serve as a standard part of the grant agreement prescribed by 40 C.F.R. section 30.345-3. The "General Grant Conditions" contain "undertakings" by the federal grantor and by the grantee, and these undertakings

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96. 40 C.F.R. §§ 30.1100(b), 30.1105, 30.1115 (1978).

97. 40 C.F.R. § 30.1120 (1978).

98. *See* 40 C.F.R. § 30.1125 (1978).

99. There are many discussions of "Disputes." *See* WHELAN & PASLEY, FEDERAL GOVERNMENT CONTRACTS, 1099-1155 (1975). In substance, government procurement regulations have long required contracts to contain a "Disputes" clause providing for initial decisions on disputes by the contracting officer and granting a subsequent appeal to the agency head. Agency heads normally delegated their powers as appellate agents to "Boards of Contract Appeals." Boards' decisions were final on matters of fact; the Court of Claims and the U.S. District Courts were able to provide judicial review under 28 U.S.C. §§ 1491, 1346(a)(2) (1976). This is a simplification of the older "Disputes" procedure, but it is sufficient.

100. The so-called Wunderlich Act, 41 U.S.C. §§ 321-322 (1976).

101. The Contract Disputes Act, 41 U.S.C.A. §§ 601-613 (Supp. 1979).

102. Although the statute does not mention a clause, regulations issued by the Office of Federal Procurement Policy (part of the Office of Management and Budget) require a clause. *See* 44 Fed. Reg. 12524 (1979).

seem to furnish consideration for each other in the "contract" sense.<sup>103</sup> Paragraph "a" illustrates some grantee undertakings:

a. General Conditions. The grantee covenants and agrees that it will expeditiously initiate and timely complete the project work for which assistance has been awarded under this grant, in accordance with the applicable grant provisions of 40 C.F.R. Subchapter B. The grantee warrants, represents, and agrees that it, and its contractors, subcontractors, employees and representatives will comply with 40 C.F.R. Subchapter B, the following General Conditions, the applicable supplemental conditions of 40 C.F.R. Subchapter B, as amended, and any Special Conditions set forth in this grant agreement or any grant agreement.<sup>104</sup>

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103. "Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another." 1 S. WILLISTON ON CONTRACTS § 103 (3d ed. 1957); see note 30 *supra*; see also Whelan, *Public Law 85-934*, *supra* note 26 at 477-485.

Statements relating to undertakings of the federal government are circumspect: for example, when the "General Grant Conditions" provide for the possibility of project termination by a grantee, they mandate, in paragraph 7(b), that the grantee notify the EPA Project Officer who then is to determine whether the termination was with or without good cause. The provision does not allow the Project Officer to indulge in inaction and must be regarded as an undertaking that he will decide on the sufficiency of cause for the termination. This seems to be implicit in the language of paragraph 7(b). Paragraph 8(a) of the "General Grant Conditions" relates to the resolution of disputes between the grantee and EPA and provides that the grant approving officer or the Project Officer shall decide the dispute and furnish his decision in writing to the grantee. These undertakings seem to be promises of a type of "consideration". Even if the number and significance of federal undertakings in the "General Grant Conditions" are minimal when compared with those of the grantee, they seem to be sufficient consideration should any debate arise on the basic contractual nature of the grant relationship. *But see* the remarks of Malcom S. Mason, Chairman of the Federal Grants Committee of the Federal Bar Association: "This emphasis on the contractual nature of grants is particularly understandable in a Yearbook of Procurement Articles, just as it is in the Briefing Sessions and National Institutes conducted under the auspices of public contract groups. It is particularly dangerous in those contexts however, because it is a half-truth that fits right in with the preconceptions of uninformed readers and is too easily perceived as a whole truth. John Whelan, Bob Wallick and Bill Montalto. Tom Madden, Joe Zorc and others are not wrong in saying that there are contractual aspects to grants, but only misunderstanding will arise unless that recognition is perceived as a qualification to a more fundamental principle that contract analysis of grant problems is in almost every specific case wrong." Letter from Malcom S. Mason to Members of the Federal Grants Committee (July 20, 1978).

104. Following that statement are ten numbered paragraphs of conditions, most of them of substantial length. 40 C.F.R. Subchapter B (1978) is an overall regulation—entitled "Grants and Other Federal Assistance"—of which 40 C.F.R. Pts. 30 (under discussion), 33 and 35 (1978) are only components. The regulations collected under this part establish mandatory policies and procedures for all EPA state and local assistance grants. The regulations reflect the requirements of various EPA programs and have to be read in conjunction with the general requirements of 40 C.F.R. Pt. 30 (1978), discussed in text accompanying notes 90-103 *supra*. These provisions are in addition to those already discussed. The principal subparts of 40 C.F.R. Pt. 35 (1978), "State and Local Assistance" are as follows: A.

## 2. 40 C.F.R. Part 33

Although the effective date of Part 33, is, at the time of this writing, still in the future, it seems likely to go into effect even if modified. Some of its provisions ought to be noted, even if their modification is possible, because of the subject matter of Part 33—"Subagreements." The scope of Part 33 is reflected in the listing of its subparts,<sup>105</sup> which range from "policy" to "procurement by formal advertising" to "protests against awards." With certain exceptions,<sup>106</sup> Part 33 applies to all subagreements made under EPA grants. "Subagreements" is defined<sup>107</sup> so as to include written agreements made between grantees and their contractors as well as subcontracts made thereunder. It obviously shares a certain concurrence of purpose with Attachment O to Office of Management and Budget Circular A-102, discussed above,<sup>108</sup> and it should be viewed as having been issued in compliance with the EPA's obligation to implement that Circular.<sup>109</sup>

A few specific provisions of Part 33 should be briefly noted to illustrate the extent of the penetration of federal regulations into grantee activities. Part 33 confirms that, in general, the grantee's own procurement systems are to be utilized, provided they do not conflict with the minimum requirements set out in the regulation.<sup>110</sup> Preference is not, however, to be given to state or local bidders even if state or local laws

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Planning Grants (two sections, one dealing with grants to state and designated area-wide planning agencies, the other with solid waste planning grants), B. Program Grants (some general provisions; sections on air pollution, water pollution control (state and interstate), state public water system supervision and solid and hazardous waste management.), C. Grants for Construction of Wastewater Treatment Works, D. Reimbursement Grants and E. Grants for Construction of Treatment Works—Federal Water Pollution Control Act Amendments of 1972.

105. The Subparts of Pt. 33 are: A. Policy, B. General, C. Code or Standards of Conduct, D. Procurement by Formal Advertising, E. Procurement by Negotiation, F. Required Provisions and G. Protests against Award. An Appendix to Pt. 33 contains provisions grantees are required to include in their contracts. These subparts generally expand the Procurement Standards set forth in Attachment O, OMB Circular A-102, 42 Fed. Reg. 45,889 (1977).

106. 40 C.F.R. § 33.001 (1978).

107. 40 C.F.R. § 33.005 (1978). *See* discussion of *National League of Cities v. Usery*, 426 U.S. 833 (1976), at notes 3 and 124.

108. *See* text accompanying notes 78-87 *supra*.

109. A glance at the subparts of Pt. 33 listed in note 96 *supra* confirms this. *See also* OMB Circular A-102, ¶ 11, 42 Fed. Reg. 45,829 (1977).

110. 40 C.F.R. § 33.100(a) (1978). In this connection, the exact language is "minimum requirements set forth in this *subchapter*" (emphasis added). The reference is to Subchapter B of 40 C.F.R. entitled "Grants and Other Federal Assistance," which includes not only Pt. 33, but Pts. 30 and 35, discussed in notes 91-104 and accompanying text *supra*.

or regulations might require such preferences.<sup>111</sup> Provisions setting up local preference are not uncommon in the United States; for example, the federal government has a similar preference, the so-called "Buy-American" Act.<sup>112</sup> On the other hand, California's preference act was declared void by the State Attorney General several years ago.<sup>113</sup>

Section 33.510-3 is an important paragraph dealing with "cost and price considerations." The problem of accurate and fair pricing has long been a bothersome one in federal procurement, where the federal government is making contracts for the acquisition of supplies, services or construction. A vital reflection of this concern was found in the so-called "Truth in Negotiation Act" or "Defective Pricing Act."<sup>114</sup> The underlying issue is this: if a contractor's reimbursement depends on cost statements furnished by him, the cost statements must be accurate, current and complete or the amount of reimbursement may be over or under the true mark. Naturally, the government is more concerned with overstatements.<sup>115</sup> Fairly to be expected was some sort of expression of these concerns when consideration of costs under grants was in order. Although there seems to be nothing parallel in Attachment O to OMB Circular A-102, it is not surprising to find a reflection of "Truth in Negotiations" in the EPA regulations.<sup>116</sup> The pertinent regulation

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111. 40 C.F.R. § 33.100(b) (1978).

112. 41 U.S.C. §§ 10(a)-10(d) (1976). There are other such federal references. *See, e.g.*, Preference for U.S. Products, 22 U.S.C. § 2354(a) (1976), an act that requires the purchase of end products manufactured in the United States for the Military Assistance Program.

113. 53 Cal. Op. Att'y Gen. 72 (1970).

The California Preference Law is found in CAL. GOV'T CODE §§ 4330-4334 (West 1966). Generally it provides that the state, counties and cities are to give preference to California produced goods. *Id.* § 4331.

The constitutionality of the California Buy American Act, CAL. GOV'T CODE §§ 4300-4305 (West 1966), was passed upon by the California Court of Appeal. In its opinion in *Bethlehem Steel Corp. v. Board of Commissioners*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969) the court held that the California Buy American Act was unconstitutional.

As the California Preference Law affects foreign commerce as much as did the California Buy American Act, the reasoning of the court in the *Bethlehem* case seems to require a like conclusion be reached with regard to the California Preference Law: i.e., it is "an unconstitutional intrusion into an exclusive federal domain." *Id.* at 229.

114. 10 U.S.C. § 2306(f) (1976). Although the Act only applies to agencies subject to the Armed Services Procurement Act, 10 U.S.C. §§ 2301-2305 (1976), regulations extend the application of the Act to other agencies of the federal government, *see* "Federal Procurement Regulation" 41 C.F.R. §§ 1-3.807, 1-3.814 (1978). This insures that, in all probability, the "Truth in Negotiations" provisions apply throughout the federal government with only minor exceptions.

115. The problem has generated a good deal of litigation and literature. *See* WHELAN & PASLEY, *supra* note 66, at 435-44 and 469-72 (illustration of the "flow down" provisions by which the Government extends its reach to subcontractors).

116. 40 C.F.R. § 33.510-3(a)(7) (1978).



contemplates that grantees will make provision in their cost-based "subagreements" (contracts) for recoupment of funds where it has been determined that a contractor's certification of costs was "not based on complete, current and accurate cost and pricing data or not based on costs allowable under the appropriate cost principles at the time of award."<sup>117</sup>

Finally, another significant provision of Part 33 is found in subpart G, "Protests against Award." Protests by bidders for federal contracts against awards or proposed awards are a commonplace occurrence. The subject has been made a legalistic one, and judicial review of federal agency disposition of bid protests is available in some cases.<sup>118</sup> It was to be expected that this bit of experience would be transposed to the world of grants, to situations where grantees were making awards of "subagreements" (contracts). Subpart G does this by providing for protests against a grantee's procurement action by parties with "an adversely affected direct financial interest."<sup>119</sup> Protest is not available, in general, to parties at the subcontract level (one step or more below the grantee's prime contractor).<sup>120</sup> Grantees are responsible for the initial

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117. *Id.* The part of the quoted regulation relating to allowability of costs and cost principles, however, is not derived from the "Truth in Negotiation Act." Allowability of costs under EPA grants to states and local governments is dealt with in 40 C.F.R. §§ 33.235 and 30.710 (1978). See 40 C.F.R. § 33.510-3(a)(5) (1978).

118. One of the better treatments of the subject of protests can be found in two opinions of Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit: *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (1971); and *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (1971).

119. 40 C.F.R. § 33.700 (1978). The paragraph permits protests based upon alleged violations of the procurement requirements of 40 C.F.R. Pt. 33 (1978), the regulations contained in that part concerning the making of contracts by state and local grantees. The phrase quoted, parties with "an adversely affected direct financial interest," appears susceptible to a broad interpretation. For example, it might include protesters other than disappointed bidders.

Might a taxpayer of a city, county, or state be eligible to protest a contract award by his grantee city, county or state? Under California Code of Civil Procedure § 526a, taxpayers can protest "illegal expenditures" by certain governmental officials. It seems that a taxpayer could claim that a violation of 40 C.F.R. Pt. 33 would amount to such an illegality. If the protested award were valid under state or local law, the question thus protested would be an extraordinarily difficult one. As far as research indicated, California courts have not considered the issue. *Cf. Advance Medical Diagnostic Lab. v. County of Los Angeles*, 58 Cal. App. 3d 263, 129 Cal. Rptr. 723 (1976) (supplier of services sued as a taxpayer and obtained a declaration that certain county contracts were in violation of state law and, therefore, void).

The rights of taxpayers to make protests under 40 C.F.R. § 30.700 seem uncertain: their financial interest does not seem "direct" unless it is founded on something more than taxpayer status. In any event, their rights under state law would not seem determinative of rights under federal regulations.

120. 40 C.F.R. § 33.700 (1978).

disposition of protests,<sup>121</sup> but the EPA may be requested to review such disposition.<sup>122</sup> Interesting issues involving protesters' rights under state law may become involved here, of course. Procedures for handling protest reviews are provided in the regulations.<sup>123</sup>

#### IV. Some Conclusions

What has been said, even though it may be only one tile in the mosaic of "federal grants," warrants a few conclusions even though they be acceptable only as hypotheses for further investigation. From the standpoint of federalism in the United States, as well as from the standpoint of students of government, these conclusions may be of interest: First, there seems to be evidence of a continuing slide toward greater centralism in the internal affairs of the United States. The strengthening of the powers of the federal government vis-a-vis states and localities began some time ago; the evidence is that federal grants can be employed to extend central authority into the conduct of certain state and local affairs. Whether or not grants have been or will be consciously used to fortify the central federal power, they do result in its accumulation. If the central power is thus to be increased, it ought to be done pursuant to some coordinated decision and direction derived from the President, the Congress and the states. There should be no "slide."

Secondly, a possible result of the implementation of federal grant regulations is the weakening of state power vis-a-vis local governments. It may be that in the larger sense, efficient government for the United States calls for federal minimization of state power and authority, but that does not sound like the government we suppose we have under our Constitution. Yet, one must concede, the federal government does have the power to place conditions on its grants. May it, nonetheless, impose such conditions as will have an intimate relation to how the states and localities exercise their own powers?<sup>124</sup>

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121. 40 C.F.R. § 33.715(a) (1978).

122. 40 C.F.R. § 33.720(a) (1978). Subsections (b) and (c) set out the procedural safeguards that have become commonplace in public administrative law: notice, opportunity to be heard, and prompt resolution of dispute.

123. 40 C.F.R. §§ 33.725-.735 (1978). Other EPA protest regulations are found at 40 C.F.R. § 35.939 (1978). The general subject of protests against awards under grants is a complicated and fascinating one. An excellent exposition can be found in Madden, *Providing An Adequate Remedy for Disappointed Contractors under Federal Grants-in-Aid to States and Units of Local Government*, 34 FED. B.J. 201 (1975).

124. For authority for the proposition that it cannot, see *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), in which the Supreme Court struck down amendments to the Fair Labor Standards Act which extended federal minimum wage and maximum hour

Thirdly, there is no ready public forum for states to present their case against federal controls (if, indeed, they have a strong desire to present such a case) apart from the United States Congress. In the United States Senate, which consists of representatives of the states as such, there may be a unique opportunity for the states to make a very forceful announcement of their wishes about grants and federalism. Even so, the federal Executive can appear there with argument and persuasion. It seems deserving of strong recommendation that the states through their Governors make clear that they ought to be partners with the federal government in deciding what are appropriate conditions and controls for grants. This short article has not been a complaint directed at the officials of the federal Executive Branch and should not be so mistaken. Rather, it has been written to point out a novel aspect of the evolution of the governmental structure of the United States, an evolution affecting the balance of federal-state power that should only come about through the conscious decision of elected public officials, rather than from a somewhat undirected bureaucracy.

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scales to state and local government employees. The Court, over substantial dissent, held that the commerce clause of the U.S. Constitution, art. I, § 8, cl. 3, could not justify Congress' action because that would not comport with the federal system embodied in the Constitution. However, the Court added an enigmatic footnote to its opinion: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." 426 U.S. at 852 n.17.

