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FEDERAL AID TO STATE AND LOCAL LAW ENFORCEMENT — IMPLICATIONS OF A NEW FEDERAL GRANT PROGRAM

*Norman Abrams**

I. Introduction

In its recently published Report, the President's Commission on Law Enforcement and Administration of Justice briefly summarized the diverse forms of the federal government's "contribution to the national effort against crime":

The Federal Government carries much of the load of financing and administering the great social programs that the America's best hope of preventing crime and delinquency

The Federal Government has the direct responsibility for enforcing major criminal statutes against, among other things, kidnapping, bank robbery, racketeering, smuggling, counterfeiting, drug abuse and tax evasion. It has a number of law enforcement agencies, a system of criminal courts and a large correctional establishment. . . .

The Federal Government has for many years provided information, advice and training to State and local law enforcement agencies. . . . In many towns and counties, for example, the Federal Bureau of Investigation's on-site training programs for police officers and sheriffs are the only systematic training programs available. The Department of Justice, under the Law Enforcement Assistance Act of 1965, has begun to give State and city agencies financial grants for research, for planning, and for demonstration projects.¹

The Commission then proceeded "not only to endorse warmly federal participation in the effort to reduce delinquency and crime, but to urge that it be intensified and accelerated."²

Until recently, the most significant form of federal participation in the nation's law enforcement and criminal justice³ efforts has been what the Commission described as the federal government's direct responsibility for enforcing major criminal statutes. Direct financial aid such as that provided under the

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1 THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 283 (1967) [hereinafter cited as CRIME REPORT].

2 *Id.*

3 This phrase or the words "law enforcement" are used interchangeably in the text. These words are used in the same sense as defined in H.R. 5037 as originally introduced into the 90th Congress. See section 501(a):

"Law enforcement and criminal justice" means all activities pertaining to crime prevention or the enforcement and administration of the criminal law, including, but not limited to, activities involving police, prosecution or defense of criminal cases, courts, probation, corrections and parole.

As passed by the House in August, 1967, the words "or defense" were not included in section 501(a). The deletion may not result in a different scope for the legislation. If it does, however, it is unfortunate, for any program in this area should be comprehensive. As the Commission put it: "The relationships among the parts of the criminal justice system . . . are so intimate and intricate that a change anywhere may be felt everywhere." CRIME REPORT 280.

Law Enforcement Assistance Act⁴ has been relatively limited and is of recent vintage. Federal financing of social programs designed to reduce crime and delinquency is of larger dimensions, but its impact upon law enforcement has been indirect and difficult to measure. If the Commission's principal recommendations regarding the federal role in law enforcement are adopted, the major emphasis on the federal level in this area may shift from direct law enforcement to direct financial aid to state and local governments. For the Commission recommended a large-scale program of federal spending to improve the quality of state and local law enforcement and administration of justice.

The Federal program the Commission visualizes is a large one. During the past fiscal year the Federal Government spent a total of about \$20 million on research into crime and delinquency, and another \$7 million, under the Law Enforcement Assistance Act, on research and demonstration projects by local agencies of justice. The Commission is not in a position to weigh against each other all the demands for funds that are made upon the Federal Government. And so it cannot recommend the expenditure of a specific number of dollars a year on the program it proposes. *However, it does see the program as one on which several hundred million dollars annually could be profitably spent over the next decade.* (Emphasis added.)⁵

The Commission justified such a large federal financial support program on three grounds: crime is a national phenomenon that does not respect geographical boundaries; there are important needs that individual jurisdictions cannot meet alone; federal funds can be used to encourage changes that will make criminal administration more effective and more fair. But at the same time, the Commission felt it necessary to remind the reader that:

[T]he Commission is mindful of the special importance of avoiding any invasion of state and local responsibility for law enforcement and criminal justice, and its recommendation is based on its judgment that Federal support and collaboration of the sort outlined below are consistent with scrupulous respect for — and indeed strengthening of — that responsibility.⁶

The Commission's reminder is not unusual. Almost every public statement by a public official about an expanded federal role in law enforcement and criminal justice carries with it a similar caveat. Thus, in his 1967 message to Congress on crime in America, the President stated: "The Federal Government must not and will not try to dominate the system. It could not if it tried. Our system of law enforcement is essentially local: based upon local initiative, generated by local energies and controlled by local officials."⁷

This same theme has been repeated by the Attorney General:

But law enforcement is a local responsibility. As a nation we have preached local law enforcement. As a nation we have practiced it. There are more of New York's finest, the police of New York City, than there are Fed-

⁴ The Law Enforcement Assistance Act of 1965, 79 Stat. 828.

⁵ CRIME REPORT 284.

⁶ *Id.* at 285.

⁷ White House Press Release, Feb. 6, 1967, p. 6. The President struck a similar note in his most recent State of the Union Address on Jan. 17, 1968.

eral law enforcement officers for the Nation. Los Angeles County has six times more deputy sheriffs than there are deputy U.S. marshals for the whole United States, and the Los Angeles Police Department is larger than the sheriff's office.

A single county has twice as many probation service officers as the entire Federal Probation Service. The Federal Bureau of Prisons has less than 5 percent of the prison population of the Nation. The Federal judiciary is but a tiny fraction of the judiciary of the States, smaller than the judiciary of even a single State.

We would have it no other way. Our safety and our liberty depend on the excellence of local and State law enforcement.⁸

A financial aid program as large as that envisaged by the Commission inevitably raises important questions about the proper relationship among federal, state and local governments in the law enforcement and criminal justice field. The question of federal versus state or local responsibility for a particular governmental function is, of course, a pervasive one in our system, but it takes on a special dimension in the law enforcement and criminal justice context. The possibility that a federal financial support program might be used to lay the foundation for the creation of a national police force or to permit the federal government to control local law enforcement is often raised as a spectre, albeit sometimes for partisan purposes.⁹ The related issue of the role to be played by state government in implementing such a financial aid program is also a subject of some controversy. These issues, currently before the Congress in connection with proposed legislation designed to implement the Commission's recommendations, merit detailed examination.

II. A National Police Force

Any discussion of the possibility of federal control of local law enforcement must begin with the most extreme horrible thrown up by those who debate the issue—the bugaboo of a national police force. There is an odd universality in the abhorrence of the idea of a national police force in this country. Conservatives and liberals alike seem opposed to the notion. Strangely enough, one of the most forceful spokesmen on the subject has been the head of the federal law enforcement agency that undoubtedly would become the cornerstone of any national police operation, were that ever to come to pass. J. Edgar Hoover has said:

The danger of a national police force is that it centralizes into one place and into the hands of one man too much authority. The Federal

⁸ Statement of Ramsey Clark, *Hearings on H.R. 5037, 5038 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 29 (1967) [hereinafter cited as *House Hearings*].

⁹ For example, see the statement of General Minority Views accompanying the House Judiciary Committee Report on H.R. 5037:

As we have seen with the 458 existing Federal categorical grant-in-aid programs, he who pays the piper must necessarily call the tune. Do Americans want law enforcement in all 50 states to be declared by a non-elected Federal officeholder in Washington? H.R. REP. No. 488, 90th Cong., 1st Sess. 28 (1967) [hereinafter cited as *HOUSE COMM. REP.*].

Government, of course, has no cure-all for the crime problems existing in any community. The need is for effective local action, and this should begin with the wholehearted support of honest, efficient, local law enforcement.¹⁰

Undoubtedly for some people rejection of the idea of a national police force merely involves a specific application of a particular political philosophy. According to this philosophy any federal operation of a governmental function is presumptively bad; state or local governmental control, or even absence of any governmental involvement at all, is almost always preferable. But the idea of a national police force also conjures up images inconsistent with our democratic ideal and touches sensitive nerves deeply-rooted in our traditions. Many who are not opposed to substantial extensions of federal power in other areas would be violently opposed to this type of extension. People do not just reject the idea, they find it abhorrent.¹¹ It almost seems to qualify as a kind of taboo. To test this notion, I recently conducted a quick, informal and unscientific "free association" poll among some of my colleagues. Reactions varied to the question, "What image do the words 'national police force' conjure up for you?" But the dominant pattern of responses revolved around words like "Gestapo," "Nazism," "stormtroopers," "government by tyranny," and "foreign or European systems where police snoop about."

What accounts for this seemingly strange pattern of responses?¹² It may, of course, be foolish to attempt to account in rational terms for what are, after all, free-association-type reactions. It is suggested, however, that underlying these reactions is the image of a very large police force saturating the country, being used for political purposes and subject to the control of one man. Such a force smacks of dictatorship and tyranny. No doubt, the experience in Europe in the 1930's has markedly conditioned our attitudes. Control over such a force has in many countries been the instrument for assuming dictatorial power. And the potential for power inherent in a federal police complement of between six and seven thousand men (taking into account only the FBI)¹³ and a nationally-controlled force of between three and four hundred thousand men (the present number of police on the local and state levels) is readily apparent. One could argue, of course, that the potential for power is already present. The armed

10 Interview with J. Edgar Hoover, U.S. NEWS AND WORLD REPORT, Dec. 21, 1964, p. 38. For his most recent statement on the subject in the same vein, see *Message from the Director*, FBI LAW ENF. BULL., Feb. 1, 1968, at 1.

11 Interview with J. Edgar Hoover, *supra* note 10.

12 One colleague has suggested that the test was not a fair one—that the words "federal police force" should have been used. He theorized that the word "national" carries with it association with national socialism and that this accounts for the pattern of reactions. Though possible, I am skeptical. Also, it is suggested that this proposed phrase does not carry with it the connotation of as complete a taking-over of the law enforcement function as the words "national police force." The FBI, for example, might legitimately be identified as federal police. Moreover, I am doubtful that the use of the word "national" so frequently used in our vocabulary conjures up national socialism just because it is juxtaposed to the words police force.

One might suppose that the reaction is to the word "police" with all the connotations that word has. But here is a marked difference in the image created by the words "local police" and "national police."

13 The President in his recent State of the Union Message asked for an increase in FBI complement by 100 men.

services are subject to the will of the commander-in-chief. This, however, has not resulted in dictatorship. Perhaps the fear is that men performing police functions might lend themselves to more abuse than the armed services which, fortunately, up to the present have not been used to serve political ends.

The unusual reaction to the notion of a national police force may have other bases too. Many people think of such force simply as involving an expansion of the FBI. Thus, reactions to Mr. Hoover, his long tenure and attitudes toward the Bureau, in general may lie behind this response. Indeed, it may be — this is very speculative — that the very efficiency and effectiveness of the FBI are a principal cause of concern. Perhaps expanding such a force to perform the entire law enforcement function of the nation is more than we are willing to accept. Perhaps we prefer that our police not be “too good” at their job. In each of us there is a little bit of the lawbreaker. Perhaps our attitudes toward the national police force idea reflect this fact.

Rejection of a national police force can, of course, be explained in the more traditional terms that are used in other areas such as education. In the law enforcement context the argument takes the following familiar form: It is undesirable to have the law enforcement function controlled by men in Washington. They are too far away and do not have a feeling for, or understanding of, local concerns and problems. This argument undoubtedly has some merit. A partial answer to such a point is that central control does not necessarily mean distant control. If one really wanted a national police operation, regional and even local offices subject to a central authority could be set up to cope with local concerns. Such a structure would no doubt resemble our present system, with one significant change. The local offices would be subject to the ultimate control of officials in Washington.

I do not propose the establishment of a national police force. Although such a force would have some law enforcement advantages, *e.g.*, in coordinating law enforcement efforts and promoting improved communications on a nationwide basis, there are too many persuasive reasons, reflected in the concerns described above, for rejecting the notion. Moreover, most of the advantages of a national force may be obtained within our traditional allocation of law enforcement authority.

Though few seriously advocate a national police force, it remains an important issue. For discussion about it arises most frequently in debates over the possibility of the development of outside control over local law enforcement through a large-scale federal financial support program. Not only do opponents of such a program hold up the bugaboo of a national police force, but all of us, it is submitted, are influenced in our thinking in this area by our reactions to this notion. It behooves us, therefore, to be aware of and understand what we mean by and what we fear in the concept of a national police force.

A national police force might also evolve in this country through the extension of federal criminal law jurisdiction and an expansion of the powers and numbers of the FBI to enforce that jurisdiction. The Commission made few recommendations relating to the substantive federal criminal laws although it did refer approvingly to the federal commission currently charged with re-

sponsibility for reform of the federal penal law, *i.e.*, the National Commission on Reform of Federal Criminal Laws. That commission is thus faced with issues relating to this subject.

III. Federal Control of Local Law Enforcement

Although the national police force idea is often mentioned in debate, few would allow that there is imminent danger that such a force will be established — at least in the present state of national affairs. It is, however, viewed by some as the possible end result of a growing federal role in local law enforcement. The more immediate concern for many is that through the development of new federal programs, the federal government will begin to exercise *control* over local law enforcement.

The problem is posed most sharply by legislation currently under consideration in the Congress. As a direct outgrowth of the Commission's recommendations, one year ago the Administration introduced the Safe Streets and Crime Control Bill.¹⁴ This proposal, amended and renamed the Law Enforcement and Criminal Justice Assistance Act, was passed by the House in August, 1967,¹⁵ and is currently under consideration by the Senate Judiciary Committee. Although there are numerous and substantial differences among the Administration's original bill, the bill reported out by the House Judiciary Committee, the bill passed by the House, and the bill under consideration in the Senate, all versions contemplating large-scale financial aid to state and local law enforcement. The issue is whether such a program is likely to lead to federal control.

The power over the purse strings undoubtedly includes the power to exercise control over those who are dependent on that purse. Our initial inquiry, therefore, must determine how great that dependency is likely to become. The extent of potential federal authority over local law enforcement will depend greatly on how significant a part of the local law enforcement budget the federal dollar is likely to become. That, in turn, may be determined by the amounts of money involved, the purposes for which the money may be used, and the extent to which there is discretion in the grant-making agency to withhold funds unless the applying local law enforcement agency meets certain conditions.

The Commission saw the federal support program as one on which several hundred million dollars could be spent annually over the next decade.¹⁶ The Administration's bill, as originally submitted to Congress, called for fifty million dollars the first year, and the Attorney General testified that three hundred million would be requested the second year. He saw the program as possibly involving the annual expenditure of a billion dollars within the next five years.¹⁷ The bill passed by the House called for seventy-five million dollars,¹⁸ and in his recent State of the Union Message the President asked for one hundred million

14 H.R. 5037, 90th Cong., 1st Sess. (1967).

15 *Id.*

16 CRIME REPORT 284.

17 House Hearings 30.

18 H.R. 5037, *supra* note 14.

dollars for fiscal 1969.¹⁹ Expenditures for law enforcement and criminal justice purposes, as estimated by the Commission, presently amount to four billion dollars a year.²⁰ The bulk of this goes to the police, and "85-90 percent of all police costs are for salaries and wages."²¹

Even assuming a substantial increase (apart from the increase represented by federal money) in local law enforcement expenditures during the next five years and taking into account other appropriate qualifications,²² if the Attorney General's rather liberal estimate is accurate, federal money could in a short time constitute a significant proportion of local law enforcement budgets. And even assuming the somewhat more conservative estimate made by the Commission, federal financial aid would soon become an important part of the nation's total law enforcement expenditure. Whatever the uses to which such federal money might be put, such an extensive support program undoubtedly would tend to make local governments dependent on the federal government for part of their budgets.

There will be an even greater potential for control if the federal funds are used for regularly-recurring costs such as salaries, where additional costs, once undertaken, are almost impossible to abandon. In addition, of course, the use of federal money for salaries poses a large problem simply because the salary item looms so large in law enforcement budgets. In this connection, it is interesting to compare the Administration's proposal concerning the salary issue with the version of the bill reported out by the House Judiciary Committee and the one finally passed by the House.

The original proposal took a fairly restrictive approach on the salary issue and provided that:

[N]ot more than one-third of any grant . . . shall be expended for the compensation of personnel, except that this limitation shall not apply to the compensation of personnel for time engaged in conducting or undergoing training programs and specialized personnel performing innovative functions.²³

The House Judiciary Committee reported out a bill that went even further and completely barred the use of grants for compensation of personnel, with the same two exceptions provided for in the original bill.²⁴ The bill passed by the House, however, contained neither provision and would appear to authorize federal grants to be used for salary purposes without limitation.²⁵ If it is true, as suggested, that the use of a grant for such a continuing expense — particularly one that is such a major portion of the law enforcement budget — gives a larger potential for control to the grant-making authority, the bill passed by the House

19 N.Y. Times, Jan. 18, 1968, at 16, col. 5.

20 CRIME REPORT 35.

21 *Id.*

22 For example, the fact that a substantial amount of federal money will not go into direct support of law enforcement but rather into research by universities, research institutes and the like.

23 H.R. 5037, § 202(a)(2), *supra* note 14.

24 Law Enforcement and Criminal Justice Assistance Act § 202(b), HOUSE COMM. REP. 18.

25 H.R. 5037, *supra* note 14.

goes further in this direction than any of the earlier versions. Interestingly enough, as developed later in this paper, that potential under the House bill seems to be vested in the states and not the federal government.

Another element that may affect the potential of a large grant program for federal control is the amount of discretion in the grant-making authority to impose conditions on the recipient of a grant. All three versions of the proposed legislation give to the grant-making authority a certain amount of discretion through the requirement that an approved plan must be submitted if a grant is to be obtained.²⁶ The power to approve the plan²⁷ carries the discretion with it. The bills themselves describe the expected content of the plan in general terms; presumably, further details will be spelled out in regulations. Inevitably, though, some discretion will remain in the grant-making authority to determine whether there has been compliance with the standards contained in the statute and regulations. In view of this, it seems fair to say that the type of program contemplated carries with it a potential for the exercise of some control by the grant-making authority over local law enforcement. The question remains whether that leverage is likely to be exercised, and if so, how.

At the outset, it is worthwhile pointing out that no one can predict with certainty the course of development of a governmental program of the type described. At best, one can engage in reasonable speculation based upon those elements presently perceived. There are, of course, many analogies that could be relied upon — such as federal aid to education and the poverty program. Although such analogies are not irrelevant, it must be remembered that each federal grant program has its own special characteristics. The risk that the federal government will use the potential for control inherent in a grant program of this sort to begin to “take over” the operation of local police agencies is minimal, despite the dire predictions of opponents of the program.²⁸ This conclusion is not based on an altruistic view of the world or on the notion that officials of the federal government are any the less corruptible by power than the average man. Rather, the exercise of detailed control over local operations by a central authority — even given the leverage that a large-scale grant program would provide — is just not feasible. The number of local police jurisdictions in this country is enormous, by one count over forty thousand.²⁹ Any attempt to regulate the details of so many police operations would require the creation of a huge federal establishment. At the very least, a large number of regional and local offices would be required, and a large staff of federal inspectors to police the police would be necessary. There is no indication that anything like that is contemplated. Such an establishment could not be created without congressional awareness and objection. Surely Congress would not stand still for it, and ultimate power over this and any other government grant program remains in the hands of Congress through the device of the annual appropriation. Indeed, the

26 *See, e.g., id.* § 204.

27 *Id.* § 202. The administration's bill, as originally introduced in the House of Representatives on Feb. 8, 1967, contained a fairly detailed formula, abandoned in later versions, application of which would affect the amount of the grant but not the extent of discretion possessed by the Attorney General.

28 HOUSE COMM. REP. 40-41 (separate views of Hon. Edward Hutchinson).

29 *House Hearings* 29.

executive may control the drawstring of the purse, giving him some power over local agencies, but Congress, in the last analysis, controls the size of that purse.

There remains to consider the argument that this program of federal grants is just the opening wedge — that:

[G]eneral acceptance of the scheme of this bill will result in making State and local law enforcement agencies so financially dependent upon Federal support that they will be unable to give it up. And in order to keep receiving Federal aid they will more and more, a little at a time, give up their local and State control over police, until finally they are persuaded that law enforcement is a national problem and no longer a local or State responsibility.³⁰

One may as well argue that the establishment of the FBI was the first step down the primrose path toward a national police force. It will be time enough to worry about such dangers when they loom larger and more realistically on the horizon.

To conclude that comprehensive federal control over the details of police operations will not come about as a result of this type of grant program does not entirely dispose of the federal control issue. A persuasive argument can be made that a financial aid program might cause "selective" control over local law enforcement. By selective control the grant-making authority may require a particular applying local jurisdiction to meet certain conditions, to do or not do something, or to modify its practices in a specified manner. Because of the limitations of manpower and the number of jurisdictions involved, this would necessarily occur only on a selective basis. It would not involve a comprehensive takeover of the local police operation, nor would it constitute the first step toward such a takeover or toward a national police force. Nevertheless, it would involve "those fellows" in Washington (or in a state capital) telling a local authority how to run some aspects of its affairs. This would clearly constitute a departure, though limited in scope, from the long-standing tradition of complete independence of the local government in the police area. The question is whether or not this is objectionable.

The answer has to be that it depends on how wisely and judiciously this newfound power is exercised by the grant-making authority. The mere expenditure of additional sums of money will not automatically improve our systems of law enforcement and criminal justice. Simply adding to the number of police will not solve our problems. There must be improvements of all types in the functioning of the system. The entire thrust of the Commission's Report was to this effect. There was a large emphasis on specific types of improvements such as more training, pooling of resources, services and information, and the use of innovative methods generally.³¹ On one level, it might be said that the grant-

30 HOUSE COMM. REP. 40-41.

31 The program of Federal support recommended by the Commission would be directed to eight major needs:

- (1) State and local planning.
- (2) Education and training of criminal justice personnel.
- (3) Surveys and advisory services concerning the organization and operation of police departments, courts, prosecuting offices, and corrections agencies.

making authority has a responsibility to see that the new funds are used responsibly in a way that will best contribute to the improvement of the system. No one believes that the Department of Justice as a grant maker will have extraordinary wisdom in these matters. But it will have the advantage of its position as a central coordinating agency.³² If it does its job well, it will quickly accumulate a wealth of experience and knowledge. In administering the program it will, for example, be able to apply the experience in the use of new techniques that will be fed into it from all over the country. Undoubtedly local officials will always have a better sense of their own problems, but there is no reason in principle why the grant maker should not use his leverage to encourage improvements in local practice. No doubt, if used excessively, such exertion of authority will result in friction between grantor and grantee. The local jurisdictions should generally welcome a certain amount of guidance of this sort, provided that it is sensible and does not concern itself too much with the matters of detail.³³ There are some who will find *any* such selective influence on local law enforcement objectionable. Others will only object if the type of influence exercised interferes with local interests deemed particularly important.

There are familiar areas where the exercise of this type of leverage will be objected to by the local governments. For example, when the federal grant-making authority attempts, as it must, to invoke the provisions of Title VI of the Civil Rights Act of 1964³⁴ against a Southern county that discriminates in its hiring of police officers, there will undoubtedly be a large outcry. That issue will be a sensitive one whether the federal program involved education, urban redevelopment, poverty, or law enforcement. While most persons have no difficulty justifying this type of string on the use of federal funds, it is conceded that one's reaction to such an exercise of control may be determined by one's attitude toward the merits of the matter. It should be emphasized, however, that the congressional policy judgment has previously been made in Title VI of the Civil Rights Act and that the problem is not peculiar to this particular grant program. Members of the Senate sub-committee hearing testimony on this

(4) Development of a coordinated national information system for operational and research purposes.

(5) Funding of limited numbers of demonstration programs in agencies of justice.

(6) Scientific and technological research and development.

(7) Development of national and regional research centers.

(8) Grants-in-aid for operational innovations. CRIME REPORT xi.

32 The Commission's final conclusion about a Federal anticrime program is that the major responsibility for administering it should lie with the Department of Justice:

... In the Department of Justice alone among Federal agencies there is a large existing pool of practical knowledge about the police, the courts and the correctional system. ... The Department of Justice has a Criminal Division, one of whose most important sections is concerned with organized crime and racketeering. It has the recently established Office of Criminal Justice, which has concentrated on criminal reform. Many of the research and demonstration portions of the Commission's program are already authorized under the Law Enforcement Assistance Act, which is administered by the Department of Justice. If it is given the money and the men it will need, the Department of Justice can take the lead in the Nation's efforts against crime. CRIME REPORT 284-85.

33 See, e.g., testimony on behalf of the National League of Cities, *House Hearings* 381-86.

34 The pertinent statutory language is to be found in 42 U.S.C. § 2000(d) which provides: "No person . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

matter raised the related problem of whether factors such as racial imbalance might be taken into account in determining whether to make a grant even where there was no evidence of discrimination constituting a violation of Title VI.³⁵ The issue is a difficult one. If racial imbalance were likely to introduce malfunctioning into the operation of the system — for example, in connection with the operation of a police community relations program — then it could plausibly be taken into account in determining whether to make the grant. Such factors, absent evidence of discrimination, generally would not be central elements in the grant-making process, and it would be regrettable if congressional concern about them were to affect the basic structure of the program.

Thus far, this article has focused on the potential for control of local law enforcement inherent in a large financial aid program. Before leaving this subject, however, it is important to call attention to the potential for control involved in other activities of the federal government related to local law enforcement. For it would seem likely that those who will not be reassured on the subject of federal control in connection with a grant program would also be concerned about other forms of increased federal activity. Consider, for example, the recommendations of the Commission for dealing with the problems of communications and obtaining information in a locally-oriented law enforcement system:

An integrated national information system is needed to serve the combined needs at the National, State, regional and metropolitan or county levels of the police, courts, and correction agencies, and of the public and the research community. Each of these agencies has information needed by others; an information system provides a means for collecting it, analyzing it, and disseminating it to those who need it. Each can be kept in close communication with the others, and information transferred by voice, by teletype, or computer to computer.

Since law enforcement is primarily a local and State function, the overall program must be geared to the circumstances and requirements of local and State agencies; and, wherever practical, the files should be located at these levels.³⁶

In a similar vein, the Commission said:

A national inquiry file (the National Crime Information Center — NCIC) is now being established by the FBI. This file will contain records of all cars reported stolen for more than 24 hours, all persons wanted for extraditable offenses, stolen guns, and all stolen identifiable property valued at over \$1,000. This file will be maintained on a computer, with terminals initially connected to 15 police agencies, and with plans to include all States eventually The utility of a fully interconnected national inquiry file depends on the need for interstate and interregional communications and on the need to provide an inquiry capability for those States that do not establish their own files. . . . It is important that the States, in assessing their own needs and developing their own computer facilities, and the FBI in operating the NCIC, seek to develop information that will

³⁵ *Id.*

³⁶ CRIME REPORT 267.

provide a basis for a sound decision on the needs for and the form of a national inquiry system.³⁷

It is worth noting that the Commission was extremely cautious in both of these recommendations and emphasized developments at the local level, for such inquiry and information systems also have a potential for growth into instruments of control. Indeed, dependence of local police operations on an outside authority might more easily come about through control over an information system upon which day-to-day operations are dependent than through a grant program where grants are made only annually.

Consider also the provisions of the bill passed by the House that provided for the establishment within the Department of Justice of a National Institute of Law Enforcement and Criminal Justice.³⁸ That Institute is "to establish and operate regional institutes for the training of State and local law enforcement personnel,"³⁹ "to make continuing studies and undertake programs of research,"⁴⁰ and "to carry out a program of behavioral research."⁴¹ The Institute is also to "establish such laboratories and research facilities as may be necessary to carry out the program described."⁴² The director may determine the "conditions" under which payments are to be made to individual trainees.⁴³ These, of course, are the type of activities described in the Commission Report that have been carried on for many years by the federal government. But the establishment and operation of regional training institutes would seem to involve a marked expansion of this type of direct activity by the federal government. Indeed, it is somewhat ironic that the House bill which in a sense attempted to limit the power of the federal government over financial aid to local law enforcement, actually expanded the direct involvement of the government in training and related activities. Again, the potential for influence and control over local law enforcement through mass training of its officers probably poses as great (or as small) a risk as that offered through a large-scale grant program.

These examples are cited not to oppose such developments in training and information systems. The fact, however, that they, too, do raise the control issue should be explicitly faced. It is not an evil for the federal government judiciously and on a selective basis to use the leverage it obtains through these various programs to effect improvements in local law enforcement and criminal justice systems. In many jurisdictions, it may be the only way to accomplish such changes.

IV. State Control

The question of whether, in a large-scale program of financial aid for state

37 *Id.* at 268. In this connection, attention should be called to an amendment incorporated into section 412 of the version of H.R. 5037 passed by the House that required annual reports describing data storage and retrieval systems employed for the storage of criminal intelligence data by the Department of Justice and by any recipient of funds under the act who uses such funds for such systems.

38 H.R. 5037, Title IV, *supra* note 14.

39 *Id.* § 301, as passed by the House, Aug. 8, 1967.

40 *Id.* § 303(2).

41 *Id.* § 303(3).

43 *Id.* § 307(b).

42 *Id.* § 304.

and local law enforcement, state governments should be involved other than as direct recipients of grants poses issues closely related to those previously discussed. If, for example — to consider the matter in its most extreme form — the federal government were simply to make large bloc grants to each state, perhaps according to a specified formula, and the state were then to make the specific grants to the various local law enforcement agencies within its borders, the issue of federal control would largely evaporate. Proposals for state involvement of this type raise other problems that have also come up in connection with other federal grant programs, *e.g.*, aid to education, and involve problems of taxation and economics that transcend the scope of this paper. Those problems, however, that particularly relate to a financial aid program in the law enforcement field are the subject of this section.

The House action last August on H.R. 5037 provided for federal grants to state planning agencies which would then administer the money for the entire state.⁴⁴ Both earlier versions of the bill, the one introduced by the Administration⁴⁵ and the one reported out by the House Judiciary Committee,⁴⁶ had provided for the making of grants by the federal government directly to local governments. The issues here are, of course, central to the basic structuring of the entire grant program. Since the full Senate Judiciary Committee recently reported out a version of the bill that on this issue follows the pattern of the administration bill, as of the date of this writing, the issue is still an open one that may, if the Senate adopts its committee's bill, have to be resolved in conference between the two houses.

The bill passed by the House places primary authority over the distribution of funds and over guidelines for their expenditure in the state governments. The question thus becomes whether such an approach is preferable to one which gives the federal government that responsibility. Putting aside ideology, considerations of the general relationship between the functions of the state and federal governments, and the revenue and economic factors previously mentioned, the issue turns on which approach is best designed to improve the overall quality of law enforcement and criminal justice.

The case to be made for the House approach is not unpersuasive. The Commission, for example, recognized that "much of the planning for action against crime will have to be done at the State level"⁴⁷ and recommended that "[a] State or local government that undertakes to improve its criminal administration should begin by constructing . . . formal machinery for planning."⁴⁸ The Commission did not, however, go so far as to recommend that this state planning machinery should be used as a conduit for the federal funds to be distributed to local governments (although it did recommend that federal grants should be made to the states to support and encourage such planning).⁴⁹ There is in fact no dispute about the value of such planning and coordination activities on the

44 *Id.* §§ 201-03.

45 *Id.* § 201 (introduced in the House of Representatives by Congressman Emanuel Celler, Feb. 8, 1967).

46 HOUSE COMM. REP. 17-18.

47 CRIME REPORT 280.

48 *Id.* at 279.

49 *Id.* at 285.

state level. Thus, for example, in response to a call from the President in October, 1966, the first meeting of the State Criminal Justice Planning Committee was held. And the bill introduced by the Administration provided for federal planning grants to both state and local governments.⁵⁰ On the same subject, the Attorney General testified:

We think it is awfully important to get the States started where they are not, because their plan can affect the other jurisdictions. So we would hope to have all of the States really working toward a fully comprehensive plan for the State.⁵¹

The issue, then, is not whether states should be encouraged to engage in planning and coordination activities but whether they should be given a large or controlling voice in the distribution of money to local governments.

It can be argued that by channeling funds through the states, they will thereby be given the "muscle" to ensure that comprehensive planning and coordination on a statewide basis are carried out. Congressman William Cahill stated this argument in his Additional Views to the Report of the House Judiciary Committee:

Under the planning mechanism provided by the present bill, pressure by local citizens and officials will force each individual local government to make hurried and separate applications for Federal assistance. In this nationwide competition for funding, there will be little time for the careful thought necessary to formulate "innovative" or "comprehensive" programs. Moreover, in the absence of *effective* State planning agencies there is little stimulus for increased coordination and cooperation among local law enforcement and judicial authorities; while the bill permits the chief executives of the several States to comment to the U.S. Attorney General on applications by local authorities, there is no *assurance* that such recommendations will be followed nor that final approval of the application will be in accordance with overall State objectives.

The administration's principal objection to statewide planning is that Governors have limited responsibility for and experience in law enforcement and are primarily concerned with the State police and their involvement in traffic control. (Emphasis added.)⁵²

With respect to the Congressman's last point, it is worth repeating that no one objects to statewide planning. The question is how can that goal be best accomplished.

The discourse on this issue has tended to focus on the extent of state activities in the law enforcement and criminal justice field. The Attorney General has argued in this regard: "When you look at the state governments and look at their involvement in local law enforcement, you will see that it is almost nil."⁵³ Congressman Cahill has replied that "many Governors have sig-

50 H.R. 5037, § 102, 90th Cong., 1st Sess. (1967).

51 *House Hearings* 56.

52 HOUSE COMM. REP. 31.

53 *House Hearings* 65.

nificant roles in law enforcement and criminal justice.”⁵⁴ With the exception of the operation of the courts and correctional systems, the Attorney General has much the better argument. But it has not been made clear why the nature and extent of present state involvement in law enforcement are relevant. The fact that state governments are or are not heavily engaged in law enforcement activities certainly directly affects the need of such governments for financial aid. It relates to the structuring of the grant program, however, only in a more indirect fashion.

In the first place, the extent of present state involvement in this area may affect the willingness of local governments to accept direction from the states. If, as the Attorney General suggests, state governments have not previously been very active in law enforcement, the problem of outside control of local law enforcement may be just as serious where the state government is attempting to provide direction as where the federal government uses the power of the purse for that purpose. For example, a local police chief might find it just as objectionable to be instructed by the state attorney general as by the U.S. Attorney General. Indeed, from the point of view of local government, the problem of control from outside may be more serious where the state government distributes the funds. By the very nature of things, state officials are likely to attempt to exercise tighter control than would federal officers, for they are closer to the scene. Whether this proximity is sufficient to justify greater intervention in local affairs, however, is debatable. Also, state officials have responsibility for a much smaller area and population than does the federal government. Such a factor, on the one hand, permits closer attention to what needs to be done; on the other, it makes probable much greater interference with essentially local control. The possibilities for a takeover of the details of local law enforcement operations, as distinguished from the type of selective control previously described, will be much greater where the effective grantor is the state rather than the federal government. This is particularly true where there are already aspects of the system traditionally operated by the states — courts and corrections. Thus, the possibility of the growth of true state police forces throughout the country under such an approach is not an unreal one. There are many who would consider such a development almost as bad as the idea of a national police force.

There is also the problem of existing friction between state and local government. It is, of course, present in some parts of the country and absent in others. This may reflect inter-party tensions — some of our larger cities are run by administrations of one party while the state houses are in the hands of the other party — or simply result from the fact that state and local governments continually come into contact and often conflict on many issues — for example, division of state tax revenues. The fact of closer contact, however, may also cut the other way. The balance of state politics may permit a local government to influence the administration of the grant program more easily where it is operated by the state.

Friction, of course, can also exist on the federal level, but historically there

54 HOUSE COMM. REP. 31.

have been fewer contacts between local government and Washington and therefore fewer conflicts. This pattern has been changing under recent federal grant programs, and it may be that the problem on the federal level will grow worse. Oddly, the fact that the basic decision making occurs in Washington may, at least from the point of view of the Congress, ease the problem. For, if such friction develops, Congress can have a large impact in resolving the conflict. Giving the primary responsibility to the states, however, may, in a sense, dilute or at least adversely affect potential congressional influence over the tone of the program.

The nature and extent of existing state involvement in law enforcement activities may be thought to affect the capability of the states to handle the grant-making function. That involvement, limited in most states, has nowhere involved state-wide planning or coordination of police activities. Nor, more importantly, has it had anything at all to do with the discretionary distribution of financial aid to local law enforcement. The states would thus come to this activity with no significant background in grant making. To implement the House bill they would be required to "tool up" quickly, to establish an office, and to hire specialized personnel. Major legislative as well as executive decisions would be necessary. A considerable effort would thus be required. For each individual state, though, the task would not be insuperable. The planning committees initiated at the President's call in 1966 might provide the nucleus of the operation, and some states have already taken legislative action to authorize such an office. The California legislature, for example, recently established the California Council on Criminal Justice⁵⁵ to, *inter alia*, "develop plans to fulfill the requirements of any federal act providing for the adoption of comprehensive plans to facilitate the receipt and allocation of federal funds"⁵⁶

Looking to the larger picture, however, it is too much to expect each of the fifty states to tool up an adequate operation in the near future. The task of staffing fifty such offices in a relatively short period of time seems an impossible one. Indeed, one of the large, pervasive problems currently being faced in attempts to implement the Commission's recommendations is that of finding qualified personnel adequately trained in the problems of police, courts, and corrections. All of this is not to say that it will not be possible eventually to develop and staff such an operation. To condition the entire program on the existence of comprehensive state plans and to rely on the states to engage in the actual distribution of the federal money, however, would cause intolerable delays in implementing the grant program.

The House bill contains a provision that is apparently designed to meet this problem;⁵⁷ if so, it fails miserably. It gives a state three months after the effective date of the act to establish a state planning agency and six months after the establishment of the state planning agency to file a comprehensive plan. If these deadlines are not met, the Attorney General is authorized to make grants directly to local governments. The deadlines, however, are unrealistic, although the likelihood is that they will be met. Thus, this approach puts a premium

55 CAL. PENAL CODE § 13800 (1967).

56 *Id.* § 13806.

57 H.R. 5037, § 305, *supra* note 50.

on haste and sloppiness. Moreover, it is not just that the deadlines are wrong. Any time period will impose an unrealistic limitation on what ought to be a continuing planning process.

The objection may be made that the federal government also lacks experience in this field and will have to "tool up." But there are significant differences. The federal government has for almost three years been making grants to local law enforcement agencies and others under the Law Enforcement Assistance Act of 1965. During this period the Office of Law Enforcement Assistance has distributed approximately seven million dollars annually for research and a variety of experimental and demonstration projects to improve law enforcement and criminal justice operations.⁵⁸ It has a staff of more than twenty-five persons who have already built up a wealth of experience and expertise in this new field of grant making. Not only is the federal government more advanced in its preparations to undertake a large-scale grant-making program, but it is undoubtedly more feasible to quickly staff and organize a single, central office than it is to build up fifty such operations. Finally, there are some particular practical disadvantages in using the states as conduits for the funds. The money involved in such a program would necessarily pass through more hands. And more opportunities for bureaucratic mistake, mishandling, corruption, or delay would thereby be created.

Although a case can be made for enlarging the state's role in the grant program — in order to encourage statewide planning and coordination, to build diversity into the program, and to beef up operations on the state level — it is submitted that an approach that gives state governments the primary responsibility for distributing funds to local governments is bound to fragment and complicate the implementation of the program and hinder the progress of its development. It is suggested, however, that one can foresee how, at some future date, a state office might reach a level of operation where it could perform the distribution function as well as a federal office. Perhaps the answer then is to establish initially a federally-controlled program but to build into it a feature whereby, after a period of time, the federal office would hand over certain authority to a state operation that met specified criteria.⁵⁹

V. Conclusion

One must be enough of a political realist to recognize that no matter how persuasive the arguments concerning the proper functioning of the program, there are other factors that weigh heavily in the legislative balance scale. And

⁵⁸ *House Hearings* 33.

⁵⁹ This approach might be viewed as the reverse of the provision of the House act that gave the federal government a power of reverter where the state failed to file a comprehensive plan. It is not clear under that provision whether, once a state fails to meet the deadline, the power of the federal government continues throughout the existence of the program or whether a late-applying state can re-obtain the power of distribution.

There are other possible compromises on the state control issue. The bill reported out by the House committee provided for submission of all applications to the chief executive of the state. Other grant legislation contains a governor's veto provision, *e.g.*, the Economic Opportunity Act. That legislation was amended in 1965 to give the Director of the OEO authority to override a veto by a governor.

what are those other factors? To cite just a few, political ideology no doubt plays a role for some. For others, the issue may be viewed as a simple question of raw political power. Where is it best to locate the power that will accompany the distribution of the funds that will be involved in this program? For still others, the matter may somehow be tied to civil rights issues. Based upon a civil rights criterion, is a federal or a state-oriented program preferable? Finally, there will be some for whom the state-federal control issue is itself not a matter of great importance. Rather, the question will present the opportunity to score political points or to trade off on other matters of legislative importance. An illustration in point is the fact that the full Senate Judiciary Committee recently reported out the Safe Streets measure with a new Title II containing provisions attempting, among other things, to overrule Supreme Court decisions in *Miranda v. Arizona*,⁶⁰ *United States v. Wade*,⁶¹ and *Mallory v. United States*.⁶²

Perhaps it is too much to ask that such considerations be ignored. For the legislative process is, after all, a process of compromise and adjustment in which the circle of relevance may be deemed very wide indeed. We can only hope that, whatever the reasoning, the resulting legislation will quickly be enacted in a form that will create a program well structured to "increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government."⁶³

60 384 U.S. 436 (1966).

61 388 U.S. 218 (1967).

62 354 U.S. 449 (1957).

63 H.R. 5037, preamble, *supra* note 50.