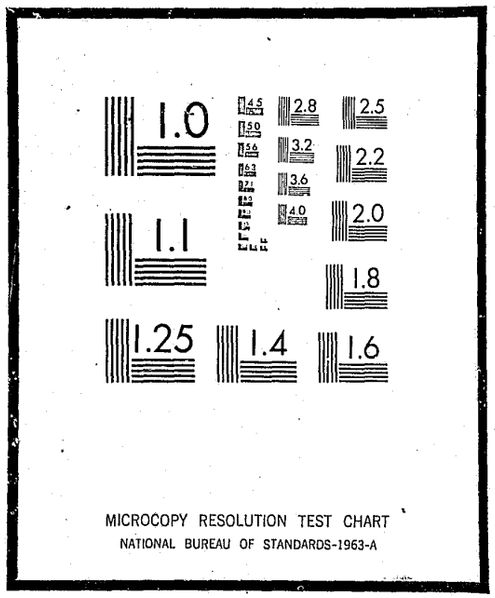

LEGAL OPINIONS

OF THE

OFFICE OF GENERAL COUNSEL

OF THE

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, UNITED STATES DEPARTMENT OF JUSTICE

JULY 1 TO DECEMBER 31, 1974

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NOTE TO READER

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

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

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

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

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

Legal Opinions in This Publication

Legislation Establishing LEAA Cited in This Volume

Note on Sectional Changes

1. The Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351) was the original legislation that established LEAA.
2. The 1970 amendments to that act were contained in the Omnibus Crime Control Act of 1970 (Public Law 91-644). The amendments redesignated Parts E and F of the 1968 act as Parts F and G and added a new Part E, entitled "Grants for Correctional Institutions and Facilities."
3. The 1973 amendments to the legislation were contained in the Crime Control Act of 1973 (Public Law 93-83). Those amendments redesignated Section 408 as Section 407 and incorporated the former Section 407 into Section 402(b)(6).

Crime Control Act of 1973

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Legal Opinion No. 75-1—(Number not used.)

Legal Opinion No. 75-2—LEAA's International Authority—September 17, 1974

TO: Office of Planning and Management, LEAA

In August 1973, the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351, as amended by Public Law 91-644) was amended by the Crime Control Act of 1973 (Public Law 93-83) to give LEAA authority to carry out certain international activities. The purpose of this memorandum is to interpret legally the extent of this authority.

Section 402(c) of the act now provides as follows, referring to the National Institute of Law Enforcement and Criminal Justice as the "Institute":

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

Section 515 of the act now provides that:

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

Although these provisions may appear clear and unambiguous, it is necessary, in order to interpret properly their meaning, to refer to the legislative history of the Crime Control Act of 1973, as well as to that of the Foreign Assistance Act of 1973 (Public Law 93-189). The Crime Control Act as passed by the House in June 1973 (H.R. 8152) did not authorize LEAA to conduct international activities in the areas cited above; the provisions in question originated in amendments introduced in the Senate (Senate Amendment No. 248 in the nature of a substitute for H.R. 8152). There was virtually no discussion of these provisions in the Senate debate on the Crime Control Act, and the most pertinent legislative history is found in the House/Senate Conference Report on the Crime Control Act.

International Authority Under Section 402(c)

With respect to Section 402(c), the Conference Report states that:

> The Senate amendment authorized the Institute to serve as an international clearinghouse for the expansion of law enforcement and criminal justice information. The House bill continued LEAA's current authority to act only within the confines of

the United States. The conferees agreed to the Senate provision. This agreement expands the scope of the Institute's authority to disseminate information related to international law enforcement problems.[1]

It is evident from the language of Section 402 cited above and the Conference Report that there is no limitation on the type of criminal justice information that can be exchanged under Section 402. In its clearinghouse function, the Institute can exchange information on all aspects of law enforcement and criminal justice including crime prevention, police, courts, and corrections. This view was subsequently reinforced by Representative Edward Hutchinson.[2]

International Authority Under Section 515(b)

The plain language of the statute as well as the House/Senate Conference Report also appears to indicate that the provisions of Section 515(b) parallel and expand on the authority granted in Section 402. Utilizing the authority of Section 515(b), LEAA presently carries out a wide range of statistical activities "within the United States." It is clear from Section 515(b) that some of these activities may now be conducted outside of ("without") the United States. Furthermore, Section 515(b) also authorizes the collection and evaluation of information "on the condition and progress of law enforcement . . . without the United States."

Under the heading "Information Dissemination and Technical Assistance," the Conference Report in discussing the meaning of Section 515(b) states that:

> The Senate amendment granted authority to LEAA for the collection and dissemination of information on law enforcement and criminal justice both within and outside of the United States. Other authority was also provided for the interchange of assistance with respect to international activities. The House bill contained the current LEAA authority which was limited to activities within the 'several States.'
>
> The conference substitute adopts the Senate amendment which provides authority to LEAA to collect and disseminate information on law enforcement within and without the United States.[3]

International Authority Under Section 515(c)

In interpreting the scope of LEAA's international authority, the most difficult problems are presented by an analysis of the meaning of Section 515(c). The clear language of the statute places no limitations on the types of law enforcement and criminal justice activities for which technical assistance may be provided.

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[1] S. Conf. Rep. No. 93-349, 93d Congress, 1st Sess. 29 (1973).
[2] See quote of Representative Edward Hutchinson below.
[3] *Supra*, footnote 1, p. 31.

The plain language of Section 515(c) would appear to authorize LEAA to provide technical assistance to international agencies in the full range of "law enforcement and criminal justice" activities.[4]

If the so-called rule of literalness were followed in the interpretation of the Crime Control Act, it would not be necessary to proceed any further. However, Sutherland in his exemplary work on *Statutory Construction* states that if the literal import of the words is not consistent with the legislative intent, "the words of the statute will be modified by the intention of the legislature."[5]

More particularly, effect must be given to the legislative intent where the same word is used with different meanings in the same statute, as noted in *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 433 (1932):

> Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Courtauld* v. *Legh*, L. R., 4 Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. [Citations omitted.]
>
> It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance.

The legislative intent of the Congress in enacting Section 515(c) would appear to modify the meaning of the words of Section 515(c). The intent of Congress appears to have been to provide for a narrower range of "law enforcement and criminal justice" activities in regard to international activities

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[4] Section 601(a) of the act defines "law enforcement and criminal justice" as follows:

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

[5] 2 Sutherland, *Statutory Construction*, §4701 (3d ed. F. Horack, 1943). Sutherland goes on to note:

> The modern cases also indicate that courts today rather than beginning their inquiry with the formal words of the act consider from the start the legislative purpose and intention. This tendency is to be commended for it is more consonant with the proper judicial use of statutory materials.

Sutherland also notes in Section 4706 that: "the intention prevails over the letter and the letter must if possible be read so as to conform to the spirit of the act."

than is defined in Section 601(a). To demonstrate the degree to which the legislative intent of the Congress modifies Section 515(c) and allows LEAA to undertake international technical assistance activities, a review of the legislative history is presented.

The first statement of congressional intent is found in the House/Senate Conference Report on the Crime Control Act. In discussing Section 515(c) the Report states:

> The conference substitute also accepts the Senate version which adds authority to provide technical assistance to international law enforcement agencies as well as national law enforcement agencies. In recognition of the international scope of many law enforcement and criminal justice problems the conferees agreed to give LEAA authority to provide technical assistance in such areas as narcotics interdiction, skyjacking, and terrorism. *The conferees felt that LEAA's international operations should be limited to providing technical assistance in cases of this character.*[6] [Emphasis added.]

The meaning was somewhat clarified by comments on the Conference Report by Senator Roman L. Hruska:

> Finally, I wish to assure Senators that with respect to the new technical assistance provisions, the conferees recognized the international scope of many law enforcement and criminal justice problems. Thus, we intended to give LEAA authority to provide technical assistance abroad in traditional police areas of international concern such as narcotics interdiction, skyjacking, and terrorism. However, these specific references are only intended to be illustrative and it would, therefore, be entirely appropriate for technical assistance to be provided in other criminal justice areas, including corrections, where there were particular benefits in terms of expertise that could only be derived abroad.[7]

Representative Hutchinson, in commenting on the Conference Report and a summary report introduced by Senator John L. McClellan in the Senate prior to Senate passage of the Crime Control Act, stated:

> Finally, LEAA and the National Institute were given authority to receive and disseminate information internationally. The summary incorrectly indicates that this function should be limited to cases such as skyjacking, drug abuse, and international terrorism. Rather, the conferees intended this limitation to apply to the international technical assistance authority because it is operational. The joint explanatory statement of the committee of conference correctly expresses this legislative intention.[8]

In order to develop a meaningful interpretation of Section 515(c), reference must also be made to the Senate debate on the Foreign Assistance Act of 1973 (S. 2325) and the Foreign Military Sales and Assistance Act of 1973 (S. 1443), which were taken up before, during, and after passage of the Crime Control

[6] *Supra*, footnote 1, p. 31.
[7] 119 Cong. Rec. S 15561 (daily ed., Aug. 2, 1973).
[8] 119 Cong. Rec. H 7215 (daily ed., Aug. 2, 1973).

Act.[9] In considering these acts the Senate was concerned with the impact that the Public Safety Program of the Agency for International Development (AID) was having on U.S. foreign policy. The Senate undertook to eliminate AID's Public Safety Program, and the Foreign Military Sales and Assistance Act as originally passed by the Senate contained a broad prohibition on the use of Federal funds for any international criminal justice activities.[10]

This act would have virtually eliminated the new LEAA authority in the international area under Section 515(c); Senators Hruska and McClellan were successful subsequently in having an amendment added on the Senate floor to the Foreign Assistance Act that would have in effect reinstated LEAA's authority under Section 515(c). In urging the Senate to reinstate LEAA's authority, Senator McClellan cited the limitation on the use of LEAA's Section 515 authority found in the House/Senate Conference Report. Senator McClellan stated that:

> Section 115 of the Foreign Assistance Act of 1961, as contained in S. 2335—the Foreign Assistance Act of 1973—presently under consideration, imposes a broad prohibition on the use of funds under any provision of law 'to conduct any police training or related program for a foreign country.' Although I wholeheartedly agree with the objective of this provision to prohibit intrusion of the United States into the domestic law enforcement situation in foreign countries, the language is susceptible to a possible construction that would eliminate the new very limited authority of the Law Enforcement Assistance Administration to contribute to solutions of international enforcement problems in the areas of narcotics interdiction, skyjacking, and terrorism....
>
> I do not think there can be any objection to these limited activities if we are to carry on our vital cooperation and assistance in support of effective international efforts to control serious crimes across international borders, such as narcotics traffic, terrorism and skyjacking.[11]

Senator Hruska supported Senator McClellan's amendment and made comments similar to those cited above. Senator Hruska also noted:

> LEAA intends that its function under this new authority would be limited to the dissemination of information on how to control these problems of international scope. It is not anticipated that LEAA would become involved in training law enforcement or other criminal justice personnel for enforcement of domestic laws or other programs within another nation. Furthermore, such international assistance would not be a major part of LEAA operations, but would involve only the dissemination of information which is a byproduct of other LEAA activities.[12]

[9] Sutherland notes that under the principle of in pari materia contemperaneous legislative interpretation of a statute occurring shortly after the enactment of a statute is valid legislative history, particularly where the legislative history is developed, as in the case at hand, by the sponsors of the original statute. Sutherland, *Statutory Construction*. Also, the Supreme Court stated in *United States* v. *Stewart*, 311 U.S. 60, 64 (1940), that "[i]t is clear that 'all acts in pari materia are to be taken together, as if they were one law.' *United States* v. *Freeman*, 3 How. 556, 564, 11 L. Ed. 724." *See*, 2 Sutherland, *Statutory Construction*, §5108, 5201-5202 (3d ed. F. Horack, 1943).

[10] Section 2502(b) of the Foreign Military Sales and Assistance Act (S. 1443), 93d Cong., 1st Sess. (1973) provided as follows:

> No part of any appropriation made available to carry out this or any other law shall be used to conduct any police training or related program for a foreign country.

[11] 119 Cong. Rec. S 18403 (daily ed., Oct. 2, 1973).
[12] *Ibid.*, S 18405.

A series of questions and answers followed and pertinent extracts include:

Mr. McGEE. Mr. President, could I ask a clarifying question of the sponsors of the amendment? In the programs that the two Senators are sponsoring, there is the program they wish to exempt. Does this involve a situation of sending abroad American personnel to advise or train a foreign police force?

Mr. McCLELLAN. No. This is solely confined to these particular crimes we have identified and which deal with such international problems as drugs, skyjacking, terrorism, and serious crimes across international borders.

Most of the international activities of these Federal agencies would involve technical assistance and exchange of information on law enforcement matters vital to crime control in this country . . . .

Mr. McCLELLAN. There is no intention to authorize a program to train a foreign police force for their internal purposes. The primary areas covered by my amendment are those where we have a direct interest in protecting our own safety in our own country . . . .

Mr. McCLELLAN. Mr. President, I can assure the Senate that there is no intent to authorize the transfer of the AID public safety program to the Department of Justice or any other agency.

It simply excludes activities presently authorized for LEAA, DEA, and the FBI from the provisions in the bill. It says that this section shall not be applicable to certain specific things. It transfers nothing. . . .

Mr. ABOUREZK. Mr. President, is the LEAA involved in providing money to foreign governments?

Mr. McCLELLAN. No. LEAA, DEA, and the FBI are involved in helping to curtail serious law enforcement problems that are international in nature, such as illegal drug traffic, and reduce the effect which these problems have upon this country. That is the purpose for which we seek an exemption for these particular agencies from section 115.[13]

Subsequently, the House and Senate went to a single conference on the Foreign Assistance Act and the Foreign Military Sales and Assistance Act, and they issued a single Conference Report in which the two bills were combined as the Foreign Assistance Act of 1973. The Conference Report was approved by the Congress and the act was signed into law by the President (Public Law 93-189, 87 Stat. 716). Section 112 provides:

Sec. 112. PROHIBITING POLICE TRAINING.–(a) No part of any appropriation made available to carry out this Act shall be used to conduct any police training or related program in a foreign country.

(b) Subsection (a) of this section shall not apply–

(1) with respect to assistance rendered under section 515(c) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, or with respect to any authority of the Drug Enforcement Administration or the Federal Bureau of Investigation which relates to crimes of the nature which are unlawful under the laws of the United States; or

(2) to any contract entered into prior to the date of enactment of this section with any person, organization, or agency of the United States Government to provide personnel to conduct, or assist in conducting, any such program.

Notwithstanding paragraph (2), subsection (a) shall apply to any renewal or extension of any contract referred to in such paragraph entered into on or after such date of enactment.

[13] *Ibid.*, S 18406.

The actual prohibition as it came out of conference has little effect on the type of activities that LEAA can conduct. This is not only because of the specific exclusion of Section 515(c) programs but also because the prohibition by its terms is limited to programs carried out under the Foreign Assistance Act. LEAA, of course, carries out its programs under the Crime Control Act. This is made clear by the Conference Report, which notes that:

The Senate bill prohibited police training and related programs for any foreign country under any law except those relating to certain crimes and administered by the Law Enforcement Assistance Administration, or with respect to any authority of the Drug Enforcement Administration, or the Federal Bureau of Investigation.

The House bill did not contain a comparable provision.

The House receded with an amendment applying the prohibition to programs in a foreign country and *to funds made available under the Foreign Assistance Act.*[14] [Emphasis added.]

The only possible direct limitation on LEAA authority is found in this Conference Report, which notes that:

It is the intent of Congress that present programs being conducted by the Agency for International Development in foreign countries should not be transferred to some other agency of the Government to avoid this prohibition.[15]

This language of the Conference Report together with the language of the Foreign Assistance Act and Senator McClellan's assurances that there was no intent to authorize transfer of the AID program to the Department of Justice, bring into play 31 U.S.C. §696. This provision prohibits LEAA and any other Federal agency from using its appropriations to assume substantially the same functions of an agency that are no longer authorized to be funded by the Congress.[16]

[14] Conference Report on the Foreign Assistance Act of 1973. H. R. Rep. 93-664, 93d Cong., 1st Sess. 1 (1973).

[15] *Ibid.*

[16] 31 U.S.C. §696 (1944) in its entirety provides:

After January 1, 1945, no part of any appropriation or fund made available by this or any other Act shall be allotted or made available to, or used to pay the expenses of, any agency or instrumentality including those established by Executive order after such agency or instrumentality has been in existence for more than one year, if the Congress has not appropriated any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it. For the purposes of this section, any agency or instrumentality including those established by Executive order shall be deemed to have been in existence during the existence of any other agency or instrumentality, established by a prior Executive order, if the principal functions of both of such agencies or instrumentalities are substantially the same or similar. When any agency or instrumentality is or has been prevented from using appropriations by reason of this section, no part of any appropriation or fund made available by this or any other Act shall be used to pay the expenses of the performance by any other agency or instrumentality of functions which are substantially the same as or similar to the principal functions of the agency or instrumentality so prevented from using appropriations, unless the Congress has specifically authorized the expenditure of funds for performing such functions.

It should be noted that under 31 U.S.C. §696, LEAA can carry out with its Section 515(c) authority police training and related activities dealing with crimes "of the nature which are unlawful under the law of the United States" because these activities were specifically exempted by the Congress in the Foreign Assistance Act of 1973.

In summary, the meaning of Section 515(c) has been modified by substantial legislative intent. The limitations indicate that Section 515(c) assistance should deal with crimes *such as* narcotics interdiction, skyjacking, and terrorism, including, in Senator McClellan's words, other "serious crimes across international borders."[17] There also appears to be some authority to provide technical assistance in other criminal justice areas where, in Senator Hruska's words, "there were particular benefits in terms of expertise that could only be derived abroad."[18]

The activities of technical assistance can include all areas covered by LEAA under its domestic technical assistance authority. The Office of General Counsel in a memorandum dated December 8, 1970, set forth a detailed opinion on the definition and usage of technical assistance under the Safe Streets Act. The opinion cites numerous examples of technical assistance activities conducted by LEAA and approved by the LEAA Appropriation Committees in appropriating technical assistance funds for LEAA. The December 8, 1970, opinion proposes that LEAA broadly define technical assistance as "the communication of knowledge, skills, and know-how by means of the provisions of expert advisory personnel, conduct of training activities and conferences and the preparation and dissemination of publications."

It should be noted that the degree to which LEAA can provide international training through its technical assistance effort would appear to be limited to matters that are clearly of an international nature. This conclusion is supported by the comments of both Senator McClellan and Senator Hruska to the effect that LEAA is not authorized to provide training "for enforcement of laws or other programs which are domestic in nature."

Conclusion

It is evident that LEAA has been given sweeping new authority to carry out international programs of law enforcement and criminal justice and has a great deal of discretion in defining that authority. However, it is also evident that the outer limits of that authority are open to interpretation.

In defining the outer limits and developing an international program, LEAA must take care to give due consideration not only to the literal language of the act but also to the legislative intent, which places limitations on LEAA's authority beyond what is evident from the statute. The rule of literalness is an anachronism from a legal as well as from a practical standpoint.

The international clearinghouse authority under Section 402 of the act and the information gathering, evaluation, and dissemination authority under Section 515(b) cover the full scope of criminal justice functions under the Crime Control Act. The technical assistance authority does not appear to be as broad. Thus, LEAA cannot assume, for example, substantially the same

[17] *Supra*, footnotes 11 and 13.
[18] *Supra*, footnote 7.

functions performed by the AID Public Safety Program except insofar as the Section 515(c) authority is exercised in relationship to "crimes of the nature which are unlawful under the laws of the United States."

Finally, it would appear that in exercising its international authority through specific programs and projects, consideration must be given to the general purposes of the Omnibus Crime Control and Safe Streets Act. The general purposes are enunciated in the "Declaration and Purpose" section of the act and are generally limited to activities that impact on "the high incidence of crime in the United States [which] threatens the peace, security and general welfare of the Nation and its citizens."

As for technical assistance authority, Senator McClellan noted, for example, that LEAA was authorized to carry out activities that:

> – Involve technical assistance and exchange of information on law enforcement matters vital to crime control in this country.[19]
> – Have a direct interest in protecting our own safety in our own country.[20]
> – Involve serious law enforcement problems that are international in nature . . . and reduce the effect which these problems have upon this country.[21]

Legal Opinion No. 75-3—Illinois Appropriation Act—Noncompliance with Federal Legislation—July 18, 1974

TO: LEAA Regional Administrator
Region V - Chicago

This is in response to your request of July 18, 1974, enclosing a request for opinion from the Illinois Law Enforcement Commission, dated July 17, 1974.

In these documents, you have enclosed relevant portions of Illinois House bill 2347, which makes appropriations for the ordinary and contingent expenses of the Illinois Law Enforcement Commission in the Office of the Governor for the fiscal year beginning July 1, 1974. The Commission is the State Criminal Justice Planning Agency (SPA) for Illinois.

Section 2 of House bill 2347 specifically designates programs that may be funded from the State appropriation. The specified programs are stated to be inconsistent with the approved comprehensive plan. Consequently, Section 2 purports to itemize and specify for the Illinois Law Enforcement Commission programs for funding not within the "established priorities" of the Commission.

In addition, by specification of fundable programs, House bill 2347 would, according to a present position of the comptroller for the State of Illinois, eliminate funding authorization for previously approved programs. Such action could result in the State being unable to comply with portions of the previously approved fiscal years 1972 and 1973 comprehensive plans.

[19] *Supra*, footnote 13.
[20] *Ibid.*
[21] *Supra*, footnote 14.

I have concluded that Section 2 of House bill 2347 would be inconsistent with the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and Public Law 93-83), because it would vest in the legislature ultimate discretion over the distribution of LEAA funds, which, under Section 203 of the act, must be vested in a "State planning agency" created or designated by the Governor and subject to his jurisdiction and control. Based upon nonconformity with the Federal act and lacking a controlling constitutional prohibition, the Federal statute must take precedence over the State law. *King* v. *Smith*, 392 U.S. 309 (1968).

Section 203 expressly provides that the State Criminal Justice Planning Agency designated by the Governor to receive and administer LEAA planning and action grants shall be broadly representative of law enforcement expertise within the State and shall have the authority to "define, develop and correlate programs and projects" and "establish priorities" for law enforcement improvement throughout the State.

It is not inconsistent with this requirement for the State legislature to provide that the SPA shall operate in accordance with State fiscal and administrative procedures, such as State procurement, audit, or fund expenditure policies, so long as they are not inconsistent with Federal law. However, the SPA must retain the essential authority to develop and approve programs and projects and determine the order of priority for funding them. The legislature may grant or withhold State funds to provide the non-Federal share of the costs of such programs and projects; but it may not, as House bill 2347 would do, substitute its own judgment for that of the Governor and the Illinois Law Enforcement Commission with respect to the allocation of LEAA funds among the various components of law enforcement and the development of programs and projects to be supported by such funds.

In addition, the elimination of previously approved programs from funding eligibility, based upon a current ruling of the State comptroller, would result in nonconformity by virtue of the elimination of programs approved in previous comprehensive plans. This appears, however, to be a technical deficiency that could be remedied by a revised interpretation of the comptroller or State attorney general. Unless remedied, this action could seriously affect the comprehensive nature of the approved plans and would also result in a substitution of legislative action for authority vested in the Governor by Section 203 of the act.

For the reasons stated above, if House bill 2347 were enacted in its present form, I would consider the Illinois Law Enforcement Commission to be ineligible to receive block planning and action grants from LEAA because of the nonconforming nature of the legislation. Rights to a hearing on these issues would be available in accord with Section 509 of the act.

Legal Opinion No. 75-4—In-Kind Match—Costs to Maintain Prisoners in Institutions—September 11, 1974

TO: LEAA Regional Administrator
Region IV - Atlanta

This opinion is in response to issues raised by the proposed in-kind match for Atlanta Impact Program No. 73-ED-04-0010. The subgrantee, Georgia Department of Offender Rehabilitation, is conducting an experimental correctional program.

Institutionalized offenders have been selected on the basis of testing and interviews to participate in the program. Those not selected will remain in the present institution and will be used as the control group to evaluate the impact of the experiment.

The issue is whether the expense of maintaining this control group may qualify as the in-kind match for the project. The expenses are those costs to house, feed, and clothe the prisoners during the period designated for the experiment. At present, the expenses are borne by the State of Georgia.

It is the opinion of this office that such expenses are not allowable as proper in-kind match.

OMB Circular A-102, Attachment F, outlines in-kind contributions as "charges for goods and services directly benefiting and specifically identifiable to the grant program." Because the expense of maintaining these prisoners will be incurred regardless of this project and no value can be specifically assigned to their work as a control group, the expense of maintaining these prisoners is not proper in-kind match. The prisoners are not working on the project. They are being studied, as a control group, as part of the experiment. There is no question of the need for a control group. The experiment may still be conducted without one, but the evaluation will suffer. However, in-kind match needs to show more than necessity to be proper. The expense must not only be necessary but also specifically attributable to the proposed project.

OMB Circular A-102, Attachment F, further specifies that "for matching grant purposes, project costs are limited to allowable types of costs as set forth in OMB Circular A-87." OMB Circular A-87 gives basic guidance in the elements that define permissible costs. As one of the general criteria in determining an allowable cost, the circular requires that the expense "be necessary and reasonable for proper and efficient administration of the grant program, be allowable thereto under these principles, and, except as specifically provided herein, not be a general expense required to carry out the overall responsibilities of State or local governments." Because the cost of maintaining an already existing correctional facility and its inmates is an expense incurred by Georgia to fulfill a responsibility already assumed by the State, it is not allowable as in-kind match. The State is not maintaining this facility for the control group, although it will be utilized in that manner by this experiment. Such a distinction provides a dividing line between the overall responsibility that the State is presently assuming and an expense that qualifies as in-kind match. Of course, if it could be shown that the expenses incurred in

maintaining members of the control group would not have been incurred but for their status as the control group, then such expenses would qualify as in-kind match.

Further, the expense of maintaining this correctional facility is not allowable as in-kind match on policy grounds. The in-kind match concept was designed and is employed as a technique both to defer some of the expenses of a project and as a device to include local elements in a showing of local support for the project. Programs require this local support or they will not survive and flourish once the Federal dollars have been expended in initiating them. The community will neither publicly support nor financially aid a project that is unacceptable to it. This acceptability is needed for successful programs, especially in the criminal justice and law enforcement area. In-kind match provides such necessary support for a program.

The two elements of the proposed match refute the above concepts because the expense would be incurred regardless of the existence of the project and the expense is not connected to any commitment that the State has made toward this project. Therefore, this proposed match is contrary to both OMB requirements and definitions and to the spirit of requiring match from State or local government.

Legal Opinion No. 75-5—Use of Part E Funds for Renovation of Rented Privately Owned Facilities—September 11, 1974

TO: LEAA Regional Administrator
Region VIII - Denver

This is in response to a request for an opinion on the propriety of using Part E funds for the renovation of privately owned facilities that are leased. A typical situation in which this may arise occurs when a nonprofit organization is awarded a grant to operate a halfway house or similar facility and leases premises that are in need of certain alterations.

The express purpose of Part E grants is "to encourage States and units of general local government to develop and implement programs and projects for the construction, acquisition, and renovation of correctional institutions and facilities and for the improvement of correctional programs and practices."

Section 453(2) of the act requires that the State plan must provide satisfactory assurances that control of the funds and title to property derived from this part (Part E) shall be in a public agency. The thrust of this provision is directed at preventing private organizations from acquiring title to property with Part E funds. A clear distinction can be drawn between construction and renovation. Construction generally involves the creation of new property while renovation involves modification of existing property. Construction is defined in the act at Section 601(f) "to include the erection, acquisition, expansion or repair (but not including minor remodeling or minor repairs) of new or existing buildings or other physical facilities. . . ." The parenthetical phrase seems to indicate that the construction restriction on title would only apply to changes

that in effect create new property or property of such a changed character as to constitute other property. The term renovation is not defined in the act but should be construed in pari materia.

As a general rule, expenditures for renovation of privately owned leased facilities would be permissible so long as the alterations are minor. However, there is no clear delineation between what constitutes a major alteration changing the character of the property and a permissible minor renovation. Each instance must be evaluated individually. One criterion that would be of assistance in the determination would be the amounts expended. Guideline Manual M 7100.1A (Chapter 4, paragraph 3), in dealing with amounts expended for construction, provides that amounts below $5,000 should not be treated as construction but rather as minor remodeling or repair. Work exceeding that amount should be submitted to LEAA for a determination if the minor remodeling section is applicable. A similar approach might be adopted for renovation. Other criteria would be the utilization of the facility before and after the changes, the increase in the tax basis, and the amount of man-hours actually expended in the changes.

Legal Opinion No. 75-6—(Number not used.)

Legal Opinion No. 75-7—Use of Funds for Activities Relating to Proposed Legislation—September 11, 1974

TO: LEAA Regional Administrator
Region IX - San Francisco

This is in response to your request of August 5, 1974, for an opinion as to whether or not the proposed Arizona State Justice Planning Agency grant to the Arizona Bar Association will violate any legal restrictions upon the use of LEAA funds. The proposed grant is intended to enable the Association to present to the public information concerning the merits of an initiative proposal that if voted upon favorably would require the merit selection of judges in two Arizona counties.

The restrictions that potentially bear upon such use of LEAA funds are those Federal statutes prohibiting the use of appropriated monies for lobbying activities. 18 U.S.C. §1913; §607(a) of the Treasury, Postal Service, and General Government Appropriations Act of 1974, Public Law 93-143. It is the opinion of this office, however, that the proposed activities of the Association will not violate these prohibitions, provided the Association fairly presents to the public both sides of the merit selection issue and does not encourage voters to cast their ballots in any particular manner.

18 U.S.C. §1913 makes illegal the use of any congressionally appropriated money "... to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote

or otherwise, any legislation or appropriation by Congress. . . ." Section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act of 1974, *supra*, provides that "[n] o part of any appropriation contained in this or any other Act . . . shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

By their terms, these provisions prohibit only the use of appropriated funds to influence a member of Congress or legislation pending before Congress. They do not apply to the use of Federal funds to influence legislators or legislation outside the congressional setting. Thus, activities that would be proscribed if directed toward influencing national legislation are technically permissible if intended only to influence legislation at the State or local level.

However, the policy underlying these provisions, that the legislative process should be free from federally financed pressures, *National Association for Community Development* v. *Hodgson*, 356 F. Supp. 1399, 1404 (D.C. D.C. 1973), is as applicable to activities at the State and local levels as at the national level. Therefore, LEAA should refrain from funding at the State or local level activities that would violate Section 1913 or Section 607(a) if directed toward congressional legislation.

Activities proscribed by these sections are those that, while supported by appropriated funds, are intended to influence the legislative judgment of individual Congressmen and of the Congress as a whole. The legislative history of Section 1913 indicates that federally financed letter campaigns and the like intended to influence legislation, and direct communications with the Congress intended to achieve the same purpose, are prohibited by that section. 58 Cong. Rec. 403, 425. The General Accounting Office has interpreted the Section 607(a) language prohibiting expenditures for "publicity or propaganda purposes designed to support or defeat legislation" as prohibiting the use of appropriated funds for personal services and publications intended to influence legislation by "molding public opinion." Letter from the Comptroller General of the United States, Joseph Campbell, to the Honorable John Bell Williams, Mississippi, September 28, 1962.

Federally financed activities that are not intended to influence legislation are not proscribed under the terms of these statutes. The presentation of information both pro and con about a controversial issue, if done without advocacy, is not a prohibited activity. Therefore, if the Arizona Bar Association presents information on all sides of the merit selection issue, without urging the adoption of any particular position, it will not violate these provisions.

Legal Opinion No. 75-8—Application by the City of Baltimore for LEAA Funding of Operation PASS (People Against Senseless Shootings)—September 3, 1974

TO: Administrator LEAA

This is in response to your request for an opinion on the legality of using LEAA funds to support Operation PASS in the City of Baltimore, Md. The question involves an interpretation of Section 301 of the Omnibus Crime

Control and Safe Streets Act of 1968, as amended, (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

An application for $648,500 in LEAA block grant funds to support Operation PASS has been forwarded to the Maryland Governor's Commission on Law Enforcement and the Administration of Justice, which has requested a legal ruling prior to its consideration of the application.[1] In addition, Commissioner Donald D. Pomerleau of the Baltimore Police Department has contacted Attorney General William Saxbe and requested support for the funding of Operation PASS.

Operation PASS is a program initiated by the Baltimore Police Department to pay a "bounty" of $50 for any operable gun presented to the Police Department by a bona fide resident of Baltimore and to pay any resident $100 for information leading to the confiscation of an illegal handgun. The grant application presented to the Maryland Governor's Commission states that Operation PASS was initiated on Aug. 22, 1974, in response to the number of gun-related crimes in Baltimore. The application states, for example, that in the first 7 months of 1974, 2,808 Baltimore residents have been assaulted with firearms and that 112 have died as a result of their wounds. According to the Baltimore Police Department, as of 8:00 a.m. today more than 9,000 guns have been collected under the program and 23 people have provided information that resulted in the confiscation of an illegal gun.

The question presented by the Operation PASS grant application is one of first impression. Although a program for State purchase of handguns was recommended in August 1973 by the National Advisory Commission on Criminal Justice Standards and Goals in its report *A National Strategy to Reduce Crime*, apparently this is the first time that a similar concept has actually been initiated in this country. Nothing comparable to the questions raised by Operation PASS has ever been presented to this office for resolution.

In order to resolve this issue, it is necessary to examine the authority provided in the Safe Streets Act. This act established the Law Enforcement Assistance Administration and authorized it to make grants to State and local governments to improve and strengthen law enforcement and criminal justice and to reduce crime. The bulk of LEAA funds is provided to the States and local governments in the form of so-called action grants under Part C of the act, and block action grants are made to State Criminal Justice Planning Agencies on a population basis after a comprehensive plan for use of these funds has been received and approved by LEAA.[2] The grant application filed with the Maryland Governor's Commission involves Part C block grant funds.

The Safe Streets Act specifies certain standards under which a given program can be funded and this office has consistently looked to these standards in ruling on the legality of funding programs under the act. The

[1] Approval of the LEAA Regional Office in Philadelphia is also necessary before the program is funded because in order to fund Operation PASS the Maryland Governor's Commission would have to modify a block grant that was previously approved by the Regional Office.

[2] See *Ely* v. *Velde*, 451 F. 2d 1130 (4th Cir. 1971).

broadest standard is found in the "Declaration and Purpose" clause of the act, which specifies that any program to be eligible for funding must be designed "to reduce and prevent crime and juvenile delinquency and to insure the greater safety of the people" through better coordinated and intensified, and more effective, law enforcement and criminal justice efforts.

The standard for funding under Part C of the act is set forth in Section 301 of the act, which specifies that to be eligible for funding under Part C a program must be designed "to improve and strengthen law enforcement and criminal justice." A further standard is set forth in Section 301(b)(1) of the act, which authorizes the funding of "public protection" programs that are "designed to improve and strengthen law enforcement and criminal justice and reduce crime in public and private places." More particularly, Section 301(b)(1), which is pertinent to the question presented, provides as follows:

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

One Congressman in commenting in 1967 on Section 201 of H.R. 3057, the original House version of the Safe Streets Act, which was almost identical to what was ultimately enacted as Section 301(b) of the act, noted that:

> The range of possible improvements that may be funded . . . is broad. It is expanding rapidly with advances in science and technology . . . . The purposes are framed to cover the entire range of activities comprehended by the phrase 'law enforcement and criminal justice.'[3]

At first reading it would appear that Section 301(b)(1) would authorize the funding of Operation PASS, and it is the opinion of this office that the second part of the Operation PASS program, the payment of money to informants for information leading to the confiscation of illegal guns, can be funded.

The informant aspect of the program is clearly related to the standards in the Safe Streets Act and in particular Section 301(b)(1) of that act. The Operation PASS program defines illegal guns as those guns that may not be possessed by the general population under State and Federal laws. Illegal guns include sawed-off shotguns, unregistered machine guns that have been used in committing a crime, and guns possessed by a person in violation of Federal or State law including the Maryland Handgun Control Law. Payment of money to informants to assist in confiscating illegal guns is clearly related to a law enforcement and criminal justice purpose. A program to pay money to informants for information leading to the confiscation of illegal guns is a "public protection" program within the meaning of Section 301(b) and the informant program is one "designed to improve and strengthen law enforcement and criminal justice and reduce crime in public and private places."

[3]Comments of Representative Herbert Tenzer, Cong. Rec. H 9895 (daily ed. Aug. 3, 1967).

The Maryland Handgun Control Law provides convincing evidence for this conclusion. Twenty-three payments have already been made under Operation PASS for information leading to the confiscation of illegal guns. In every instance the possession of these guns was prohibited by the Maryland Handgun Control Law, and this law in its "Declaration of Policy" provision states that:

> The General Assembly of Maryland hereby finds and declares that:
> (i) There has, in recent years, been an alarming increase in the number of violent crimes perpetrated in Maryland, and a high percentage of those crimes involves the use of handguns;
> (ii) The result has been a substantial increase in the number of persons killed or injured which is traceable, in large part, to the carrying of handguns on the streets and public ways by persons inclined to use them in criminal activity;
> (iii) The laws currently in force have not been effective in curbing the more frequent use of handguns in perpetrating crime; and
> (iv) Further regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of its citizens.[4]

Under Section 301(b)(1) or any other provision of the Safe Streets Act, it is more difficult to justify funding the "bounty" part of Operation PASS, which provides for payment of $50 for any working gun, legal or illegal, turned into the Baltimore Police Department by a Baltimore resident.

The purposes of the program are laudatory and it is arguable that the program will have some impact on crime rates, that it will insure the greater safety of the public, and that it will improve and strengthen law enforcement as required by the Safe Streets Act. That argument is countered by the fact that under the program and applicable gun control laws no restrictions are placed on how a person presenting a gun to the police for the $50 bounty originally acquired the gun, and no distinction is made between legal or illegal guns. The program seeks to control and reduce in numbers a commodity—guns—when the possession, manufacture, sale, and use of these guns are clearly authorized by law and when this commodity can be replenished without limitation.

Although some efforts have been made to secure volunteer pledges from gun dealers not to sell guns at less than $50 in Maryland, there is apparently no way under Operation PASS to prevent a citizen of Baltimore from buying a gun anywhere in Maryland or in an adjacent State and selling that gun to the police at a profit. The Police Department has stated that it will not buy new guns, but it will buy a gun that has been fired only once, even if otherwise new. There is nothing to prevent a Baltimore resident who turns in a gun and receives $50 for it from buying a new gun to replace the one that he sells to the police.

The program as structured is actually designed to encourage the manufacture and sale of handguns. As long as it is possible to buy a gun, any gun, for less than $50 and turn it into the Police Department for $50, the profit motive is present and the laws of economics dictate that if people can buy guns at a lower price and sell them at the higher price they will do so. The reaction of one individual participating in Operation PASS and interviewed by the

[4]27 Maryland Code §36B (1972 Chap. 13, §3; 1973, Chaps. 61, 332).

Washington Star-News is instructive. When asked why he turned in his gun, he replied that he did so because he could take the $50 and buy "five" more guns. When told that the police were on guard for such action, he reportedly replied:

> Well, I'll just buy me a bus ticket to Pennsylvania and buy me three guns instead of five. I still make a profit.[5]

The National Advisory Commission on Criminal Justice Standards and Goals, when it called for the establishment and funding of State agencies to purchase voluntarily surrendered handguns, clearly recognized this problem and coupled this recommendation with a call for public education programs on the use of guns, strict penalties for the use of guns in crimes, and prohibitions on the manufacture, sale, and importation into a State of all handguns as well as urging a ban on the private possession of handguns.[6] It further urged States to consider implementing its recommendations in a sequential or incremental form and specified that the program of purchasing guns turned in voluntarily should be implemented only *after* prohibitions on manufacture, sale, or importation of handguns were enacted.[7]

The National Commission on the Causes and Prevention of Violence estimated that in 1968 there were 90 million guns in the possession of private citizens[8] and the U.S. Department of the Treasury estimates that Americans are acquiring handguns at a rate of 1,800,000 a year.[9]

Based on population figures, if Baltimore citizens had a proportionate share of the estimated total number of guns, there would be almost 500,000 guns in Baltimore and this number would be increasing at a rate of 9,000 handguns a year. The Federal funds supplied under this grant together with the $70,000 in State and local funds required to be provided to match the Federal funds could pay for fewer than 15,000 of these guns. The program was initiated less than 2 weeks ago, and the Baltimore Police Department has indicated that almost $500,000 has been expended. At this rate the $648,500 in requested funds would be expended in a very short period of time.[10]

These considerations together with the lack of restrictions on manufacture, sale, and importation of guns in Maryland seriously call into question the potential impact of the program on crime reduction and increased safety of the public.

It should also be noted that if the Baltimore Police Department subjects to investigation and arrest someone who turns in a gun that has been used in a

[5] *Washington Star-News*, p. A-1, Aug. 29, 1974.

[6] National Advisory Commission on Criminal Justice Standards and Goals, *A National Strategy to Reduce Crime* (Government Printing Office, 1973), pp. 139-145.

[7] *Ibid.*

[8] National Commission on the Causes and Prevention of Violence, *To Insure Domestic Tranquility* (Government Printing Office, 1969), p. 170.

[9] *Supra*, footnote 6.

[10] The grant application asked that approval of this program be made effective Aug. 28, 1974. It also indicated that at that point 3,300 guns had been received by the Police Department. Between August 28 and today almost 6,000 new guns have been received. At the cost of $50 a gun, $300,000 in pre-agreement costs will be incurred, leaving a little more than half of the grant funds, $348,500, available for the program from today on.

crime, the program may ultimately discourage those in illegal possession of a gun from coming forward and presenting it to the Police Department. Only law-abiding citizens could then turn in a gun without fear of police action.

On the issue of program impact, an analogy to the drug issue is useful. Funds under the Safe Streets Act have been used to purchase illicit drugs such as heroin and cocaine, and there is some indication that Safe Streets funds and funds from other State and local sources have had a significant impact on curbing illegal drug traffic and drug-related crimes. Certainly this impact has been possible in a large degree because it is illegal to manufacture, sell, or import these drugs into the United States except for medical purposes and then only under strict controls. Severe penalties are provided for violation of these laws and the Federal Government has gone so far as to provide a subsidy to Turkish farmers to pay them not to grow the poppy flowers from which heroin is derived.

Without appropriate restrictions the impact of the program on crime reduction, increased public safety, and the improvement of law enforcement and criminal justice is questionable.

Therefore, based on the information provided in the grant application prepared by the Baltimore Police Department and submitted to the Maryland Governor's Commission on Law Enforcement and the Administration of Justice on Aug. 28, 1973, it is the opinion of this office that the "bounty" aspect of the program does not meaningfully relate to the purposes of the Safe Streets Act and therefore cannot be funded under the Safe Streets Act.

Legal Opinion No. 75-9—Allowability of Administrative Expenses to SPA's on Discretionary Grants—September 11, 1974

TO: LEAA Regional Administrator
Region VIII - Denver

This is in response to your inquiry as to whether discretionary fund grants awarded to programs developed in response to LEAA National Initiatives (Priorities) may include funds for State Criminal Justice Planning Agency (SPA) administration of the programs. Specifically, you suggest that National Initiatives programs have a "national impact" as that term is used in this office's Legal Opinion No. 74-17, and you ask whether, for this reason, discretionary fund grants to these programs can be excepted from the general rule that additional funds may not be provided to an SPA solely for the purpose of administering a discretionary grant.

It is the opinion of this office that grants of discretionary funds to National Initiatives programs do not, except in "exceptional situations," Legal Opinion No. 74-17, *supra*, entitle an SPA to receive additional funds to cover the costs of administration.

As Legal Opinion No. 74-17 indicated, discretionary grant funds available under Part C and Part E of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and

by Public Law 93-83) may not be used to cover the costs of administering grants. However, in certain exceptional situations, as that opinion noted, additional funds might be provided to an SPA where the administrative services rendered by it in monitoring a particular project benefits many States, i.e., the administration is an element of the project itself.

The rationale for this exception to the general rule is, as you noted, that it would be unfair to require one State to bear the entire cost of administering a project where a number of States are direct participants. National scope projects (e.g., Project SEARCH) are examples of the types of multi-State programs for which additional grant funds may be available for purposes of administering the grant awards.

Programs submitted in response to LEAA National Initiatives may or may not be of such a nature as to render unfair the requirement that administrative expenses for an entire project be borne by one State. Whether such unfairness exists will depend upon the number of States participating directly in a particular project and upon the degree and immediacy of benefit derived by each. Where one State alone develops and participates in a National Initiatives project, costs for administration ordinarily are not allowable. If more than one State is involved, the question of unfairness may be properly considered. The fact that National Initiatives originate outside the SPA and are intended ultimately to improve law enforcement on a nationwide scale does not automatically entitle programs seeking these funds to additional funds for purposes of grant administration.

Legal Opinion No. 75-10—Majority of Local Elected Officials Requirement—September 10, 1974

TO: New York Division of Criminal Justice Services

This is in response to your question as to whether United States Congressmen, State Senators, and State Assemblymen may be considered "local elected officials" for the purposes of Section 203(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

Section 203(a) requires that "regional planning units within the State shall be comprised of a majority of local elected officials." Upon examination of this section's legislative history, it is the opinion of this office that the above mentioned officials are not to be considered "local elected officials" for the purpose of complying with this requirement.

As originally reported out of the Senate Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, the proposed Section 203(a) required that regional planning units be comprised of a "majority of local elected *executive* officials." 119 Cong. Rec. 12408 (daily ed. June 28, 1973). [Emphasis added.] The purpose of this requirement as stated by Senator John L. McClellan was to ". . . [increase] local participation and responsibility in such planning boards." *Ibid.* at 12416.

An amendment to this subcommittee language was offered by Senator Hugh Scott for the purpose of ". . . clarify[ing] that the composition of regional planning units under Section 203(a) of the bill as amended, be composed [sic] of a majority of elected officials *representing general purpose local government.*" *Ibid.* at 12447. [Emphasis added.]

The Scott amendment required any regional planning unit to be "comprised of a majority of local elected executive and legislative officials . . .", and it was with this language that the proposed Section 203(a) was passed in the Senate.

The present language of Section 203(a) was proposed by the Conference Committee with the words "executive and legislative" deleted. S. Rep. No. 347, 93d Cong., 1st Sess. 2 (1973). No reason was given in the Conference Report for the deletion. However, the Joint Explanatory Statement of the Committee of Conference indicates that it was the intention of the conferees to adopt, essentially as proposed by the Senate, the requirement that local elected officials predominate on regional planning units. The conferees stated that:

> [t]he House bill provided that State planning agencies and regional planning units may include citizen, community, and professional organization representatives. The Senate amendment did not so provide, but provided that the majority of the members of any regional planning unit must be elected executive and legislative officials. The conference substitute adopts both the House and Senate approaches and provides permission for representation of citizen, community and professional organizations, and provides that the majority of the members of any regional planning unit must be elected officials. *Ibid.* at p. 26.

Viewing the Senate discussion of this requirement, particularly the remarks of Senator McClellan and Senator Scott, it seems evident that the intent of the Congress in enacting the "majority of local elected officials" language was to insure that localities, through the participation of elected members of their "general purpose local governments," be involved in the planning process.

It should be emphasized, as the legislative history makes clear, that the Section 203(a) requirement is not satisfied by including as part of the required majority officials who merely happened to be elected by the votes of a limited geographic area, as, for example, a congressional or State legislative district, and who do not serve as representatives to such "general purpose local governments."

It is the opinion of this office that in determining whether a particular officer qualifies as a "local elected official," the language of this requirement must be read in conjunction with the immediately preceding sentence of Section 203(a). This sentence provides in part that:

> The State planning agency and any regional planning units within the State shall, within their respective jurisdictions, be representative of the law enforcement and criminal justice agencies, units of general local government, and public agencies maintaining programs to reduce and control crime . . . .

Under this interpretation, a "local elected official" is defined as an elected officer of any one of the types of organizations set out in the preceding sentence, provided that the particular organization of which the official in question is a member is an element within a general purpose political subdivision of a State. Thus, any elected official of a local law enforcement or criminal justice agency, unit of general local government, or local public agency maintaining programs to reduce and control crime will qualify as a "local elected official."

This definition will permit sheriffs, judges, and district attorneys to be considered "local elected officials" as indicated by Guideline Manual M 4100.1C, paragraph 24(c) (1) (a), as long as they are elected and serve within the kind of local agency described in the third sentence of Section 203(a).

Congressmen and State legislators do not qualify under the foregoing criteria and, therefore, should not be considered "local elected officials" for the purpose of meeting the requirement imposed by Section 203(a).

Legal Opinion No. 75-11—Use of Disaster Relief Act Loans as Match for LEAA Grants—September 11, 1974

TO: Office of the Comptroller, LEAA

The question presented is whether loans made to local governments under the Disaster Relief Act of 1974, (Public Law 93-288, §414, amending, 42 U.S.C. §4460) can be used to meet the non-Federal match required for participation in programs carried out under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

The Disaster Relief Act of 1974 would have to authorize use of appropriated funds specifically in order to meet non-Federal matching requirements, which the act does not do. In addition, the legislative history of the Disaster Relief Act of 1974, S. Rep. No. 778, 93d Cong., 2d Sess. (1974), states:

> . . . The loan or any cancelled portion, cannot be used as the non-federal share of any Federal program, including those under this Act.

It is the opinion of this office, therefore, that loans made to local governments under the Disaster Relief Act of 1974 cannot be used to meet the non-Federal match required for participation in programs carried out under the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

Legal Opinion No. 75-12—Eligibility of New Mexico Juvenile Delinquency Prevention Program for Part C Funding—November 6, 1974

TO: LEAA Regional Administrator
Region VI - Dallas

This is in response to your request for an opinion regarding the eligibility for Part C funding of the New Mexico Program C5 entitled "Develop Early Identification and Remediation of Children at Risk Programs."

This program proposes to provide financial assistance to initiate or expand locally based and/or statewide programs that include one or more of the following components:

1. A program of early identification of children (ages 5 to 12) at risk.
2. A program of guidance within elementary schools for support and position development of the potentials of children at risk.
3. Supportive and consultative psychiatric and psychological services for pre-adolescents at risk provided to schools, juvenile probation offices, and/or other social service agencies.
4. Development and enhancement of social work skills in child development.
5. Development of a system of medical reporting of handicapped children by the medical community of children ages 5 years and younger who may be vulnerable in later life because of biological, psychological, or social exceptionability.

You ask specifically whether Program C5 meets current criteria for a delinquency prevention program outside the criminal justice system, whether it meets the criteria for an innovative delinquency prevention program, and whether it meets minimum security and privacy requirements. On the basis of the program description and other information supplied to this office, it is my conclusion that these questions must be answered in the negative and that the program as outlined is not currently eligible for LEAA funding.

Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), authorizes LEAA funding of crime and juvenile delinquency programs.

The "Declaration and Purpose" section of the act states that:

> To reduce and *prevent* crime and *juvenile delinquency*, and to insure the greater safety of the people, law enforcement and criminal justice efforts must be better coordinated, intensified, and made more effective at all levels of government. [Emphasis added.]

Section 301(b)(1) authorizes the use of action grants for the implementation of methods and devices to improve law enforcement and reduce crime. Section 301(b)(3) authorizes public education programs relating to crime prevention. Section 301(b)(9) concerns the development and operation of community-based delinquency prevention programs. Section 601(a) defines

law enforcement and criminal justice as "... any activity pertaining to crime prevention, control or reduction ..., including, but not limited to ... programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction."

These provisions of the act indicate congressional intent that LEAA exercise a broad prevention mandate. However, given the wide variety of activities that might be included within the concept of prevention, a determination must be made as to the specific types of activities that Congress intended LEAA to fund. It must be kept in mind that the goal of all LEAA activity is to "reduce and prevent crime and delinquency." Programs designed to achieve other goals, however laudable, may not be funded if a nexus cannot be found to exist between the proposed program and a direct impact upon reduction and prevention of crime and delinquency.

The requirement of a direct impact upon reduction and prevention of crime and delinquency in order to qualify for LEAA funding is further underscored by the development of Department of Health, Education, and Welfare (HEW) authority in the juvenile delinquency area.

In 1968, Congress passed the Juvenile Delinquency Prevention and Control Act (Public Law 90-445). The purpose of this act was to enable HEW to assist and coordinate the efforts of public and private agencies to combat juvenile delinquency. In 1971, to eliminate duplication of effort, the Attorney General and the Secretary of HEW agreed that HEW would concentrate on prevention while LEAA concentrated on rehabilitation. In 1972, amendments to the Juvenile Delinquency Act reflected this division of responsibility between HEW and LEAA. HEW's mandated role became that of prevention of delinquency through assistance to States and local education agencies and other public and nonprofit private agencies to establish and operate community-based programs, including school programs.[1]

A full statement of the legislative history of the juvenile delinquency effort under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and a history of the Juvenile Delinquency Prevention Act is found in the National Advisory Commission on Criminal Justice Standards and Goals report entitled *Community Crime Prevention* (Appendix B, "Federal Anticrime Funds for Juvenile Delinquency Prevention," by Jerris Leonard and Thomas J. Madden, pp. 287-300 (1973)). The conclusion reached is that, although a strict division of authority between HEW and LEAA is not warranted by the legislative history, "... the school has not and probably should not be the focal point of LEAA prevention efforts" (*Community Crime Prevention, supra,* p. 294).

In response to the need to establish the boundaries of LEAA's authority in the prevention of juvenile delinquency, tentative minimum standards were developed in late 1972 to assist grantees in the determination of whether particular prevention programs and strategies were eligible for LEAA funding (*Community Crime Prevention, supra,* p. 287). As of this date, permanent guidelines not having been issued, this office will continue to evaluate prevention programs in terms of the 1972 standards.

[1] It was understood that LEAA would continue to do some prevention and HEW some rehabilitation work.

The standards for determining whether a particular program can be funded are divided into three categories:

(1) Juvenile delinquency prevention programs exclusively within the criminal justice system;

(2) Delinquency prevention programs outside the criminal justice system; and

(3) Innovative delinquency prevention programing.

New Mexico Program C5 is clearly not within the first category, as the C5 program deals with children outside the criminal justice system. The program also is not within the second category of delinquency prevention programs outside the criminal justice system. Such programs must be "... geared toward servicing what are commonly considered high risk youth, or youth who, although not yet involved in the system, are for some well reasoned, researched and documented reason considered on the verge of entering the system" (*Community Crime Prevention, supra,* p. 298). Program C5 is a threshold program that is not concerned with reaching children on the verge of entering the juvenile justice system. Rather, it is concerned with identifying at the earliest possible stage those children who might fail academically or socially in school and then attempting to bring them to their full potential before school failure and/or delinquent behavior results. The program material makes no pretense that children, identified as at risk, are on the verge of entering the juvenile justice system.

Program C5 fits the category of an innovative delinquency prevention program. This category is reserved for untried approaches to delinquency prevention that are "... so novel as to be dubiously eligible for funding by LEAA because of their apparent remoteness to the actual incidents of crime" (*Community Crime Prevention, supra,* p. 299). But Program C5 fails to meet the criteria under which such programs can be funded by LEAA.

In order for an innovative delinquency program to be eligible for LEAA funding, the following elements, required for all delinquency prevention programs outside the criminal justice system, must be met:

(a) The State or local government grantee must have conducted a crime or delinquency analysis setting forth the characteristics and scope of its delinquency problem;

(b) The program description must set out the program's objectives in terms of its anticipated impact on delinquency during a specified period of time and by a specified amount; and

(c) The appropriateness of the program approach selected, when compared with other alternatives, the anticipated impact on delinquency, and the program's cost effectiveness, must be supported by adequate data.

In addition, innovative programs must meet the following criteria:

(d) The reduction of delinquency must be the goal and there must be a reasonable basis supported by documented data for the cause and effect relationship between the goal and the program;

(e) There must be an extensive evaluation of the alternative programs along with the one chosen;

(f) The program must be coordinated with other funding agencies that might also have cognizance of the program area; and

(g) There must be a cost effectiveness analysis.

Any programing or funding decision that is based on less information is an unauthorized diversion of LEAA funds, which, it must be presumed, would not result in any significant return in terms of the goal of improving law enforcement or reducing crime and delinquency.

The information supplied to this office concerning Program C5 is wholly inadequate to demonstrate that consideration has been given to any of the general standards (a-c) for programs outside the system. The nature and extent of the delinquency problem to be impacted upon apparently have not been analyzed. The program objective, "to identify at as early an age as possible those children who might fail, either academically or socially, in the schools and to make every effort to bring them to their full potential before failure in this primary institution occurs and/or possible delinquent behavior results," is vague. It raises such questions as what is "social failure?" What is a child's "full potential," and how is it to be measured? Also, this program is intended to have only an "indirect" effect on the prevention of delinquency. (Multiyear Plan for the Functional Category of Crime and Juvenile Delinquency Prevention, p. VI-130.) No effort has been made to quantify the program's anticipated impact upon delinquency or to demonstrate the significance in terms of delinquency prevention of the circumstances with which the program intends to deal. Data demonstrating any cause and effect relationship between the program objective and the prevention of delinquency, and data setting out the program's cost effectiveness, have not been included.

The additional requirements (d-g) for innovative delinquency prevention programs, needed further to demonstrate a nexus between the program and the prevention of juvenile delinquency, similarly are not addressed or met by Program C5.

Reduction of delinquency is not the goal of Program C5. Rather, such a reduction is envisioned as a possible byproduct of a program designed to identify children who might fail academically or socially in school, to utilize techniques to obtain maximum adaptive potentials, and thus to prevent failure in school. Such failure may or may not result in delinquent behavior. There is no reasonable basis set forth, and no documented data offered, that could conceivably establish a cause and effect relationship between the goal of reducing juvenile delinquency and this program to identify and treat children at risk. The plan merely states at page VI-129 that "[a]mong possible failures later in life are crime and delinquency," and at page VI-130 that through such a program "the indirect prevention of crime and delinquency should be possible."

Although there is no extensive evaluation of alternative programs, this may be due in part to the uniqueness of Program C5. However, full justification for Program C5 is lacking. Although subgrants are to be special conditioned to safeguard against "negative labeling," there is no guidance as to how such an effect could possibly be avoided. The potential abuse of the label "at risk" is significant. Further, with teacher participation in the evaluation process, there is a danger of setting up self-fulfilling prophecies, thus building in failure for

those identified as "at risk." There does not appear to have been any effort made to validate independently the procedures and testing devices to be used to identify children "at risk." Certainly, with the obvious dangers involved in labeling children, any justification for such a program should include extensive safeguards and validation of the testing vehicle to be used.

This program has not been coordinated with HEW, which is the Agency primarily responsible for juvenile delinquency prevention programs outside the criminal justice system and particularly for those concerning schools.[2]

Finally, although there is a rudimentary cost analysis in the multiyear plan, there is no meaningful analysis of the effectiveness of the program. The ratio of students to professionals to be utilized in implementing the program is so great that one must question whether or not children identified as "at risk" could possibly receive the effective assistance required to develop their full potentials.

To summarize the first two questions presented:

(1) Program C5 is not a delinquency prevention program outside the criminal justice system under the definition developed by LEAA; (2) This program fails to meet the criteria for an innovative delinquency prevention program identified in *Community Crime Prevention, supra,* pp. 298-300.

The third question is whether Program C5 meets minimum security and privacy requirements. Security and privacy questions are clearly raised by elements that Program C5 proposes to fund, particularly by Component 1, entitled "Program of Early Identification of Children at Risk," and by Component 5, entitled "System of Medical Reporting of Handicapped Children Ages 5 Years and Younger Who May be Vulnerable in Later Life Because of Biological, Psychological, or Social Exceptionability." But no determination as to these questions can be made without more detailed information describing the manner in which each program would operate. It should be noted, however, that the District Court of the United States for the Eastern District of Pennsylvania has held that a school-based program designed to identify potential drug abusers in schools violated the constitutional right of privacy of parents and students affected. *Merriken* v. *Cressman,* 364 F. Supp. 913 (1973). Also, Congress has been increasingly concerned with questions of security and privacy of school records. This concern is reflected in provisions placed in the Education Amendments of 1974 (Public Law 93-380) to assure protection of the rights and privacy of parents and students.

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[2]On September 1, 1974, the President signed the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415). This act continues the HEW role in this area for the balance of fiscal year 1975. It also authorizes a role and new funding authority for LEAA in the area in question. However, exercise of the funding authority requires an appropriation from Congress. Until such time as an appropriation is made, LEAA cannot exercise the new authority. Part C and Part E funds under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, are still governed by the provisions of Section 301 and the content of this opinion.

Conclusion

This opinion addresses the question of whether New Mexico's innovative juvenile delinquency program known as Program C5 meets the minimum criteria established to determine eligibility for funding under Part C of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

Although this program fails to meet the established criteria, it is clear that effective prevention programs are within the mandate of the act. Each program must be tested against the criteria to determine whether there is established the requisite nexus between the proposed program and a direct impact upon reduction and prevention of crime and delinquency.

This office is available to render further assistance in the area of the legal sufficiency of particular prevention programs. It is essential, however, that complete information be obtained so that programs can be fully evaluated in terms of the criteria established and set forth in *Community Crime Prevention, supra,* pp. 287-300, or similar criteria.

Legal Opinion No. 75-13—Use of Part C Funds to Supplement Part B Funds Under Authority of Section 301(b)(8)—November 5, 1974

TO: LEAA Regional Administrator
Region VII - Kansas City

This memorandum is in response to your request for an opinion concerning the use of Part C funds to supplement Part B funds. The question presented is whether the Central Iowa Area Crime Commission and the Northeast Iowa Area Crime Commission, which are regional planning units, also qualify as Criminal Justice Coordinating Councils for the purpose of receiving Part C funds under the authority of Section 301(b)(8).

Section 301(b)(8) was enacted in the Omnibus Crime Control Act of 1970 (Public Law 91-644) as an amendment to the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351). The amendment provides for the establishment of a Criminal Justice Coordinating Council (CJCC) to be financed by Part C funds. The origin of the CJCC was in the report of the National Commission on the Causes and Prevention of Violence, which recognized that fragmented operations of police, courts, and corrections cause duplication and inefficiency in addressing the problem of crime. The Violence Commission recommended a central organization to act as a catalyst to coordinate these divergent systems. It believed that a full-time criminal justice office would establish staff relationships to executive agencies and liaison ties to oversee and coordinate the police, prosecutorial, and correctional functions.[1]

[1] National Commission on the Causes and Prevention of Violence, *Law and Order Reconsidered* (Government Printing Office, 1969), Vol. X, pp. 275-278.

When Congress amended the Safe Streets Act in Public Law 91-644, one of its purposes was to effectuate the recommendations made by the Violence Commission on CJCC's. (House Report No. 91-1174, p. 10.) Congress envisioned that such councils would be able to overcome the pervasive fragmentation of police, courts, and correctional agencies. The purpose of the CJCC, as seen by Congress, was to perform a liaison role in respect to the many overlapping functions of the criminal justice process by performing or sponsoring systems analyses and evaluations of agency programs as well as developing coordinated program planning. Criteria to define the CJCC, therefore, should follow the lines envisioned by Congress and the Violence Commission.

Although the functions of both regional planning units and CJCC's may overlap, in most instances their functions and organizations are different. It was not the intent of Congress to create more planning units or to supplement already existing units. The Violence Commission anticipated a full-time CJCC office to perform a specific function. This was the reason why Congress incorporated a threshold population requirement of 250,000 in order to provide a base for such a full-time organization. As stated by Senator Roman L. Hruska, ". . . this limitation was added because establishment of councils for smaller population areas would be a needless proliferation of the planning function." (Cong. Rec. S 20474 (daily ed. Dec. 17, 1970).) However, the 250,000 population criterion is not the only consideration. The units should be created as a CJCC and function as such rather than as a side activity of a planning unit. This is not to say that a regional planning unit cannot also function as a CJCC. Rather, it must be clearly established that it is also functioning as a CJCC in order to receive Part C funds.

Part B funded agencies, whose duty is to plan and administer the Crime Control Act, are governed by standards such as representative character, which Part C agencies do not have. Part C agencies exist under authority of a local unit of government or combination of such units. Part B agencies are created and exist by authority of the Governor or State legislature. Part B agencies plan, monitor, and administer a wide range of projects in the criminal justice area. CJCC's are primarily coordinators between police, courts, and corrections, although planning is also a function of the CJCC.

When a CJCC consists of a combination of units totaling the statutory minimum of 250,000 population, it must have authority or capacity from the State level of government and delegation of authority from the local units that will enable it effectively to achieve "regionalized" operations in terms of coordinating police, courts, and corrections. Without that local authority, a CJCC could not be a viable organization.

Guideline Manual M 4100.1C, Appendix 2-4(1)(g) should not be interpreted as allowing Part C funds to supplement Part B funds through utilizing the authority of Section 301(b)(8). The guideline is not intended to be used as authority to divert Part C funds for Part B purposes. It would be contrary to the act and to the intent of Congress if planning units were to use only Part C funds for the administration of the Safe Streets Act. However, if the regional planning unit's purpose as a CJCC is effectively to achieve coordinated operations, Part C funds may be utilized.

The opinion issued by the Office of General Counsel entitled "Legality of Oklahoma Proposed 1972 Program for Criminal Justice Coordinating Councils," March 21, 1972, and cited by the Kansas City Regional Office as a source, reiterates many of the above considerations and sets forth the following requirements, which must be met:

> (i) The CJCC agency (or region in this case) must have authority or capacity from the State level of government and delegations of authority from the local units which will enable that unit to effectively achieve "regionalized" operations and activities;
> (ii) Some individual units totalling the 250,000 minimum population must have police, corrections and courts (where a unified court system does not exist) related operational responsibilities; and
> (iii) The State planning agency must make a determination that adequate Part B funds are not available to achieve these purposes.

This office has reviewed the purposes and functions of the Northeast Iowa Area Crime Commission and of the Central Iowa Area Crime Commission. As stated in the functional statement of the Northeast Iowa Area Crime Commission, most of the activities performed deal with program administration. The Commission is a general planning unit and is the "policy and decision body with regard to *all* project activity carried on in the Northeast Iowa Area." [Emphasis added.]

This Commission approves or rejects applications for assistance and is thus a general clearinghouse for criminal justice programs. The Commission sets priorities and monitors and evaluates grant-funded projects. Such a description defines a planning unit rather than a CJCC.

Although the object of the Commission is stated to be to increase the effectiveness of the criminal justice system, it is not at all clear that with or without being able to provide financial assistance the Commission would have the authority to oversee and coordinate the police, prosecutorial, and correctional functions.

The Central Iowa Area Crime Commission clearly does not fall within the CJCC concept. The general organization and functions are described as follows:

(1) Make policies and set priorities for the area LEAA-related criminal justice program;

(2) Employ and direct the area crime commission staff;

(3) Review all grant applications being submitted to the State Criminal Justice Planning Agency (SPA);

(4) Review for authorization the area criminal justice plan required by the SPA;

(5) Communicate to the Iowa Crime Commission such recommendations and information as will improve the area and State criminal justice systems; and

(6) Authorize and supervise the fiscal administration and the monitoring and evaluation of grant-funded projects.

Only function No. 5 appears to approach the criteria of a CJCC. However, the Commission has no authority to coordinate any activities but can only "communicate to the Iowa Crime Commission such recommendations and information as will improve the area and State criminal justice systems." The criteria, therefore, are not met. There is nothing that the Commission can do to

coordinate the area's criminal justice program over and above simply administering the LEAA-related program.

It is the opinion of the Office of General Counsel that the two regional planning units do not meet the considerations required for CJCC funding under Section 301(b)(8).

Legal Opinion No. 75-14—Majority of Local Elected Officials Requirement—September 10, 1974

TO: Kentucky Department of Justice

This is in response to your request for an opinion as to whether certain State officials elected on a local basis and serving a specific geographic area may be considered "local elected officials" for the purposes of Section 203(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

Section 203(a) requires that "regional planning units within the State shall be comprised of a majority of local elected officials." Upon examination of this section's legislative history, it is the opinion of this office that State legislators, to whom you refer in your request, are not to be considered "local elected officials" for the purpose of complying with this requirement. Whether the circuit judges, sheriffs, and Commonwealth's attorneys to whom you also refer qualify as "local elected officials" depends upon factors to be discussed below.

As originally reported out of the Senate Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, the proposed Section 203(a) required that regional planning units be comprised of a "majority of local elected *executive* officials." 119 Cong. Rec. 12408 (daily ed. June 28, 1973). [Emphasis added.] The purpose of this requirement as stated by Senator John L. McClellan was to ". . . [increase] local participation and responsibility on such planning boards." *Ibid.* at 12416.

An amendment to this subcommittee language was offered by Senator Hugh Scott for the purpose of ". . . clarify[ing] that the composition of regional planning units under Section 203(a) of the bill as amended, be composed [sic] of a majority of elected officials *representing general purpose local government.*" *Ibid.* at 12447. [Emphasis added.] The Scott amendment required any regional planning unit to be "comprised of a majority of local elected executive and legislative officials . . ." and it was with this language that the proposed Section 203(a) was passed in the Senate.

The present language of Section 203(a) was proposed by the Conference Committee, with the words "executive and legislative" deleted. Conference Report on H.R. 8152, 93d Cong., 1st Sess. 2(1973). No reason was given in the Conference Report for the deletion. However, the Joint Explanatory Statement of the Committee of Conference indicates that it was the intention

of the conferees to adopt, essentially as proposed by the Senate, the requirement that local elected officials predominate on regional planning units. The conferees stated that:

> [t]he House bill provided that State planning agencies and regional planning units may include citizen, community, and professional organization representatives. The Senate amendment did not so provide, but provided that the majority of the members of any regional planning unit must be elected executive and legislative officials. The conference substitute adopts both the House and Senate approaches and provides permission for representation of citizen, community, and professional organizations, and provides that the majority of the members of any regional planning unit must be elected officials. *Ibid.* at p. 26.

Viewing the Senate discussion of this requirement, particularly the remarks of Senator McClellan and Senator Scott, it seems evident that the intent of Congress in enacting the "majority of local elected officials" language was to insure that localities, through the participation of elected members of their "general purpose local governments," could exercise involvement in the planning process.

It should be emphasized, as the legislative history makes clear, that the Section 203(a) requirement is not satisfied by including as part of the required majority officials who merely happened to be elected by the voters of a limited geographic area, as, for example, a congressional or State legislative district, and who do not serve as representatives to such "general purpose local governments."

It is the opinion of this office that in determining whether a particular officer qualifies as a "local elected official," the language of this requirement must be read in conjunction with the immediately preceding sentence of Section 203(a). This sentence provides in part that:

> The State planning agency and any regional planning units within the State shall, within their respective jurisdictions, be representative of the law enforcement and criminal justice agencies, units of general local government, and public agencies maintaining programs to reduce and control crime. . . .

Under this interpretation, a "local elected official" is defined as an elected officer of any one of the types of organizations set out in the preceding sentence, provided the particular organization of which the official in question is a member is an element within a general purpose political subdivision of a State. Thus, any elected official of a local law enforcement or criminal justice agency, unit of general local government, or local public agency maintaining programs to reduce and control crime will qualify as a "local elected official."

This definition will permit sheriffs, judges, and district attorneys to be considered "local elected officials" as indicated by Guideline Manual M 4100.1C, paragraph 24(c)(1)(a), as long as they are elected and serve within a local agency as defined in the third sentence of Section 203(a).

Congressmen and State legislators do not qualify under the foregoing criteria and, therefore, should not be considered "local elected officials" for the purpose of meeting the requirement imposed by Section 203(a). (*See*, Legal Opinion No. 75-10—Majority of Local Elected Officials Requirement—September 10, 1974.)

With regard to Kentucky circuit judges, sheriffs, and Commonwealth's attorneys, the question that arises is whether these officials qualify as "local elected officials," despite their denomination as State officers. Resolution of this question would seem to turn on the extent to which these officers are, in their official capacities, members of or participants in "units of general local government." If they are State officials in name only, and in fact serve essentially local functions without substantial direction and control by State authorities, their designation as "local elected officials" for the purposes of Section 203(a) would seem consistent with the congressional purpose. If, on the other hand, these officials are representatives of the State government and are subject to substantial State control, they would not appear to be "local elected officials" as envisioned by Congress, notwithstanding the fact that they have been elected on a local basis and may serve a specific geographic region.

The resolution of this question is left by this office to the Kentucky Department of Justice.

Legal Opinion No. 75-15—Use of Part C Funds for SPA Implemented Grants—October 2, 1974

TO: LEAA Regional Administrator
Region IX - San Francisco

This is in response to your request for an opinion with regard to use of Part C funds for accounting costs incurred by a State Criminal Justice Planning Agency (SPA) in implementing a grant where the grant has been awarded directly to the SPA without a subsequent award to a subgrantee. The costs in question are not the costs that are incurred normally by an SPA in administering a program composed of awards to other subgrantees. Such costs are borne by the SPA from its Part B funds. (*See*, Legal Opinion No. 74-37—Charges Against Part C Action Grant Funds for State Criminal Justice Planning Agency Administered Projects—October 16, 1973.)

It should be noted at the outset that the types of grants in question are awarded in very limited and extraordinary circumstances. Therefore, in the narrow area of grants that are not subgranted but implemented directly by SPA's, the use of Part C funds is allowable to provide for accounting costs. The SPA stands in the place of the subgrantee and such accounting costs (which should be built into the budget of each grant) are above and beyond the accounting and related services provided by an SPA in administering the grant program.

Legal Opinion No. 75-16—(Superseded by administrative action.)

Legal Opinion No. 75-17—(Number not used.)

Legal Opinion No. 75-18—(Superseded by administrative action.)

Legal Opinion No. 75-19—(Number not used.)

Legal Opinion No. 75-20—(Number not used.)

Legal Opinion No. 75-21—SPA's Requiring Subgrantees to Refund Interest Earned on Grants—December 11, 1974

TO: Office of Inspector General, LEAA

This is in response to your request of November 12, 1974, in which you requested an opinion as to the legality of the policy of the Michigan Office of Criminal Justice Programs of requiring subgrantees to return to it any interest earned on LEAA funds. The Michigan Office of Criminal Justice Programs is Michigan's State Criminal Justice Planning Agency (SPA).

The relevant Comptroller General Opinion (B-171019, Oct. 16, 1973) held that Section 203 of the Intergovernmental Cooperation Act of 1968 (Public Law 90-577), which exempts States from accountability for interest earned on grant-in-aid funds received by them, makes no differentiation between grants that the States will disburse themselves and grants involving funds to be subgranted by the States to political subdivisions. Because of that opinion, LEAA no longer requires subgrantees to return interest earned on grant funds. At issue here is a policy of the Michigan SPA that requires the subgrantees to return to the State interest earned on LEAA funds. Your inquiries are, specifically:

(1) Whether the SPA has the authority to require its subgrantees to return to it interest earned on LEAA funds; and

(2) If it does, what disposition is required of these funds.

The State's authority to require return of interest is not based in this case on Federal law but upon its own law. Whether the State has such independent authority can only be determined by looking at the State's own laws in this area.

Assuming that such authority exists, LEAA would not require the return from the State of such interest, because upon return to the State, Section 203 of the Intergovemmental Cooperation Act would control:

> States shall not be held accountable for interest earned on grant-in-aid funds.

It would appear to be of no consequence, therefore, whether the interest held by the State was interest earned by the State or interest returned to the State by a political subdivision.

The Comptroller General's Office has informally advised us that this is the proper position to take.

Legal Opinion No. 75-22—(Number not used.)

Legal Opinion No. 75-23—Eligibility of Oregon Liquor Control Commission Enforcement Division Officers for LEEP Assistance—December 31, 1974

TO: LEAA Regional Administrator
Region X - Seattle

This is in response to your request for an opinion as to whether officers of the Oregon Liquor Control Commission (Commission) Enforcement Division (Division) are eligible for employment cancellation of Law Enforcement Education Program (LEEP) loans and for the award of LEEP grants. For the reasons that follow, this office concludes that these officers are eligible, as are officers of other law enforcement and criminal justice agencies that meet the criteria set out below.

The Enforcement Division of the Commission employs 55 officers and is the "police" arm of the Commission. The officers enforce the provisions of the Oregon Liquor Control Act (Ore. Rev. Stat. Title 37, Chapter 471), the State law that regulates the manufacture, importation, and sale of liquor. All violations of the act are misdemeanor offenses, with the exception of one that is a felony. Enforcement of the Liquor Control Act requires that the officers spend a good deal of time outside the office during the evening hours. This places the officers in proximate contact with other city and State law enforcement officers and leads them frequently to render assistance to these other officers.

During fiscal year 1974, the 55 Division officers rendered assistance to other law enforcement officers in part as follows:

- Narcotics and Dangerous Drugs — 34 Cases
- Burglar Alarm Reports and Assists — 29 Cases
- Parole and Probation Violations — 17 Cases
- Petty Larceny — 16 Cases
- Assault/Disorderly Conduct — 5 Cases

It is the position of the Division that these activities make the officers eligible for LEEP assistance under the provisions of paragraph 45c of Law Enforcement Assistance Administration, Department of Justice, Guide. Man. No. M5200.1A, Law Enforcement Education Program (1974). Employee eligibility is determined according to that paragraph by the activities of the employing agency. Specifically, the principal activities of the agency must be crime prevention, control, or reduction or the enforcement of criminal law. Paragraph 45c provides that the employees of a division within a larger administrative agency will be eligible if that division primarily is engaged in law enforcement and criminal justice activities.

The question of LEEP eligibility here is: What is an eligible law enforcement and criminal justice agency? Because this question recurs frequently, it appears to be advisable at this time to set out criteria that can be used as a guide to future eligibility questions arising under paragraph 45c. These criteria are applicable only to those law enforcement and criminal justice agencies engaged in "police efforts to prevent, control or reduce crime or to apprehend criminals."

It should be noted that the term "law enforcement and criminal justice agency" is nowhere defined in the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). However, Congress has delegated sufficient administrative and rulemaking authority to LEAA under Sections 406(b) and 501 of the act to enable LEAA to make an administrative determination of what constitutes an eligible agency.

Section 406(b) provides that LEEP loans "shall be made on such terms and conditions as the Administration . . ." may determine. Section 501 authorizes LEAA "to establish such rules, regulations and procedures as are necessary" to carry out programs under the act.

Such administrative determinations must also be "reasonably related to the purposes of the enabling legislation" under which they are made. *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969). The purpose of LEEP is to assist law enforcement and criminal justice officers and professional employees to attain the education goals of the President's Commission on Law Enforcement and Administration of Justice. (*See*, S. Rep. No. 1097, 90th Cong., 2d Sess., 36 (1968).) Statutory amendments to this program in 1970 and again in 1973 indicate the intent of Congress that LEEP benefits be made broadly available. However, this intent must be reconciled with the appropriation made by Congress each year for LEEP. If eligibility is defined too broadly, program administrators from school financial

aid officers to LEEP program managers at LEAA will be placed in the difficult position of trying to award, in a fair manner, a limited amount of funds among applicants who greatly exceed the number that could realistically be expected to benefit from the program. The burdens imposed by such a situation would greatly undermine the LEEP program to the detriment of all applicants. But, if the bounds of eligibility are too narrowly drawn, the program will not assist all those whom Congress intended to benefit from LEEP loans and grants.

An analysis of the cumulative legislative history of the act suggests that the Congress did not specifically consider all types of law enforcement and criminal justice agencies that would be eligible for LEEP participation.

In order to carry out the intent of Congress, it is necessary that LEAA administrative determinations account for the different approaches the States take toward law enforcement and criminal justice. Regulations cannot be so strict and narrow as to restrict unduly a State by denying LEEP participation to an agency just because the agency's organizational structure and functional breakdown are unique to that State.

The following criteria have been distilled from the legislative history of the act. They attempt to take into account the different roles assigned to law enforcement and criminal justice agencies. For the purposes of paragraph 45c of the Law Enforcement Education Program Guideline Manual, an eligible section or division is one that satisfies these criteria:

1. The primary function is the enforcement of criminal law.
2. The criminal laws must be statutes enacted by the legislature as distinguished from administrative regulations.
3. There must be a logical nexus between the particular criminal laws that the agency enforces, No. 1 above, and the broader law enforcement and criminal justice problem areas to which the act is addressed.
4. If the primary criminal law enforcement function referred to in No. 1 above pertains to a limited area of enforcement, such as alcohol abuse, then the agency must have as a secondary responsibility the enforcement of the general criminal law. Further, the agency must, in fact, discharge this duty.

The Division officers meet the above criteria making them eligible for LEEP assistance, loan cancellation, and inservice grants. Their primary duty is to enforce the Oregon Liquor Control Act, a criminal statute enacted by the State legislature, which satisfies criteria Nos. 1 and 2.

The third criterion, the one that will be decisive in most questions of eligibility, is met by the well established connection between alcohol and the abuse of alcohol and crime. In one-half of the murders committed each year in the United States, according to the National Advisory Commission on Criminal Justice Standards and Goals, the person committing the murder is under the

influence of alcohol.[1] The National Institute of Alcohol Abuse and Alcoholism, in its 1974 report to Congress, found that alcohol is either a direct or indirect cause of almost one-half of all arrests in the United States each year.

Organized crime is involved in illegal liquor operations and in controlling otherwise legitimate liquor businesses. These activities provide a source of money that is in turn used to finance other criminal activity.[2]

It can be reasonably concluded that improved enforcement of the Liquor Control Act will have a positive effect on the law enforcement areas with which LEAA is concerned.

As to the fourth criterion above, the statistics for assistance rendered by Division officers to other law enforcement agencies evidence enforcement efforts of the general criminal law. This finding is supported by the Oregon Revised Statutes. The term "police officer" is defined by Ore. Rev. Stat. §237.003(11) to include:

> (c) Employees of the Oregon Liquor Control Commission who are classified as enforcement officers by the Administrator of the Commission.

Eligibility for LEEP assistance is extended here only to the officers of the Enforcement Division of the Commission.

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[1] National Advisory Commission on Criminal Justice Standards and Goals, *Community Crime Prevention* (Government Printing Office, 1973), p. 10.

[2] *See,* Address by William S. Lynch, Chief, Organized Crime and Racketeering Section, Criminal Division, U.S. Department of Justice, before the National Conference of State Liquor Administrators Annual Meeting, May 15, 1974.

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