REPORT IN SUPPORT OF RECOMMENDATION 79-2

PROCEDURES USED IN FORMING AND CARRYING OUT FEDERAL-STATE AGREEMENTS UNDER THE SUPPLEMENTAL SECURITY INCOME PROGRAM

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PART 1. INTRODUCTION

A. Background

For over forty years, welfare has been a joint enterprise of Federal and state governments. The mechanism for cooperation has been Federal grants-in-aid to state programs serving specified categories of the poor—dependent children, the aged, the blind, the disabled. "Cooperative federalism", the late Chief Justice Earl Warren labelled it in the Supreme Court's first welfare decision, *King v. Smith,* decided in 1968.[1] He then went on to outline the basic terms of cooperation:

> The AFDC program . . . is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). . . . The plan must conform with several requirements of the

1. King v. Smith, 392 U.S. 309 (1968).

Social Security Act and with rules and regulations promulgated by HEW. . . .[2]

This grant-in-aid approach has hardly been peculiar to welfare. A similar combination of Federal money and standards together with state or local initiative and administration has been employed to furnish medical services to the indigent (Medicaid), to construct interstate highways, to demolish and rebuild depressed urban areas (Urban Renewal) and to carry on countless other local activities of national interest. However, among those numerous and diverse programs welfare has, for two decades at least, been one of the most costly.[3] One recent study characterized "welfare finance" as "the leading edge of the movement toward fiscal interdependence between levels of government."[4]

After so many years of service, the grant-in-aid approach to welfare may be ending. Recent welfare reforms, both enacted and proposed have abandoned it. In 1972, Congress replaced grant-in-aid support for state programs of assistance to the needy elderly, blind and disabled (OAA, AB, and APTD) with a Federally administered cash program for the same groups of the poor—the Supplemental Security Income Program or SSI. Recent comprehensive welfare reform proposals, including President Carter's Program for Better Jobs and Income, would supplant or severely modify the use of grants-in-aid to support welfare programs on a much broader basis.[5]

While the SSI model of Federal welfare support seems, at first glance, to represent the shift from a cooperative Federal-state program to one which is solely the responsibility and concern of the Federal government—like Social Security (OASDI) and Medicare, Federal money, Federal eligibility and benefit standards, Federal administration—that is not the full picture. State welfare programs for the elderly, blind, and disabled have not been totally displaced by SSI. The level of the Federal benefits (well below those many states were paying under the predecessor grant-in-aid programs)

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2. *Id.* at 316-17.

3. Total Federal grant-in-aid support of state and local government programs grew from $7 billion in fiscal year 1960 to approximately $70.5 billion in fiscal year 1977. 2 *Advisory Commission on Inter-governmental Relations, Significant Features of Fiscal Federalism 1976-77,* Table 38, at 55 (1977). Among the sectors of specifically supported activity (as distinguished from revenue sharing), public welfare programs accounted for the largest expenditure. *Id. See also Social Security Bulletin, Annual Statistical Supplement, 1975,* Table 24, at 58.

4. *E. Hamilton & F. Rabinovitz, Whose Ox Would Be Healed? The Financial Effects of Federalization of Welfare* (Welfare Policy Project 1977).

5. H.R. 9030, 95 Cong., 1st Sess. (1977). *See also* H.R. 10950, 95th Cong., 2d Sess. (1978) (the House Special Welfare Reform Subcommittee's version of the administration bill).

The ABLE plan which resulted from the Public Welfare Study of the Subcommittee on Fiscal Policy of Joint Economic Committee had this same structural feature. *See Subcomm. on Fiscal Policy of Joint Economic Comm., 93d Cong., 2d Sess., Income Security for Americans: Recommendations of the Public Welfare Study* (1974).

those many states were paying under the predecessor grant-in-aid programs) and the extreme simplification of its aid formula leave substantial room or need for supplementary state assistance. Initially, states were simply encouraged to supplement the Federal amounts, but subsequent amendment to the 1972 legislation require them to do so in amounts based upon prior welfare expenditures. (The requirements are imposed as a condition for continued state receipt of Federal grant-in-aid support for its Medicaid program.)

What is startlingly new is that most of these supplementary, state-funded benefits (measured either by dollar amount or number of states) are administered by the Federal government. The Social Security Administration, which handles the basic SSI program, administers these state-funded supplementary benefits as well. Indeed, the two benefits (Federal and state) are included in a single check to the recipient. That turn about, which now has state monies flowing to a Federal agency for its disbursement (where previously just the reverse occurred), is authorized by this brief portion of the 1972 legislation:

> (a) . . . .
> [T]he Secretary and [a supplementing] State may enter into an agreement . . . under which the Secretary will, on behalf of such State (or subdivision) make such supplementary payments. . . .
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> (b) Any agreement between the Secretary and a State entered into under subsection (a) shall provide—
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> (1) that such payment will be made . . . to all individuals residing in such State (or subdivision) who are receiving benefits under this title [SSI], and
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> (2) such other rules with respect to eligibility for or amount of the supplementary payments, and such procedural or other general administrative provisions, as the Secretary finds necessary . . . to achieve efficient and effective administration of both the program which he conducts under this title and the optional State supplementation.
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> . . . . .
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> (d) Any State which has entered into an agreement with the Secretary under this section which provides that the Secretary will, on behalf of the State (or political subdivision), make the supplementary payments to individuals who are receiving benefits under this title (or who would but for their income be eligible to receive such benefits), shall, at such time and in such installments as may be agreed upon between the Secretary and such State, pay to the Secretary an amount equal to the expenditures made by the Secretary as such supplementary payments.[6]

Two very strong inducements led most states to enter such agreements.

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6. 42 U.S.C. § 1382e (Supp. V 1975).

First, Federal administration cast the cost of administering the state supplementary benefits on the Federal government; the state, thus, had to pay only for the benefits themselves. Second, important to only a handful of states, but precisely those with the largest rolls and highest benefits, was a "hold harmless" guarantee tied to the election of Federal administration. That guarantee assured high benefit states (like New York, California, and Massachusetts) that, to the extent they were only supplementing to levels paid under the predecessor grant-in-aid assistance programs and not choosing to go higher, they need spend no more than under the grant-in-aid matching formula, any additional benefit cost being borne by the Federal government.

As a result of these incentives, over half the states entered agreements providing for Federal administration of supplementary benefits paid under state law and out of state funds.[7] During 1976 approximately $1.4 billion in benefits were disbursed by the Social Security Administration pursuant to such agreements.[8] The amount is significantly smaller than the $4.5 billion paid in basic Federal benefits during the same period, [9] and the $2.1 billion in Federal money distributed to the states under the three predecessor grant-in-aid programs in fiscal year 1973.[10] But one doesn't have to go back very many years to find less Federal money flowing through state assistance programs for the elderly, blind and disabled than now flows from the states through the Federal government to the same population.

This new form of Federal-state cooperation has had a tumultuous early life. The Social Security Administration (SSA) had only a little more than a year's lead time to gear up for running the basic SSI benefit program and to reach agreements with states desiring Federal administration of their supplements. Furthermore, Congress kept tinkering with the legislation during this period.

No ready-made forms existed for the administration agreements. Being a novel relationship, it did not fit comfortably into established legal or administrative categories. Once agreements were executed and the program was underway, very serious disputes about the parties' respective responsibilities and liabilities arose. Again, the novelty of the relationship led to uncertainty over where, when, and how these disputes should be resolved.

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7. Thirty-one states (counting the District of Columbia) had agreements for the first half of 1974. Since then there have been a few additions and drop outs. The figure for 1977 was 27.

8. *Office of Research and Statistics, Social Security Administration, Program and Demographic Characteristics of Supplemental Security Beneficiaries, December 1976,* Table A, at 4 (1977). This compares to $168 million supplementary benefits over which states retained administration. *Id.*

9. *Id.*

10. *See Staff of Subcomm. on Fiscal Policy of the Joint Economic Comm., 92d Cong., 2d Sess., Handbook of Public Income Transfer Programs* 102, 120, 128 (Studies in Public Welfare, Paper No.2, 1972).

B. This Study

1. Scope

This study undertakes first to analyze the basic legal relationship created by the provision for Federal administration of state supplementary benefits. Its focus is on disagreement. What sorts of disputes are—given the relationship—inevitable or likely to arise? What sorts have arisen? What procedural path do statute, agreement, and relevant Federal court jurisdictional provisions chart for them once they do arise?

The legal framework at the center of these several kinds of controversy is a contract or, in the words of the statute, an "agreement" between the Secretary of HEW and a state. That suggests a dichotomy between disputes arising under or during the course of such an agreement and those which concern agreement formation. This study will concern itself with both phases, examining: (1) the procedures used to develop the terms on which the Federal agency would contract ("enter into an agreement") to administer state benefits (both the original "Model Agreements" and subsequent years' revisions); and (2) the procedures available, post-agreement, to resolve disputes between the parties over liability, performance, and contract interpretation.

Numerous other "agreements" between a state and the Secretary of HEW are provided for in the SSI legislation, as amended—the state's agreement to furnish the mandatory supplementary benefits,[11] an agreement under which Medicaid eligibility determinations for the SSI population will be made by the Social Security Administration,[12] an agreement setting up an arrangement for reimbursement to the state for assistance furnished an applicant pending receipt of SSI benefits (an "interim assistance agreement"),[13] an agreement committing the state to a continuing level of supplemental benefits.[14] While this study focuses on the agreement for Federal administration of state supplementary benefits, the procedural questions it explores bear on these other agreements as well.

2. Approach

The necessary starting point for this study is a review of the statute which established this new form of "cooperative federalism." Part 2 of the report, which follows this introductory part, scrutinized the terse language of the SSI statute itself, and also traces the Congressional deliberations which preceded the 1972 legislation and subsequent amendments in a search for more detailed evidence of Congressional intent. What general purposes

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11. Pub. L. No. 93-66, § 212, 87 Stat. 152 (1973).
12. 42 U.S.C. § 1383c (Supp. V 1975).
13. 42 U.S.C. § 1383(g)(4) (Supp. V 1975).
14. Pub. L. No. 94-585, sec. 2, § 1618, 90 Stat. 2901 (1976).

motivated the establishment of this new form of Federal-state legal relations? Was there any suggestion as to how HEW and the states were to come to "agreement?" Was there any anticipation of the potential for intergovernment disputes and the need for procedures to resolve them?

In addition to pursuing such questions, Part 2 describes the continuing Congressional attention to the program during the period in which the Social Security Administration and the states were racing to implement the original legislation—attention which not only produced amendments drastically altering the nature of the Federal administrative undertaking but disrupted the "agreement-formation" process.

Part 3 explores how the parties worked with each other during 1973 to achieve the original set of agreement terms for Federal administration of state benefits and also how subsequent revisions of those terms were handled. It investigates which matters were dealt with by formally promulgated Federal regulations, which through "Model Agreements" negotiated with a contract committee comprised of state representatives, and finally which through state-by-state negotiation. Because of the importance of the "Model Agreements" Part 3 carefully analyzes the successive negotiations on their terms—noting the issues raised by the parties (including, in the case of post-1973 negotiations, the impact of the parties' experience with the program on those issues) and how those issues were ultimately dealt with.

Part 4 turns to the disputes which have arisen under the agreements. It summarizes the areas of controversy over performance and interpretation and their treatment under the "disputes" paragraph of the Model Agreements.

In Part 5, the SSI Federal-state administration agreements and associated disputes are set against relevant Federal statutes which apply to agency decision making and dispute resolution, including those which establish and limit jurisdiction in the Federal courts. The question which underlies the section is whether, and if so where, these agreements and disputes concerning them fit into such general Federal law.

The concluding section of the report, Part 6, compares the procedures for resolving Federal-state disagreements under SSI's new form of "cooperative federalism" with those applicable to the grant-in-aid programs. Building on that comparison, the part next presents an evaluation of the procedures which have been used in establishing and maintaining this new arrangement. That evaluation leads to several recommended changes in current SSI procedures.

3. *Importance*

The agreement for Federal administration of state-funded benefits introduced by the 1972 SSI legislation is a novel intergovernmental arrangement. Implementing that arrangement required and received a great deal of creative improvisation on both sides—state and Federal. This report on

what has emerged from SSI's early years—the formative years of that arrangement—furnishes encouraging evidence of the capacity for innovation in our Federal system. The major responsibility for making this novel arrangement work fell on the Social Security Administration of HEW and the states, Congress having given these matters very little attention. The surprising fact is not that there is room for improvement in what they devised during a period of great administrative pressure and confusion, but that they did so well. The improvements recommended in this report represent, overall, modest adjustments to the procedures which have emerged from that start-up period. Clearly, the relationship can be improved. The sort of procedural changes recommended in this report ought to succeed in reducing friction and tension in the case of states currently entrusting administration of an SSI supplement to the Social Security Administration; they may even encourage some of the states which have clung to state administration of supplements to enter or re-enter agreements with the Federal agency.

Beyond impact on the successful functioning of SSI, itself a major program, this report and the issues it explores have direct bearing on proposals for "comprehensive welfare reform." SSI furnishes one obvious structural model for plans designed to replace AFDC with a more universal cash benefit program assuring at least a minimum, uniform level of payments nationwide. The degree of confidence which the states have in the Federal-state relationship under SSI—including its capacity for fair resolution of intergovernmental differences—is likely to have a major influence on whether that model or simply a variant of the grant-in-aid approach becomes the vehicle of such "welfare reform." If the SSI model is followed, the issues addressed in this study will have to be faced by Congress, Federal agency and the states in connection with a welfare program many times the size of SSI.

Part 2. The Statutory Framework

A. Language of the Act Itself

1. Agreement Formation

The 1972 SSI legislation provided (HEW) and the states little guidance and even less time as they faced framing this totally new form of intergovernmental arrangement.[15] It described the arrangement simply as "an agreement . . . under which the Secretary [of HEW] will, on behalf of [a] state

15. The act specified an effective date only fourteen months after enactment (January 1, 1974) although it did offer HEW the option of deferring Federal administration of the basic SSI program and necessarily state supplements as well, by requiring states if requested to enter into agreements with HEW for administration in whole or part of the basic benefit during a one and a half year transition period. Social Security Amendments of 1972, Pub. L. No. 92-603, § 402, 86 Stat. 1329, as amended by Pub. L. No. 93-233, § 18 (i), 87 Stat. 947.

. . . make . . . supplementary payment,"[16] furnishing little detail as to the content of the agreement and none concerning appropriate procedures for developing the necessary terms and conditions. The statute laid a few limits on what the Federal agency could "agree" to do (make "cash payments . . . on a regular basis to individuals . . . receiving [SSI] benefits or who would but for their income be eligible to"),[17] set limits on state eligibility rules HEW would enforce,[18] authorized states to disregard income counted for SSI purposes,[19] and spoke tersely of the state's necessary fiscal undertaking: "Any State which has entered into an agreement [for Federal administration] . . . shall, at such times and in such installments as may be agreed upon between the Secretary and such State, pay to the Secretary an amount equal to the expenditures made by the Secretary as such supplementary payments."[20] More elaborate provisions spelled out the "hold harmless" ceiling on state reimbursement liability.[21]

Wide discretion to fill in the details was explicitly left to HEW. The statute stated that agreements would include "such other rules with respect to eligibility for or amount of the supplementary payments, and such procedural or other general administrative provisions, as the Secretary finds necessary . . . to achieve efficient and effective administration of both [SSI] and the optional State supplementation."[22]

It was reasonably clear from the full statutory scheme, however, as well as its legislative history (discussed in the following section) that Federal discretion was not total and that efficiency of administration was not to be HEW's sole consideration during the shaping of such agreements. The very term "agreement" connoted some mutuality in the process. Moreover, substantial financial benefits were coupled with Federal administration, which both reflected a Congressional desire to induce states to elect Federal administration and gave rise to legitimate state claims for reasonable accomodation of their interests in the course of coming to "agreement."

"Mandatory supplement" legislation enacted midway through 1973[23] required states to supplement SSI payments for all those covered by the

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16. 42 U.S.C. § 1382c(a) (Supp. V 1975). [All of the statutory provisions central to this report are contained in Appendix A.].

17. *Id.*

18. "Any agreement . . . shall provide . . . that such payments will be made (subject to [duration residency requirements allowed under a following subsection]) to all individuals residing in such State (or subdivision) who are receiving [federal SSI benefits] . . . " 42 U.S.C. § 1382c(b) (Supp. V 1975).

19. 42 U.S.C. § 1382c(c) (2) (Supp. V 1975).

20. 42 U.S.C. § 1382c(d) (Supp. V 1975).

21. *See* Pub. L. No. 92-603, § 401, 86 Stat. 1329 (1972), as amended by Pub. L. No. 93-233, § 18(h), 87 Stat. 947 (1973.)

22. 42 U.S.C. § 1382c(b) (2) (Supp. V 1975).

23. Pub. L. No. 93-6, § 212, 87 Stat. 152 (1973).

predecessor programs to the extent necessary to assure they did not experience a benefit reduction once SSI began. That act also provided for Federal administration by agreement. It established Federal administration under "an administration agreement with the Secretary" as an option for "any State" providing mandatory supplements.[24] Since those supplements necessarily reflected all of the special needs grants, income exclusions, and so forth which were part of 1973 state grant-in-aid programs their administration by the Federal agency raised a range of potential problems not presented by optional supplements. Inefficient though the administration of such "grandfathered" provisions might be, the statute did not leave HEW free (as it was with a state's optional supplement) to decline to enter into an administration agreement. States had no choice (if they wished to retain Federal support for Medicaid) but to establish a supplementary benefit program that for existing recipients preserved all the quirks and intricacies of their prior programs; and HEW was obliged, upon state request, to "enter into an administration agreement . . . whereby the Secretary [would], on behalf of such State, make the [required] supplementary payments."[25]

In language similar to that contained in the 1972 act, the mandatory supplement provisions required that "any State which has entered into an administration agreement . . . shall, at such times and in such installments as may be agreed upon between the Secretary and the State, pay to the Secretary an amount equal to the expenditures made by the Secretary as supplementary payments to individuals entitled thereto."[26]

In addition, the act listed two other state obligations to be reflected in the agreement:

> Any such administration agreement between the Secretary and a State . . . shall provide that the State will (A) certify to the Secretary the names of each individual who, for December 1973, was a recipient of aid or assistance (in the form of money payments) [under one of the predecessor programs], together with the amount of such assistance payable to each such individual and the amount of such individual's December 1973 income [both necessary to determine the level of mandatory support], and (B) provide the Secretary with such additional data at such times as the Secretary may reasonably require in order properly, economically, and efficiently to carry out such administration agreement.[27]

2. Post-Agreement Disputes

Neither the 1972 legislation or any of the numerous subsequent amendments addressed post-agreement disputes—that is, disagreements between

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24. Id. § 212(b)(1).
25. *Id.*
26. *Id.* § 212(b)(3).
27. *Id.* § 212(b)(2).

states and the Federal agency over compliance with the terms of their administration agreement, the regulations, or statute. The statute is totally silent concerning the administrative and judicial remedies available to either party to such a dispute. It does include a section entitled "Hearings and Review" that outlines a right to notice and hearing, followed by judicial review of final determinations of the Secretary; but the section's terms clearly apply only to disagreements between individual claimants of SSI benefits and the Federal agency.[28]

B. Legislative History

1. The Original 1972 Legislation

The Supplemental Security Income Program (SSI) was enacted in late 1972 by a Congress preoccupied by, though ultimately unwilling to accept, more comprehensive welfare reform proposals. Consequently, although the program was hailed soon after enactment as "the most significant Federal civilian program since the introduction of Medicare in 1966, and one of the largest scale efforts in civilian history,"[29] SSI's conception and birth received startingly little attention. From 1969 through 1972 nearly all eyes were on President Nixon's Family Assistance Plan (FAP) which would have replaced Federal grants-in-aid to state programs of Aid to Families with Dependent Children (AFDC) with a purely Federal benefit program augmented by state supplements. The degree of parallel reform to be worked on Federally supported state programs for the so-called adult categories—Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled—was a matter which received low-level, though continuing attention as the political battles over FAP surged back and forth. While Congress ultimately failed to enact FAP, it did vote to replace the grant-in-aid programs for the adult categories with SSI, an FAP-like scheme.[30]

Because of Congressional preoccupation with the Family Assistance Plan, the legislative history of SSI itself offers little insight on most of the points of program architecture which are the focus of this study.[31] Some

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28. 42 U.S.C. § 1383(c) (Supp. V 1975).

29. *HEW, Annual Report of the Social Security Administration for Fiscal Year 1974,* at 13 (1975).

30. Pub. L. No. 92-603, § 301, 86 Stat. 1329 (codified at 42 U.S.C. § § 1381-1883-c(Supp. V 1975).

31. The critical point for the legislation was the Senate where FAP failed, having passed the House twice. SSI, however, was approved by the Senate because needy, blind, aged, and disabled adults were seen as more deserving of help than poor families, because it did not cause as much or add as many new recipients to welfare rolls, and, most important, because the attention of the Sentate was focused almost completely on the proposed programs for families. Describing action on the Senate floor, [Senator] Ribicoff's legislative assistant said,

> people were so concerned about Title IV (the family provisions) that no one paid any

administrative issues germane to SSI were debated in the context of FAP; but even if one borrows from the record of consideration given to FAP, the basis for determining legislative intent on how the administration agreements should be formed or operate subsequently is extremely meager.

SSI's novel provision for Federal administration of state supplementary benefits coupled with Federal mandate of specific levels of state supplementary support were not part of President Nixon's original reform plan for the adult categories. From the start, however, they were features of at least some of the versions of the family program (FAP) being considered by Congress and the Administration.

As passed by the House in 1970, the first FAP bill, H.R. 16311, provided in connection with Family Assistance or FAP that:

> The Secretary may enter into an agreement with any State under which the Secretary will make, on behalf of the State, the supplementary payments provided for under Part E, or will perform such other functions of the State in connection with such payments as may be agreed upon, or both. In any such case, the agreement shall also (1) provide for payment by the State to the Secretary of an amount equal to the supplementary payments the State would otherwise make pursuant to Part E, less any payments which would be made to the State under section 453 (a) [which provided for Federal grant-in-aid support of state supplementary payments], and (2) at the request of the State, provide for joint audit of payments under the agreement.[32]

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attention to Title III (provisions pertaining to aged, blind, and disabled adults). If SSI had been on its own it would never have made it. Also, it passed because it looked like peanuts next to the family programs.

A Senate Finance Committee staff member told a reporter that "during conference the SSI barely captured the conferees' attention." *M. Bowler, The Nixon Guaranteed Income Proposal* 147 (1974).

Reviewing the same record V.&V. Burke conclude that the controversy surrounding FAP "probably helped passage" of SSI:

> The welfare revolution embodied in SSI escaped detection because few read the plan, because few understood the welfare status quo well enough to appreciate the plan; because many interpreted the triple endorsement of Richard Nixon, Wilbur Mills, and Russell Long as a guarantee that the plan was modest.
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> Except for the few persons who engineered it and for governors, who anticipated savings from its federally paid floor for the aged, blind, and disabled, few knew what was in Title III of H.R. 1.

V. Burke & V. Burke, Nixon's Good Deed: Welfare Reform 197 (1974).

Preoccupation with replacing AFDC characterized the 1969-72 welfare reform effort from the start. President Nixon's August 8, 1969 television address on welfare reform devoted only one sentence to the adult programs. *See id.* at 112.13

32. H.R. 16311, 91st Cong., 2d Sess. § 461(a)(1970).

A following section authorized reverse agreements under which states would assume all or part of the administration of the basic Federal family benefits.[33]

As Professor Joel Handler noted in 1972:

> The [bill] left the federalism issue hanging in mid-air. It created three possibilities: (1) HEW would contract with a state to administer FAP along with the state supplementation program; (2) HEW could contract with a state to have HEW administer the state program; or (3) in a particular state, HEW could administer FAP and the state could administer its program. The third alternative is called the "two-window" option, as the recipients would be compelled to pick up checks at two different windows. The other two options are "one-window" plans, but the question is *whose* window? Not only is maximum flexibility created by the three options, but presumably the choices are subject to negotiation and bargaining on a state-by-state basis . . . .
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> The [second option] (that of the federal government administering the state supplement program) is a completely novel idea in American federal-state regulations [sic]. It is the only example of "up-stream" delegation—that is, from the states back to the federal government—that I know of.[34]

Equally unprecedented was a mandatory FAP supplementation provision contained in H.R. 16311. States were required to supplement the basic Federal benefit up to the state's AFDC standard of need "as in effect for January 1970" or the poverty level, if lower. Failure to do so would cost the state the loss of all Federal grant-in-aid support under several Social Security Act titles, including the adult programs and Medicaid.[35]

That mandate proved sufficiently unpopular that it was removed in the following year's version of the legislation. (H.R. 16311 died in the Senate with the adjournment of the 91st Congress). H.R. 1, as reported by the House Ways and Means Committee in May 1971 and passed by the House June 22, 1971, did not discourage state supplements but neither required nor subsidized them.[36]

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33. *Id.* § 461(b).

34. *J. Handler, Reforming the Poor* 114 (1972).

35. H.R. 16311, 91st Cong., 2d Sess. § 451 (1970). According to a reliable account this was the product of a last-minute insertion in President Nixon's August 8 speech by HEW. The critical sentence assured that under FAP: "In no case would anyone's present level of benefits be lowered." *See V. Burke & V. Burke, Nixon's Good Deed: Welfare Reform* 113-15 (1974).

36. While the administration stood behind the original mandatory supplement requirement during negotiations with the House Ways and Means Committee over H.R. 1 in 1971, the Ways and Means Committee itself was sharply divided. On the one side were "liberals, especially Corman, Carey, and Burke, [who] wanted a provision that would mandate state supplementation up to current payment levels in order to protect present recipients against a loss of benefits . . . [and also] wanted the Federal Government to pay part of the cost of this supple-

A "hold harmless" assurance, however, applicable to all programs (those for the aged, blind and disabled as well as families) provided that if the state supplemented (with Federal administration) the Federal government would pick up any increase in total state welfare expenditures over the level for calendar year 1971, to the extent that the increase was not caused by supplementation to higher payment levels than were in effect for January 1971.

The 1971 House bill also, for the first time, cast the adult programs in the same form as FAP. The Nixon Administration's initial welfare reform bill, H.R. 14173, introduced in October 1969, and the version passed by the House in 1970, H.R. 16311, both left the adult categories in state hands but would have imposed a nationwide minimum payment level and uniform national eligibility standards.[37] They sought simply to improve the adequacy and equity of the existing grant-in-aid programs without requiring alteration of their basic structure. An opportunity for structural change (one-window Federal administration) was contained, however, in a provision which gave states the option of having their adult programs administered by the same Federal agency that would be making Family Assistance Plan payments. H.R. 16311, § 1605 would have authorized the Secretary of HEW to

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ment and thereby increase the financial savings that states like California, New York, and Massachusetts with higher welfare payment levels and expenditures would realize under H.R. 1." *M. Bowler, The Nixon Guaranteed Income Proposal* 98 (1974). On the other side were the Republicans and conservative Democrats, led by the senior minority member of the Committee John Byrnes:

> Byrnes opposed [mandated supplements with federal cost-sharing] for budgetary reasons but most important, for reasons of administrative efficiency and control. He was "tired of governors and mayors complaining to him about the Federal Government's forcing them to spend money on federal programs," and he did not want another federal-state welfare program with dual administrative structures, responsibilities, and matching funds. He wanted the federal program to be completely federal. The states, then, could do what they wanted without any pressure or interference from the Federal government, so long as they did nothing to undermine the principles and objective of the federal program.

Id.

Committee Chairman Wilbur Mills' position that supplements should not be required but that large benefit states should receive Federal reimbursement to the extent their supplementation costs exceeded 1971 welfare expenditures (the so-called "hold harmless" provision) found the middle ground. Mills also added on the floor of the House an amendment that purported to require positive action by a state legislature for the state *not* to supplement. *See id.* at 74, 99; 117 Cong. Rec. 21460-61 (1971).

37. To offset the possible adverse fiscal consequences for some states of these new adult category requirements (which were combined with a new grant-in-aid formula), the original bill contained an assurance that the combined reforms—FAP and the adult category changes—would not increase a state's welfare expenditure. The so-called 50–90 provision required a state, for a five year period, to continue spending under the new combination of programs at least 50% of what it would have spent under the old, but at the same time set a ceiling of 90%. (In other words all states were guaranteed, under the second half of the provision, at least a 10% reduction in welfare costs.) *See M. Bowler, The Nixon Guaranteed Income Proposal*27(1974).

"enter into an agreement with a State under which he will, on behalf of the State pay [adult category] aid directly to individuals in the State under the State's plan . . . and perform such other functions of the State in connection with such payments as may be agreed upon." (Because these programs would have still be in the grant-in-aid form, the Federally paid state benefits subject to such agreements would have been payments partially supported by Federal funds.)[38]

This approach, seeking reform of the adult programs through revision of the terms for Federal grant-in-aid, was rejected by the House in 1971 in favor of a more radically Federalized structure like FAP. The latter reflected a clear preference of House Ways and Means Chairman Wilbur Mills which was accepted by his committee and the full House with little debate or discussion.[39] The 1971 bill passed by the House contained in title III a new Federally funded and administered program to replace the Federal-state programs of Old Age Assistance, Aid to the Blind, and Aid to the Totally and Permanently Disabled.[40] Consistent with the 1971 bill's FAP provisions, states were permitted but neither required nor financially encouraged (beyond the "hold harmless" provision) to supplement. Federal administration of supplements was not only authorized but encouraged by two incentives. First, Federal administration was made a prerequisite to "hold harmless" coverage. Second, it was furnished without cost; a state administering its own supplement had to bear the full cost of administration. The Ways and Means Committee clearly favored "one-window" Federal administration. Its report on H.R. 1 stated:

> [I]t would appear generally desirable that [State] supplementation be provided through the same agencies which would be established to operate the Federal programs. This would avoid unnecessary duplication of administrative costs, would permit the States to take advantage of the improved methods and procedures which the bill would require, and would tend to foster national uniformity in the operation of assistance programs. Your committee's bill accordingly not only permits the States to enter into agreements with [HEW] which provide for Federal administration of State supplemental payments, but encourages such agreements by not requiring the States to make any contribution toward the administrative costs arising out of these agreements and by

38. *See R. Levy, T. Lewis, and P. Martin, Social Welfare and the Individual* 99–100 (1971).

39. *M. Bowler, The Nixon Guaranteed Income Proposal* 94 (1974).

40. The new program was at that point labelled simply "Assistance for the Aged, Blind, and Disabled." The name "Supplemental Security Income" was substituted in the Senate in 1972 at the suggestion of HEW Undersecretary John Veneman. *See V. Burke & V. Burke, Nixon's Good Deed: Welfare Reform* 197 (1974).

guaranteeing the States that agree to Federal Administration against increases in the cost of making supplemental payments.[41]

The report also justified tying "hold harmless" to acceptance of Federal administration on the ground that states needed protection in a situation in which they would be losing all administrative control over supplementary payments.[42]

It was not the Committee's intent, however, that the Federal agency agree to administer all forms of supplementation which, juding from past assistance patterns, states might wish to continue. "Special needs" grants furnished only to those in "unusual circumstances" were such a case as, for example, a special housekeeper allowance for "an aged, blind, or disabled person unable to provide housekeeping services for himself." The Committee's report took the position:

> [T]hat the responsibility of the Federal Government in administering a State program of supplemental payments should generally be limited to administration of a basic uniform payment which does not vary according to such "special need" and is the same throughout the State and that any additional "special need" payments should be generally made directly by the State. Thus, a State could also pay an additional amount on an individual case-by-case basis . . . . This additional payment would have no effect on either the amounts payable under the Federal program or the federally administered State uniform supplementation program.[43]

In neither the House nor later in the Senate did discussion focus on the type of arrangement contemplated by the bill's authorization, indeed encouragement, of agreements for Federal administration of state financed supplements. The administrative problems posed by such novel arrangements were almost totally ignored. The portions of the House Committee report referred to above furnished the most detailed indication of legislative intent concerning the agreements.

When, after House passage in 1971, H.R. 1 went to the Senate Finance Committee, it encountered drastically different views on the desirability of Federal administration. Senate Finance Committee Chairman Russell B. Long was, at best, skeptical. As a result, the Senate committee's hearings paid considerable attention to the basic question of whether a Federally administered cash payment should be substituted for Federally supported state programs. However, throughout that discussion, the subsidiary issues surrounded Federal administration of state supplements received only passing mention.

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41. *H.R. Rep. No. 231, 92d Cong., 1st Sess.* 199 (1971).
42. *Id.* at 201.
43. *Id.* at 200.

Confronted with the testimony of numerous governors in favor of the provisions for Federal administration in H.R. 1, Senator Long repeatedly expressed his doubts. For example, in January 1972, Governor Smith of Texas told the Finance Committee he was "convinced . . . of the validity of a Federal takeover of the welfare program. . . . . [W]e need a new definition of responsibility between the States and Federal Government, with the Federal Government assuming complete and immediate responsibility for the operation and funding of the four public assistance categories . . . ." Title III drew his particularly strong support: "The establishment in H.R. 1 of a totally Federal program for the aged, blind, and disabled is one of the most far reaching and desirable features of the bill.[44]

Senator Long replied:

> [T]he more I think of it the more I believe it will be better to follow the type of approach we have in the unemployment insurance program where the Federal Government assumes the responsibility for raising the money but the State administrators continue to do the job, being appointed by the Governor but being subject to the regulations that the overall program requires.[45]

Altogether sixteen governors presented their views on H.R. 1 in person or by written statement to the Committee. Eleven of them supported the bill or its basic approach.[46] Several advocated the more generous version which had earlier been put forward by Senator Ribicoff. Most of these supporters dealt quite explicitly with the question of Federalization. Then Governor of Georgia, Jimmy Carter, said, for example, "I believe that the income maintenance programs should be federally funded and federally administered."[47]

The governors of California (Reagan), Oklahoma, Washington, and Wisconsin took negative positions on the bill, stressing the desirability of state welfare administration from several different perspectives.[48]

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44. *Social Security Amendments of 1971: Hearings on H.R. 1 Before the Senate Comm. on Finance, 92d Cong., 1st and 2d Sess.* 1088-89 (1972).

45. *Id.* at 1092-93.

46. *See id.* at 943, 1027, 1043, 1088, 1101, 1999, 2002, 2144, 2799. Shortly after President Nixon's welfare reform address in August 1969, the National Governors Conference passed a resolution calling for:

> 1. Substitution, on a phased basis, of a federally financed system of welfare payments for the current federal-state programs for the aged, blind, disabled, and dependent children, and including also the general assistance programs now financed by the states themselves. Eligibility and grants would be determined by the federal government . . .
>
> 2. Transfer [of] the present Old Age Assistance, Aid to Permanently and Totally Disabled, and Aid to the Blind programs to the Social Security Program, with payments being made from federal general revenues to the Social Security Trust Fund to cover the increased cost.

Resolution on Welfare Reform adopted by National Governors' Conference at 61st Annual Meeting in Colorado Springs, Colo., Aug. 31-Sept. 3, 1969.

47. *Social Security Amendments of 1971: Hearings on H.R. 1 Before the Senate Comm. on Finance,* 92d Cong., 1st and 2d Sess. 1999 (1972).

48. *Id.* at 1873, 1939, 2802, 2803.

Finally, one governor, Meskill of Connecticut, took a position that foreshadowed the action Congress eventually took in 1972. He expressed a general preference for state administration, but said, he thought the adult categories were a special case:

> I strongly recommend the immediate assumption and administration by the Federal Government for the full costs of all categories of welfare which include old-age assistance, aid to the blind, and aid to the disabled . . . .
>
> These areas are so like [Social Security] that there really is very little reason why they could not and should not be administered from Washington. The blind are not going to get their sight back, the disabled are not going to become able bodied, and the old are not going to become young, and I feel it is in the other areas where supervision and administration can keep the numbers on the rolls down and can eliminate fraud and prevent overpayments and underpayments. This is the area where we should have the State and the local control.[49]

Senator Long picked up the idea:

> Governor, I find some appeal to your suggestion that the Federal Government should take over the adult categories. If I thought the Federal Government would administer it better than the States, I might vote to do just that.
>
> It occurs to me that we might have a try at the area that should be the easiest to administer—that is, the old age assistance area—by voting that the Federal Government should immediately take [it] over . . . . Would you think that most States would elect to let the Federal Government simply go ahead and take that program?[50]

Meskill replied: "I think they would . . . ."[51]

Only one state official, Governor Lucey of Wisconsin, focused particular attention on the administrative problems and possible intergovernmental friction which might arise out of Federal administration of state supplements. He told the committee:

> The administrative structure proposed in this bill creates problems rather than solves them. Although basic grants will be simplified, federal agencies will have to keep two separate records—one for determining federal benefits and another for those cases eligible for state supplements. However, this extensive bureaucracy does not relieve the state of the need for record keeping. States will want to review these records thoroughly to insure that they are not billed for cases that would be federally funded or for state supplements in excess of established benefits.

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49. *Id.* at 2008.
50. *Id.* at 2014.
51. *Id.*

> Since administrative costs are relatively small in comparison to total assistance payments, most states will want to keep administrative control over their supplemental program to insure that the savings are realized. However, the bill is structured in such a way that states are in effect precluded from retaining administrative control of the supplements even though the state supplements may still approximate 50 percent of the total cost of benefits.[52]

In June 1972, following its hearing on H.R. 1, the Senate Finance Committee announced several tentative points of agreement including dropping the new Federal program for the aged, blind, and disabled contained in Title III in favor of minimum benefit standards for state assistance programs for the adult categories combined with a more generous Federal grant formula (essentially the approach contained in President Nixon's original plan).[53] But by the time the committee reported out a bill on September 26, 1972, it had reversed its position and the Federal program for the adult categories, now called Supplementary Security Income, was back in. A Senate staff member is quoted as saying:

> The Committee looked at the new program for aged and disabled adults early in the proceedings and they voted to change H.R. 1 so the adult programs would remain under state administration. This motion was advocated by the "states' rights types" on the Committee. It took a big lobbying job by HEW to get the federal program approved by the House back into the Committee's bill.[54]

When H.R. 1 came to the Senate floor, Senator Tunney of California offered an amendment to the Supplemental Security Income sections of the bill which would have required states to supplement the Federal SSI benefits up to the level paid under existing state adult programs so that "aged, blind, and disabled public assistance recipients in States such as California will not be worse off after the enactment of H.R. 1 than they are presently."[55] The amendment failed.

On October 17, 1972, H.R. 1 was enacted without FAP (which the Senate would not pass) but including the new SSI program.[56]

2. *The Pre-Implementation Amendments—Mandatory Supplements*

The relative inattention to SSI before H.R. 1's passage may explain, in part, why the program's legislation was amended three times in the following fourteen months between enactment and implementation on January 1,

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52. *Id.* at 2804.
53. *See M. Bowler, The Nixon Guaranteed Income Proposal* 136 (1974).
54. *Id.* at 142.
55. *See* 118 Cong. Rec. 33980–81 (1972).
56. *See* notes 16 & 17 *supra.*

1974. On two of the three occasions (including Pub. L. 94-233, the Social Security Amendments of 1973, which was passed on December 31, 1973— *the day before SSI was to go into effect*) Congress adjusted the basic Federal benefit levels upward.[57] The relationship between SSI and Food Stamps also figured in two of the amendments.[58] But the most significant change occured in July 1973 (approximately six months before the program's inaugural date) when Pub. L. No. 93-66 imposed a supplementation requirement on the states similar to though not quite so extensive as the one which the Senate had defeated in October 1972. As a condition for continued eligibility for Federal grant-in-aid support of a state's Medicaid program that law required the payment of supplementary benefits to all SSI beneficiaries who had been recipients under the adult grant-in-aid programs in December 1973 to the extent necessary to assure that they would suffer no reduction in benefits due to the replacement of those programs by SSI.[59]

Like the basic SSI legislation, Pub. L. No. 93-66 broke new ground in Federal-state relations with little evidence that Congress was aware it was doing so.

The amendment was preceded by a one-day Senate Finance Committee hearing (June 19, 1973) consisting primarily of discussion between Chairman Russell Long and HEW Secretary Weinberger about the likelihood that states would permit their needy aged, blind, and disabled to suffer a benefit reduction when SSI began. The Senator's remarks indicate he thought widespread reduction possible and a serious problem.[60] Secretary Weinberger's testimony dealt with two proposals for dealing with that problem which committee staff had outlined in advance of the hearing—a one-year delay of SSI's start and a grandfathering of adult category recipients by the Federal government at December 1973 state benefit levels. He objected to both, the former on the ground that it would disrupt the very extensive conversion efforts of state and Federal agencies and the latter because of its large additional Federal expense and its administrative impact.[61] The Secretary noted, "there would be serious

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57. *See* Pub. L. No. 93-66, § 210, 87 Stat. 152 (1973); Pub. L. No. 93-233, § 4, 87 Stat. 947 (1973).

58. *See* Publ. L. No. 93-86, § 3(b), 87 Stat. 221 (1973); Pub. L. No. 93-233, § 8, 87 Stat. 947 (1973).

59. *See* Pub. L. No. 93-66, § 212, 87 Stat. 152 (1973).

60. *See Supplemental Security Income Program: Hearing on the Need for Protecting Aged, Blind, and Disabled Welfare Recipients from Suffering a Reduction in Benefits When the New Federal Supplemental Security Income Program Becomes Effective in January 1974 Before Senate Comm. on Finance,* 93d Cong., 1st Sess. (1973).

61. Said Weinberger:

> Any change in direction now or any uncertainty as to the commitment of the Federal Government to the program would disrupt the progress of the many Federal, State, and county officials who are deeply engaged in accomplishing the conversion. Even more important, any vacillation would, in our judgment as responsible administrators, seriously jeopardize the receipt of checks in January 1974 by some 6 million needy aged, blind, and disabled people.

Id. at 7.

administrative implications arising out of the fact that for many years—as long as the 'grandfathered' people remain on the rolls—there would have to be case-by-case approach to maintain the payments that would take into account the multitude of special provisions in the States and local jurisdictions."[62] Requiring states to grandfather with an option for Federal administration was an alternative which no one addressed at the hearing. Yet only ten days later the Senate Finance Committee proposed that solution—mandatory state supplementation *for one year*—as one of a series of Social Security Act amendments to a House passed debt limit bill (H.R. 8410) which was then before the Senate.[63] The Senate agreed to those amendments and others, but the House held fast.[64] None of the discussion in the House, however, dealt with the merits of mandating state supplementation; the dominant objection was to the Senate's attachment of diverse non-germane amendments to legislation which had to be passed by the end of June.[65] The day after House rejection (June 30), the Senate added mandatory supplementation to H.R. 7445, "An Act to Amend the Renegotiation Act for Two Years and for Other Purposes."[66] This bill had slightly less urgency surrounding it than the debt limit bill, although without its passage the Renegotiation Act expired that very day. The bill went to conference and came out—all on June 30.[67] For reasons never explained the conferees made the one-year mandatory supplement provision permanent.[68] This time the House agreed.

Discussion on the floor of both Senate and House was minimal.[69] Neither the novelty of the requirement in terms of Federal-state relations nor the administrative difficulties it posed received mention.

C. Summary

In developing procedures for reaching agreement with states for Federal administration of both optional and mandatory supplementary benefits, HEW received little guidance from Congress, beyond the basic message that the process should encourage states to elect Federal administration. And in establishing procedures for dealing with post-agreement disputes concerning agreement terms, liability, and so forth, whether in the agreement itself or by regulation, the agency was similarly on its own. Any specific procedural requirements came not from the Social Security Act but from other more general legislation—as, for example, the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. The applicability of such other legislation to these unique arrangements (explored in Part 5 of this report) was, itself, unclear in large part because of their novelty.

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62. *Id.* at 6.
63. *See* 119 Cong. Rec. 21582–90 (1973). Actually the Committee's action was taken within two days of the hearing. A press release dated June 21, 1973 described the full set of committee amendments to H.R. 8410, including the mandatory supplementation provision.
64. *See id.* at 21628, 22384-403.
65. *See id.* at 22398-403.
66. *See id.* at 22481-99.
67. *See id.* at 22499, 22605, 22637.
68. *See id.* at 22606.
69. *See id.* at 22605–10, 22637–46.

PART 3. THE AGREEMENT FORMATION PROCESS—AS IT WORKED (1973-1977)

A. 1973—The Critical Start-Up Period

1. Early Involvement of State Officials

With the enactment of H.R. 1 in late 1972, HEW and the states faced the challenge of implementing SSI, including the novel provisions for Federal administration of state supplements, in little more than a year.

Low benefit states in which the Federal SSI benefit surpassed the level of assistance under the soon-to-be-replaced grant-in-aid programs for all or most recipients could reasonably expect to take a passive role. For them, January 1, 1974, appeared to mark the end of state responsibility for the "adult" segments of the welfare population.

In many states, however, the Federal benefits fell below the OAA, AB, or APTD grants paid a large number of recipients. In these states, supplementation was an important issue. At the time it seemed evident, particularly if the novel arrangement for Federal administration were to be used, that providing supplementation would, in most states, require new state legislation.[70] Consequently, it was critically important to resolve questions about state supplementation—including the principal requirements to be imposed as conditions for Federal administration—early enough in 1973 to permit state legislatures to act.

Fortunately, despite the uncertainties that had surrounded H.R. 1 generally and the form of its adult program provisions in particular, neither the Social Security Administration nor the states were caught totally unprepared by passage of the SSI legislation. Social Security Administration planning for eventual implementation of Federally administered assistance had begun as early as March 1971.[71] And shortly after House passage of H.R. 1, the agency took steps to involve state welfare officials in that planning process. Social Security Commissioner Ball outlined the need for joint

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70. A memorandum entitled "Guidelines for State Enabling Legislation" distributed by Irving Engelman, APWA-SSA Contract Administrator, as his first Information Bulletin to State Public Welfare Administrators on February 6, 1973, see note 73 *infra,* expressed the view that:

> Any State which plans to supplement the Federal benefits may now lack the legal authority to do so. It would appear likely that most, if not all, of such States will need enabling legislation in this area particularly because the State will need to be transmitting *State funds* to the Secretary for distribution as supplemental payments.

The memorandum went on to outline the principal elements to be included in such enabling legislation.

71. *SSI Study Group, Report to the Commissioner of Social Security and the Secretary of Health, Education, and Welfare on the Supplemental Security Income Program* 13 (1976) [hereinafter cited as *SSI Study Group Report*].

72. *Id.* at 15-16.

planning at a meeting of the National Council of State Public Welfare Administrators (NCSPWA) in June 1971. The following day the Council established an eleven member Committee on Problems of Transition "to work with SSA and the FAP planning group in anticipation of the federalization of all public assistance categories." Subsequently the group met on a regular basis with Federal agency staff.[72] Less than a month after Pub. L. No. 92-603 was signed into law by the President, the Social Security Administration held a two day Supplemental Security Income Conference for state welfare officials in Baltimore. At that conference SSA's plans for implementation were outlined. Particular attention was given to contractual arrangements under which the states would perform essential conversion activity for the Federal agency. A draft "Agreement with State Agencies for Conversion," dated November 20, 1972, was circulated. (It provided full Federal reimbursement for specified activities necessary to transfer the existing adult caseload to the Federal agency. The latter required key information from state records on all persons carrying over to SSI assembled in a format compatible with the Federal agency's data system. The Social Security Administration had determined that establishing fresh records through applications by those millions of individuals was neither desirable nor feasible.)

Also in late 1972 the agency entered into an agreement with the American Public Welfare Association (APWA), parent group for the National Council of State Public Welfare Administrators (NCSPWA), under which the Association contracted to perform a liaison function with the states during the start-up of SSI. Mr. Irving J. Engelman, Director of the Division of Public Welfare of the New Jersey Department of Institutions and Agencies, was selected to handle the contracted for liaison activities. He joined the APWA by January 1973 and served as director of the APWA-SSA contract through several extensions until it finally terminated September 30, 1977.[73]

In February 1973, the NCSPWA's Committee on Problems of Transition was revived and renamed, becoming the Committee on SSI Transition. Dr. R. Archie Ellis, Commissioner of South Carolina's Department of Social Services, was appointed chairman. The committee was assigned the related tasks of "working with SSA on the technical problem of transition of the adult assistance categories from state to federal administration,

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72. *Id.* at 15-16.

73. Much of Mr. Engelman's liaison activity was furnished in the form of staff support and guidance for the NCSPWA committees whose work is discussed in this Part. Independent of the committees, however, he surveyed the states on matters of importance to SSA and communicated regularly with state administrators through a series of Information Bulletins. These Information Bulletins, consecutively numbered, began in February 1973 and continued at a rate of several per month right up to the end of the APWA-SSA contract in September 1977. When referred to in this report, they are cited by number and date, *e.g.,* Information Bulletin #1, February 6, 1973.

and . . . serving in an advisory capacity on the APWA-SSA contract." The group convened for the first time on April 15. The call for that meeting, a memorandum from Mr. Harold Hagen, Washington representative of the APWA (which at that point still had its principal office in Chicago),[74] informed the members: "Since Mr. Irving J. Engelman, in his capacity as the Director of the APWA-SSA contract, is directly involved in the matters of primary concern to this Committee, he has agreed to provide the staff services for the committee. In the future, therefore, communications and arrangements relating to the work of your committee will be handled by Mr. Engelman."

The SSI Transition Committee met twice more in 1973 (August and October) to review and respond to proposed SSI regulations published in the Federal Register—particularly those dealing with state supplementation.

A second NCSPWA SSI committee was appointed in 1973, the Special Committee on Contracts. Its task was to work out appropriate basic agreement terms with SSA in the several areas where the statute contemplated Federal-state agreements or contracts. Like the Transition Committee it was chaired by Commissioner Ellis of South Carolina and recieved staff support from Mr. Engelman. Including Chairman Ellis the Committee was comprised of five NCSPWA members augmented by four representatives from the American Association of Public Welfare Attorneys (another consistuent group of the APWA).

2. HEW's Resolution of Two Questions Central to State Decisions About Supplementation

Before state welfare officials and legislatures could make the most fundamental decisions about supplementation, they needed additional information in two areas on which the statute spoke with insufficient detail. As state legislatures met in 1973 and in some cases moved close to adjournment, legislation necessary to implement supplementation awaited resolution of questions in these areas.

Operation of the Hold Harmless Formula.—In place of the old matching formulae, the arrangement established by the SSI legislation had the Federal government covering a portion of some but not all states' supplementary benefit costs. (As the formula worked it offered nothing to prior low-benefit states.)[75] The Federal share was to be determined under a "hold harmless" provision of uncertain dimensions tied to the election of Federal

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74. The APWA office moved to Washington, D.C. in January 1974.

75. Pub. L. No. 92-603, § 401, 86 Stat. 1329 (1972), as amended by Pub. L. No. 93-233, § 18(h), 87 Stat. 947 (1973).

In a low-benefit state, the "difference between . . . the adjusted payment level under the appropriate approved plan of such State as in effect for January 1972. . . . , and . . . the benefits under Title XVI of the Social Security Act [SSI], plus [countable] income"—one limit on Federal "hold harmless"—would be zero or less. *Id.* § 401(a)(2).

administration. The balance of supplementary benefit expenditures had to be paid by the state without Federal contribution. For states to which the "hold harmless" protection might conceivably apply knowing precisely how it was to be calculated more critically on decisions about the general level of state supplementation, the contours of any payment level variations designed to reflect differences in need, and the basic issue of whether to elect Federal administration of all or some or none of the state benefits.

The Degree of Flexibility To Be Allowed in Federally Administered Supplements.—Whether or not potentially subject to "hold harmless" Federal contributions, states contemplating supplementation needed to know what sorts of eligibility limits and payment variations HEW would accept in supplementation programs for which Federal administration was sought.[76] Compared to the pattern of the Federal SSI benefits, most state "adult" programs had high degree of variation in payment levels to reflect diverse recipient living situations. The issue for such a state was, in essense: Could a reasonable approximation of its old approach be carried forward as a Federally administered state supplement? States also wondered whether they could (again with Federal administration) supplement some SSI recipients (*e.g.*, those transferred from the prior programs or those with ineligible spouses in their household) but not others.[77]

By early March, 1973, SSA had identified those states most likely to be affected by the "hold harmless" provision should they elect Federal administration of their supplementary benefits. Those states were contacted and individual studies were begun by SSA to determine the consequences of alternative methods of determining the critical elements of the "hold harmless" formula, in particular the "adjusted payment level" for January 1972, the "non-Federal share of expenditures as aid or assistance . . . in . . . 1972," and the manner in which state supplements were to be held against those amounts. Information Bulletin #5 from Irving Engelman to State Public Welfare Administrators, dated March 6, 1973, directed states desiring an "official determination of [their] 'adjusted payment level' " that had not been contacted by SSA on or before March 15 to notify his office immediately. By mid-April SSA had visited 22 states and collected data bearing on the range of 1972 payment levels from 14 states plus the District of Columbia.

On April 15 at the first meeting of the APWA SSI Transition Committee SSA officials outlined the results of that study and expressed the hope

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76. Recall that the statute specifically instructed the Secretary to set, through the agreement, "such . . . rules with respect to eligibility for or amount of the supplementary payments, and such procedural or other general administrative provisions, as [he] finds necessary . . . to achieve efficient and effective administration of both the program which he conducts under this subchapter [SSI] and the optional State supplementation." 42 U.S.C. § 1382e(b)(2) (Supp. V 1975).

that Federal answers to the various key questions would be available soon.[78]

Mr. Sumner Whittier, Director of the Bureau of Supplemental Security Income (BSSI) responded to an expression of state concern about the urgent need for definite answers to permit state agencies to prepare recommendations for their legislatures, saying that Federal officials were as deeply concerned with the problem as the states. He asked for understanding of the difficulties faced by the Federal agency.

> . . . [H]e observed that although supplementation appears on the surface to be a relatively simple matter, it turned out to be a problem area involving extreme variations in data, making it difficult for the Secretary to arrive at valid decisions without sufficient information of a kind which was not immediately available anywhere. This information has now been obtained . . . and is presently being considered. A decision should be forthcoming with respect to basic supplementation policies within a week or so.

Mr. William Ferguson of BSSI, the project officer for the APWA contract, elaborated. He indicated that the data collected from the 14 states plus the District of Columbia showed that great disparities existed "among the states with respect to the relationship between their published payment standards and the actual level(s) of payments made." Special needs payments, differential payment levels for those living in special care facilities, and so forth produced large differences. He reported that "in recognition of these disparities, a paper identifying the effects of various optional approaches [had] been prepared for submission to the Secretary, with recommendations, for his final determination of what will be the ultimate official policies."

On April 26 Mr. Engelman communicated the following expectation to all state administrators:

> Within the next two weeks there will be announcement of decisions on various major policy issues that have been awaiting resolution . . . . We anticipate that such announcement will be in the form of *proposed* regulations, to be published in the Federal Register, with opportunity for official expression of views thereafter by all interested parties. We have every confidence that all such expressions which may be communicated to the Secretary in response to such publication will be seriously considered.[79]

He turned out to be wrong on both timing and procedure. A month later, May 25, in a letter to the fifty state governors, the Secretary of HEW

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78. A memorandum prepared by Engelman for use by members of the SSI Transition Committee and a summary of the meeting from which the account in the text is drawn were circulated with Information Bulletin #10, April 26, 1973.

79. *Id.*

set forth "finalized major policy decisions" on SSI supplementation.[80] Taken together those decisions provided much greater inducement for states to elect Federal administration than they had previously been given reason to expect.

States for which "hold harmless" was a possibility were told that in calculating their "adjusted payment level" "the average of cash payments to individuals living alone with no other income within each category (aged, blind, and disabled) for basic needs, and some special needs, and at the state's option, for domiciliary care would be determined." They were also informed that if a state supplemented different groups of SSI recipients at different amounts, those it supplemented below the "adjusted payment level" could be used to offset others supplemented at a higher level.

All states were offered greater flexibility in shaping supplements which the Federal agency would administer than the statute, legislative history, and prior discussions with SSA staff might have led them to expect. Not only could they set different payment levels for the three distinct SSI categories (aged, blind, and disabled) but HEW would accept, in addition, two and, on special showing, three geographic variations and up to five different payment levels for different living arrangements.

Engelman pointed out to state administrators that in view of those decisions "undoubtedly certain states which heretofore had determined not to consider a plan for Federally-administered State supplementation may now find it advantageous to reconsider the question."[81]

The hour was late for such reconsideration, however; it was even late for states already planning to use Federal administration. According to HEW monitoring, this is how matters stood in June 1973, shortly following issuance of the "finalized decisions" on supplementation questions:

(a) Ten states had decided not to supplement since the Federal SSI benefits would, at least on average, exceed their prior payment levels;

(b) Officials in sixteen states had determined that existing law authorized the state welfare agency to pay supplementary benefits without further action by the legislature; and

(c) In twenty-four states and the District of Columbia enabling legislation was in some stage of consideration. (In all but four of those states the legislature was still in session, although in some cases not for long. In the other four a special session was necessary if the state was to supplement as of January 1, 1974).[82]

It was roughly at this point, of course, that Congress, concerned about the adequacy of state supplementation, passed Pub. L. No. 93-66, the

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80. *See* Information Bulletin #12, June 8, 1973.

81. *Id.*

82. Letter from Frank C. Carlucci, Under Secretary of HEW, published in the *Washington Post,* June 20, 1973.

mandatory supplement legislation, adding new complexity to the decision-making process, for both HEW and the states.

HEW's "finalized major policy decisions" remained final. They were incorporated in HEW's first "proposed" SSI regulations, which did not appear until August 6, 1973 (delayed, at least in part, by the confusion generated by the the mandatory supplement legislation).[83] They remained unmodified in the "final" regulations, which were not issued until over a year after the program was underway.[84]

3. Circulation of "Model" Agreement Forms

Before the major questions affecting state supplementation decisions had been resolved by HEW, a first draft of the terms and conditions on which the agency would agree to administer state supplements was released for state comment. The AWPA was used as the channel. Engelman's Information Bulletin #9 to state administrators (dated April 23, 1973), carried a copy of the draft and invited critical comments "either as to substance or form." It noted:

> This text is purely tentative. It has not yet been approved by the Office of General Counsel, nor of course by the Office of the Secretary. Therefore, it should not be regarded as expressive, directly or indirectly, of any official policy determinations.

The main body of the draft agreement avoided the hard questions of payment level variations and "hold harmless" calculation. Those provisions were to be contained in an Appendix A which the basic agreement terms incorporated by reference. Thus, Article IV, C provided that "the amount of supplementary payments [made by the Secretary] shall be determined in accordance with Article I of Appendix A of this agreement." And Article V, A provided that a state should advance funds for supplementary payments "until the amount specified in Article II of Appendix A [the hold harmless provision] is reached in any fiscal year." This early draft included an Appendix A with blanks for several payment levels and the terms of the "hold harmless" equation. Its framework, however, clearly contemplated fewer state payment level variations and a more rigid "hold harmless" approach than emerged from the HEW decision-making process a month-or-so later.

The draft agreement, which bore the legend "Revision 3-5-73" and comprised, without appendices, 7 typewritten pages, covered allocation of function payment procedures, basic liabilities of the parties (who would pay for what), duration of the agreement, and procedures for its termination or modification.

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83. *See* Subpart T, 38 Fed. Reg. 21,189 (1973).
84. Subpart T, 40 Fed. Reg. 7639 (1975).

Some of the these matters were ultimately to be addressed, at least partially, in HEW's SSI regulations (which as noted above were not issued in proposed form until August 1973) but many details of the agreement were not. The Federal agency appears to have taken the view that the full detail of the Federal-state agreement was not a proper subject for regulation, that technical, operational details, of this sort were best handled through the circulation for comment and subsequent revision of model agreement form(s). The states responded by creating a Committee on Contracts.

That early draft did, however, deal decisively with at least two matters of such importance to the states that they later became "policy questions" requiring high-level HEW attention. The first concerned HEW liability for erroneous payments—that is, payments to individuals who were ineligible or of amounts that were greater than they should have been.

As to this, the draft agreement provided in Article VIII:

> The Secretary shall not be liable for supplementary payments made on behalf of the State which are erroneously paid to any individual unless such erroneous payments are the direct consequence of gross negligence or fraud in the administration of such supplementary payment program. The Secretary shall, nevertheless, undertake recovery, adjustment or recoupment of any such overpayments pursuant to regulations and policies adopted by the Secretary with respect to overpayments of basic federal payments.

The second matter was the timing of state transfers of funds to the federal agency. Article VI of the draft agreement called for "the State [to] make a monthly *advance* of funds to the Secretary which is sufficient for his use in paying the [specified] supplementary payments" (emphasis added).

Other "contractual" details, although less troublesome than those two, also proved difficult to resolve as the Federal agency and the states "negotiated" the terms of the "model agreements" which were to form the basis for Federal-state arrangements under SSI.

4. "Negotiations"

The review of subsequent model agreement drafts and "negotiations" with SSA over their terms were handled by the NCSPWA Special Committee on Contracts. The addition of mandatory supplementation by Pub. L. No. 93-66 in July 1973 necessarily increased the number of agreement forms and delayed the process. That act not only necessitated a new agreement with terms appropriate to Federal administration of the mandated supplementary benefits for states electing not to administer themselves, but its terms required *all* states subject to the supplementation mandate to "agree" to supplement. Consequently, the Act gave even those states with no interest in Federal administration a stake in the negotiations of at least one agreement form.

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By the end of July 1973 the Special Committee on Contracts had received a full package of four new proposed "model" agreements. These were "drafts . . . developed by BSSI (Bureau of Supplemental Security Income) . . . not yet . . . cleared by the Office of the General Counsel." They included #1 (agreement for mandatory supplemental benefits—state administered), #2 (agreement for mandatory supplemental benefits—federally administered), #3 (agreement for mandatory and optional supplemental benefits—federally administered) and #4 (agreement for federal administration of Medicaid eligibility determinations).[85] At the committee's request Engelman distributed a questionnaire to state administrators which among other things asked for their evaluation of the agreement terms for Federal administration (of both supplemental benefits and Medicaid eligibility determinations.) By September 5 he had received 26 responses which he distributed to the committee.

In early October, the Special Committee on Contracts met with Social Security Administration representatives to go over the draft agreements. (This was over a month after the Transition Committee had gone over the first regulations on state supplementation with SSA). At that meeting "the understanding . . . was reached" that the Model Mandatory Minimum State Supplementation Agreement (Agreement #1) should receive first priority. On October 16, members of the Special Committee on Contracts were sent a copy of a revised draft of that agreement, prepared by SSA, which with a few exceptions "incorporated almost all of the editorial and substantive changes which the Committee requested."

By November 7, the Committee was prepared to endorse a version of that agreement which was distributed with Engelman's Information Bulletin #24 of that date. The Bulletin stated that the Committee approved the text in principle; that the text had not yet "been officially approved on behalf of the Social Security Administration"; but that the Committee thought it "likely to be so approved, either exactly as in the attachment or substantially so;" and that, therefore, it recommended that all states execute an agreement if offered on such terms "without waiting for further advice from the Committee as regards such contract." The bulletin also promised additional advice from the Committee concerning the other three agreement forms "in a day or two."

"A day or two" turned out to be three weeks. Furthermore, the mandatory supplementation agreement underwent other changes. Information Bulletin #25, dated November 28, superseded #24. It reported that "continuing discussions between the NCSPWA's Special Committee on Contracts and representatives of the Social Security Administration [had] resulted in

85. Despite other changes, that numbering system struck. Subsequent references to Agreement #1 and so on in this report are consistent with these subject matter identifications.

the development of a final model for the Mandatory Minimum State Supplementation Agreement (. . . #1)." The Committee endorsed the form: "The Committee affirmatively recommends that every State proceed forthwith to execute a basic agreement in this form, since it may appropriately be executed even by States which will be contracting, in separate agreements, for Federal administration of mandatory and optional supplementation or both." Bulletin #26, which followed the next day, informed stated administrators of "the final results of the continuing negotiations in which the NCSPWA's Special Committee on Contracts had been engaged, with representatives of the Social Security Administration, concerning mutually acceptable contract models," and noted one provision in earlier drafts which had been deleted by "the Commissioner" in response to the "Association's insistent request."

In 1973, almost from the start, the successive HEW drafts of general terms and conditions for the Federal-state agreements bore the label "model agreements." As the phrase suggested it was not then clear how much uniformity the Social Security Administration would or could insist on in its agreements with the states. The establishment of a contract committee by the states and the evolution of a collective bargaining relationship with that committee were developments not foreseen by the Federal agency. Through that process, the "model agreements" became more than mere models to be used by HEW in state-by-state negotiation. Ultimately they became mandatory terms and conditions or the near equivalent. To this day, though, the standard terms and conditions for SSI Federal-state agreements are called the "model agreements."

5. HEW's SSI Regulations

The tentative regulations on optional state supplementation issued on August 6, 1973[86] (which were followed by those on mandatory supplementation appearing on October 3)[87] dealt with a number of areas which concerned state administrators who had received the initial draft agreements and the May 25 Secretarial letter laying down supplementation guidelines. To begin, they elaborated on the "hold harmless" calculation, without, however, answering all the questions states were raising about it. They also responded, at least partially, to state unhappiness with the lack of accountability reflected in the earliest agreement forms. Section 416.2005(c) of the proposed regulations provided:

> Any state entering into an agreement with the Secretary which provides for Federal administration of the State's supplementary payments may audit the payments made by the Secretary on behalf of such

86. Subpart T, 38 Fed. Reg. 21, 189 (1973).
87. § § 416.2070–416.2082, 38 Fed. Reg. 27,412 (1973).

> State. State audit of supplementary payments made by the Secretary, in accordance with the agreement, is limited to no more than one such audit in each fiscal year provided in the agreement, and shall be made at State expense. Resolution of the audit findings shall be made in accordance with the provisions of the State's agreement with the Secretary. In addition, the State and the Secretary may further agree to provide for interim quality assurance procedures compatible with efficient administration where justified by circumstances.

The original draft agreement contained nothing comparable. It simply stated at one point that the Federal agency would "receive, disburse and account to the State for State funds in making such supplementary payments and furnish the State periodic fiscal reports thereon." At another point the agreement provided that: "The Secretary, as soon as possible, after the expiration of each fiscal year, shall submit to the State a report, including supporting data, of the total supplementary payments made by the Secretary on behalf of the State and the State's total liability therefor." The states consistently maintained that they were entitled to greater accountability for the disbursement of their funds by the Social Security Administration, indeed that their state laws required it.

But even in responding to this state concern the August 6 HEW regulations left many important issues to be resolved in the framing of the ultimate agreement terms. As in the portion quoted above numerous matters touched on by the regulations were to be resolved "in accordance with the agreement." As to other critical matters, such as federal liability for erroneous payments and procedures to be employed in resolving disputes arising under the agreement the regulations were silent.

All subsequent Federal-state discussion over the framework and terms for state supplementation concerned the several model agreements circulating in 1973 and the specific versions of those models being offered each individual state. Additions to or amendments of the regulations were not used in 1973 as a procedure for dealing with these issues. The states both individually and collectively, through the SSI Transition Committee, did comment on the August 6 and later regulations but no revised regulations appeared. In January 1974 (after the first Federal-state agreements had been signed and the program was operational) the Social Security Administration announced in the *Federal Register* that it would use the proposed SSI regulations previously issued, including those pertaining to state supplementary benefits, to administer the program "until final regulations are adopted."[88] The regulations on state supplementation did not appear in final form until February 1975[89]—long after not only the first version of the agreements, but also the second had been worked out between SSA and the states.

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88. 39 Fed. Reg. 3674 (1974).
89. Subpart T, 40 Fed. Reg. 7639 (1975).

A few of the provisions contained in the first or second round agreements were somewhat at odds with the original regulations. These discrepancies were not resolved until the proposed regulations were supplanted by slightly revised final regulations in 1975.

6. What the "Negotiations" Achieved

With perhaps one exception all changes of substance in the agreement terms from the SSA draft of April 1973 to the final versions of the model agreements mutually approved by the NCSPWA Contract Committee and the Social Security Administration were made in response to State concerns. That exception was a provision expressly exempting Federal termination of the agreement because of state noncompliance from the 120 day written notice requirement that applied to terminations generally. Responding to state concerns were provisions which: (1) spelled out the state's audit and quality assurance rights mentioned in the August 6 proposed regulations; (2) recognized federal liability for erroneous payments and set up a formula for its determination; (3) assured states of a month-by-month adjustment of their payment obligation to reflect the cumulative experience during the year; (4) spelled out a procedure for resolving liability and other agreement disputes which offered greater assurance of impartiality.

In addition, the final agreement forms omitted a clause which had greatly disturbed the states. That clause had said, quite simply:

Compliance With Regulations and General Instructions

> The State shall comply with such Regulations and General Instructions as the Secretary may from time-to-time prescribe for the administration of this agreement. Nothing in this agreement shall be construed to limit, inhibit or otherwise control or affect the Secretary's authority to make regulations and issue general instructions respecting the Act and for the administration of the programs established pursuant thereto.

To the states it appeared to grant the Federal agency the unilateral power to amend the agreement. In late November 1973, the Commissioner of SSA approved deletion of that article from the model agreements.

A final issue for the states, addressed partially by changes in the model agreement and in a few instances by authorized individual state variations from the model, had to do with the timing of state payments to the Federal agency. The original draft agreement had said merely: "The state shall make a monthly advance of funds to the Secretary which is sufficient for his use in paying the supplementary [benefits]." The August 6 proposed regulations were more explicit: "In order for the Secretary to make State supplementary payments as provided by the agreement, the necessary amount of

State funds must be on deposit with the Secretary *prior to the month for which the supplementary payments are to be made on behalf of such state.*" (Emphasis added).[90]

At an August meeting of the SSI Transition Committee at which not only that provision of the regulations but also a set of "proposed guidelines" on "advance and adjustment of state money" provoked discussion of the issue, several state representatives expressed the view that it might be impracticable to get payments out in response to Federal statements of the amount required in as little time as the guidelines allowed (7 days) and illegal, under the fiscal and budgetary controls of some states, to pay in advance, particularly when that involved crossing fiscal or legislative years.

While the final model agreement contained the same language as the first version—"monthly advance of funds to the Secretary"—deviations from that language were permitted in the case of states for which it posed legal difficulty. The Iowa agreement, for example, read: "The state shall make a monthly payment to the Secretary on or before the date payment is to be received by the recipient." Moreover, the model agreement not only failed to pick up the tentative regulation's clear indication that state failure to make timely advance payment would cause supplements immediately to be withheld from recipients, but suggested the contrary in a revised termination clause:

> Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 120 days if the State fails to comply with the terms of paragraphs A, B, C, and H of Article III of this agreement (which shall include the failure of the State to make payments in a timely manner under Article VI) and fails to cure such noncompliance, or request an initial determination under [the disputes clause] of this agreement, within a period of 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds of the proposed termination.

All these areas of state concern over the early model agreement terms (augmented by the August 6 tentative regulations) were raised by the SSI Transition Committee in discussion with SSA representatives at a meeting held on August 24, 1973.

At that time the states faced a deadline of September 14 for execution of the agreements (in their then current version). In the face of state unwillingness to sign agreements before the regulations on mandatory supplementation were issued (which did not occur finally until October 3) and Federal concern that states desiring Federal administration not be lost which led to a willingness to consider state dissatisfaction with the agreement terms, that deadline (itself an adjustment of an earlier August deadline) was pushed

90. § 416.2005(a), 38 Fed. Reg. 21,189(1973).

back. Ultimately, December 1 set the limit. Negotiations between the NCSPWA contract committee and SSA continued right up to the wire. SSA distributed a revised set of model agreements to its regional offices for discussions with individual states in mid-November but they lacked the approval of the NCSPWA committee. Further negotiations produced agreement on both sides by November 27. SSA promptly sent out a list of the required changes in each of the model agreements dated 11/15/73. Some states had already signed agreements. They were "afforded the opportunity of replacing an already executed contract with a new one corresponding to the final model."[91]

Virtually all the matters of general state concern raised at the August SSI Transition Committee meeting led to some change in the final agreement forms. Indeed, the two major issues had already (in August) been identified by SSA for possible accommodation. At that meeting, David Tomlinson, a BSSI representative reported:

> We have recognized most of the things you are saying here: (1) timing of money exchange; (2) question of fiscal accountability for "erroneous" payments. Both issues are having material prepared now. We are concerned since we are custodians of your funds, and there should be some kind of accountability. That is being developed-explored-and within a very short time we should have a definite response on that.

SSA intended the model forms to eliminate the need for a great deal of individualized negotiation, state to state. There were, of course, issues on which such negotiations were inescapable. The "hold harmless" formula, incorporating as it did, historic data derived from very different state benefit plans meant not only that agreement on a particular state's adjusted payment level(s) required individual negotiation and settlement, but even that issues of interpretation arising out of the federal formula promulgated in May and elaborated in the August tentative regulations concerning but a single state or two might arise. The New York representative at the August SSI Transition Committee meeting was quite concerned about two "adjusted payment level questions" on which SSA's position was unclear. But such matters were never resolved in the general negotiations since most states were unaffected.

SSA also contemplated minor variations from the model. Individual states could, and a few did, negotiate changes that clarified intent or made reasonable accomodation of strong state requirements (*e.g.*, fiscal procedures).

7. The Disputes Procedure

The regulations issued in August and October 1973 showed little recognition of the need for some procedural mechanism to resolve Federal-state

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91. *See* Information Bulletin #26, November 29, 1973.

disputes arising under the agreements. The only explicit reference to a situation of disagreement left its resolution to the terms of the agreement: "Resolution of audit findings shall be made in accordance with the provisions of the State's agreement with the Secretary."[92]

However, the early model agreement draft contained a "disputes" paragraph in Article V, "Advance of Funds and Final Settlements." It expressly applied to disputes over application of the "hold harmless" formula and seemed intended as well to apply generally to disputes over the amount of a State's reimbursement liability for a year's supplementary payments. The paragraph provided for a determination on such disputed matters by the Secretary. It gave the state a right to appeal that determination, leading to a new decision by the Secretary (acting through a different representative than made the initial determination). Such appeals had to be filed within 30 days after notice of the initial determination and the paragraph provided the state "an opportunity to be heard and to offer evidence in support of its appeal." While its scope was narrower than the standard disputes clause contained in Federal procurement contracts (which purports to apply to "any dispute concerning a question of fact arising under this contract"),[93] the "disputes" paragraph of the model agreement otherwise tracked its language closely.[94]

By June the revised model contract forms contained a new sentence providing that: "The final decision on appeal on behalf of the Secretary shall be made by the Armed Services Board of Contract Appeals in accordance with the provisions of 41 C.F.R. 3-1.318-51." (That section designates "the ASBCA to hear, consider, and determine fully and finally appeals by contractors from decisions of [HEW] contracting officers or their authorized representatives pursuant to [the standard procurement contract disputes clause]").

In early November that sentence was removed from revised model agreements. Further negotiations between SSA personnel and the NCSPWA Contracts Committee produced a new disputes clause which was circulated, with the Committee's approval on November 28, 1973.[95] The clause remained in the same article ("State Funding and Final Settlements"), immediately following the paragraph dealing with "negotiations on a final determination of state liability for supplementary payments and mandatory minimum supplements paid on behalf of the state . . . after audit." In full the revised paragraph, provided:

E. If the Secretary and the State are unable to agree upon any

92. § 416.2005(c), 38 Fed. Reg. 21,189 (1973).

93. As discussed in Part 5, *see* p. 169 *infra,* the standard disputes clause used in Federal government contracts hasn't quite the scope its language would suggest.

94. *See* Federal Procurement Regulations, 41 C.F.R. § 1-7.102-12 (1977).

95. *See* Information Bulletin #26, November 29, 1973.

item in dispute, an official designated by the Secretary shall make an initial determination and inform the State, in writing, of his determination with a full explanation thereof. The Secretary shall review the initial determination if a written request is filed with him by the State within 90 days after notification to the State of such determination. On the basis of the evidence obtained by or submitted to the Secretary, he shall render a final decision affirming, modifying, or reversing such initial determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Secretary's review, the State shall be afforded an opportunity to be heard and to offer evidence in support of its position. Pending the final decision of the Secretary, the State and the Secretary shall proceed diligently with the performance of this agreement. The final decision of the Secretary upon such review shall be conclusive as to any question of fact in connection with his final decision, unless a court of competent jurisdiction finds such decision not to have been supported by substantial evidence. The previous provisions of this paragraph do not preclude consideration by the Secretary of any question of law in connection with decisions provided therein, except that nothing in this agreement shall be construed as making final such decisions on a question of law. The delegate of the Secretary who makes the final decision shall not be the same delegate who made the initial determination on behalf of the Secretary.

The official designated by the Secretary to make the initial determination will be empowered by the Secretary to make his decision based on his own judgment of the facts and the law, and this decision will be final unless appealed by the State within 90 days as provided above.

The delegate who makes the final decision on appeal for the Secretary will be empowered by the Secretary to hear, consider and determine fully and finally any such appeal by the State under the provisions of this paragraph.

In addition to having a clearer and arguably broader scope ("disputes" subject to the paragraph) the new paragraph provided: a longer period for state decisions on whether to appeal (90 days instead of 30 days), a commitment on the part of the Federal agency matching the state's "to proceed diligently with the performance of [the] agreement" pending an appeal, and language stressing the independence of those officials designated by the Secretary to make both the initial decision and a subsequent decision upon appeal. The finality language was also changed to stress its limitation to questions "of fact." References to judicial reversal of "fraudulent," "capricious" and "arbitrary" decisions, as well as those "so grossly erroneous as necessarily to imply bad faith" were removed leaving a lack of "substantial evidence" as the only agreed-upon limitation on the finality of factual determinations.

8. The Influence of Federal-State Conflict Over Other Programs

Relations between SSA and the states during 1973 cannot be completely understood without an awareness of concurrent developments in the relationship between state welfare departments and HEW's Social and Rehabilitation Service (SRS) which then administered the Social Security Act grant-in-aid programs, including those about to be replaced by SSI.

To begin, there was built-in tension between the conversion effort and normal attention to ongoing administration of the adult programs. To "facilitate the Social Security Administration conversion and enumeration effort and normal attention to ongoing administration of the adult programs. To "facilitate the Social Security Administration conversion and enumeration effort" SRS allowed states to exclude the adult category programs from both the agency's stringent "quality control regulations" and normal requirements of periodic redeterminations of eligibility. On the other hand, to the distress of SSA, SRS repealed regulations which had allowed simplified methods of determining eligibility and required that states return to a more demanding verification of all eligibility factors. A January 1973 SSA report noted: "Reverting to more complete verification will increase the manpower needs of the States. While the cases should be more thoroughly investigated when received by the Social Security Administration in the conversion, the drain on State/local manpower required to accomplish this will have an adverse effect upon the SSA's requirement to involve these same employees in enumeration and conversion. This may create serious problems in some States."[96]

Of greater importance from the standpoint of the states were tensions created by SRS efforts beginning in late 1972 which sought to induce improvement in state administration of the grant-in-aid programs. The agency also took a very rigid attitude on reimbursing states for social services expenditures then in dispute. Altogether 1973 was, because of these developments, a year with an unusually high level of conflict between HEW and state welfare agencies.

The steps taken by SRS to control state payment errors began with a regulation which purported to allow States zero tolerance for errors in public assistance eligibility or benefit determinations. That regulation was withdrawn because of strenuous state protest, but was replaced by a regulation which set tight tolerance limits with fiscal sanctions (Federal reimbursement reductions) for a state's failure to meet them. These unpopular new measures figured quite explicitly in some of the dealings between SSA and state administrators. The later were inclined to point out the role reversal in the new arrangements for Federal administration of state supplemental benefits, suggesting that similarly strict controls on the quality of Federal administration (coupled with fiscal sanctions) were called for.

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96. *See SSI Study Group Report* 17.

Comments prepared by the NCSPWA Committee on SSI Transition on Subparts T and U of the SSI regulations (those dealing with state supplementation and Federal determination of Medicaid eligibility) submitted in a letter from NCSPWA Chairman Wilbur J. Schmidt to Acting Social Security Commissioner Arthur E. Hess, dated August 31, 1973, expressed that general point:

> In various respects the obligations and other attributes of Federal (HEW)/State relationships will, in the SSA sector, be the reverse of those that exist in the SRS sector. This observation embraces such operations as fund advances, required periodic reporting, fiscal and operations audits, fiscal and operations accountability, quality control, and ultimate liabilities for error. It is the position of the States that the Secretary should, both in official regulations and in the actual implementation thereof, establish complete mutuality and reciprocity. The Secretary's proposed regulations governing the SSI program, as compared with the Secretary's existent and proposed regulations governing the various SRS programs, do violence to this principle.

In October Mr. Engelman was asked by SSA to obtain state reaction to a proposed agreement provision covering federal liability for errors. Engelman's memorandum dated October 18 describing the unanimous negative reaction offered two reasons for the states' response:

> 1. [T]he Secretary's liability with respect to errors in his disbursement of State funds (under SSI) should be no less in kind or degree than the liability he unilaterally imposes on the States for their errors in the disbursement of Federal funds (under SRS);
> 2. [T]his reciprocity should apply in the year 1974 as well as any other year; . . . if the Secretary wishes 1974 to be a year of sanction-free experimentation and evaluation (and all [state] respondents characterized such a wish as reasonable and understandable), he should apply this principle to *both* of his operating agencies, SRS as well as SSA.[97]

Finally, SSA minutes of an early 1974 session between Federal representatives and the NCSPWA Special Committee on Contracts note at one point: "Many times during our conversations their [the Committee's] efforts were to have a mutual treatment between the SRS program and ours."

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97. In retrospect the second point seems especially significant. The states were, in 1973 at least, more interested in having penalties for erroneous welfare payments removed from the grant-in-aid programs than seeing them imposed on SSA in connection with its administration of state SSI supplementation.

B. 1974—Revised Agreements

1. Renewed Negotiations

Time had been a critical factor in 1973. The agreement forms were approved with a mutual understanding that something had to be in place by the end of the year and that both parties would cooperate in working out the bugs (administrative and contractual) which would, no doubt, appear. The first set of agreements ran only to the end of the 1974 fiscal year, June 30, 1974. They contained a provision whereby failure to terminate led to automatic renewal for another full year, but the states contemplated some improvement in the agreements by then.

The National Conference of the American Association of Public Welfare Attorneys meeting in December 1973 passed a resolution offering continuing assistance to the NCSPWA's committee "to draft state model contracts" for the period beginning July 1974. And a memorandum from Mr. Engelman to the Special Committee on Contracts dated January 29, 1974 presented a lengthy list of points of concern to the states which had not been pressed in the rush to produce agreements to cover the first six months of 1974. The committee prepared a proposed redraft of the agreement for Federal administration of supplemental benefits (#2). What followed is summarized in a memorandum to the NCSPWA from R. Archie Ellis, Chairman of the Special Committee on Contracts:

> On February 5 the Committee met with representatives of the Bureau of Supplemental Security Income, and presented and interpreted to them a proposed revision of Contract #2, embodying changes which, if accepted, would be reflected in all other contracts. The SSI representatives agreed that their goal would be to secure approval of the draft, or the development of a counter-proposal, for transmission to the members of the Committee not later than February 19.
>
> It was agreed that the conferees would thereafter meet again on Monday, February 25, for the purpose of seeking final agreement on a revised set of models to be reported to the Council at its meeting today. It was stipulated by your Committee that, if revised models could not for whatever reason, be finally agreed upon by this date, the Committee would recommend that every State promptly notify SSA in writing of its intention to terminate all existing contracts at their expiration June 30, 1974 so as to avoid automatic renewal for another year.
>
> The Committee and the SSI conferees met again on February 25 as scheduled. The Bureau of SSI had completed its work with respect to the Committee's draft (reflecting acceptance of most of the Committee's requests) by February 19; however, the Bureau had become unable to make an official response to the Committee on that date or by this time because of the introduction of new and different proposals at

other echelons of the Department. The resulting issues in dispute are now on the desk of Commissioner Cardwell for decision.

An official response to the Committee will be transmitted as soon as possible, and it was agreed that there will be a further meeting of the parties to be scheduled one week from the date of such transmittal. Meanwhile, we are assured that SSA will *not* treat existing contracts #1, #2, or #3 as being automatically renewed. The period of renegotiation of new contracts will be extended to the end of May, if necessary. A letter to such effect will be sent to all States.

It was not until April 24 that SSA's counterproposals, redrafts of Model Agreements #1, #2, and #3 were delivered to the Committee. Discussions with the Social Security Administration ensued.

Information Bulletin #57 to state welfare administrators, dated May 17, 1974, finally reported the successful completion of negotiations between the Special Committee on Contracts and the Social Security Administration. The Committee "affirmatively [recommended] that all States accept the model contracts" identified as "Revision May 16, 1974." Drafts bearing the date "3/12/74 or any other date earlier than May 16, 1974" were said to be "not acceptable." With a few exceptions which the committee was willing to accept, the May 16 versions were said to reflect "acceptance and incorporation of all changes which were requested by the Contracts Committee at the conclusion of the final negotiating session on May 9."

2. The Revised Terms

a. State Requested Changes

At the first meeting between the APWA Contract Committee and SSA officials concerning 1974 contract revision, on February 5, 1974, the Committee presented a draft agreement incorporating their proposed changes. An internal memorandum prepared by James Vidmar reporting on that meeting to BSSI director, Sumner Whittier, summarized the major issues requiring negotiation as follows:

[Article I–] The Contract Committee has asked that all references in the contract to "general instructions and policies" be deleted. They prefer that promulgated regulations govern.

[Article II–] The Contract Committee requests that costs of any studies which the Secretary conducts on the State's behalf which are in the interest of effective and efficient administration of the SSI program be borne by the Secretary.

[Article V–] Somewhat facetiously the Committee is requesting that we have legally designated representative payees as they are attempting to force SRS to allow them to emulate SSA's current practice of allowing any interested persons to serve as a representative payee.

Many times during our conversations their efforts were to have a mutual treatment between the SRS program and ours.

[Article VI–] The Committee urged that we delete reference to advance payments. They pointed out that the Act itself does not call for an advance payment and they suggested their contract proposal specifically tracks section 1616 of the statute. Additionally, the Committee asked that the disputes clause be completely revamped to place the State in the role of contract officer and review officer rather than the Secretary, as is now the case.

[Article IV–] Mr. Tomlinson [of SSA], in reviewing [the audit article proposed by the states], submitted for the Committee's consideration the possibility that one audit firm, whether it be government or private, be allowed to represent the 31 States currently having Federal administration; the group was quite sympathetic with the request, and will discuss it at a later time. The Committee seems satisfied that the States would build on to our quality assurance program but would request that SRS act similarly in their programs.

[Article IX–] The Committee asked that State liability for furnishing erroneous conversion data will be limited up to the time of the first redetermination.

[Articles X and XI–] In both [the renewal and termination] articles the Committee asked for a 60-day period rather than the 120 days in the contract.

[Article XII–] The Committee has asked that the State have the same examination of records rights as the Secretary now enjoys in the current contract. [Article XII].

[Certification–] The Committee suggests that the attorney general "or any other attesting official" have the authority to sign the certification.

(The article numbers preceding each item refer to the relevant article or articles in the final 1973 version of Agreement #3. *See* Appendix C.) In addition to those enumerated points, the Contract Committee draft repeatedly added language requiring the Federal agency to take various actions "promptly."

The agreement forms ultimately approved by the APWA Committee and SSA contained in complete or modified form a large number of these state-proposed revisions. The degree of the Committee's success during the 1974 negotiations is best seen by simply going down the items listed in the BSSI memorandum, quoted above.

References to general instructions and policies.—The 1973 agreements' definition for "eligible individual" and "December 1973 income" stated that the phrases would have "the same meaning as they have when used in [the relevant sections of the Act, as amended] and in regulations and policies prescribed thereunder by the Secretary." The 1974 forms eliminated

"and policies." They also deleted the issuance of "general instructions for the administration of the supplementary payment program" from the enumeration of "Functions to be Performed by the Secretary" in Article II and the accompanying definition of "General Instructions" in Article I. The 1974 Article I defined only "regulations."

> K. The term "regulations" means those regulations promulgated by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 551 et seq.

The Contract Committee's draft had included an additional sentence in that section reading: "If any such regulation is promulgated subsequent to the date that this Agreement is signed by the State, and the State does not wish to comply therewith, the State may terminate this Agreement." Its concern was reflected in the negotiated form, by new language in Article III ("Functions to be Performed by the State"). The new section H provided that:

> The State shall . . . comply with regulations promulgated by the Secretary. If any such regulation is promulgated subsequent to the date that this agreement is signed by the State, and the State does not wish to comply therewith, the State may terminate this agreement upon 45 days written notice to the Secretary which must be given within 30 days of the effective date of such regulation. The State shall, however, comply with any such regulation promulgated subsequent to the date that this agreement is signed until the effective date of such termination.

As noted earlier, state concern over a provision which, without qualification, required compliance with all HEW regulations had led to its removal from the 1973 agreement forms. Thus, the new 1974 provision represented the return of an express statement of that obligation combined with a termination right to protect the states against unilateral SSA amendment of the agreement by regulation.

Studies.—The new agreement gave the states the right to request studies and evaluations. SSA would perform requested studies at state expense so long as they were both "reasonably requested" and "feasible." Such state-funded studies did not have to be found to be "in the interest of effective and efficient administration of the supplemental security income program" as the 1973 terms seemed to require. Under the 1974 provision a state requested study meeting that test would be carried out at Federal expense.

Representative Payee.—As suggested by Vidmar's memorandum the principal point of the states' proposal was to secure changes in the representative payee requirements for AFDC. However, the 1974 model agreements finally negotiated did include more detailed treatment of the issue.

The Timing of State Payments and the Disputes Clause.—The 1974 agreements no longer referred to the state payment as an "advance of funds

to the Secretary . . . sufficient for his use" in making payments. The new language in Article VI read:

> [T]he State shall pay monthly to the Secretary, on or before the date payment is to be received in the month by recipients, or 5 days after delivery to the State, of the SDX [State Data Exchange] payment data file issued in conjunction with the monthly SSI Treasury tape, whichever is later, an amount equal to the expenditures made by the Secretary for the supplementary payments . . . for that month . . . .

The changes in the disputes clause are discussed in detail in Part 4 of this report. They did not incorporate the Contract Committee's suggestion that initial determinations and appeals be decided by the state rather than the Federal agency.

Audit and Quality Assurance.—No changes of substance were negotiated.

State Liability for Erroneous Conversion Data.—The states' proposal was accepted. The new Article IX provided:

> [T]he State shall be liable for any erroneous mandatory minimum supplement or supplementary payment *which occurs between the time of the State furnishing the erroneous data and the first redermination by the Secretary.*

Notice Period for Termination.—The 1974 forms, reflecting a compromise between the original agreements' 120 days and the states' request for 60, specified 90 days.

Examination of Records.—While not granting states rights to examine Federal records equivalent to those enjoyed by the Federal government, the new article more narrowly circumscribed those rights reserved by the Federal government, limiting access and examination to that done "for purposes of verifying: Administrative costs paid by the Secretary to the State, the amount of Adjusted Payments levels, calendar year 1972 non-Federal expenditures, and establishment or recalculations of Minimum Income Levels and countable income."

Certification.—The new form permitted certification by the State Attorney General or the "legal counsel for the State agency."

Federal Agency Delays.—New language in Article II required the Federal agency to make supplementary payments "at such times" as the agreement specified and to impose deductions for a recipient's failure to report changes "as promptly as is feasible." Article II also specified that fiscal reports be furnished the state "not less frequently than monthly." The new state payment provision (quoted above) which allowed a state to withhold payment until receipt of the SDX payment data filed reflected even more forcefully a concern with Federal promptness.

b. SSA Initiated Changes

The Social Security Administration was itself not totally satisfied with the 1973 model agreements. While the states seized the initiative in 1974, the Federal agency also proposed several changes. Ultimately, in addition to the insertion of an express state obligation to comply with subsequent regulations (discussed in the preceding section) and the disputes paragraph revisions (discussed in Part 4), SSA secured two significant modifications. First, it got language in Article XI granting the Secretary a right to suspend payments immediately in the event of a significant state payment default. The new provision read:

> If the State fails to comply with paragraph G of article III of this agreement [the payment provision], the Secretary may immediately suspend making further supplementary payments . . . , provided that the cumulative amount of unpaid funds by the State is greater than one-third of the total amount which was paid by the State for the calendar quarter immediately preceding the month in which the State does not make such payments . . . .

Second, it was able to tighten up slightly on the terms for Federal reimbursement of state administrative costs by securing in the Article III provision which authorized the state to "perform such other functions as may be necessary to carry out the provisions of this agreement" a new sentence reading: "If the State desires reimbursement by the Secretary pursuant to article VIII-B of this agreement, the State shall obtain the consent of the Secretary before performing such other functions under this paragraph."

3. Continuation of Formal Cooperation

Agreement terms were not the only Federal-state issues which still required attention in 1974. At the APWA meeting in February 1974 Social Security Commissioner Cardwell "recommended that there be developed an appropriate committee mechanism under which APWA and SSA would work together on a continuous basis to solve operational problems and to develop and promote possible legislation to improve the SSI program." The mechanism ultimately adopted was a transformed SSI Transition Committee. The new committee, named the APWA-SSA Liaison Committee, represented all APWA constituencies, not simply the NCSPWA. Its membership included "state and local administrators, welfare attorneys, and others represented on the APWA Board of Directors." An even more significant change was the inclusion of Social Security Administration staff. The committee was less seen as a vehicle for bringing state viewpoints together to permit forceful representation before the Federal agency than as a "mechanism" through which state and Federal agencies could cooperately seek solutions to their mutual problems with the new program. The committee, thus, bore a close kinship to the APWA-SSA contract administered by

Irving Engelman. It continued to function from 1974 through 1977 until that contract ended. From time to time numerous subcommittees were established to deal with particular concerns—data exchange, audits and the like.

Describing the work of the APWA-SSA Liaison Committee in late 1974, Sumner Whittier, Director of the Bureau of Supplemental Security Income, said: "The Committee's work in both administrative and legislative areas has proven invaluable to SSI operations. With APWA's cooperation, we have been able to bring together Federal, State, and local public welfare administrators for a common discussion and resolution of SSI problems."

Shortly after the program got underway in 1974, a problem arose which demanded and got prompt attention from the SSI Transition (later Liaison) Committee. It stemmed from the inadequate provision for prompt payment to those whose needs could not wait for a lengthy application process. The law allowed an advance of $100 to applicants in some cases, but the delays in approving applications were so extreme that that amount was insufficient by any test. The states were disposed to meet the interim needs of SSI applicants pending their approval for the Federal program. But, however they did so led to problems. An opinion of HEW General Counsel's office took the view that assistance furnished under such circumstances was not an excludable state supplement (since it was intended to substitute for, not add on to SSI)[98] but instead had to be counted as income, thereby reducing the eventual retroactive SSI payment. Counsel's office also ruled that while states could structure their interim assistance as a loan (which would mean it would not count as income for SSI benefit purposes) the Federal statute would not permit the applicant to assign the initial SSI payment to a state or local government to repay such a "loan." Thus, a state following that route faced difficult if not impossible collection problems.

The interim payment problem was an important item on the Transition Committee's agenda for a February 25 meeting with SSA officials. The discussion led it to recommend to the full NCSPWA that the Council request SSA to see to it that:

> either under existing law, or by new legislation if necessary, provision be made for States to be directly repaid by the Federal Government (to the extent of retroactive SSI eligibility) for assistance payments made to SSI eligibles during the pendency of SSI approvals; and in no event shall assistance payments provided to individuals on a needs basis during the pendency of SSI applications, by the State or its political subdivisions, regardless of the names of the programs under which this is

98. The statute excluded as income only "cash payments . . . as assistance based on need in supplementation of such benefits [SSI] (as determined by the Secretary)." 42 U.S.C. § 1382e (a) (Supp. V 1975).

accomplished, be treated as income having an adverse effect on SSI eligibility or amount of entitlement.

The Council adopted that recommendation in full.

As soon as the APWA-SSI Liaison Committee was established, it created a Subcommittee on SSI Interim Payments. That group drafted a proposed amendment to the Social Security Act allowing for assignment of initial SSI benefits to states or local governments furnishing interim assistance and laying out the terms under which such assignments could occur. Its recommendations won the endorsement of the full Liaison Committee, SSA, and NCSPWA. With such joint state and Federal agency backing the amendment moved quickly into law, as part of Pub. L. No. 93-368.[99]

After enactment, the Special Committee on Contracts took over work on the model agreement. It developed a proposed agreement which was submitted to SSA in late August 1974. The agency approved; and in Engelman's Information Bulletin #89, dated September 12, 1974, state administrators received a copy of the model agreement which carried the committee's "affirmative recommendation that it be accepted as a satisfactory model for all States." The committee also drafted a model "authorization" form to be executed by applicants seeking interim assistance, which consented to the issuance of the initial SSI payment to the state or local agency furnishing interim assistance and to deduction by that agency of the amount of such assistance before turning the balance over to the applicant.

C. 1975—No Revision of the Agreements

During 1975 both the Federal agency and the States left the agreements alone. There was plenty enough activity on other fronts. The first year's experience with SSI—lengthy delays in payments, high error rate, failures of the data systems for the program, inadequate staffing—drew criticism and study from every side. Both the House Ways and Means and Senate Finance Committees conducted hearings. SSA Commissioner Cardwell set up a "blue ribbon" SSI Study Group. The NCSPWA presented its views on the situation quite forcefully. A resolution adopted in December 1974 by the Council proclaimed:

> the intense concerns of the States about the many and serious inadequacies and malfunctions in the administration of the SSI program, including particularly the critical insufficiency of staff and resources now available to the Social Security Administration for purposes of that program.

A following resolution urged the Executive Committee to communicate those concerns to the Federal government and to take other "measures calculated to bring about effective correction."

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99. 42 U.S.C. § 1383 (g) (Supp. V 1975).

The Executive Committee adopted a statement entitled "Immediate Imperatives for the SSI Program" which elaborated on the Council's concerns. It was conveyed to HEW Secretary Weinberger by a letter dated February 5, which asked for a meeting between Wilbur J. Schmidt, Chairman of the Council, accompanied by a few others from the Executive Committee, and the Secretary. Such a meeting occurred on April 7. The NCSPWA representatives which are being undertaken by the Department and the Social Security Administration toward strengthening the effective operation of the SSI program."

A memorandum to state administrators from Engelman dated February 21, 1975, reminded them of the need to serve notice in timely fashion if they wished to terminate any of their agreements. It reported that SSA was not seeking any changes in the national models, and that the Contracts Committee did not consider it had reason to negotiate for changes. The memorandum concluded:

> Proposals, if any, for contract changes which any particular State deems to be necessary as of July 1, 1975, will have to be brought up for consideration at the initiative of the State itself by presentation to the Regional Office. This should be done immediately.

The Contracts Committee asked to be notified of any such individual state effort.

D. 1976—Revision at SSA's Initiative

1. The Negotiations and Their Setting

Through 1975 the NCSPWA Special Committee on Contracts remained a separate group, but in 1976 the APWA-SSA Liaison Committee assumed responsibility for its activities through a Subcommittee on Federal-State Agreements.

By 1976, the Liaison Committee had become a forum in which SSA representatives presented agency positions and received state response. Thus, its undertaking the negotiation of agreement terms on behalf of the States was consistent with a general shift in its function. At the June meeting, for example, the agenda consisted primarily of reports by SSA people on the Federal position concerning alternative methods for arriving at fiscal settlements for FY 1974, FY 1975 and FY 1976 (the three month period through September 1976) and on SSA proposals for the content and design of the new Federal-state agreements to be effective October 1, 1976. During the year SSA showed less enthusiasm for negotiations with the Committee. The agency also appeared uncertain about whether to continue funding the APWA liaison activities which included the work of the Committee. Engelman's Information Bulletin #184, dated May 24, 1976 reported on the current membership of the Liaison Committee, but concluded:

Since December 1972, the informational, logistic and other staff services for the Committee have been provided by the APWA/SSA Contract Unit and financed in part as expenses under such contract. The termination date of the existing contract is June 30, 1976. The nature of the specific arrangements under which continuing liaison activity between the Social Security Administration and the public welfare community will be maintained after that date has not yet been established.

The Congressional Budget Act of 1974 changed the start of the Federal fiscal year from July 1 to October 1.[100] The shift occurred in 1976, creating a "transitional quarter" July 1, 1976 through September 30, 1976. SSA determined that it wished to substitute new agreements for the old forms at the start of the new style fiscal year and that to cover the "transitional quarter" it would require execution of a short form extending the outstanding agreements for three months. In late June 1976 the Liaison Committee reviewed the extension forms (which had already been sent to the Regional Offices for presentation to the states). It objected to a one-sided provision which expressly preserved SSA's right to assert a certain position under the original agreements but said nothing about a comparable right for the state. The Liaison Committee promptly secured SSA agreement to the substitution of a clause reading:

> Nothing in this modification shall be construed as waiving the state's or SSA's rights to assert any position arising out of or under the agreement hereby extended as to the imposition by the Secretary of fiscal sanctions under the AFDC program or as to Federal fiscal liability for erroneous payments under the SSI program.

That clause was teletyped to the Regional Offices by SSA, and a memorandum from Norman Lourie, Chairman of the APWA-SSA Liaison Committee, advised state administrators:

> If you are presented with one or more of these agreements, as appropriate to your particular situation, with a request for the promptest possible execution by your State, it is the recommendation of the Liaison Committee that you do so if the correct substitution for [the objectionable clause] has been incorporated.

The extension agreement(s) which states signed expressly contemplated new agreements for FY 1977:

> 1. The date of termination of the aforesaid agreement shall be September 30, 1976. The automatic renewal provision of such agreement shall not, however, apply.

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100. Pub. L. No. 93-344, § 501, 88 Stat. 297 (1974), codified at 31 U.S.C. § 1020 (Supp. V 1975).

> 2. It is the intent of the parties that before August 1, 1976, the Secretary and the State shall negotiate and execute an agreement . . . for fiscal year 1977.

Thus, for the first time since 1973 the subsequent discussions between the states and SSA over agreement terms took place in a situation that required some affirmative action by the parties, some new agreement, for there to be a continuing arrangement (beyond September 30, 1976). (The NCSPWA Contract Committee had threatened to recommend that states serve notice of non-renewal at an early point in the 1974 negotiations, but it never did).

The proposed new agreement terms tendered by SSA for FY 1977 (to take effect October 1, 1976) were not favorably received by the states. Some fifteen state representatives who had seen the forms participated in discussions of the Liaison Committee's Subcommittee on Federal-State Agreements in early August 1976. A summary of those discussions reported: "Many of the proposed changes . . . were regarded by the State representatives as unconditionally unacceptable; others were regarded as seriously controversial and therefore subject to intensive debate and negotiation; and others required more careful review and analysis than [the subcommittee then had time for]." State administrators were urged to review the drafts pertinent to their state and to send their comments to the Subcommittee "which is establishing a schedule of further working sessions with Federal representatives."

Resolution of the significant differences between the Subcommittee and SSA representatives was not reached prior to the beginning of the fiscal year. Even Agreement #1 about which there was less controversy was not approved by the subcommittee until October 5 while discussions over the others continued.

On October 14, (two weeks after the expiration date of the old agreements), Norman Lourie of Pennsylvania, Commissioner Ellis's replacement as Chairman of the APWA-SSA Liaison Committee sent a telegram to HEW Secretary Mathews seeking his intervention in the stalemated negotiations. His message noted that the deadline was passed and explained: "SSA seeks to include in such agreements certain key provisions in terms which are totally unacceptable to all states and which are not mandated by statute or official regulations. . . . The delay in concluding mutually acceptable agreements is severely impacting our mutual abilities to administer the program."

Further negotiations between SSA and the Subcommittee on Federal-State Agreements followed. On November 11, 1976, Engelman on behalf of the Subcommittee advised state administrators that agreements #2 and #3 had been revised "in terms assented to by negotiating parties as mutually acceptable for current purposes (i.e., to be effective as of October 1, 1976 for FY 1977, unless subsequently revised within such fiscal year)." He

noted in particular that the revised models, bearing the date November 8, 1976 "include a special appendix which comments on the understandings of the parties with respect to Article IX on Federal Fiscal Liability." The Subcommittee recommended execution of the final model of the appropriate agreement. Proposed changes in Agreement #4 (federal determination of Medicaid eligibility) remained unsettled. The Subcommittee recommended that all affected states accept SSA's offer of a simple extension of the existing agreement without substantive change "provided, however, that the extension carry an expiration date as of March 30, 1977 (instead of September 30, 1977)"

2. The Revised Terms

Whereas a draft prepared by the NCSPWA Contract Committee launched negotiations in 1974, an SSA draft set the basis for Federal-State discussions in 1976. That draft and the negative state response to it reflected the substantial difficulties experienced by both parties under the original agreements. By the summer of 1976, the audit reports for the first six months of 1974 were available and Federal liability for errors during that period was a disputed subject, a matter discussed in detail in Part 4. The question of future audits had great prominence because of that recent experience. State demands for more complete accounting data, Federal displeasure over what it viewed as excessive claims for reimbursement for state administrative expenses, and the spill-over of the litigated dispute concerning penalties for state errors in making AFDC payments were all reflected in the proposed SSA revisions and state reaction to them.

a. Audit Rights and Accounting Data

The SSI Surveillance Committee (a committee comprised of state audit officials which oversaw the HEW Audit Agency's audit of the first six months of 1974 (see Part 4, *infra*)) had recommended that the next agreement grant: "the participating states . . . the right to perform an audit without being subject to any mutual agreements with the Secretary as to the manner in which an audit should be performed." Following up on that recommendation, the successor Committee on Audits recommended specific agreement language to the APWA (neither group was directly affiliated with the APWA) dealing both with audit rights and with accounting data. The former provided:

> The Secretary agrees that the State (including its authorized representatives) shall have access to and the right to examine any pertinent books, documents, papers, and records of the Department of Health, Education and Welfare involving transactions related to this agreement. The Secretary and the State further agree that there shall be a cooperative exchange of audit working papers between the HEW Audit Agency and the State's audit agency.

The Committee's recommended provision on accounting data read:

> Upon request of the State, the Secretary shall furnish the following information to the State relating to supplemental payments made by the Secretary on behalf of the State:
>
> 1. The name, the address, the social security number, and amounts of supplemental payments made to the recipient during the same period of the statement rendered by the Secretary of the State.
>
> The Secretary and State agree that the State shall make no payments to the Secretary for any supplementary payments to any recipients for which the Secretary is unable to furnish all of the above information to support his statement to the State; or in any case in which the Secretary has included and paid a recipient who does not have a qualified residence, as defined herein, within the State.

In sharp contrast to such state desires, the SSA draft included a new audit article which granted the state "the right to conduct an audit within one year after the close of the fiscal year being audited," but still required mutual agreement upon time and place, and went on to say:

> The purpose of any such audit will be to verify that the amounts reported as paid by the Secretary as supplementary payments and mandatory minimum supplements on behalf of the State were expended by the Secretary. The audit will not be used to determine whether such amounts were erroneously paid nor to assign fiscal responsibility for erroneous payments.

It also listed nine items which it said were the "only . . . supporting documentation [to] be made available by the Secretary for review in connection with the audit."

The new provisions on accounting data offered no more than the following:

> The Secretary is developing the capability to provide the State with monthly case-by-case accounting data with respect to the automated disbursements included in [the] monthly Financial Accountability Statements (SSA-8700) received by the State for periods beginning on or after October 1, 1976. When available, such financial accounting data will be furnished by the Secretary to the State upon the State's request.

In both cases negotiations ultimately produced significant movement in the Federal position. The 1976 model agreement forms approved by the APWA Contract Committee and SSA in November provided in Article IV:

> The Secretary recognizes the right of the State (including its authorized representatives) to conduct audits and in connection with any such audit, to examine any pertinent books, documents, papers, or records of the Secretary related to payment and denial of claims and to

expenditures made by the Secretary on behalf of the State for State supplementary payments and mandatory minimum supplements. The audit shall be at State expense except that those books, documents, papers, or records customarily provided free of charge for audit purposes shall be so provided by the Secretary. No such audit shall extend to any inquiry into the Secretary's administrative or operational activities and practices. The results of such audits shall not be used for determining FFL [Federal Fiscal Liability] for erroneous payments. The State shall initiate its request to conduct any audit no later than 1 year from the close of the fiscal year to be audited. The audit shall be completed within 3 years of the close of the fiscal year to be audited. The Secretary and the State further agree that there shall be a cooperative exchange of audit working papers between the HEW Audit Agency and the State. The State may elect to conduct its own audit, to participate in a joint audit with other States, or to have an independent public accountant represent the State in conducting such audit. The Secretary shall, within 60 days after the State notifies the Secretary of its intention to conduct any audit, propose a reasonable time and place for the conduct of the audit.

Appendix B added this gloss:

Section C of Article IV provides that neither the results of State audit nor the results of the State's quality assurance reviews may be substituted for the provisions of Article IV as the basis for determining Federal fiscal liability for erroneous payments. The Secretary will, however, take into account those results as they pertain to the accuracy of determination of erroneous payments in the SSI quality assurance process specified in Article IX.

The section on accounting data in Article II read:

Upon the State's request, the Secretary shall, no later than January 1, 1977, provide monthly case-by-case accounting data with respect to the automated disbursements, including such monthly accountability statements (SSA-8700) received by the State for periods beginning on or after October 1, 1976. It is the intention of both parties that as soon as feasible all aggregate items appearing on the Financial Accountability Statements subsequent to the time that it is feasible shall be accompanied by or reconcilable to supporting data which shall include automated and manual disbursements, collections by withholding, by cash refunds, by returned checks or any other means, and any other element used in computing total expenditures, such as postentitlement adjustments and miscellaneous expenditures.

b. Federal Liability for Errors

For the periods beginning after 1974 the first two versions of the model

agreements had established a system of measuring Federal liability for erroneous eligibility and payment decisions that was tied to the system which HEW was introducing, over strenuous state opposition, in the AFDC program:

> [T]he Secretary's liability for any State-funded mandatory minimum supplement or supplementary payments made on behalf of the State which was erroneously paid to any individual shall be determined in a manner similar to that for determining the State's liability for erroneous payments made to ineligible recipients and for overpayments, as provided for in 45 CFR 205.40 and 45 CFR 205.41 (the Social and Rehabilitation Service's regulations applicable to the State's program of Aid to Families with Dependent Children), *but only to the extent aid only for so long as* the State is complying with the provisions of 45 CFR 205.40 and 45 CFR 205.41 with respect to the State's Program of Aid to Families with Dependent Children.

In May 1976, the U.S. District Court for the District of Columbia held those AFDC regulations invalid in *Maryland v. Mathews.*[101] (In addition to Maryland, thirteen other states had joined in the suit as plaintiffs or plaintiff-intervenors). During the summer of 1976, SSA took the position that the elimination of those regulations and state liability for errors in AFDC removed a precondition for Federal liability. The paragraph of SSA's proposed form for extending agreements to cover the "transitional quarter" which, as noted earlier aroused state objections, had said:

> Nothing in this agreement shall be construed as waiving SSA's position that there is no Federal fiscal liability for any period after December 31, 1974, for which the States are not liable to fiscal disallowances under the provisions for 45 CFR 205.40 and CFR 205.41 with respect to the State's program of Aid to Families with Dependent Children.[102]

Consistent with that view, the draft agreement tendered the states by SSA in the summer of 1976 contained the following totally new article on "Federal Liability for Erroneous Payments":

> The parties take notice that the Secretary and the States are endeavoring to develop a common system or related systems for determining and assessing liability for erroneous payments under the program of Aid to Families with Dependent Children and under the supplemental security income program. Accordingly, the Secretary agrees to modify

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101. Maryland v. Mathews, 415 F. Supp. 1206 (D.D.C. 1976).

102. For that language the final form substituted a sentence preserving both parties' rights "to assert any position arising out of or under the agreement hereby extended" as to liability for errors. *See* p. 119 *supra.*

this agreement (upon development of such system or systems) to provide for Federal liability for erroneous payments under the supplemental security income program comparable in timing and the degree of liability to that agreed to by the State under the program of Aid to Families with Dependent Children. Until such modification is executed, the Secretary shall not be liable to the State for any erroneous payment of supplementary payments or mandatory minimum supplements.

The fact that the Federal agency finally relented on this point probably had more to do with state acceptance of the 1976 forms than any other change of position during the negotiations. The final Article IX acceded to the state view that *Maryland v. Mathews* had no effect on Federal liability for SSI supplementation errors. In addition to a new paragraph in the article itself which said as much, Appendix B of the 1976 forms contained the following "Commentary on Federal Liability for Erroneous Payments" explaining the new paragraph's intent:

The language of Article IX has been modified to reflect that the provisions of the prior agreement on Federal fiscal liability (FFL) shall be carried forward to the present agreement period. These provisions shall be effective until the effective date of any new regulations promulgated on quality assurance for the AFDC and SSI programs. At the time of promulgation this article will be renegotiated, with no liability accruing for the Secretary under the SSI program [after those future regulations take effect] until mutual agreement at which time liability will be effective retroactively to the effective date of the new regulations. The States will be considered to be in compliance [with the AFDC systems] for any 6-month period where the Secretary has not made a formal finding of noncompliance. Absent such a finding, the Secretary will be liable for erroneous payments under the SSI program for such periods.

This language is provided by way of clarification of the Secretary's position with respect to the following items:

1. Maryland v. Mathews cannot be used as a defense against the Secretary's liability for erroneous payments under the SSI program;

2. The Secretary would continue to be liable for erroneous payments above a 3 percent case error level for ineligibles and a 5 percent case error level for overpayments.

3. A State will be in compliance with 45 CFR 205.40 and 45 CFR 205.41 for any 6-month period until the Secretary makes a formal determination of noncompliance with any such determination being applicable only to the 6-month period for which the determination is made.

4. The fact that a State has an error rate in the AFDC program above the tolerance level established will not in itself constitute the State being in noncompliance. If a State pays the appropriate penalty for any period of noncompliance, the State will be

then found to be in compliance for purposes of FFL under the SSI program.

The State also secured new language dealing with a particular type of erroneous payment that they found especially troubling. Many states had had the experience of reporting changes (or new information) on the income, living situation, or residence of supplement recipients to the Social Security Administration without that information having any prompt effect on payments. A provision in Article II of the 1976 forms stated:

> Subject to verification by the Secretary and any required opportunity for hearing before suspension, reduction or termination of benefits, [the Secretary shall] take action as promptly as feasible to determine and pay the correct amount of supplementary payments or mandatory minimum supplements following receipt of notice from the recipient, the State, or any political subdivision thereof concerning a change in living arrangements, income, or other factors which may affect a recipient's amount of such payments or supplements.

c. Reimbursement of State Costs of Administration

A third area in which the 1976 SSA draft substituted provisions with which the states were dissatisfied was Federal reimbursement of state administrative expense. Although negotiations softened the provisions somewhat, the 1976 agreements set up much tighter controls. They introduced a system of budget request in advance of the fiscal year with review by the Secretary producing a notification to "the State of the amount which will be made available to it." That amount the State agreed it would "use its best efforts" not to exceed. "If at any time the State has reason to believe that the costs which it expects to incur in its performance . . . will exceed [the approved amount] it shall notify the Secretary, in writing, to this effect, giving its revised estimate of such total costs."

In addition to such procedural controls, the agreements specified those functions performed in connection with the mandatory supplements for which reimbursement was available, required "written consent of the Secretary before" the performance of other functions for which the State wished to seek reimbursement, and expressly excluded two areas from reimbursement, namely: (1) "any activity related to the determination of an optional supplement variation," and (2) "furnishing the Secretary with data related to current State programs," e.g., AFDC, general assistance, Food Stamps.

The one significant concession the states were able to obtain appeared in a new Article III, J:

> In determining the amount of reimbursement of indirect costs related to functions approved by the Secretary, the State shall use the State's administrative cost allocation plan approved by the cognizant Federal agency.

d. Effect on the Agreement of Subsequent Regulations

The SSA draft made no significant changes in the 1974 agreements' treatment of the state's obligation to comply with formally promulgated regulations. In the course of negotiations, the states pursued this continuing source of concern, a concern which was exacerbated by the uncertain status of the prior agreements' provisions covering Federal Fiscal Liability for errors with their express tie to HEW regulations. This led to the addition of two sentences in the final forms qualifying the state's commitment to be bound by future regulations:

> With respect to regulations which alter specific Federal and State responsibilities for administration and fiscal responsibilities as stipulated in this agreement, promulgated during the term of this agreement, the State shall not be required to comply therewith until the agreement is extended or renewed for any additional period or periods. The State and Secretary may mutually agree, however, to comply with any such regulation during the current agreement period.

Consistent with that general approach, the provisions on Federal liability for errors, discussed above, called for renegotiation of the agreement when regulations on the subject were subsequently issued instead of contemplating that the regulations would themselves have direct effect on the parties' relationship.

e. Clearer Guidelines for Eligibility Decisions

Perhaps as a consequence of disputes over rates of erroneous payments, with the associated issue of what constitutes an error, the Federal agency sought and got, in 1976, more explicit provisions dealing with how SSA would determine eligibility for the state's supplement. SSA's draft added to Article V, ("Amount of and Payment of Supplementary Payments and Mandatory Minimum Supplements") a provision which specified that "eligibility [for supplementary payments] shall be determined in accordance with title XVI of the Act and regulations thereunder." The states accepted it in the final agreements. They also accepted a new provision which the draft added by way of elaboration on a term which had been in the 1974 agreements (though not the original 1973 forms). ("No mandatory minimum or supplementary payment shall be payable to an individual for any month . . . [f]or which such individual is not a resident of the State. In the absence of any other evidence pertaining to residency, for purposes of this provision, an individual shall no longer be presumed to be a resident of the State after he is outside the State for any period of 90 consecutive days.") The 1976 provision was both more detailed and broader in its impact:

> For purposes of this agreement [not just "this provision"], an individual will cease to reside in a State if he leaves the State with the present intention to abandon his home there. In the absence of evidence to the contrary,

1. If an individual leaves the State for a period of 90 calendar days or less, his absence from the State will be considered temporary and he will be considered to continue to reside in such State; and

2. If an individual leaves the State for a period in excess of 90 calendar days, he will no longer be considered to reside continuously in such State.

f. Deletions Successfully Fought by the States

The SSA draft deleted three other provisions contained in the prior agreements: the section of Article II which obligated the Federal agency to conduct studies and evaluations; the language in Article VI which allowed a state to hold off making payment until 5 days after receipt of the SDX payment data file, and the sentence in the Disputes paragraph which stated: "Nothing in this agreement shall be construed to waive the State's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision." State protest led to all three being put back in, in the latter case with the addition of an express reservation of the "Secretary's right to assert lack of jurisdiction." The final provision concerning studies and evaluations expressly excluded decisions about whether a state-requested study should be Federally financed from the disputes procedure.

g. Disputes and Termination

Changes in both the disputes and termination provisions were proposed by SSA and negotiated by the States. The results are more completely described in Part 4, infra. However, one, the inclusion of some specific time limits for Federal determinations on matters subject to the disputes procedure, was counted by the States as a significant gain.

h. The Parties' Relationship

A nuance of symbolic importance to the states was the inclusion in Article II, A, B, and C of the phrase "on behalf of the State." Thus, under the 1976 model agreements, when the Federal agency undertook to make determinations of eligibility, to make payments, and to establish the amount of such payments, it expressly did so "on behalf of the State."

E. 1977—An Apparent End to Negotiation Through the APWA

By 1977 HEW's recognition of the APWA as the exclusive bargaining agent for the states, during negotiation of agreement terms, had effectively ended. Even at the time that the Subcommittee on Federal/State Agreements of the APWA Liaison Committee (the successor to original Contract Committee) reported final approval of the 1976 model agreements in November of that year, it noted that the discussions between HEW and the

states over the systems to be used in the future to measure liability for errors in AFDC and SSI were taking place elsewhere. The Task Force on Quality Control of the New Coalition was preparing recommendations for HEW on the subject.[103] It (the subcommittee) was to be involved though only as a specially invited participant. The New Coalition, not welfare administrators but a group of elected state and local officials representing the National Governors' Association, the National Conference of State Legislatures, the National Association of Counties, the U.S. Conference of Mayors and the National League of Cities, had been drawn into this question. However, only that one issue—which had generated both important Federal-state litigation and sizable liability claims, in short a significant Federal-state confrontation—not the terms of the agreements generally commanded New Coalition attention.

Clear evidence of APWA's new outsider role on agreement terms came later in 1977. Pub. L. No. 94-585, enacted in October 1976 with an effective date of July 1, 1977, required a new form of agreement concerning state supplement "pass-along" of federal benefit increases.[104] Mr. Engelman notified state administrators on July 5 that:

> On June 27, 1977, SSA transmitted to all Regional Commissioners a model form of agreement on this subject, with instructions that such model be used in negotiations to have the States sign a suitable agreement as soon as possible.
>
> For your information, the APWA/SSA Liaison Committee was not a participant in the development of such model agreement and no analysis or advice with respect thereto on behalf of the Committee is presently available.

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103. The very memorandum from Engelman to State Public Welfare Administrators that reported subcommittee approval of the 1976 model agreements noted:

> At the request of the Office of the Secretary, the Ad Hoc Subcommittee has been invited to participate with the Task Force on QC of the New Coalition in addressing the issues involved in the structures of QC in AFDC and QA in SSI, and the use of such structures in determining allocations of Federal State fiscal liabilities under the respective programs. The Subcommittee will make no commitments or offers on these issues, on behalf of the Liaison Committee or on behalf of the National Council of State Public Welfare Administrators, without first presenting its views and recommendations to those bodies for review and authorizations.

An internal memorandum of the California Health and Welfare Agency concerning the 1976 agreements, dated November 24, 1976, reported that HEW contemplated issuing new regulations "regarding fiscal sanctions under the AFDC, SSI and Food Stamp Programs" and that the agreements provided for that eventuality. It went on to say:

> Presently, the New Coalition is preparing recommendations for HEW on this issue. We are in the process of providing input to the new Coalition so as to fully protect our interests.

104. *See* Pub. L. No. 94-585, § 2, 90 Stat. 2901 (1976), codified at 42 U.S.C.A. § 1382 g (Supp. 1978).

Moreover, Committee efforts to engage HEW in negotiations over Agreement #4 (federal medicaid determination) met with no success.

F. How the Model Agreements Were Used in Dealings With Individual States

1. The Initial Version (1973)

The 1973 Model Agreements, like those to follow, left a number of areas for individual negotiation between a state and SSA. That was not only true of the key determinants of the "hold harmless" formula—relevant to a few important states, but also of the state payment level variations and the living arrangement definitions which governed them—a consideration for all optional supplement states. Appendix A of the Model Agreements furnished the space for these particular agreements.[105]

In other respects, though, while styled "model agreements" the terms were treated as essentially mandatory. States were not free to negotiate significantly different provisions. However, they were permitted in a few instances, to modify the language of the Model in minor ways that in SSA's judgment merely clarified intent or accommodated a state's own legal requirements.[106] Thus, for example, the agreement with Iowa for the period January 1, 1974, through June 30, 1974, incorporated these modifications:

a. In Article VI the phrase "monthly advance of funds" by the state was changed to "monthly payment" and a footnote indicated the payment was to be made "on or before the date payment is to be received by recipient." (This change was subsequently incorporated in the 1974 Model Agreements).

b. The disputes paragraph was amended to assure that the Secretarial determinations would be furnished "in writing;" that not only the State but the Secretary would "proceed diligently with the performance" of the agreement pending resolution of a dispute; and that administrative determinations under the paragraph might be reversed by a court of competent jurisdiction which found "the same to have been arbitrary or contrary to law."

c. Finally, the Termination article was modified so that Secretarial terminations in the event of state noncompliance could occur only if a state failed "to materially comply."

2. The 1974 Version

Initiative for the 1974 amendments came from the states. SSA did not

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105 Agreement #4 had remained unchanged since the original form was put together in 1973. Since, on the Federal side, that agreement involved initially SRA and after the 1977 HEW reorganization the Health Care Financing Administration, changes required more than SSA's participation.

106. These individualized provisions could be quite complex. The Hawaii agreement for January 1, 1974 through June 30, 974 contained six pages of living arrangement definitions in Appendix A.

2. The 1974 Version

Initiative for the 1974 amendments came from the states. SSA did not serve notice to prevent the automatic renewal of the original agreements. Consequently, the 1974 agreements were offered states formally as alternatives to renewal of the original terms. The individual states, judging the new versions superior, agreed to the substitution. The existence in all cases of agreement terms, which would carry forward if the parties did nothing, removed the pressure on SSA for acceptance of individual state modifications of the new Model Agreements.

3. The 1976 Version

The terms on which SSA extended the agreements to cover the 1976 "transitional quarter" saw to it that automatic renewal of the prior agreement terms did not occur. However, the failure of negotiations to yield a satisfactory replacement by the end of the "transitional quarter" led the agency to treat the agreements as being renewed. Once the APWA committee and SSA reached agreement in November, states were given an option between the new terms and the old. An intra-agency memorandum for Mario G. Obledo, Secretary of the California Health and Welfare Agency, reporting on the subsequent bargaining sessions with SSA over the agreement, described the agency's position:

> SSA made it clear in these meetings that our only alternatives were to extend the old agreement or to agree to a new agreement incorporating the provisions set forth below [the 1976 version].

California and most other states opted for the new terms. The California memorandum, quoted above, expressed the judgment that: "the new agreement represents substantial improvements over the agreement we have had in the past." Many states were slow in coming to that conclusion, however; execution of the new form in some cases occurred well into 1977.[107] And a few states chose simply to extend the earlier form.[108]

While states had a choice, it was a choice between the 1974 Model Agreement terms and the 1976 version; no opportunity to negotiate individual variants was offered by SSA.

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107. Delaware did not execute the new agreement until January 1977; Maryland, February 1977; Maine and Rhode Island, July 1977; and Florida, August 1977.

108. The form which HEW used to extend the agreements at the point the 1976 negotiations came to impasse extended the prior agreements for fiscal year 1977 but stated:

> It is the intent of the parties that the Secretary and the State shall negotiate and execute a new agreement . . . for fiscal year 1977. The parties agree that upon their execution of the new agreement, such new agreement shall supersede this modification . . .

With some states—Nevada, for example—a substitute agreement was never executed, with the result that the 1974 agreement terms remained in force.

Part 4. Resolving Disputes Under the Agreement—in Theory and in Practice (1974–1977)

A. The Terms of the Disputes Paragraph

The evolution and final terms of the disputes clause contained in the 1973 Model Agreements have already been described in Part 3.[109] As noted there, the clause appeared as a paragraph in the article entitled, "State Funding and Final Settlements." In context it seemed reasonably certain that the procedure the paragraph outlined was intended to apply primarily, if not exclusively, to disputed items arising out of the negotiations over "a final determination of State liability for supplementary payments and mandatory minimum supplements paid on behalf of the State." Such negotiations were to come after the conclusion of the agreement term. (The agreement did, however, include other articles which incorporated that disputes paragraph by reference. *See* section A-2(b) *infra.*)

Negotiations in 1974 and 1976 both produced some revision of the disputes paragraph itself as well as the other provisions of the agreements bearing directly on it.

1. Revisions of the Disputes Paragraph Itself

a. The 1974 Version

The "State Funding and Final Settlements" Article of the 1974 Model Agreement #3 (Federal Administration of Mandatory and Optional Supplementation) contained the following "disputes" language:

> D. If the Secretary and the State are unable to agree upon any item in dispute, an official designated by the Commissioner of Social Security shall make an initial determination and inform the State, in writing, of his determination with a full explanation thereof. This determination shall be final and conclusive unless, within 30 days the State requests the Commissioner of Social Security to reconsider this initial decision, whereupon the Commissioner will reconsider the initial determination and inform the State, in writing, of his determination with a full explanation thereof. This determination shall be final and conclusive unless the State files a written appeal to the Secretary within 30 days. If the State appeals the Commissioner's determination, the Secretary will review the reconsideration and, on the basis of the evidence obtained by or submitted to the Secretary, he shall render a decision affirming, modifying or reversing such determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Commissioner's or Secretary's review, the State

109. *See* pp. 105–107 *supra.*

shall be afforded an opportunity to be heard and to offer evidence in support of its position. Pending the decision of the Secretary, the State and the Secretary shall proceed diligently with the performance of this agreement. The delegate of the Secretary who makes the decision shall not be the Commissioner of Social Security or any subordinate of the Commissioner of Social Security.

Nothing in this agreement shall be construed to waive the State's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision.

Among the changes from the 1973 version were these:

(1) The "initial determination" on a disputed item was to be made by "an official designated by the Commissioner of Social Security" rather than "an official designated by the Secretary."

(2) A reconsideration at the level of the Commissioner of Social Security was added, coupled with assurance that on an appeal from that reconsideration to the Secretary "the delegate of the Secretary who makes the decision shall not be the Commissioner of Social Security or any subordinate of the Commissioner."

(3) Shorter (30 day) limits for requests for reconsideration and appeal were set. Under the 1973 version the periods in both cases were 90 days.

(4) The language assuring the independence of those designated by the Secretary or Commissioner of the Social Security Administration to render a decision "based on his own judgment of the facts and the law" was deleted.

(5) A simple reservation of "the state's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision" on an appeal from a Social Security Administration reconsidered decision was substituted for the original language which explicitly noted the limited finality of Secretarial decisions on questions of fact and law.

Changes (3) and (4) both removed specific gains over the original SSA draft the states had achieved during the 1973 negotiations.

b. The 1976 Version

Further significant changes were incorporated in the 1976 Model Agreements. The relevant paragraph of their "State Funding and Final Settlement" Article reads:

D. If the Secretary and State are unable to agree upon any matter in dispute arising under this agreement, the State may request the Associate Commissioner for Program Operations, SSA, to make an initial determination. Within 90 days from the receipt of such request, the Associate Commissioner for Program Operations, SSA, or his designee, shall make an initial determination in writing with a full explanation

thereof, or provide written notification of the reason such determination cannot be made, what further information or actions by the parties may be required, and within what time period a determination is expected to be made. This determination shall be final and conclusive unless within 30 days the State appeals to the Commissioner of Social Security to reconsider the initial determination. Within 90 days the Commissioner shall inform the State, in writing, of his determination with a full explanation thereof, or provide written notification of the reasons such determination cannot be made and what further information or actions by the parties may be required. This determination shall be final and conclusive unless the State files a written appeal to the Secretary within 30 days. If the State appeals the Commissioner's determination, the Secretary shall review and render a decision affirming, modifying, or reversing such determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Secretary's review, the parties shall be afforded an opportunity to be heard and to offer evidence in support of their positions before the Grant Appeals Board of the Department of Health, Education and Welfare. Pending the decision of the Secretary, and State and the Secretary shall proceed diligently with the performance of this agreement. Nothing in this agreement shall be construed to waive the State's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision, or to enforce its rights under this agreement by any available remedies. Nothing in this agreement shall be construed as waiving the Secretary's right to assert lack of jurisdiction with respect to any suit brought under this agreement, or to enforce the Secretary's rights under this agreement by any available remedies.

Among the noteworthy modifications are:

(1) The clause, while still in the "State Funding and Final Settlement" article, purports for the first time, to apply to "any matter in dispute arising under this agreement."

(2) The initial decider has become the "Associate Commissioner for Program Operations, SSA, or his designee."

(3) States are assured of a decision on reconsideration by the Commissioner within 90 days of an appeal or "written notification of the reasons such determination cannot be made and what further information or actions by the parties may be required." The initial decider is also to provide such notification in the event a determination cannot be made.

(4) Concerning the "Secretary's" decision, the clause no longer assures against delegation to the Commissioner of Social Security or his subordinate but it does—at that level—provide that the opportunity to "be heard and offer evidence" shall be "before the Grant Appeals Board of the

Department of Health, Education and Welfare." The authority to render a decision is, however, not delegated to that Board, simply the function of conducting a hearing.

(5) The reference to potential litigation is expanded: The state expressly reserving its right "to enforce its rights under this agreement by any available remedies" and perhaps more importantly the Federal agency reserving its "right to assert lack of jurisdiction with respect to any suit brought under this agreement, or to enforce the Secretary's rights under this agreement by any available remedies."

2. Other Revisions Directly Affecting the Disputes Paragraph

a. Timing of the Settlement Negotiations from which Disputes Might Arise

The 1973, 1974 and 1976 agreements differed concerning when a dispute as to State (and Federal) liability would be ripe for submission to the administrative process established by the disputes paragraph. The 1973 "State Funding and Final Settlements" article stated that "negotiations on a final determination of state liability for supplementary payments and mandatory minimum supplements paid on behalf of the State in each fiscal year . . . [should] be undertaken by the Secretary and the State *as rapidly as possible after audit.*" (Emphasis added). This gave rise to substantial delays. No audit reports for the first six months of 1974 were available until March 1976. Attempted settlement was to follow audit, and the only "disputes" clearly governed by the disputes paragraph were those arising from a failure to settle.

The 1974 agreements called for year-end settlement negotiations to begin within 90 days after completion of the "reconciliation" specified in a paragraph which directed the Secretary to submit "a statement to the State showing total amounts expended as supplementary payments and mandatory minimum supplements by the Secretary on behalf of the State during the fiscal year, the State's total liability therefor, and the end-of-year balance of the State's cash on deposit with the Secretary (if any)" as soon as possible after the close of the year. In other words, under the 1974 agreements the process did not necessarily await the audit about which both the 1973 and 1974 agreements stated:

> The State shall have the right to conduct an audit and the Secretary and the State shall mutually agree upon a satisfactory audit arrangement to verify that the supplementary payments and mandatory minimum supplements paid by the Secretary on behalf of the State were made in accordance with the terms of this agreement.

However, for the period through December 1974, the article covering "Federal Liability for Erroneous Payments" set a measurement of liability

on which audit findings were pertinent; hence, effective negotiations over a settlement, through fiscal year 1975, had nonetheless to await audit. As to later periods, however, Federal liability was to be established by a formula keyed to the Social Security Administration's Quality Assurance system not audit, permitting settlement of final liability or failure to settle giving rise to a dispute to occur much earlier.

Under the 1976 agreement which contained more elaborate details on state audit, direct connection to Federal liability for errors was renounced: "No such audit shall extend to any inquiry into the Secretary's administrative or operational activities and practices. *The results of such audits shall not be used for determining FFL* [Federal fiscal liability] *for erroneous payments.*"[110] The 1976 "State Funding and Final Settlements" article like the 1974 version provided that negotiations over a fiscal year should begin with the Federal agency's year-end statement, not a subsequent audit. The explicit separation of audit from liability questions made that point even clearer.

b. Cross-References to the Disputes Paragraph

The 1973 agreement forms all provided for Federal reimbursement of certain state administrative expenses. The pertinent article concluded: "These costs are subject to audit and to the provisions of paragraph E, Article VI of this agreement" [the disputes provisions]. The "State Funding and Final Settlements" article also provided that the negotiations over the first agreement period (January 1 to June 30, 1974) would "include the audit adjustments, if any, of the provisional amounts" set forth in the agreement's appendix as the non-Federal share of calendar year 1972 expenditures and the State's Adjusted Payment Levels—the key elements of the "hold harmless" equation—thus clearly bringing these questions under the disputes procedure. Finally, the article entitled "Termination and Modification of Agreement" implicitly granted states the right to utilize the disputes procedure in the event of a Secretarial termination for asserted state non-compliance with the agreement. Paragraph D of that article provided:

> Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 120 days [termination on 120 days written notice being authorized without cause by either party] if the State fails to comply with [various paragraphs] of Article III of this agreement (which shall include the failure of the State to make payments in a timely manner under Article IV) and fails to cure such noncompliance, or request an initial determination under paragraph E of Article VI of this agreement, within a period 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds for the proposed termination.

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110. This was qualified slightly by a gloss contained in the appendix. *See* p. 125 *supra.*

The 1974 agreements contained the same cross-reference in the article covering Federal reimbursement of state administrative costs; however, the article entitled "Termination and Modification of Agreement" no longer mentioned use of the disputes procedure as a possible response to receipt of a Secretarial notice of termination for an alleged state failure to comply with the agreement terms. The 1974 version said simply:

> Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 90 days [the notice period for terminations at will under the 1974 agreements] if the State fails to materially comply with the terms of [various] paragraphs . . . of article III of this agreement and fails to cure such noncompliance, or *fails to request an opportunity to show cause why such agreement should not be terminated,* within a period of 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds for the proposed termination. If the State fails to comply with paragraph G of article III [which sets the schedule for state payments to the Federal agency], the Secretary may immediately suspend making further supplementary payments and mandatory minimum supplements pursuant to . . . this agreement, provided that the cumulative amount of the unpaid funds by the State is greater than one-third of the total amount which was paid by the State for the calendar quarter immediately preceding the month in which the State does not make such [required] payment . . . (Emphasis added.)

This language seemingly allowed a state to delay a termination for asserted acts of noncompliance (other than nonpayment) by "requesting an opportunity to show cause." However, the article no longer specified the full disputes procedure of the "State Funding and Final Settlements" article as the method for showing cause. Presumably, a less complete and, therefore, less time-consuming "opportunity" would fulfill the article's requirements.

In these respects the 1976 agreement forms were identical. The termination article did include one additional reference to the Article VI disputes procedure but that occured merely because the revised article included more detail on how post-termination settlements were to be handled (including, finally, "If the State and the Secretary are unable to agree upon a final determination of the total liability of the State, the final determination of such liability shall be achieved through the procedures set forth in section D of Article VI"). The earlier versions of the termination article all had simply incorporated the "adjustment and settlement provisions provided for in article VI" (albeit only in cases of termination "by the State," settlement after terminations by "the Secretary" being not specifically addressed).

As noted above, however, the 1976 agreements contained, for the first time, a disputes paragraph which might itself be read as reaching out to all

disputes, without need for specific cross-reference.[111] The paragraph, as revised, referred to "any matter in dispute arising under this agreement." The agreements also included a provision expressly excluding one item from the "disputes" procedure. (*See* p. 3.45 *supra.*)

B. The Types of Disputes Which Arose and How They Were, in Fact, Resolved

Because of the limited scope of the 1973 and 1974 versions of the disputes paragraph and the apparent placement of the procedure they established as the final stage in the year-end settlement process, no disputes had, by the end of 1977, gone through the full sequence of administrative appeals or even got to the stage of a final appeal to the Secretary. Nonetheless, over the three years of Federal administration of state supplementary benefits, there had been an extraordinarily high degree of disagreement between the parties over their respective compliance with the terms of the arrangement. The following sections describe several major categories of dispute which arose and how the parties, in fact, sought to resolve them.

1. Accounting Data in Support of Federal "Billings"

Being a totally unique arrangement, these agreements under which the Federal government undertook to administer state funds fit very awkwardly against general provisions of state administrative and fiscal law. During the summer of 1973, several states expressed doubts about whether the reimbursement cycle contemplated by the Social Security Administration could be accommodated under their state budget and fiscal procedures. The primary concern, at that stage, seems to have been with the short period between statement and payment. Norman Lourie of Pennsylvania, speaking at the August 24, 1973 meeting of the Committee on SSI Transition, expressed extreme reservation about a set of SSA guidelines on the "advance and adjustment of state money:"

> If you look at the time frame in terms of State procedure—every State by its fiscal law has a different set of procedures. For a department in some States to get a check out requires a procedure whereby the State budgeting system has to allow for the expenditure, and you may have an auditor general and a treasurer and go through a set of procedures . . . I do not know whether or not I can arrange a monthly payment based on Federal estimates. Can I set up such a procedure which operates on such short notice?

Once the program got underway, however, the area of tension, and ultimately dispute moved very quickly to the adequacy of supporting data provided or available to the states to explain and justify the flat Federal

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111. The likely effectiveness of that language is discussed in Part 5, *infra.*

request, received each month, to pay so many dollars "to the Secretary." Most states have controls on the disbursement of appropriate monies by state agencies enforced by independent fiscal officials—treasurers, comptrollers and auditor generals. In some states, such officials concluded early in 1974 that the Federal billings and associated documentation furnished an inadequate basis for payments.[112]

Illustrative of state controls of this sort are the sections of the State Finance Law of New York which describe the duties of the comptroller:

§8. The comptroller shall:

1. Superintend the fiscal concerns of the state.

2. Keep, audit and state all accounts in which the state is interested, and keep accurate and proper books, showing their condition at all times . . . .

7. Audit all vouchers of any person, corporation, association, state or other public officer, department or institution, to whom or which moneys appropriated are payable, or are authorized or directed to be paid pursuant to law, before issuing his warrant for the payment thereof; and vouchers shall be required in all such cases.

8. Draw warrants on the treasury for the payment of the moneys directed by law to paid out of the treasury, but no such warrant shall be drawn unless authorized by law, and every such warrant shall refer to the law under which it is drawn.

§109.

1. The comptroller shall not draw his warrant for the payment of

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112. Had these inadequacies been foreseen, the states, no doubt, would have had far greater difficulty than they did clearing the 1973 agreements with their legal officers. A Florida Attorney General's opinion, dated November 28, 1973, which found the proposed agreement consistent with Florida law and not an unlawful delegation, assumed far more complete accountability than SSA provided through 1974 and 1975:

> [S]tate funds will not [under the agreement] be paid in advance of services rendered or goods delivered, contrary to the rule which is customarily followed by the comptroller in disbursing state funds . . . [T]he federal government, acting as the agent of the state, will disburse the state's welfare payments to the recipients at the time they are entitled to receive them and not before.
>
> As soon as the program gets under way, the comptroller will be provided with substantially the same information concerning welfare recipients as he now receives. I understand that the Department of Health and Rehabilitative Services will furnish him each month an up-to-date list of recipients of state and federal benefits, showing the disposition of state funds as to each recipient, which list will serve as the basis for the estimate of funds needed for the state's payments during the ensuing month and for the department's requisition of such funds for disbursement to the federal government for payment to the state's welfare recipients; and that the contract with the federal government will provide for an adjustment of the funds to be advanced to reflect either an over-advancement or an under-advancement of funds for a particular month. Presumably, other provisions necessary to satisfy the "bookkeeping" requirements of the comptroller and the auditor general will be included in the contract.

any sum appropriated, except for salaries and other expenditures and appropriations, the amount of which are duly established and fixed by law, until the person demanding the same presents to him a detailed statement thereof in items and makes all reports required of him by law. If such statement is for services rendered or articles furnished, it must show when, where, to whom and under what authority they were rendered or furnished . . . . Each statement of accounts must contain a certificate by or on behalf of the party presenting the same to the effect that it is just, true and correct, that no part thereof has been paid, except as stated therein, and that the balance therein stated is actually due and owing . . . .

4. The comptroller shall not approve for payment any expenditure from any fund except upon audit of such vouchers or other documents as are necessary to insure that such payment is lawful and proper.

5. The foregoing provisions of this section shall not be construed to limit, in any manner, the right of the comptroller to demand such other proofs as he shall deem necessary.[113]

The monthly statement which SSA sent the states during the first year and more of the agreements (Form SSA-8700) presented the Federal agency's determination of the money payments to be made for the month and the cumulative disbursements (minus returns of overpayments, etc.) for the fiscal year. The information it furnished or otherwise available to the states at the time it was sent failed to satisfy the fiscal requirements of

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113. N.Y. State Finance Law (McKinney 1974). In New York the legislation, eventually enacted in 1974, which explicitly authorized the State Department of Social Services to "enter into an agreement with the Secretary of the federal department of health, education, and welfare" for state supplement administration, contained nothing which New York officials construed as authorizing payment to HEW without full adherence to the safeguards of the Finance Law. *See* N.Y. Social Services Law § 211 (McKinney 1976). In some other states the enabling legislation explicitly authorized payments according to the Federal agency estimate, with state fiscal control resting (as Federal officials thought it should) on an end-of-term audit. For example, the Maine statute enacted in 1974, contained a "fiscal procedures" section which reads:

> There shall be advanced with the authorization of the department, from the State Treasury to the secretary, prior to the first day of each month, an amount equal to the secretary's estimate of state supplemental benefits authorized pursuant to this Part for such month corrected for any adjustments resulting from benefits relating to any other month. The department shall conduct, at lease once each fiscal year, an audit of such benefits paid by the secretary on behalf of the state.
>
> An agreement shall specify procedures for making payments to the secretary and limitations on such payments . . . adjustments against future state payments on account of . . . recoupment, and any other fiscal and quality control provision deemed advisable by the department.

Maine Revised Statutes Annot.tit.22, § 3264 (Supp. 1975).

many. In addition to Form SSA-8700 the states also received the SDX case files on a monthly basis. While this presented payment information case-by-case, it could not be reconciled with the Form SSA-8700 because of the different way in which the two were prepared. The SDX system was designed to deliver certain items of information to the states to assist in their administration of programs related to SSI—Medicaid, Social Services and so forth. It was not intended to serve as support for the SSA-8700 billing and did not work well for states that sought to use it in that fashion. Recognizing its inadequacies, New York, nonetheless, used the case-by-case SDX data as the supporting material for the expenditures reported on the SSA-8700. It refused to pay those amounts on the forms which could not be reconciled with the SDX tapes. A letter dated May 15, 1975 responding to an SSA request that states "provide justification for the data they deemed minimally acceptable to substantiate billings" explained New York's position:

> According to the New York State Finance Law, payment documents must be certified for accuracy to the State Comptroller, must be supported by a detailed statement, and payment may not be made unless a detailed statement is presented to him which verifies that such money was used for appropriated purposes. Using the only available information, the State Data Exchange (SDX) does not allow the State to reconcile the Statement of Accountability [SSA-8700] to actual expenditures and liability. Reconciliation is not possible because of lack of timeliness of information, the omission of certain types of payments from the tape and no provision for a breakdown of adjustments. For these reasons, a tape containing the information listed below for each payment transaction is necessary in order to validate the Form-8700.
>
> [The list included: Identification of recipient, type of payment transaction (e.g., regular monthly payment, lump sum retroactive payment, recoupment of past overpayment), total amount broken down between state and Federal benefits, countable income, date of payment, and period to which transaction applies.]

New York's letter concluded by noting that the state was planning on continuing to take some supporting data from the SDX and that should that cease to be possible it would need more information with the statement:

> The State will use this breakdown to verify the amounts on the SSA-8700 against the SDX. It should be noted that other elements already contained in the SDX (e.g., living arrangements, supplement code, eligibility date) are also necessary for financial reconciliation. If the financial data is produced separately from the SDX, such elements must be included.

At the March 1975 meeting that prompted the New York letter, several other states expressed the view that a detailed monthly tape containing every

recipient and payment amount was required for their fiscal purposes. SSA presented a plan for providing states by July, 1975 a monthly breakdown of total recipients by category (e.g., aged, blind, disabled) and by county to accompany the SSA-8700. It argued that this, along with the data available at the end of the contract period for audit, the Quality Assurance program, and the agreement provision holding SSA liable for errors "should be sufficient for essential accounting purposes." The states insisted that was not enough and "unanimously expressed a need to have the accounting data, and preferably by addition to the SDX tage, as soon as possible." SSA indicated that would take a minimum of thirteen months.

An internal memorandum prepared by Kyle McKinsey, Deputy Director of the California Health and Welfare Agency's Department of Benefit Payments, more than thirteen months later (June 16, 1976) summarized the state's experience:

> Accounting of expenditure of SSP [state supplement] funds by SSA is not satisfactory to the state. Expenditure data provided in requesting payment is not in sufficient detail for reconciliation, proper accountability and estimating. Existing contract language is quite adequate. The difficulty is in getting SSA to comply with current requirements.
>
> It would appear, from the continuing disinterest expressed by SSA, that they do not consider this issue to be of a high priority, SSA Regional Staff are in agreement with our position, but are not able to effectively back us . . . .
>
> Since the receipt of the first SSA expenditure report, DBP [Department of Benefit Payments] has had problems determining the reliability and/or validity of the date reported. The information we are requesting is essential to the maintenance of a sound fiscal system. While our needs are detailed in the federal/state contract, we have told SSA that we will accept almost anything on an interim basis. None of their promises for supplemental data have been fulfilled.

During 1974 and 1975, the problem was not limited to a failure to transmit accounting data to the states. SSA's basic accounting system was faulty; complete accounting data existed to transmit. The Report of the SSI Study Group in January 1976 concluded:

> SSA laid out its accounting requirements within the necessity to make the SSI program operational as scheduled. First priority was given to the establishment of a master record including both the converted State records and new initial Federal claims so that checks could be delivered on time to the right persons. Accounting was given a lower priority.
>
> It was apparent even before the first payment was made, and later confirmed, that the accounting system had many shortcomings and

lacked adherence to several generally accepted accounting principles. Totals were not balanced from one part of the processing to another. Amounts certified to the Treasury Department for payment to recipients were not supported at the earliest possible point to provide a predetermined total to verify that the correct amount was certified for payment. Accurate accounting distributions were not provided for billing State agencies and charging the Federal appropriation. Accounting data were not generated for all types of actions taken.[114]

The State Auditors' Surveillance Committee, established in October 1974 to oversee the HEW audit of the first six months of Federal administration, specifically criticized the SSA-8700 statement in its final report, issued at about the same time:

> The Committee concludes from the audit reports that the 8700 report is a totally useless document. The figures contained therein cannot be substantiated by supporting documents showing payments to individual recipients. Although the individual states and the Surveillance Committee have repeatedly emphasized to SSA the necessity for adequate documentation, such documentation is not now available, nor is there any evidence that documentation will be available in the foreseeable future. This information is absolutely essential of the States are to maintain fiscal accountability over State funds as required by State statutes as well as by sound business practice.
>
> The Surveillance Committee believes the individual States would be clearly justified in insisting that SSA furnish payment tapes or other supporting documents showing payments to individual recipients to the State and insisting that future contracts with SSA provide for appropriate fiscal sanctions if SSA fails to furnish such information.

As the complaining states viewed the matter, SSA's failures in this area were failures to comply with the terms of the agreement. True, due to the states' experience efforts were made during each succeeding negotiation to provide more detailed specification of the Federal agency's obligation; but from the states' vantage point this was seen as an area of noncompliance rather than seriously inadequate contract coverage.[115]

The 1974 Model Agreements, for example, which were in force during most of the critical period, provided in Article II ("Functions to Be Performed by the Secretary"):

> The Secretary shall: . . .
>
> D. Maintain records of individuals eligible for and receiving State supplementary payments or mandatory minimum supplements.

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114. *SSI Study Group Report* 127–28.

115. *See* the California memorandum quoted at p. 142 *supra,* which expresses this view.

F. Receive, disburse, and account to the State for State funds in making such supplementary payments and mandatory minimum supplements and furnish the State periodic fiscal reports thereon, not less frequently than monthly.

Neither the agreement or other source, however, furnished a state a ready forum in which to establish the claim that the Federal agency was not supplying accounting data to meet the agreement's requirements. The "disputes" paragraph of Article VI with its apparent tie to year-end fiscal settlements offered no clear relief. The agreement established no explicit penalties which the state might invoke, turning the matter in a question of liability which might ultimately be run through the disputes procedure.[116]

What states did, on the basis of diverse theories of legal justification, was to pay less than all of the amount requested by the Federal agency on the Form SSA-8700. As already noted, this was New York's approach. Arguing that its state finance law would only allow payment of amounts that could be supported, New York paid just those portions of the total on the Form SSA-8700 that could, according to state calculations, be related to the SDX tape.

Failure to furnish accounting data to support the Form SSA-8700 was not the only ground on which states refused to pay portions of the amount requested during 1974 and 1975, but even when other justifications were invoked (such as, the high level of Federal errors) the lack of reconcilable accounting data counted as an important additional factor.[117]

2. Timely State Payment

As of August 1975 states had withheld $237 million of the total billed for state supplement payments on the Form SSA-8700. A year later the situation has improved slightly and the amount outstanding had dropped to approximately $120 million.[118] Later adjusted Federal calculations of the amount of unreimbursed expenditures produced much lower figures

116. During the 1976 negotiations, the states sought but failed to achieve either a provision that would establish a financial incentive for furnishing more adequate accounting data or a term conditioning the state's payment obligation on its receipt of adequate supporting documentation.

117. For a while during 1976, Washington withheld $100,000 per month against SSA's monthly statement on the ground that the agency was "knowingly requesting an amount each month to cover their high rate of erroneous payments." The state based this assumption on: "The excessively high error rate (nearly one-third of all payments) displayed in the audit, their unwillingness to get down to decision making on the audit settlement, the presence of evidence that a high rate of errors were continuing, and, at the time, their failure to present a workable contract for continued Federal administration." Washington maintained that it was not, despite such withholding, "in violation of the contract for Federal administration."

118. *Staff of Senate Committee on Finance, 95th Cong., 1st Sess., The Supplemental Security Income Program* 88 (1977).

(without even getting to the question of offsetting Federal liability for erroneous payments).[119]

The HEW budget justification for Fiscal Year 1977, thus, put the amount of unreimbursed Federal expenditures for fiscal year 1974 and 1975 at approximately $60 million and reported only $30 million for the first six months of fiscal year 1976.[120] A year later (in March 1977) the agency reported:

> The amount of reimbursement withheld by States for fiscal years 1974 and 1975 is about $59.6 million. The reimbursement deficit for FY 1976 is about $27.5 million, most of which was withheld during the first half of the year. During the last half of fiscal year 1976 and the transition quarter States not only reimbursed SSA in full for current obligations, but some States repaid parts of the prior years' deficits. We attribute this change in position by States to the following factors:
>
> —States are aware of SSA's intensified efforts to improve SSI payment accuracy.
>
> —As negotiations for FFL [Federal fiscal liability for errors] for the first 6 months of the program drew closer, States were reassured of Federal intentions to deal fairly.[121]

By April of 1978, the situation had improved further:

> During the last half of 1976, States began reimbursing SSA timely for current State supplementation obligations. Generally this practice has continued through the present time. SSA began recovery of the reimbursement deficit in 1977 by offsetting its FFL settlements with appropriate States against the reimbursement they owe the Federal government. This method of recovery reduced the reimbursement deficit from about $87.1 million at the beginning of 1977 to about $68.4 million at the end of the year.[122]

The original Model Agreements did not spell out SSA's recourse when confronted by a state failure to make timely and complete payments of the

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119. The issue was not a straight-forward one, particularly, in the case of states subject to "hold harmless" protection. In the case of two states, California and New York, there were initially significant differences between the Adjusted Payment Levels calculated by the states and those estimated by SSA leading to substantial differences of opinion as to the state share of Federal expenditures.

120. *Departments of Labor and Health, Education and Welfare Appropriations for 1977, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 94th Cong., 2d Sess., Part 6, at 357 (1976).

121. *Departments of Labor and Health, Education and Welfare Appropriations for 1978, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 95th Cong., 1stSess., Part 6, at 381 (1977).

122. *Departments of Labor and Health, Education and Welfare Appropriations for 1979, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 95th Cong., 2d Sess., Part 6, at 343 (1978).

amounts billed. The only path clearly traced in the agreement was termination for noncompliance under Article XI, which arguably permitted a State to forestall termination until after exhaustion of the disputes procedure of Article VI. The agency could also, of course, terminate by serving the 120 written notice thereby avoiding the issue of compliance. No doubt the agency might have asserted (as the states, in effect, were) that its performance was contingent on timely performance by the states and ceased making payments beyond the amounts paid by the states. (Under Federal law the authority for the agency to continue making payments under those circumstances was far from clear.)

The 1974 Model Agreement, responding to the first six months experience, addressed these matters. Under its terms, as noted in section A(2) *supra,* a state was merely entitled to an opportunity "to show cause" why the agreement should not be terminated for noncompliance if SSA took that route. More importantly, a state's failure to make timely payments expressly authorized the Secretary to "immediately suspend making further" payments, provided that the cumulative amount of unreimbursed funds exceeded roughly one month's obligation.

SSA never used these measures. It tolerated state withholding. SSI appropriations were used to cover the gap between expenditures and state reimbursement with a full disclosure to Congress during annual appropriation hearings. Thus, SSA budget justification for 1977 stated:

> SSA again wants to bring to the attention of the Congress that it is using the SSI appropriation to cover shortfalls in State reimbursement of supplemental payments made on their behalf. This was first pointed out to the Congress in the justification of the 1975 supplemental appropriation request for the SSI program.[123]

Similar language appeared in the justification for 1978, followed by this projection for the future:

> Although generally states have reimbursed SSA for these reimbursable obligations over the past several months, there have been some instances where States have delayed reimbursement. For example, California in the first three months of FY 1977 [during which there was no executed agreement] did not reimburse SSA until the FY 1977 agreements were completely negotiated and agreed upon by both parties. Experience has shown that use of the appropriation for this purpose is diminishing but may continue for awhile.[124]

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123. *Departments of Labor and Health, Education and Welfare Appropriations for 1977, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 94th Cong., 2d Sess., Part 6, at 357 (1976).

124. *Departments of Labor and Health, Education and Welfare Appropriations for 1978, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 95th Cong., 2d Sess., Part 6, at 382 (1978).

3. Audit Rights

Their displeasure with the quality of the accounting data furnished by SSA and evidence of a very high rate of Federal error led states to be particularly eager to exercise their audit rights under Article IV, upon completion of the first agreement period (January 1 through June 30, 1974.) The provisions of Article IX required case-by-case identification of errors before liability would shift to the Federal government. The states were liable, subject to "hold harmless," for all payments other than "erroneous payments . . . identified on an individual basis." That, the article said, meant "identified or discovered during the quality assurance review or reported by the State in writing and verified by the Secretary."

The Federal agency quickly concluded, however, that it did not relish the notion of auditors representing 31 states (the number with agreements for that period) going over its SSI records. Pointing to the provision in the audit article that required mutual agreement "upon a satisfactory audit arrangement," SSA indicated it would not accept any individual state audit request prior to completion of an audit of that first six month period which the HEW Audit Agency would undertake. What followed is described in the Report of the Supplemental Security Income Study Group:

> The Audit Agency regarded the audit as an appropriate undertaking. The basic function of the agency is to evaluate ongoing programs, reviewing their operations and detecting areas of weakness which need improvement. These audits are made on a one-time or on a periodic basis for benefit of management. They are not made on a continuing basis to meet program needs. As it turned out, the review of SSI during fiscal year 1975 required 115 man years at a cost of $4,057,000. This represented approximately 12 to 15 percent of the Audit Agency resources. The National Intergovernmental Audit Forum, composed of audit executives from Federal, State, and local governments, agreed to select a committee [the SSI Surveillance Committee] to oversee the Audit Agency's role and help solve any auditing problems between the States and SSA. . . .
>
> SSA, regarding the audit as a *State* audit, neither offered nor sought to discuss the audit guidelines with the Audit Agency although it did inform the Agency about the quality assurance system and its methodology. Neither the Audit Agency nor SSA was aware of the extent of the differences in the quality assurance [measurement of errors which began during the second half of 1974] and Audit Agency approaches and the significant ramifications this would cause. The lack of consultation between the two agencies also left vague how the audit findings were to be used in settling Federal fiscal liability.[125]

125. *SSI Study Group Report* 124–25.

SSA did not maintain that states would be bound by the findings of the audit. Any state would, the agency said, be free "to arrange for additional or expanded audit on its own behalf and at its own expense", if it chose, after the HEW audit was complete. Moreover, HEW promised that each of the 31 states involved would be given the opportunity of having one of its own auditors "participate directly in the conduct of that portion of the [HEW] relating to such State." Many utilized that opportunity. The HEW audit was to be performed and the final report furnished at no cost to the individual states.

HEW's audit of the first six months of 1976 took much longer than anticipated. The majority of the final audit reports were not released until March 1976. However, state misgivings about the objectivity of the HEW agency were, during that time, relieved. In its final report to the states, the seven member Surveillance Committee wrote:

> Through the course of this audit, the Committee has been favorably impressed by the overall quality of the audit work performed by HEWAA. Initial concerns voiced by some States as to the independence and credibility of HEWAA were dispelled to the satisfaction of the Committee as the audit progressed. The Committee recognizes the difficulties inherent in an audit of this magnitude and complexity. We complement HEWAA for its professional and proficient conduct of the audit.

Between the HEW agency's audit and the quality assurance system which produced measurements of error for the succeeding period, the states were clear which they had greater confidence in. In July 1975 the SSI Surveillance Committee voted unanimously to request HEW to have the Audit Agency undertake for fiscal year 1975 a "fiscal audit," subject to independent surveillance, similar to "the first audit." This position was restated in the committee's final report with the acknowledgment that "to date, HEW has not agreed to the Committee's request."

HEW firmly resisted efforts to secure agreement modifications which would remove the quality assurance findings as the basis for negotiating Federal fiscal liability for errors during the second half of fiscal year 1975. It also refused to provide an HEW Audit Agency audit of Federal-state liability covering any part of that fiscal year, including the first half which, like the six months of fiscal year 1974, was to have FFL determined on an individual basis.

Even the HEWAA audit reports for fiscal year 1974 did not permit case-by-case identification of error as the agreements seemed to require. The audit, as each individual report, explained: "Was made in accordance with standards for governmental auditing. The objective of the audit was to ascertain whether the SSI payments made between January 1, 1974 and June 30, 1974, were properly determined and whether the liability for

payments was accurately divided between the State of ———— and the Federal government. . . . " It used a sample of case files of individuals with payment records during the six month period and projected the mean of the errors found in that sample and the sample standard deviation to the full universe of cases. Because the agreement terms caused liability for errors to hinge on whether or not they were caused by state errors in furnishing data during the conversion process, the audit necessarily assigned the cause for errors, where possible, to the state or SSA. Because of the accounting problems already discussed and sampling, all state audits found a certain amount of "unlocated difference" between the adjusted totals from the Form SSA-8700 and the liability calculated from the case files. "In the 31 Federally administered States [the agency] found that the amount of the unlocated difference ranged from 1 to 6 percent of the total reported payment."

The agency recommended to both the individual states and HEW that its "audit results" be used "to negotiate settlement of liability for the six-month period ending June 30, 1974."

Upon issuance of its final report in 1976, the SSI Surveillance Committee disbanded. It was succeeded by a State Audit Committee, similarly comprised of state audit officials. That group had no more success than its predecessor in obtaining an HEW audit of fiscal year 1975 state liability. It did, however, establish a cooperative working relationship with the HEW Audit Agency, which undertook, in 1976, "a two-phase indepth audit of . . . SSI program practices and procedures." While not a state-by-state audit, it covered fiscal year 1975. HEW "invited [the states] to participate in these two audits in order to satisfy their right to audit." SSA noted that:

> A successor to the SSI Surveillance Committee is being formed [the SSI State Audit Committee] to work with HEW in the conduct of the audit. Should States desire audit rights beyond this, they will have to be negotiated with SSA under the terms of the agreement which requires that any such State audit must be mutually worked out with both parties.

The SSI State Audit Committee negotiated a memorandum of understanding with the HEW Audit Agency which offered access to the latter's audits of the central office, the SSA's quality assurance system, and district offices. In return the Committee recommended that the states share with the Federal agency any audits they performed for fiscal year 1975. (This understanding was subsequently incorporated in the 1976 Model Agreements. *See* p. 3.39 *supra*). The Committee also undertook to aid states which desired to perform audits for fiscal years 1975 and 1976 in a variety of ways.

A July 1977 summary of the Committee's accomplishments listed the following:

—Provided an audit plan for States who wished to perform audits of fiscal years 1975 and 1976

—Devised a sample plan and oversaw pulling of the sample

—Prepared a work program for conducting an audit and provided the necessary tools for performing an audit for States who were interested
—Devised a sample plan for fiscal year 1976
—Represented the participating States in resolving many issues with the Social Security Administration

Even with the assistance of the committee and the cooperation of the HEW Audit Agency, some states attempting audits experienced difficulty. It was reported in July 1977 that:

> [A]udits [were] under way for California, Massachusetts, New York, Tennessee, and Washington; difficulties are being experienced in some of these States in getting case folders, and in some instances auditors were reporting that folders when received were found to have been screened and data removed. Michigan and Rhode Island had not yet received the case folders requested; Arkansas and Georgia had not yet started; and Nevada had decided not to continue.

The lengthening time between any possible state audits and the periods to be reviewed raised a potential problem of record retention. The SSI Audit Committee raised this issue with SSA officials in 1977 and secured a commitment that the latter would retain the tapes with accounting data, which had not already been sent the states, "for a minimum of 3 years or until any audits started in that 3-year period are completed."

4. Year-End Liability

a. Erroneous Payments

Since negotiations looking toward final settlement of liability for the program's first six months—January 1, 1974 through June 30, 1974—had to await completion of the audit, those negotiations did not get underway until the winter of 1976. (Original hopes had been for completion of the audit mid-way through 1975 with settlement occurring shortly thereafter). Shortly before release of the final audit reports, SSA presented a proposal for achieving fiscal settlements for fiscal year 1974, together with its position on subsequent years. That proposal included the following general propositions:

> A. Fiscal Year 1974: SSA will be willing to agree with the States to modify the State supplementation agreement to accept Federal fiscal liability (FFL) for overpayments or payments to ineligibles for fiscal year 1974, based on the results of the HEW audit conducted on behalf of the 31 federally administered States subject to certain adjustments . . . . Any State that prefers adhering to the provisions of the fiscal year 1974 agreements may opt to have Federal liability computed on a case-by-case basis rather than using the audit.

B. Fiscal Year 1975: It is SSA's intent to comply with the FFL language of the fiscal year 1975 agreement. The first 6-month liability will be on a case-by-case basis. The second 6 months will be the first liability period in which the QA/FFL system will be fully operative. In any State in which the first stepdown tolerance limit was not reached liability will be assessed according to the QA findings.

C. Fiscal Year 1976: The QA/FFL system is operative, according to the terms of our Federal/State agreement, for the entire period.

While the states found settlement on the basis of the HEW audit reports attractive, they objected strongly to several of the "adjustments" that SSA proposed be made to the audit findings when using them to calculate final liability.

A major point of contention, for example, was SSA's insistence that since the audit of a sample projected to the whole was being substituted for a system which required states to identify errors case-by-case some "tolerance" level should be subtracted from the audit figure. It presented this position as follows:

> The case-by-case liability language in the agreement was not based on the premise that SSA would be liable for all errors made in the first 6 months of the program. To project liability from a sample audit would make us liable for all errors projected and with less than adequate reliability based on the variability of the sample in some instances. In order to comply with the spirit of the agreement and be consistent with the ongoing FFL program in which there is an ongoing tolerance of 3 percent for ineligible cases and 5 percent for overpaid cases, it is our intent to apply such a tolerance to the audit findings when used for fiscal year 1974 fiscal settlement. Since there was not a full QA system operative in the January through June 1974 period, we intend to use the QA findings for the second 6 months (July through December) to establish the error rate against which the tolerance will be applied in order to determine the proportion of overpayments determined by the audit for which SSA will be liable for fiscal year 1974. Example: The composite tolerance is 8 percent (3 percent ineligible, 5 percent overpaid). If in a particular State the composite QA error rate for overpayments and payments to ineligibles for July through December 1974 was 24 percent, the tolerance used for settlement can be expressed as 8/24 or one-third. This means that the Federal Government would be liable for two-thirds of the Federal liability projected from the HEW audit for fiscal year 1974.

Other disputed "adjustments" included treatment of the "unlocated difference" between audit projections and the totals from the SSA-8700 financial accountability reports and treatment of division of errors for "hold harmless" states.

The APWA/SSA Liaison Committee established an Ad Hoc Subcommittee on Fiscal Settlements to consider the SSA proposal and to recommend a unified state response. That subcommittee, at a meeting held on March 31, 1976, voted to recommend rejection of the SSA proposed adjustments, while asking for continuing negotiation on the basis of the HEW audit findings—"the best, and for many States the only reliable body of fiscal information presently available." While expressing a willingness "to consider some other, more appropriate, method for giving recognition to a 'tolerance' concept," the subcommittee condemned SSA's proposed formula:

> In fact, this adjustment, although [in SSA's example] referred to as an "8% tolerance" (as derived from the 5%/3% formula for AFDC which is still in litigation) is not really 8 percent, but rather represents a proposed ratio of the "8 percent tolerance" to the base period "error rate" reported by SSA's QA study for the succeeding 6-month period, i.e., July–December 1974.
>
> In the [example furnished] this method results in a [33] percent reduction in Federal Liability and is based on the illogical application of Quality Assurance data from a different 6-month period from that under consideration.

The National Council of State Public Welfare Administrators, meeting in April 1976, affirmed the subcommittee's position.

In early August 1976, the subcommittee met again with SSA representatives. At that time a somewhat different "settlement proposal" was described by Federal representatives. The principal feature of this second SSA proposal was its substitution of an offset equal to the erroneous Federal SSI payments caused by state errors during conversion (based upon the findings of the HEW Audit Agency) for the controversial "tolerance level" adjustment.

The subcommittee requested that SSA submit the proposal in written form with illustrative material. When received, that document was circulated to the 31 states involved along with some comments prepared for the subcommittee's chairman, Sumner Hoisington, Deputy Commissioner of the Massachusetts Department of Public Welfare. On the subcommittee's behalf, the covering memorandum, dated October 14, 1976, requested that states provide the following information:

1. Is the original "Settlement Proposal" . . . acceptable to your State?
2. Is the alternate "Settlement Proposal" . . . acceptable to your State?
3. If your responses to 1 and 2 are both negative, does your State plan to claim fiscal settlement on a "case-by-case" basis as provided in the original Agreement?

4. If your responses to 1, 2, and 3 are all negative, what other plan or formula do you suggest should be sought by the Subcommittee?

By early December (three weeks after the deadline set by the inquiry) 22 of 31 states had responded. The answers indicated the following:

—only four States (Kansas, New Jersey, South Dakota, and Wyoming) [found] Settlement Proposal #1 acceptable, and for the last two the only acceptable [was] conditional
—only four States (Kansas, Iowa, Massachusetts and New York) would consider Settlement Proposal #2 but subject to certain conditions
—only two States (Montana and South Carolina) [indicated] an immediate readiness and preference for a case-by-case settlement
—the preponderance [was] for settlement based directly on the conclusions reached by the HEW Audit Agency, with further negotiations as to the interpretation of "State-caused error" and as to a reasonable tolerance allowance for Federal error not related to the . . . AFDC formula.

Several states took specific exception to the offset contained in Proposal #2. For example, Michigan wrote:

> The second federal formula, which would apply a tolerance of error equal to the state caused federal overpayments, was . . . advanced by SSA simply as an alternative to the first approach which the states had clearly rejected. The implied justification in this approach is that shared errors imply shared liability. We disagree with this argument.
>
> The Social Security Administration, in order to expedite the implementation of the SSI program, decided to rely on conversion information provided by the states. Contracts to provide that information were developed. These contracts nowhere established any liability for errors in state supplied information. Had SSA wished to avoid any errors in state initiated information they could have developed each conversion case anew using their own staff, etc. It is our position that SSA wished to "purchase" our information including any errors not rectified during the conversion process and that, having chosen to rely on the information we provided, they have no contractual or other justification for assigning liability for errors to the state.

And Maine added:

> [T]here [should] be acceptance by SSA of the fact that they invited all of the errors by essentially assuring States that if we would give them whatever information we had, they would "correct and purify" it; we were assured that they had the capability of doing this. It obviously was a blatant, gross over-statement of crass naivete, but we, at the State level, should not be held responsible now for such oversimplification.

Both settlement proposals accepted the HEW Audit Agency's allocation of errors between those which were "caused by" the state and those which were the responsibility of the Federal agency. As to supplementary payments, the FFL provisions of the agreement required the separation. Its importance was, of course, magnified by Proposal #2. Several of the states disputed the way HEWAA had performed the allocation. For example, Indiana's reply to the subcommittee inquiry stated:

> Our rejection of [the] second proposal is based on the inability Indiana had in accepting the findings of the HEW Audit Agency in which apparent arbitrary assumptions were made by that Agency as to what constituted State caused errors. An example of this would be those cases in which the recipients were residents of County Homes at the time of conversion. Indiana raised the question as to whether such individuals were eligible for conversion during the conversion process and was advised by the Regional Office of the Bureau of Supplemental Security Income to proceed in converting them. However, the blame for federal and state payments issued to [these] ineligibles was subsequently placed on the state. It is also necessary to note that during the six-month period for which the audit was completed . . . and for several months after that period there were no available means by which the County Departments of Public Welfare could report detected errors in conversion data or changes that occurred after January 1, 1974 to Social Security Administration District Offices due to the fact that the use of Form SSA-8820, SSA State SSI Information Exchange, was not implemented until the latter part of 1974. There was also limited cooperation on the part of the Social Security Administration in processing data submitted on the form this Department had developed specifically for communicating such data to the servicing District Offices.

The Ad Hoc Subcommittee on Fiscal Settlements subsequently prepared two new settlement proposals which it saw as offering a compromise, being based on SSA's Proposal #2 but modified "along lines suggested by the States' comments." SSA did not accept the major features of these counterproposals, but in April of 1977 issued slightly refined versions of its Proposals #1 and #2. Each state was presented with settlement calculations employing both formulae and was offered whichever proved more advantageous. (Proposal #2 tended to be more attractive to large supplement states, e.g., Massachusetts, while #1 was the more palatable to low level supplement states).

As of September 14, 1977, Irving Engelman reported the following settlement situation for fiscal year 1974:

> 21 States have indicated willingness to accept the higher of the offered amounts;

3 States (Michigan, Montana, and Utah) have informed SSA that they will proceed to establish their claims on a case-by-case basis;

7 States (California, Florida, Georgia, Ohio, Pennsylvania, Rhode Island, and South Carolina) have indicated no willingness to accept the settlement offer, nor to proceed with a case-by-case claim, but are engaging in continuing negotiation with SSA.[126]

Fiscal year 1975 settlements, with the agreement stipulating resolution of Federal fiscal liability on the basis of case-by-case identification for the first half and by use of the Quality Assurance system for the second, still lay ahead. Without an HEW Audit Agency report no uniform method of resolution seemed possible.[127]

Fiscal year 1976 and succeeding years, however, for which FFL rested totally on the results of the Quality Assurance system provided a much clearer basis for settlement without the need for audit or lengthy post-term review.

While full settlement of the first six months of 1974 had still not been achieved by April 1978, the HEW budget justification of that date reported full settlement of FFL for January-December 1975.[128]

b. "Hold Harmless"

The "hold harmless" formula as interpreted by HEW, turned out to limit state supplement liability for six states through Fiscal Year 1976: California, Hawaii, Massachusetts, Nevada, New York, and Wisconsin. Under the agreements with those and other potential "hold harmless" states, an additional possible area of dispute was present—calculation of the "hold harmless" amount. The calculation rested on a very troublesome measurement, the state's "adjusted payment level (APL)." The original agreements set provisional "adjustment payment levels," providing for audit and adjustment as part of the fiscal year 1974 final settlement. Concern about the accuracy of APL calculations based on a sample of cases, led SSA to request five states to recalculate their APLs based on a review of all the appropriate cases. The agency entered into Adjusted Payment Level agreements with the affected states which spelled out in somewhat greater detail

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125. *SSI Study Group Report* 124–25.

126. As of October 16, 1978, 24 states had accepted SSA's settlement offer; four states had initiated the disputes process or were about to (Florida, Ohio, Pennsylvania, and Utah), Montana had submitted asserted errors on a case-by-case basis, and two states were still negotiating (California and Nevada).

127. In September of 1978, SSA offered the states an alternative to use of case-by-case data for July-December 1974. The settlement offer made use of the Quality Assurance data for that base period.

128. *Departments of Labor and Health, Education and Welfare Appropriations for 1979, Hearing Before a Subcomm. of House Comm. on Appropriations,* 95th Cong., 2d Sess. 342 (1978).

the process for reaching agreement on a final adjusted payment level (APL). Those agreements provided for a state calculation of the APL according to specified guidelines, a Federal audit of the state determination, followed by negotiation, with submission of any unresolved issues to the basic agreement's disputes procedure. By March of 1976, all but two states had complied and had reached agreement with SSA on "final" APLs.[129]

In the case of one of those states, California, negotiation of a final APL produced an impasse which the state finally attempted to resolve through the disputes procedure laid out in the agreement. On June 20, 1976, California submitted a request for a determination under Article VI, D on the issue which it said arose out of SSA's "failure to accept and implement the Adjusted Payment Levels (APL) as redetermined by the survey we conducted according to the Agreement for Determining Adjusted Payment Level Redetermination, dated February 11, 1975."

Ten days earlier California had submitted a separate "hold harmless" dispute, raising essentially a single-point of statutory interpretation having to do, not with the APL, but another element of the "hold harmless" equation. The SSA regional office, on the basis of an opinion by HEW General Counsel's Office, had held to the position that in calculating the difference between the APL and SSI benefits plus countable income, as required by the statute (the amount of so-called "protected payments"), the 1/3 reduction in benefits which applied in lieu of an actual reduction according to the value of in-kind income to those living in the household of another should be treated as countable income. California maintained that benefit reduction was not income. The state position yielded higher "protected payments" and therefore a larger "hold harmless" amount.

A letter dated December 6, 1976, signed by Robert P. Bynum, Associate Commissioner for Program Operations of SSA rejected this "hold harmless" claim. The letter indicated: "This decision is the initial determination referred to in the disputes clause of our agreement dated July 12, 1974, for the period from July 1, 1974, to the present, at paragraph D of article VI." It noted that under the agreement California had 30 days to request a reconsideration from the Commissioner. The state did so on January 5, 1977, asserting that its appeal related to the agreement for the first six months of 1974 as well, and should, therefore, be considered filed under its disputes procedure, too. The appeal was denied by SSA on July 7, 1978. In October 1978, California filed an appeal with the HEW Departmental Grant Appeals Board.

5. Reimbursement of State Administrative Costs

The extent of Federal reimbursement for state administrative expenses

129. The five states required to recalculate their APL included three of the six ultimately benefitting from "hold harmless" (California, New York, and Wisconsin) and two others (Michigan and New Jersey).

was a growing area of tension between the parties. This not only influenced successive revisions of the Model Agreements, but was reflected in disputes as to past periods. Such disputes were, under the terms of Article VIII of the Model Agreements, subject to the disputes procedure of Article VI. At least one state, California, made use of that procedure. By a letter dated July 2, 1976, the state appealed the following issue:

> In April 1975 the Social Security Administration notified California that as of July 1, 1975 it would no longer reimburse the administrative costs incurred by counties in responding to SSA District Office inquiries unless the inquiry fell within one of seven specified categories. This arbitrary restriction has created an ongoing dispute between this Department and the Social Security Administration. Since we are unable to agree on this item of dispute, we are requesting that you designate an official to make a determination of this issue and inform us of your decision pursuant to Article IV-D of the current SSI/SSP contract between California and the Secretary of Health, Education, and Welfare.
>
> It is the Department's position that SSA is bound by the SSI/SSP contract to provide funding for any work the county welfare department does at SSA District Office request.

That particular issue was later resolved by SSA in the state's favor; but in September 1976, the state appealed several other administrative cost issues. That request for a determination was not even acknowledged by SSA until March 29, 1977.

In addition to disputes about specific items for reimbursement, delays in reimbursement also generated state concern. In March 1976, California protested that for fiscal year 1976 claims were being dealt with "only on a total claim basis after the entire claim has been monitored and approved." In a letter to SSA Commissioner Cardwell the state suggested a procedure for separating out the agree-upon reimbursable items from those under dispute. The letter concluded:

> Failure in the effort above will leave us no other course but to consider litigation against the Social Security Administration for more timely and reasonable payment of state and county expenditures for administration of the SSI/SSP Program in behalf of the Federal Government.

6. Adequate Treatment of Applicants and Recipients

The difficulties experienced by SSA during SSI's start-up produced not only payments to ineligibles and excessive payments, but also enormous delays in making eligibility determinations and issuing payments. There were as well significant underpayments. These were not matters which bore directly on Federal liability under the agreements, thus feeding through the

settlement and disputes process. They did, however, affect the states, not simply as they might feel injury vicariously through their needy citizens but in a direct fiscal sense. Many states were obliged to respond to the needs created by SSA's administrative deficiencies with state and locally funded assistance payments. By late 1974 the Interim Assistance legislation[130] (42 U.S.C. § 1383 (g) (Supp. V 1975) provided the states partial though not complete protection.

The Model Agreements assured (as the stature and regulations did not) that SSA's administration of state benefits included a commitment to:

> Provide individuals reasonable notice and opportunity for a hearing with respect to any adverse decisions as to the rights of such individuals to receive such supplementary payments or mandatory minimum supplements.

The agreements did not, however, establish a clear route for resolution of any state claims that the Federal agency was failing to furnish recipients with timely and accurate payments or otherwise meet their needs as required by the agreement. Was SSA, for example, required to furnish bilingual administration in areas with large non-English speaking populations? Such issues had no certain way of getting formal attention under the agreement. In cases of asserted state noncompliance, the agreement terms expressly granted the Federal agency a right to terminate. And under the original agreement, though not subsequent versions, Federal termination for noncompliance could be appealed under the disputes procedure. States, however, were not expressly granted a comparable right, so not even that generally unappealing mechanism was available to them in such cases.

Part 5. The Legal Setting Into Which The SSI Agreements Fit— Procedural Standards and Opportunities for Judicial Review

Any detailed appraisal of the procedures employed by the Social Security Administration in establishing the terms for Federal administration agreements with the states and in resolving disputes subsequently arising must begin with a general understanding of the legal setting into which these agreements fit. Since the Social Security Act provisions themselves furnish so little guidance on these matters (*see* Part 2-A), that setting is defined almost totally by other Federal statutes and court decisions interpreting them. Any legal standards pertinent to SSA's procedures and opportunity for judicial review of its actions must derive from sources outside the Social Security Act.

This part, therefore explores the applicability to the SSI Federal-state

130. 42 U.S.C. § 1383 (g) (Supp. V 1975).

agreements of such statutes as the Federal Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.;* the Wunderlich Act, 41 U.S.C. §§ 321-22 and others concerning Federal government contracts; and finally those setting the jurisdiction of the Federal courts. Because of the novelty of the agreements and the total lack, at this early point, of judicial opinion on these issues, the treatment is necessarily speculative.

A. Agreement Formation

1. The Federal Administrative Procedure Act

When the Social Security Administration issued Model Agreements in 1973 and issued revised Model Agreements in 1974 and 1976, it was engaged in "rule making"—a form of agency decision-making both defined and regulated by the Federal Administrative Procedure Act (APA). The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule."[131] "Rule" is, in turn, defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."[132] Surely, a document setting forth the basic terms and conditions on which SSA will execute an agreement, authorized by statute, with states desiring Federal administration of state benefits falls within the scope of that definition.

Various procedural requirements for Federal agency "rule making" are laid down by the APA. The most detailed requirements appear in section 4:

> (b) General notice of proposed rule making shall be published in the Federal Register . . . . The notice shall include—
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> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose.[133]

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131. 5 U.S.C. § 551(5) (1976).
132. 5 U.S.C. § 551(4) (1976).
133. 5 U.S.C. § 553 (1976).

Section 3 requires publication in the Federal Register of all "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."[134]

While SSA did attempt to issue SSI regulations which complied with these requirements during 1973, including some dealing with the Federal-state administration agreements, most of the critical terms of the agreements were not covered by such regulations.[135] And the Model Agreements of 1973, 1974, and 1976 were issued without compliance with the full procedural demands of APA sections 3 and 4. Justification for the more informal process used by SSA must derive from one or more of the exceptions also contained in those sections.

a. Rule Making "Relating to . . . Public . . . Contracts"

Section 4 totally excepts from the APA's procedural requirements for agency rule making: "a matter relating to agency management or personnel, or to public property, loans, grants, benefits, or contracts."[136] That exception covers HEW's regulations setting requirements for state welfare programs supported by Federal grants-in-aid, on the one hand.[137] It also applies to the promulgation of regulations and standard contract clauses for government procurement.[138] It would appear to apply to the SSI Federal-state agreements.

Recommendation No. 16 of the Administrative Conference of the U.S.

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134. 5 U.S.C. § 552(a)(1)(D) (1976).

135. *See* Part 3-A(5) *supra.*

136. 5 U.S.C. § 553(a)(2) (1976).

137. Rodriguez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd mem.* 403 U.S. 901 (1971).

138. "This permits, in theory and in practice, ex parte development of contract clauses . . . . There is thus no opportunity for any public comment or objection prior to the time clauses are implemented or selection standards adopted, except in the unusual case that the agency chooses to establish such procedures itself." Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process,* 1974 *Wis. L. Rev.* 301, 315.

Current agency practices were described by the Commission on Government Procurement as follows:

> Some agencies never solicit comment from industry [those most directly affected]; some do so occasionally; others, like DOD [Defense] and to a lesser extent GSA, do so fairly regularly, but even they solicit comment from selected industry, professional, and institutional associations, and do not publish proposed regulations in the *Federal Register* for the benefit of individual contractors and the public. Agencies sometimes make exceptions in cases seriously affecting contractors, frequently solicit comment too late to be fully effective, and provide little or no rationale for proposed or adopted changes or for rejecting industry recommendations.

1 *Report of the Commission on Government Procurement* 39 (1972) [hereinafter cited as *Procurement Commission Report*].

(No. 69-8 under the present numbering system) urged removal of that portion of the section (a)(2) exemption covering "public property, loans, grants, benefits, or contracts."[139] It reasoned that cases where exemption was truly warranted could be dealt with through section 4 (b)(B) which permits agencies to omit the notice and comment procedure of sec. 4 (a) in cases where they: "for good cause [find] (and [incorporate] the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." To date, Congress has failed to pass any of the numerous bills which have been submitted to implement that recommendation.[140] The chances of complete Congressional acceptance were reduced in 1972 when the Commission on Government Procurement failed to endorse the Administrative Conference recommendation, at least as to "procurement contracts," because of fears about "unduly burdening the procurement process with APA-type rule making procedures" and "the potential [for delay of] procurement actions by litigation over whether an agency complied with rulemaking requirements."[141] The Commission did, however, recommend the establishment of "criteria and procedures for an effective method of soliciting the viewpoints of interested parties in the development of procurement regulations,"[142] recognizing the vital importance of "giving contractors and other interested parties an opportunity to comment on proposed procurement regulations during their development."[143] (In speaking of procurement regulations both the Administrative Conference and Commission on Government Procurement were, of course, addressing not only agency rules that prescribe the procedures for entering procurement contracts but also those promulgating standard clauses for use in them.)

The 1969 Administrative Conference Recommendation did not place total reliance on legislative reform, but concluded by calling for voluntary agency compliance with APA rulemaking procedures in the area of "public property, loans, grants, benefits, or contracts."[144] Several agencies, though none of the major procuring agencies (Defense, NASA, GSA, or AEC), adopted policies implementing that recommendation.[145] Significantly HEW was one of the agencies to do so. In January 1971, the Department's Assistant Secretary for Administration issued the following statement, subsequently published in the *Federal Register:*

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139. 1 *Recommendations and Reports of the Administrative Conference of the United States* 29 (1970).

140. *See, e.g.* S. 1421, 93d Cong., 1st Sess. (1972), and H.R. 6223, 93d Cong., 1st Sess. (1973).

141. 1 *Procurement Commission Report* 39.

142. *Id.* at 38 (Recommendation 11).

143. *Id.* at 39.

144. 1 *Recommendations and Reports of the Administrative Conference of the United States* 30 (1970).

145. 1 *Procurement Commission Report* 39.

> Effective immediately, all agencies and offices of the Department which issue rules and regulations relating to public property, loans, grants, benefits, or contracts are directed to utilize the public participation procedures of the APA, 5 U.S.C. 553. Although the APA permits exceptions from these procedures when an agency for good cause finds that such procedures would be impracticable, unnecessary or contrary to the public interest, such exceptions should be used sparingly, as for example in emergencies and in instances where public participation would be useless or wasteful because proposed amendments to regulations cover minor technical matters.[146]

A similar policy statement was issued by the Department of Agriculture, also in 1971.[147] Because of those statements both agencies (HEW and Agriculture) have since been held to the APA rulemaking requirements by courts in otherwise exempt areas (grants and benefits).[148] As agency policies, not required by statute, they can, of course, be rescinded or modified; but so long as they stand unqualified, the section 4(2) exemption does not exist for HEW or the Department of Agriculture programs and agencies. Consequently, that exemption cannot furnish justification for SSA's failure to follow APA rulemaking procedures in promulgating the terms of the agreement (the "Model Agreements") on which it would undertake administration of state supplementary payments.

b. "Good Cause"

Very likely under the time pressures which existed in 1973 (made worse by the mandatory supplement legislation) "good cause" existed for waiving full Section 4 procedures. (Although the terms of that section would have required stating that "good cause" was the ground for noncompliance.)[149] But later revision of the model or standard terms in 1974 and 1976 cannot lay claim to such a justification. Furthermore, the "good cause" exception (as distinguished from that which applies—in the absence of agency waiver —to "public property, loans, grants, benefits, or contracts") applies only to the notice and comment provisions of section 4.[150]

c. Interpretative Rules

"Interpretative rules" also need not be issued in accordance with section 4 "notice and comment." The "Model Agreement" forms developed

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146. 36 Fed. Reg. 2532 (1971).

147. 36 Fed. Reg. 13,804 (1971). *See* Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975).

148. Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); NWRO v. Mathews, 533 F.2d 637 (D.C. Cir. 1976).

149. 5 U.S.C. § 553(b)(B) (1976).

150. There is, however, a separate provision for "good cause" waiver of the requirement that a substantive rule be published 30 days prior to its effective date. 5 U.S.C. § 553(d)(3) (1976).

in 1973, 1974, 1976 were probably thought to fall under that head—internal instructions on negotiating position for Social Security Administration personnel dealing with particular states. The difficulty with that view is that agency personnel in fact had little or no discretion to modify the terms. The "Model Agreements" were ultimately presented, with the exception of minor detail, on a "take it or leave it" basis to individual states; and once executed they had the "force and effect of law."

The principal characteristic of an interpretative rule is that it has no such binding effect on legal rights as they may be adjudicated in court. Interpretative rules express the agency's own view on a legal question, to which a court may defer, but do not represent an effort at statutorily authorized law making.[151] Because the Model Agreements had the effect of law (once executed) they were more than mere agency interpretation of statutory language. Furthermore, even interpretative rules with substantial impact have been required by some courts to meet section 4-like procedural requirements.[152]

d. Adequate Notice Without Publication

APA section 3(a)(1) directs publication in the *Federal Register* of rules —not covered by the "notice and comment" promulgation procedure. Thus, both the Armed Services Procurement Regulations and the Federal Procurement Regulations, including in both cases standard contract clauses (optional and mandatory), are published in the *Federal Register* even though not issued by the Department of Defense and GSA in compliance with section 4 procedures.

An agency can dispense with notice of a proposed regulation in the *Federal Register* if all "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."[153] If states are viewed as the only "persons" subject to the agreement terms, such alternative notice, coupled with an opportunity for comment, was functionally present in 1973, 1974, 1976. However, after notice of proposed rules with the opportunity for comment demanded by Section 4(b), whether actual or published, the agency must consider "the relevant matters presented" and "incorporate in the rules adopted a concise general statement of their basis and purpose."[154]

2. Government Contract Statutes

Numerous statutes and regulations establish procedures for contracting

151. *See K. Davis, Administrative Law of the Seventies* § 5.03 (1976).
152. *Id.* § 6.01-8 (1976).
153. 5 U.S.C. § 553(b) (1976).
154. 5 U.S.C. § 553(c) (1976).

by federal agencies, prescribe standard contract clauses, and govern resolution of claims arising out of "government contracts."[155] (Most of the statutes are collected in title 41 of the *United States Code,* "Public Contracts," while the regulations appear in title 41 of the *Code of Federal Regulations.*) An essential question for those shaping the model agreement terms in 1973 was the applicability of those diverse legal requirements to this novel form of agreement.

For example, 41 U.S.C. § 22 provides:

> In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of Congress shall be admitted to any share of such contract or agreement, or to any benefit to arise thereupon . . . .

41 C.F.R. § 1.805-3 requires the inclusion of a clause entitled "Utilization of Concerns in Labor Surplus Area" in "all contracts in amounts which may exceed $100,000 except [certain categories not pertinent here]."

The initial version of the model agreement for Federal administration included a set of general provisions as "Appendix B." Those provisions were 10 clauses required by statute or regulation to be included in certain government contracts. Ultimately, they were dropped from the agreement.

The principal statute regulating government contracting and furnishing the authority for the Federal Procurement Regulations is the Federal Property and Administrative Services Act of 1949, as amended.[156] The relevant sections quite clearly apply only to the "procurement of supplies and services" by the federal government or "purchases and contracts for supplies or services," rather than all contracts entered into by the Federal government.[157] Accordingly they have no application to contracts in which the Federal government furnishes a service and cash is paid by a state government. The language of most other statutes and regulations dealing with "government contracts" shows the same intended scope—purchase of goods or services, purchase or lease of land—contracts which exercise the "spending power" implicit in Article 8 of the U.S. Constitution to acquire something. But not all are clearly so limited.[158] None of the doubtful ones, however, relate directly to the agreement formation process. The only issue they raise is whether the agreements should include certain terms or conditions which on

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155. *See generally* 4 *Procurement Commission Report* 167–228.

156. 41 U.S.C. § § 251–60 (1970).

157. *See, e.g.,* 41 U.S.C. § 252(a) (1970) ("Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this chapter and implementing regulations . . . . "); 41 C.F.R. § 1-1.208 (1977) ("Contract" means establishment of a binding legal relation basically obligating the seller to furnish personal property or nonpersonal services . . . and the buyer to pay therefore.)

158. *See* 41 U.S.C. § 22 (1970), quoted in the text.

the one hand seem likely to cause little inconvenience to the parties, but on the other have no apparent relevance to agreements of this unusual sort.[159]

The only exception is a statute which affects the agreement formation process indirectly. The "Wunderlich Act," one of the few statutes which seemingly apply to Federal government contracts generally not just procurement contracts, while not specifying any particular contract language nonetheless constrains contract provisions dealing with potential disputes and liability claims. It states:

> § 321. No provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is [fraudulent] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> § 322. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.[160]

Nothing in the language, evident purpose, or legislative history of those two sections compels the view that they are limited in effect to procurement contracts. Court decisions have, indeed, read them as reaching other types of government contracts.[161] Consistent with a broader interpretation of their scope, the "disputes" language of the Model Agreements purports to give only limited finality to the Federal agency determinations it authorizes. The earliest version of that language tracked the Wunderlich Act provisions closely. Later versions, though less detailed in their agreement with the Act, still explicitly acknowledged limited finality in the event of judicial review.

3. *Judicial Review*

A state desiring to challenge a Model Agreement term on grounds that it violated the statute or regulation, or indeed had been promulgated in

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159. The GSA, Standard Form 114C (March 1974 ed.), which is used in contracts for the sale of government property (a non-procurement contract) contains three "statutory" clauses presumably on the ground that they are not limited to procurement—the "Covenant Against Contingent Fees" (41 U.S.C. § 254(a) (1970)), and the standard "Officials Not to Benefit" (41 U.S.C. § 22(1970)) and "Assignments of Contracts" (41 U.S.C. § 15 (1970)) clauses. Their inclusion in the SSI agreements would represent simply so much excess baggage.

160. 41 U.S.C. § § 321, 322 (1970).

161. *See* M. Berger Co. v. U.S., 199 F. Supp. 22 (W.D. Pa. 1961) (contract to purchase surplus property from Federal government).

violation of the APA rule making requirements would turn to 5 U.S.C. §§ 702-06 (1976) (formerly section 10 of the APA). Those sections establish a right to judicial review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[162] A recent amendment, recommended by the Administrative Conference eliminates sovereign immunity as a possible bar in such actions "seeking relief other than money damages."[163]

The statutory requirement that the action, to be reviewable, must be a "final agency action" and not a "preliminary, procedural, or intermediate agency action"[164] might create some difficulty. Yet at the point, prior to execution, that SSA has released a set of Model Agreements no longer subject to state bargaining, it would appear that a "final agency action" has occurred. The matter is "ripe" for review at that point, applying the two-part standard laid down by the Supreme Court in *Abbott Laboratories v. Gardner.*[165] Both the "fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration"[166] force a conclusion that judicial consideration of a legal challenge to Model Agreement terms is appropriate prior to execution (rather than later).

The 1976 removal of the "amount in controversy" limit on Federal District Court jurisdiction under 28 U.S.C. § 1331 for actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity" (again at the recommendation of the Administrative Conference) assures jurisdiction.[167] Any state claim of the sort discussed here would be one arising "under the Constitution, laws or treaties of the United States."[168]

The "standing" barrier, which used to halt all potential contractors seeking judicial review of the procedures or terms being employed by a Federal agency in a procurement contract setting, poses little threat under these very different circumstances.[169] While both the private firm seeking a defense contract and a state contemplating a Federal administration agreement are would-be parties to a contract with the Federal government,

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162. 5 U.S.C. § 702 (1976).
163. *Id.*
164. 5 U.S.C. § 704 (1976).
165. 387 U.S. 136 (1967).
166. *Id.* at 149.
167. *See* Publ. L. No. 94-574, § 2, 90 Stat. 2721 (1976).
168. 28 U.S.C.A. § 1331(a) (Supp. 1978).
169. Wrote the Supreme Court in Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940):

> Like private individuals and business, the government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal and to fix the terms and conditions upon which it will make the purchase. . . .
>
> Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law."

similarity ceases beyond the most superficial level. The purposes of the respective statutory schemes are totally different. Far more clearly than a private firm challenging a procurement regulation or award, a state faced with an objectionable Model Agreement term is both "injured in fact" and "arguably within the zone of interest protected or regulated" by the challenged rule or action—the standing test laid down by the Supreme Court in 1970.[170] Indeed, some recent decisions have found that test met in suits by private firms over procurement policies.[171]

B. Post-Agreement Disputes

1. Wunderlich Act and Interpretation of the Disputes Clause

The pertinent Social Security Act provisions are totally silent on the possibility of and therefore treatment of disputes between states and the Federal agency concerning each other's compliance with the terms of an executed agreement.[172] Consequently, the APA requirements for Federal agency adjudications do not apply. They are limited to situations of "adjudication required by statute to be determined on the record after opportunity for an agency hearing."[173]

The only basis for an agency hearing is furnished by the terms of the Model Agreements themselves. The "disputes" paragraph, discussed in Parts 3 and 4, establishes a series of determinations and redeterminations by officials of the Federal agency on certain questions which the parties cannot mutually resolve. Evolution of the paragraph through successive revisions has produced some change but the basic contours have remained undisturbed.[174]

Such clauses have a long history in government contracts.[175] They are currently standard in both Federal procurement contracts[176] and contracts for the sale of surplus government property.[177]

It is firmly established that the statutory authority to contract (or presumably to enter into an agreement) carries with it the authority to create

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170. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152–53 (1970). *See also* Barlow v. Collins, 397 U.S. 159 (1970).

171. *See, e.g.,* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). *See generally* Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process,* 1974 *Wisc. L. Rev.* 301, 330–32, 339–40.

172. *See* p. 79 *supra.*

173. 5 U.S.C. § 554 (1976).

174. *See* pp. 132–135 *supra.*

175. *See H. Petrowitz, Operation and Effectiveness of Government Boards of Contract Appeals, S.Doc. No.99,* 89th Cong. 2d Sess. (1966).

176. *See* 41 C.F.R. § 1-7.102-12 (1977).

177. *See* GSA, Standard Form 114C, § 19 (1974 ed.).

such an administrative procedure by contract.[178] With very limited exceptions, Federal courts have applied such clauses as written—leaving the parties to whatever procedural protections "their" clause affords and granting any resulting administrative determination the degree of finality specified in the contract. In United States v. Moorman, 338 U.S. 457 (1950), the Supreme Court held that if a "disputes" clause specified complete finality that applied to administrative determinations on questions of law as well as issues of fact. In United States v. Wunderlich, 342 U.S. 98 (1952), it held that only proof of fraud in connection with the agency decision would warrant a court upsetting a factual determination under a clause in which the parties "agreed" to the finality of the administrative hearing process.

Congress responded to those decisions with the Wunderlich Act, quoted on p. 5.8 *supra,* which limits the ability of contract or agreement provisions to establish the finality of administrative determinations—on questions of law and fact. It is the only Federal statute bearing directly on the administrative process established by the terms of SSA's Model Agreements. And its effect is limited to the judicial treatment of any resulting determinations. The extent of the hearing rights, the degree of independence of the decider, time limits on the various stages of the administrative process—all these are set solely by the terms of the agreement. Furthermore, the existence of such an "agreed upon" procedure means that a failure to employ it, a failure to submit an initial request for determination or to press an appeal all the way to the top, precludes judicial recognition of the claim. Courts require "exhaustion" of the procedures established by such contractual terms.[179] Moreover, judicial review of agency decisions on matters covered by such clauses is review on the record established before the agency, not "de novo."[180]

The substantial effect which such clauses have on the rights of a contracting party to judicial consideration of a claim has put a great deal of stress on questions of "disputes" clause scope. Matters outside the scope of such a clause need not be submitted to the relevant agency for administrative resolution before being taken to Federal court nor need a court heed any agency decision on them.

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178. In 1875 the Supreme Court held that since Congress had authorized the executive branch to make contracts "it would be of serious detriment to the public service if [that] . . . power . . . did not extend to providing for all possible contingencies by modification or suspension of the contracts, and settlement with the contractors." United States v. Corliss Steam-Engine Co., 91 U.S. 321, 323 (1875). *See also* Kilberg v. United States, 97 U.S. 398 (1878).

179. *See* Speidel, *Exhaustion of Administrative Remedies in Government Contracts,* 38 N.Y. L. Rev. 621 (1963).

180. *See* United States v. Carlo Bianchi, 373 U.S. 709 (1963); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966).

Part 4 notes the uncertain application of the three versions of the Model Agreement disputes paragraph to the various controversies over agreement terms and compliance in which the parties (SSA and the states) have in fact been embroiled.[181] Despite the amendment of that paragraph in 1976 so that it now applies "if the Secretary and the State are unable to agree upon *any matter in dispute arising under this agreement,*" that uncertainty remains. The new language is close though not identical to standard procurement contract "disputes" clause language, which has been held limited to disputes over questions for which the contract through some other clause provides explicit remedy. Changes in specifications ordered by the government, late delivery essential government furnished property, and the like are covered by other clauses that specify adjustment of the contract price.[182] The existence of provisions authorizing contract price adjustment render those questions—matters "arising under the contract". By contrast a Government action or failure to act which constitutes an arguable instance of noncompliance (breach) for which no specific price adjustment is authorized does not, the cases hold, "arise under the contract".

In *United States v. Utah Construction & Mining Co.* the Supreme Court confronted an assertion by the Justice Department that those decisions were wrong and that the standard "disputes" clause used in procurement contracts should be construed as authorizing and compelling "administrative action in connection with all disputes arising between the parties in the course of completing the contract."[183] The clause in that case referred to "all disputes concerning questions of fact arising under this contract." The Supreme Court firmly rejected the government's position, relying on the "uniform, continuous, and long-standing judicial and administrative construction of the disputes clause"[184] as limited "to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief."[185] The Court did suggest, however, that expansion of the scope of the clause could be accomplished either by creating additional adjustment provisions for acts which would otherwise constitute breach or by modifying the language of the clause:

> Thus the settled construction of the disputes clause excluded breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than *de novo*. This is not to say that the Government does not have a powerful argument for construing the disputes clause to afford administrative relief for a wider

181. *See* pp. 138–158 *supra.*
182. *See, e.g.,* 41 C.F.R. § § 1-7.102-2, 1-7.303-7 (1977).
183. 384 U.S. 394, 404 (1966).
184. *Id.* at 405.
185. *Id.*

spectrum of disputes arising between the contracting parties. It can be argued, as the Government persuasively does, that the same considerations which initially led to providing an administrative remedy in those situations covered by such clauses as Articles 3, 4 and 9 of the contract [three adjustment clauses] also support the broader reading of the disputes clause permitting and requiring administrative fact finding with respect to all disputes arising between the contracting parties. But the coverage of the disputes clause is a matter susceptible of contractual determination . . . , subject to the limitations on finality imposed by the Wunderlich Act, and one would have expected modification of the disputes clause to encompass breach of contract disputes if the restrictive interpretation of Article 15 was thought unduly to hinder government contracting. In fact the contracting departments have not rejected the narrower judicial reading of the disputes clause nor attempted any wholesale revision of its language to cover all factual disputes. Instead they have acted to create alternative administrative remedies for some breach of contract claims and to disestablish others by fashioning additional specific adjustment provisions contemplating relief under the contract in specified situations not reached by such provisions as Articles 3,4 and 9.[186]

Today the standard procurement contract contains a great variety of adjustment provisions which, as interpreted, bring most, though not all issues of government non-compliance or breach "under the contract."[187] (Contractor breach or non-compliance is not so completely covered, although a "default" termination by the government can be challenged under the "disputes" clause and if it is determined "default did not exist," the standard terms provide for conversion of the termination into one "for the convenience of the government" which carries a more generous measure of compensation.)[188]

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186. *Id.* at 412–13. A 1972 Fifth Circuit decision involving an unambiguous "all disputes clause" held a contractor's claim for damages arising out of alleged government breach barred for failure to exhaust the "disputes" clause procedure even though the contract contained no relevant adjustment clause. Patton Wrecking & Demolition Co. v. TVA, 465 F.2d 1073 (5th Cir. 1972). The disputes clause in that case applied to:

> Any dispute arising out of or connected in any way with any obligation of the parties arising out of the performance or nonperformance of the contract whether arising before or after completion of performance, including disputes as to any alleged violation or breach thereof. . . .

187. *See* Saltman, *"Breach of Contract: The Comptroller General, the Boards, the Courts and the All-Disputes Clause,* 7 Pub. Contract L.J. 123 (1974); Lane, *Administrative Resolution of Government Breaches—The Case for An All-Breach Clause,* 28 Fed. B.J. 199 (1968); Witte, *Administrative Resolution of Government Breaches—A Solution Without a Problem,* 28 Fed. B.J. 234 (1968).

188. *See* 41 C.F.R. § § 1-8.707,1-8.701 (1977).

The SSA Model Agreements by contrast contain very few adjustment provisions. Adjustment is provided for in the case of excessive error by the Federal agency, but not in connection with numerous other ways in which the parties may fail to meet standards of performance set by the agreement.

2. Judicial Remedies

a. State Claims

The established avenue of judicial relief open to the private party to a government procurement contract lies with the Court of Claims under the Tucker Act.[189] Compensation provided for in the contract or damages awarded for its breach are available in such a suit. If the matter is covered by a "disputes" clause, the court's role is limited to review on the record. If the matter lies outside the scope of a disputes clause the case is heard *de novo*.

While the Federal agency might assert that the SSI agreements are not a "contract" for purposes of establishing Tucker Act jurisdiction and the associated waiver of sovereign immunity on contract claims,[190] the Court of Claims decisions suggest strongly that it would reject such an agrument. A wide range of government agreements have been held "contracts" creating Tucker Act jurisdiction. For example, the Court of Claims has found jurisdiction to hear the reimbursement claims of Medicare providers under their agreements with HEW. The statute characterizes the arrangements as "agreements".[191] the Court of Claims considers them contracts within the meaning of the Tucker Act.[192]

A Disaster Assistance Agreement between a state and the Federal Office of Emergency Planning has also been held a Tucker Act "contract". In Texas v. United States, 537 F.2d 466 (Ct. Cl.1976) the Court of Claims rejected the state's claim that the federal government had not paid the amount due under such an agreement, but said:

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189. 4 *Procurement Commission Report* 2-3.
The Tucker Act provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

28 U.S.C. § 1491 (1970). (Federal district courts are granted concurrent jurisdiction over such claims but only when the amount does not exceed $10,000. 28 U.S.C. § 1346(a)(2) (1970)).

190. The 1976 Model Agreements' "disputes" paragraph states:

> Nothing in this agreement shall be construed as waiving the Secretary's right to assert lack of jurisdiction with respect to any suit brought under this agreement . . .

191. 42 U.S.C. § 1395cc (1970).

192. Overlook Nursing Home, Inc. v. United States, 556 F.2d 500 (Ct. Cl. 1977); Whitecliff, Inc. v. United States, 536 F.2d 347 (Ct. Cl. 1976).

At the outset both parties devoted considerable argument as to whether their Disaster Assistance Agreement is, as plaintiff contends, a contract, or as defendant asserts, not "a binding contract in the traditional sense." In our view defendant's valid execution of a document, which it prepared and titled "Federal-State Disaster Assistance Agreement," specifying that "Federal Assistance will be made available in accordance with [various specified laws, Executive Orders and regulations]" obligates defendant to provide such assistance as called for by the parties' Agreement. See State of Arizona v. United States, 204 Ct. Cl. 171, 494 F.2d 1285 (1974).

It also noted that:

The Comptroller General has ruled that executed Disaster Assistance Agreements impose enforceable obligations on both parties to the Agreement. Comp. Gen. Decision B-167790 (January 15, 1973). See also 42 Comp. Gen. 289 (1962).

In Pennsylvania v. United States, 207 Ct. Cl. 1029 (1975) a Federal-Aid Project Agreement covering construction of a filtration plant was held a contract on which the Federal government could be sued. The authorizing legislation in that case, the Federal-Aid Highway Act, does, however, explicitly state: "[The Secretary's] approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. § 106(a) (1970).

An agreement between a county flood control district and the Department of Agriculture under the Watershed Protection and Flood Protection Act, supplemented by an "attorneys' fees contract" was held to support jurisdiction in Contra Costra County Flood Control & Water Conservation Dist. v. United States, 512 F.2d 1094 (Ct. Cl. 1975).

A suit in Federal District Court seeking injunctive or declaratory relief, rather than damages, poses more serious difficulties. The jurisdictional basis of such a suit would be a Federal question jurisdiction under 28 U.S.C. § 1331. The judicial review section of the APA would appear to permit suit by the state as a party aggrieved by "final agency action;"[193] however, sovereign immunity or some similar defense might stand in the way.

In Minnesota v. Weinberger, 359 F. Supp. 789 (D. Minn. 1973) the court combined arguments of sovereign immunity and the existence of an adequate remedy before the Court of Claims to reject a state's suit seeking monetary relief against Federal officials on a contract theory. The decision rested in part on the APA section that provides: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review." (The court went on to

193. 5 U.S.C. § 702 (1976).

find a statutory basis for mandamus in that particular case.) A similar denial of relief occurred in International Engineering Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975), a suit to enjoin the government's release of trade secrets in violation of contract provision. The court, in the latter case, not only relied on the adequacy of the Court of Claims remedy but concluded that a "final agency action" was not involved.

On the other hand, decisions can be found awarding injunctive or declaratory relief on claims also congnizable as contract damage actions in the Court of Claims.[194]

Ironically, the 1976 amendment to 5 U.S.C. § 702 which removed "sovereign immunity" as a bar in most actions to review agency action adds force to the argument that in "contract" situations "sovereign immunity" still stands except in suits under the Tucker Act. Pub. L. 94-574, implementing a recommendation of Administrative Conference, added two sentences to § 702 reading:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The Unites States may be named as a defendant in any such action, and a judgement or decree may be entered against the United States. . . .[195]

Their purpose according to the House Judiciary Committee's report was to eliminate the "sovereign immunity defense" in some, though not all, actions under § 702:

> The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory judgement, mandatory relief, etc.). Thus, limitations on the recovery of money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes are unaffected.[196]

If the legislation had said no more, it would have supported rather than undercut suits by states seeking non-monetary relief against Federal agency

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194. *See, e.g.,* Mount Sinai Hosp., Inc. v. Weinberger, 517 F.2d 329 (5th Cir. 1975); Columbia Heights Nursing Home & Hosp. v. Weinberger, 380 F. Supp. 1066 (M.D.La. 1974). *See generally* Note, *The Interrelationship of the APA and the Tucker Act: The Government Contracts Example,* 64 Geo. L.J. 1083 (1976).

195. Pub. L. No. 94-574, 90 Stat. 2721 (1976) (amending 5 U.S.C. § 702).

196. *H.R. Rep. No. 1656,* 94th Cong., 2d Sess. 11, reprinted in [1976] *U.S. Code Cong. & Ad. News* 6121, 6131.

action claimed to violate the SSI agreements. But the amendments also added a proviso to § 702, which reads:

> Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.[197]

The House Committee's explanation used the Tucker Act to illustrate the intent of that language:

> . . . [The] proviso [is] concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.,* the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.[198]

b. Federal Claims

Assuming that the SSI Federal-state agreements establish enforceable contractual obligations, the Federal government can seek appropriate judicial relief in instances of state non-compliance—damages, injunction, or declaratory judgement. Suit would be in Federal district court under 28 U.S.C. § 1345 (1970) which provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.[199]

The lack of explicit statutory authority to sue to enforce the agreements should not stand in the government's way:

> The Supreme Court long ago made it clear that the executive does have authority to bring suit in some situations even though the Constitution says nothing explicitly concerning such power and even

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197. 5 U.S.C. § 702 (1976).

198. *H.R. Rep. No. 1656,* 94th Cong., 2d Sess. 12-13, reprinted in [1976] *U.S. Code Cong. & Ad. News* 6121, 6133.

199. There is also original though not exclusive jurisdiction in the Supreme Court. 28 U.S.C. § 1251(b) (1970).

though Congress has not expressly granted such power. The first of such situations recognized by the Court involved the proprietary and contractual interests of the federal government. Dugan v. United States, 16 U.S. (3 Wheat.) 172, 4 L.Ed. 362 (1818) (suit on a bill of exchange); United States v. Tingey, 30 U.S. (5 Pet.) 115, 8 L.Ed. 66 (1831) (suit for breach of contract); Cotton v. United States, 52 U.S. (11 How.) 229, 13 L.Ed. 675 (1850) (suit for trespass). Broadly speaking, the Supreme Court concluded that the power to bring suit was a logical and necessary adjunct to the executive's power to oversee the national government's proprietary and contractual interest. See also United States v. California, 332 U.S. 19, 27, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).[200]

On matters covered by the disputes paragraph the Federal government would be bound (under its present terms) to accept the finality of administrative decisions not appealed by the state.[201] On matters falling outside the paragraph, the government's action would in effect seek enforcement of a contract.

Far more likely than such an action, however, in cases of liability dispute would be an offset of amounts believed due from a state against payments the state is entitled to under some other program. Use of this standard technique puts the burden of suit back on the state.[202] It should not, however, avoid the effect of the "disputes" paragraph on questions of liability within its scope.

C. *Impact of the Federal Grant and Cooperative Agreement Act of 1977*

The Commission on Government Procurement, which reported to Congress in December 1972 after more than two years of studying ways "to promote the economy, efficiency, and effectiveness of Federal procurement," concerning itself—as a peripheral matter—with the confusion over the differences between those legal relationships and procedures associated with procurement and with grant-type assistance.[203] As it pursued the matter the Commission expanded its study of grants beyond the simple question of proper boundaries. Compared to the reasonable degree of central guidance and uniform terminology that characterized procurement, it found the area of "grant-type assistance" chaotic. The Commission's report attributed the "disarray" to three causes:

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200. United States v. Solomon, 419 F. Supp. 358, 363 (D. Md. 1976). *See generally* Note, *Nonstatutory Executive Authority to Bring Suit,* 85 *Harv. L. Rev.* 1566 (1972).

201. *See* S & E Contractors v. United States, 406 U.S. 1 (1972).

202. *See* Mt. Sinai Hospital v. Weinberger, 517 F.2d 329 (5th Cir.), *modified* 522 F.2d (5th Cir.), *cert. denied,* 425 US 935 (1976).

203. 3 *Procurement Commission Report* 153.

Confusion of grant-type assistance relationship and transactions with procurement relationships and transactions.

Failure to recognize that there is more than one kind of grant-type relationship or transaction.

Lack of Government-wide guidance for Federal grant-type relationships and transactions.

The Commission recommended legislation to deal with these problems and after several abortive attempts Congress complied with the Federal Grant and Cooperative Agreement Act of 1977.[204] The Act does several things. First, it establishes uniform terminology—reserving the word "contract" for "procurement contracts" and establishing the labels "grant agreements" and "cooperative agreement" to denote the relationships under the two categories of grant-type assistance distinguished by the Commission. (The Commission on Government Procurement had discovered that some grants were reflected in "grant-contracts.")[205] Next, it explicitly requires use of a "procurement contract" (necessitating compliance with all pertinent procurement statutes and regulations) rather than a grant instrument "whenever the principal purpose [of the agency] is the aquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government."[206] (It *allows* use of a procurement contract rather than a grant instrument in other cases where the agency "determines [it] appropriate.")[207] The new law *authorizes* use of grant-type instruments in appropriate cases, filling in lacking statutory authority for some agencies.[208] (The Procurement Commission's report had noted that "each year, for its training programs, the Department of Labor writes some 7,000 cost-reimbursement [procurement] contracts with state and local governments because it does not have statutory authority to use grants.")[209]

The two types of grant instruments distinguished by the Act art: "grant agreement" and "cooperative agreement." Both share a common definition of the purpose of the relationship and are separated by whether or not "substantial involvement between the [Federal] agency . . . and the state or local government or other recipient during performance" is anticipated. If so, a type of "cooperative agreement" should be used. If not, a type of "grant agreement."[210]

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204. Pub. L. No. 95-224, 92 Stat. 3 (1978).

205. 3 *Procurement Commission Report* 156. The Commission's Report argued flatly: "The term 'contract' should be restricted to procurement relationships. The term should not be used to express assistance-type relationships regardless of the type of recipient being assisted." *Id.* at 164.

206. *Id.* § 4(1).

207. *Id.* § 4(2).

208. *Id.* § 7(2).

209. 3 *Procurement Commission Report* 159.

210. *Compare* Pub. L. No. 95-224, § 5(2), 92 Stat. 3 (1978) *with id.* § 6(2).

In either case "the principal purpose of the relationship [should be] the transfer of money, property, services, or anything of value to the state or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government."[211] (Excluded are agreements "under which only direct Federal cash assistance to individuals, a subsidy, a loan, a loan guarantee, or insurance is provided.")[212]

Finally, the legislation authorizes "the Director of the Office of Management and Budget . . . to issue supplementary interpretative guidelines to promote consistent and efficient use of contract, grants agreement, and cooperative agreements as defined in [the] Act,"[213] and also to "undertake a study to develop a better understanding of alternative means of implementing Federal assistance programs, and to determine the feasibility of developing a comprehensive system of guidelines for Federal assistance programs."[214]

Whether the Act touches at all on the SSI supplementation agreements is unclear. Indeed, the attempt to fit those agreements against the terms of the law furnishes another illustration of their novelty.

One point is certain; if there were any doubt, the Federal Grant and Cooperative Agreement Act of 1977 confirms the conclusion that procedures and forms prescribed for "procurement contracts" are inappropriate for this sort of relationship in which the "principal purpose" is not "acquisition . . . of property or services for the direct benefit or use of the Federal Government."[215] Less certain is whether the new label "cooperative agreement" and contemplated future guidelines governing such agreements apply. Both the Commission on Government Procurement and Congress had traditional grant programs in mind in recommending and enacting these provisions—that is, programs characterized by a flow of Federal money or the equivalent to a grantee who (with varying degrees of Federal

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211. *Id.* § § 5(1), 6(1).

212. *Id.* § 3(5).

213. *Id.* § 9.

214. *Id.* § 8. The Commission on Government Procurement identified the problem as follows:

> A variety of media is used to issue government-wide guidance to granting agencies. What guidance there is occurs in various GSA and OMB issuances, letters to agencies from the Office of Science and Technology (OST), Presidential memorandums to heads of agencies, and Executive orders. This guidance is not issued systematically through a medium similar to procurement regulations.
>
> Almost all agencies acknowledge the need for Government-wide guidance on grant-type activities, provided that the guidance is well conceived and administered.

3 *Procurement Commission Report* 159–60.

215. *See id.* § 4. *See also* note 219 *infra.*

supervision) carries on the subsidized activity. The Commission's Report, for example, at one point characterizes assistance as supporting "functions and objectives . . . carried out by state and local governments, educational institutions, other nonprofit organizations, and individuals *rather than by or under the direct control of the [Federal] Government.*" (Emphasis added.)[216]

State supplementation agreements, by contrast, involve not merely Federal "intervention" but Federal activity. However, from one vantage point it is possible to fit the agreements within the Act's formula as a "transfer of services . . . to accomplish a public purpose of support or stimulation" . . . with "substantial involvement . . . between the [Federal agency] and the State . . . government."[217]

In light of the legislative history of the Act and its purposes a sounder view is that this is not a relationship whose "principal purpose" is a transfer to the recipient but rather one whose "principal purpose" is a transfer to the Federal government—that it is, therefore, a type of relationship not dealt with by the Act. (The Act manifestly does not embrace all Federal-state contracts or agreements. There are, first of all, express exclusions—"subsidy, loan, a loan guarantee, or insurance."[218] In addition, certain other transactions, like the sale of surplus property, clearly fall outside its provisions.) To underscore the distinction, the SSI and future agreements of like kind might better be given a more complete label than the present "Agreement"—something like "Federal Administration Agreement," for example. (A central purpose of the Act is to reduce the use of similar terminology to describe dissimilar relationships.)

Not much is at stake so long as the question is simply one of labeling—i.e., should the agreements be called "cooperative agreements" or something else. However, future guidelines appropriate to "grants" may very well not be suitable for these quite different agreements.

While the Act substitutes the word "agreement" for "contract" in all situations of grant assistance, there is no suggestion in its specific provisions or legislative history that this was intended to affect the application of those statutory references to "contracts" which have been construed as reaching beyond the procurement setting.[219] The Commission on Government Procurement noted, for example, that some agencies' grant instruments contain standard clauses required of government "contracts" by statute.[220] One of the subjects it urged for study (the study of guidance authorized the Act)

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216. 3 *Procurement Commission Report* 161.

217. Pub. L. No. 95-224, § 6(1), 92 Stat. 3 (1978).

218. *Id.* § 3(5).

219. The intent is clear, however, that regulations and statutes applying to *procurement* contracts shall not govern activities properly handled through a "grant agreement" or a "cooperative agreement." *See S. Rep. No. 449,* 95th Cong., 1st Sess. 11 (1977).

220. 3 *Procurement Commission Report* 158–59.

was "the applicability of clauses now used in procurement to assistance transactions."[221] Thus, the scope of the "contract" references in the Wunderlich Act and the Tucker Act ought to remain undisturbed by the new act. Their applicability to grant agreements or the SSI supplementation agreements should not be affected.

PART 6. THE NEW COOPERATIVE FEDERALISM COMPARED TO THE OLD, EVALUATION AND RECOMMENDATIONS

A. The Grant-in-Aid Procedures Compared

While it oversimplifies the relationship, it is useful to view AFDC and the three grant-in-aid programs which preceded SSI (Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled) as state welfare programs partially funded by the Federal government. The initial establishment of a program, any significant expansion of its coverage along with administration and annual funding decisions all rest (or rested) initially on state agencies and legislatures. The states establish, set funding levels and amend their programs with the Federal agency's role being limited to determining whether the standards that control the availability of Federal financial contribution have been met. While the Federal agency has a weapon of great theoretical influence in its statutory authority to determine that a state plan does not meet Federal standards, the formal arrangements put important practical limits on its ability to use that weapon to secure the enactment of new states' policies or implementation of administrative measures it deems necessary. (This was particularly true during the many years before recipients succeeded in getting Federal courts to address some of these questions of state program compliance with Federal standards.)

Martha Derthick's important study of intergovernmental relations in public assistance notes, after recounting a failure of behind-the-scenes Federal influence which had sought passage of legislation in Massachusetts the Federal agency thought necessary for full compliance with the Social Security Act:

> [The] incident . . . illustrates the limits and ambiguity of the federal administrators' position when a conflict occurs. They must exercise influence without seeming to. If they seem to exercise it, they become vulnerable to congressional intervention and probably also to general criticism: A large body of opinion holds that the federal government should not meddle in state and local affairs, and federal administrators naturally do not want to get caught doing so.[222]

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221. *Id.*
222. *M. Derthick, The Influence of Federal Grants* 117–18 (1970).

Somewhat later she observes:

> Federal enforcement is a diplomatic process. It is as if the terms of a treaty, an agreement of mutual interest to the two governmental parties, were more or less continuously being negotiated. In these negotiations, numerous diplomatic forms and manners are observed, especially by the federal negotiators. Typically they are in the position of having made a demarche. Negotiations become active when a new federal condition is promulgated or an old one is reinterpreted, or when a federal administrative review has revealed a defect in the state's administration. Negotiations are carried on privately. The federal negotiators refrain from making statements in public, for they want to avoid the appearance of meddling in the internal affairs of the states. They refrain from making overt threats. They are patient. Negotiations over a single issue may go on steadily for several years and intermittently for decades. They are polite. In addressing state officials, they are usually elaborately courteous. They make small gestures of deference to the host government, as by offering to meet at times and at places of its choosing.
>
> The objective of the negotiating process is to obtain as much conformance as can be had without the actual withholding of funds.[223]

With a grant-in-aid welfare plan, two types of interaction between state policies and procedures and Federal standards pose the possibility of conflict, with an attendant need for negotiation. The first involves questions of "conformity" between the plan's eligibility rules, formal procedures, or consistent operation and Federal requirements. Such questions may arise either upon state initiative, as when a state submits a new program or—as has normally been the case from 1938 on—an amendment to an existing program, seeking Federal "plan" approval, or more likely, as Derthick suggests, on the initiative of the Federal agency if its review of state practices raises some question of compliance. The question of compliance often flows from some addition to or modification of the Federal statute or a new agency view of existing provisions.

The second point of interaction and potential controversy lies at the point the state and Federal governments are totalling up how much Federal money the state is entitled to under the statutory aid formula. This operation presupposes an approved plan, the issue is simply whether a particular item or class of items is covered by: (1) the state plan and (2) the Federal grant-in-aid formula. There may also be a question concerning the appropriate rate of reimbursement. This type of issue is commonly called one of Federal "disallowance," for it arises when the state seeks reimbursement of an amount that the Federal agency disallows.

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223. *Id.* at 209–210.

Prior to 1965 disputes between Federal and state agencies of both kinds were common. They were resolved exclusively by the process of negotiation described by Derthick, with possible recourse to Congress the principal avenue open to a state that believed it had been dealt with arbitrarily by the Federal agency. The Federal courts were not a promising forum in either kind of dispute. In 1954 Arizona sought review of an HEW determination that its plan did not meet Federal requirements; the suit was rejected for lack of jurisdiction.[224]

In 1965, Congress responded favorably to a recommendation from the Advisory Commission on Intergovernmental Relations[225] and enacted provisions reflecting a sensitivity to "state sovereignty" by granting states certain procedural protections in both conformity and disallowance disputes. States facing a possible cutoff of funds over a "conformity" question are, by that legislation, assured prior notice and a full administrative hearing by the Secretary of HEW, followed by judicial review in the U.S. Court of Appeals "for the circuit in which [the] state is located." [226] The statute deals less completely with disallowance or audit exceptions. No judicial review is mentioned in such cases and a less formal administrative determination is outlined.[227] This traces directly to the 1964 report of the Advisory Commission on Intergovernmental Relations which said the following about disallowance issues:

> Some state and local officials believe that some form of judicial reivew should encompass all aspects of the public assistance programs, including "matching" issues or audit exceptions. However, the much greater concern is for review of decisions regarding "plan conformity" issues. The Commission believes that to involve audit exceptions or issues other than those of plan conformity in the judicial review process would create many additional problems.[228]

Since 1965, three additional modes of formal interaction have developed in the grant-in-aid relationship. First, *King v. Smith,* decided by the Supreme Court in 1968,[229] introduced a new mechanism for raising some conformity questions (but only those having clear impact on recipients or applicants). This new mechanism, initiated by neither Federal or state agency, is a suit in Federal district court by recipients or applicants.

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224. Arizona v. Hobby, 221 F.2d 498 (D.C. Cir. 1954).

225. *Advisory Comm'n on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance* (1964).

226. 42 U.S.C. § 1316 (1970).

227. *Id.* ("[T]he State shall be entitled to and upon request shall receive a reconsideration of the disallowance.")

228. *Advisory Comm'n on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance* 95 (1964).

229. 392 U.S. 309 (1968).

Typically, the party sued is the state agency (technically the director). Ordinarily, the Federal agency is not a party in the suit, but HEW's regulations require states to notify it of such litigation and the agency often seeks to assert its views of Federal requirements as an *amicus curiae.*

The second development, which occurred in 1971, has already been discussed in Part 5. That year, HEW committed itself to issuing the regulations governing all its grant (and contract) programs in full compliance with the "notice and comment" rule making procedures of the Federal Administrative Procedure Act. [230] In the years since, this procedure has given states and other interested parties a formal opportunity to respond in advance to changes in HEW requirements. That opportunity for comment has been used effectively by the states and recipient groups. On several occasions, proposed standards have been modified to reflect their concerns. And—in a few cases—states have succeeded in challenging regulations eventually issued by HEW in court on procedural or substantive grounds—an opportunity materially assisted by the notice and comment procedure.[231]

Finally, during the early seventies, HEW began to show a strong interest in standards of administration that might be enforced by penalties less drastic (and therefore more credible) than total cutoff, but more compelling than an after-the-fact audit backed by disallowance. In some instances with the clear support of the statute, in others relying solely on regulation, the agency created variable fiscal penalties (reduced Federal reimbursement) to back a number of Federal norms. Assessment of state performance against such standards and the potential imposition of such penalties created another type of Federal-state dispute which the regulations characterized as a "disallowance" for purposes of determining state procedural rights.[232]

The increasingly stringent HEW review and larger disallowances of the seventies put strain on this system. States with large amounts at stake in disallowance disputes have sought to take the issues to Federal district court. However, as the decisions presently stand, a state confronted with a straight disallowance cannot count on having judicial review of its case.[233] The Federal government's litigating position appears to be that judicial review is not available—more specifically, that the section added to the statute in 1965 that grants judicial review of conformity determinations but only quite limited administrative review of disallowances must be read as expressing Congressional intent to keep the latter out of the courts. That position coupled

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230. 36 Fed. Reg. 2532 (1971).

231. *See* NWRO v. Mathews, 533 F.2d 637 (D.C. Cir. 1976); Maryland v. Mathews, 415 F. Supp. 1206 (D.D.C. 1976).

232. *See* 45 C.F.R. § 201.14 (1977).

233. *See* County of Alameda v. Weinberger, 520 F.2d 344 (9th Cir. 1975); United States v. Pennsylvania, 533 F.2d 107 (3d Cir. 1976); State Dep't of Public Welfare v. Califano, 556 F.2d 326 (5th Cir. 1977).

with larger disallowances have created pressure for improvement of the administrative appeal open to a state. Only last year (1978) HEW transferred "reconsideration" of disallowances to the department's Grant Appeals Board. The new procedure gives states a full hearing before the Board and an independent and final decision by that body,[234] thus going beyond the terms of the 1965 statute and the original procedures established under it.[235]

A comparison of these procedures for resolving intergovernmental differences which have evolved under the grant-in-aid programs with those used and available in connection with the SSI Federal-state agreements reveals some significant differences. At the agreement-formation stage (with a grant-in-aid welfare program the equivalent point is plan approval or subsequent review of a state plan's conformity with Federal requirements) HEW now utilizes "notice and comment" rule making to set the basic procedural and substantive terms of the grant-in-aid relationship, with judicial review available to challenge regulations that violate the statute or are invalid on some other ground. Questions about whether an individual state is entitled to enter or continue in the grant-in-aid relationship ("conformity" questions) are the subject of a statutorily prescribed hearing, followed by judicial review in the U.S. Court of Appeals. By contrast, the SSI administration agreements have had most of their important terms set without "notice and comment" rule making. Judicial review is probably available to a state challenging a controversial agreement term insisted on by the Federal agency, although the Social Security Act does not provide for it. No clear procedural path is open in the event a state considers that it has been improperly denied an agreement, although, here too, judicial review may be available.

Individual liability questions (or other matters of agreement interpretation) also present a contrast. With a grant-in-aid program all questions of financial liability that are not "conformity" issues are, by virtue of HEW's 1978 regulation, appealable to the department's Grant Appeals Board for a hearing and decision on the record. Subsequent judicial review is, however, still in doubt. Questions of the parties' respective obligations which are neither "conformity" questions nor raised in the firm of disallowance have no clear route to follow. Under the SSI agreements, on the other hand, some questions must go through a contractually established "dispute" procedure, culminating, under the most recent terms, with an appeal also heard by the HEW Grant Appeals Board. The terms of the agreements (1976 version) do not, however, establish the Board as the final and independent decider of such questions. Other questions arising under the agreements have no certain administrative forum. Liability questions, whether or not subject

234. 43 Fed. Reg. 9264 (1978).
235. 45 C.F.R. § 201.14 (1977).

to the "disputes" paragraph, seem fairly certain of a hearing in the Court of Claims under the Tucker Act, being "contractual" in nature. State questions which require non-monetary relief for their resolution may encounter difficulty in Federal district court.

While there are major structural differences between the new "cooperative federalism" and the old, the foregoing discrepancies in procedural protections seem more the result of accident than careful thought. They appear to be primarily unforeseen consequences of reversing the money flow and characterizing the new relationship as an "agreement."

B. Evaluation and Recommendations

1. Agreement-Formation Stage

The establishment of the American Public Welfare Association as a liaison with the states was an excellent and imaginative way to build the sort of cooperative relationship, absolutely essential to the conversion from grant-in-aid state administered welfare to Federal administration of both basic Federal benefits and most state supplements in the very limited time available during 1973. The creation of a "negotiating" relationship with a contract committee representing state welfare and legal officials was by the same token an excellent way to reach basic terms for the Federal administration agreements which would reflect and respond to state interests and problems as well as the Federal interest. The Social Security Administration not only use these related mechanisms effectively for securing state input, but responded sufficiently to the state views presented that on three separate occasions 1973, 1974, and 1976, the state committee finally recommended the resulting terms to all individual states—as acceptable and, at least, the best that could be obtained.

At the same time, SSA's failure to comply with full "notice and comment" procedures may have denied individual states a direct opportunity to express their views on proposed agreement terms to the Federal officials ultimately responsible for their promulgation. Even more significant is the resulting exclusion of interested parties other than states from the agreement formation process. Some of the agreement terms have significant potential impact on recipients or applicants. Group representing such individuals have made effective use of the "notice and comment" procedure in connection with the grant-in-aid programs, so the exclusion very likely has more than nominal effect.

> Recommendation 1: The process of negotiation and agreement between the Secretary of HEW on the one hand, and individual States desiring federal administration of SSI supplementary benefits on the other, is conducted in substantial part on the basis of the general terms and conditions established by HEW. These general terms and conditions (sometimes called "model agreements") are in turn related to

published regulations of HEW. Both the regulations and the general terms and conditions should be developed by a procedure that embraces both (a) discussions with a representative committee of State officials, of the type that led to agreement on successive versions of the general terms and conditions in 1973, 1974, and 1976, and (b) the notice and public comment procedures of 5 U.S.C. § 553. The notice of proposed rulemaking (or, in appropriate cases, an advance notice of proposed rulemaking) should precede the discussions with the committee of state representatives. This does not necessarily imply an added cycle of notice and public comment nor any diminution of HEW's flexibility in negotiation.

Since the current general terms and conditions have never been the subject of notice and public comment, and include several areas noted in Recommendations 2 and 3 below in which procedural improvements can be achieved, HEW should initiate a full review of them, utilizing the above procedures.

The recommendation is not that "notice and comment" replace the sort of "negotiation" that took place between a state contract committee and the Social Security Administration in 1973 and 1974 and 1976, but rather that it supplement such a process. Under recently established HEW procedures for issuing regulations, such methods of soliciting the views of directly interested parties are encouraged and in some cases required.[236] Since, in most instances, it should be possible to revise both the regulations governing the agreements and the model agreements simultaneously, the recommendation makes clear that it does not necessarily imply a double cycle of notice and public comment (first for the regulations, then for the model agreements).

2. Post-Agreement Disputes

The amount of post-agreement controversy is, in large part, a function of the adequacy of the other agreement terms. At least two problems with the original Model Agreements were responsible for disputes that, with benefit of hindsight, it appears might have been avoided. Both pertain to measurement of the final division of liability for supplementary payments between state and Federal government. First, having the Federal government's liability for errors rest on a case by case identification of errors by the states created a situation in which the data for liability determination was hard if not impossible to obtain. That resulted in massive delays and in most cases rich ground for disagreement. The determination of liability according to the findings of the Social Security Administration's Quality Assurance review, specified by the Agreements for periods beginning in

236. *See* 43 Fed. Reg. 23,119 (1978).

Assurance review, specified by the Agreements for periods beginning in 1975, had the advantage of substituting data that were routinely collected and promptly available to assist final settlement. The difficulty with that approach is that the states, in general, have lacked confidence in the measurement process. Moreover, states seem particularly to be upset by Federal policies or consistent practices which, to them, seem a violation of statute, regulation, or agreement. Yet under the current agreements such policies or practices are lumped together with all other "errors."

> Recommendation 2: Consideration should be given through such procedures [those outlined in Recommendation 1] to a new agreement provision for measuring the respective liabilities of the federal government and of the States. In formulating such new provision, specific consideration should be given to (a) inclusion of liability standards and measurement systems that are generally acceptable to the States, (b) explicit establishment of the right of a State to seek any adjustment of liability that its own data (derived through the generally accepted systems) may indicate, with recourse to the contractual disputes procedure in the event SSA declines adjustment on the basis of such State data, and (c) possible procedures for separate treatment of liability for errors resulting from consistent SSA practices or policies that violate statute, regulation or agreement, as distinct from liability for random errors in general.

Once disputes arise, some though seemingly not all, are dealt with by the Model Agreements' "disputes paragraph." Recent studies of similar clauses used in procurement contracts have urged that their scope be expanded to encompass all disputes concerning contract performance.[237] The argument has even greater force with these agreements because of the limited number of adjustment provisions they contain compared to the typical procurement contract.

One significant source of dispute less than adequately addressed by the present Model Agreement terms is Federal agency treatment of state failures to comply with the statute, regulation, or agreement. The only certain remedy is a termination of the agreement under certain circumstances, or suspension of payments, depending on the type of alleged non-compliance. The current "disputes" paragraph is not well shaped to deal with such issues of compliance raised by the Social Security Administration.

Once a matter has been considered by the Commissioner of Social Security or his designee, under the disputes article, the next and last step should

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237. The Commission on Government Procurement recommended:

> Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into the United States.

4 *Procurement Commission Report* 22 (1972).

be a full hearing before an independent, reasonably expert decisionmaking body. The current Model Agreements fail to assure that, yet they purport to bind the states (subject to Wunderlich Act limitations) to the final administrative determination. By virtue of the recent regulation creating jurisdiction over all redeterminations of grant-in-aid program disallowances in the HEW Grant Appeals Board there is reason to believe that it may grow into the sort of body described above—an administrative tribunal in which the states may have sufficient confidence to warrant "agreeing" to give its decisions finality.

Recommendation 3: On the assumption that the agreements will continue to contain a provision granting dispute resolution authority to an official or officials in HEW, the provision should be amended (a) to encompass, without doubt or ambiguity, all disputes between the parties concerning performance of their respective obligations arising out of the agreement—including federal claims of State non-compliance, (b) to assure prompt resolution of all disputes submitted pursuant to its terms, and (c) to provide that the last stage of the administrative dispute process is to be before the HEW Departmental Grant Appeals Board, which shall render an independent decision, based on a hearing and the record.

While there are some troubling uncertainties about the availability of judicial review at a few critical points of this new Federal-state arrangement, no recommendations for Social Act amendments to deal with the question seemed called for at this point. Tucker Act jurisdiction would appear to assure states of a judicial determination on questions that ultimately resolve to questions of liability. The uncertainty about the availability of nonmonetary relief in Federal district court is just that—an uncertainty. Such relief may well be available despite the "contractual" arrangement. With the recommended expansion of the disputes clause to cover all instances of Federal non-compliance and addition of a liability term which establishes Federal liability for policies or consistent practices which violate the agreement terms, the need for nonmonetary relief may in any event be substantially diminished if not, as a practical matter, removed.

[1976 Revision]

AGREEMENT NO. 3—FEDERALLY ADMINISTERED MANDATORY MINIMUM SUPPLEMENTS AND SUPPLEMENTARY PAYMENTS (OPTIONAL)

SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

(Agreement with the State Pursuant to Section 1616 of the Social Security Act and Section 212 of P.L. 93-66)

AGREEMENT BETWEEN

The Secretary of Health, Education, and Welfare

AND

The State of _____

The Secretary of Health, Education, and Welfare, hereinafter referred to as the Secretary and the (State Agency), hereinafter referred to as the State, pursuant to section 1616 of the Social Security Act (providing for Federal administration of optional State supplementary payments to individuals who are receiving or who would but for their income be eligible to receive Federal Supplemental Security Income Payments), and pursuant to section 212 of P.L. 93–66 hereby agree to the following:

ARTICLE I. DEFINITIONS

For purposes of this agreement—

A. The term "Secretary" means the Secretary of Health, Education, and Welfare or his delegate.

B. The term "State" means the (State Agency), including any local, county, or other jurisdiction thereof.

C. The term "Act" means the Social Security Act.

D. The term "supplementary payment" means the money payment determined to be payable by the Secretary on behalf of the State in accordance with section 1616 of the Social Security Act.

E. The term "mandatory minimum supplement" means the money payment required by the provisions of section 212 of P.L. 93–66 and P.L. 93–233.

F. The term "basic Federal payment" means the money payment required by section 1611 of the Act, section 211 of P.L. 93–66 and P.L. 93–233.

G. The terms "eligible individual," "eligible spouse," "aged individual," "blind individual," and "disabled individual" shall have the same meaning as they have when used in title XVI of the Act, P.L. 93–233, and in regulations promulgated thereunder by the Secretary.

H. The terms "essential person," "qualified individual," "December 1973 income," and "title XVI benefit plus other income" shall have the same meaning as they have when used in sections 211 and 212 of P.L. 93–66, P.L. 93–233, and in regulations promulgated thereunder by the Secretary.

I. The term "Supplemental Security Income Program" means the Federal program of Supplemental Security Income for the Aged, Blind, and Disabled established by P.L. 92–603, and amended and modified by P.L. 93–66 and P.L. 93–233.

J. The term "Unprotected Payment" has the same meaning as it has when used in subpart T of part 416 of chapter III of title 20 of the Code of Federal Regulations.

K. The term "regulations" means those regulations promulgated by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 551 et seq..

L. The term "fiscal year" means the year beginning October 1 and ending September 30 the following calendar year. The first such fiscal year begins on October 1, 1976.

ARTICLE II. FUNCTIONS TO BE PERFORMED BY THE SECRETARY

The Secretary shall:

A. On behalf of the State, make determinations of eligibility for supplementary payments with respect to individuals residing in the State who are or will be receiving (or would but for their income be eligible to receive) basic Federal payments, and make determinations of eligibility for mandatory minimum supplements pursuant to the terms of this agreement with respect to any individual certified by the State to the Secretary pursuant to Article III.

B. On behalf of the State, make such supplementary payments or mandatory minimum supplements (whichever are higher) to individuals determined to be eligible to receive such payments in such amounts and at such times as prescribed by the terms of this agreement.

C. On behalf of the State, establish the amount of such supplementary payments or mandatory minimum supplements in accordance with the terms of this agreement.

D. Maintain records of individuals eligible for and receiving State supplementary payments or mandatory minimum supplements.

E. Provide individuals reasonable notice and opportunity for a hearing with respect to any adverse decisions as to the rights of such individuals to receive such supplementary payments, or mandatory minimum supplements, or both.

F. Subject to verification by the Secretary and any required opportunity for hearing before suspension, reduction or termination of benefits, take action as promptly as feasible to determine and pay the correct amount of supplementary payments or mandatory minimum supplements following receipt of notice from the recipient, the State, or any political subdivision thereof concerning a change in living arrangements, income, or other factors which may affect a recipient's amount of such payments or supplements.

G. Receive, disburse, and account to the State for State funds in making such supplementary payments and mandatory minimum supplements and furnish the State monthly Financial Accountability Statements. Upon the State's request, the Secretary shall, no later than January 1, 1977, provide monthly case-by-case accounting data with respect to the automated disbursements, including such monthly accountability statements (SSA-8700) received by the State for periods beginning on or after October I, 1976. It is the intention of both parties that as soon as feasible all aggregate items appearing on the Financial Accountability Statements subsequent to the time that it is feasible shall be accompanied by or reconcilable to supporting data which shall include automated and manual disbursements, collections by withholding, by cash refunds, by returned checks or any other means, and any other element used in computing total expenditures, such as postentitlement adjustments and miscellaneous expenditures.

H. Conduct studies and evaluations of the supplementary payment program and mandatory minimum supplement program which the Secretary determines to be necessary to ensure effective and efficient administration of the supplemental security income program, at the Secretary's expense, and provide full and prompt reports thereon to the State. The Secretary shall also conduct such studies or evaluations as the State reasonably requests which he determines to be feasible. If the Secretary performs such studies, the State shall bear the costs thereof, unless the Secretary finds that such studies or evaluations are in the interest of effective and efficient administration of the supplemental security income program. It is agreed that this provision is to be excluded from the disputes procedures specified in Article VI, Paragraph D.

I. Establish procedures to detect and investigate potential fraud or program abuse cases and make prompt reports to the State on such cases. This provision shall be understood not to preclude the Secretary from taking appropriate action where the fraud or abuse may constitute an offense committed against the United States.

J. Establish effective procedures to ascertain the incidence of payments to ineligibles and erroneous payments to eligible recipients and make prompt reports to the State on such payments.

K. Impose, as promptly as is feasible, deductions against supplementary payments or mandatory minimum supplements, if any are validly prescribed by the State on eligible individuals or eligible spouses for failure to comply with the reporting requirements established by the Secretary.

L. Perform such other functions as may be required by regulations or by the Secretary and the State through a written modification of this agreement which may be necessary to carry out the provisions of this agreement.

M. If the State so requests, clearly indicate either by a separate notice accompanying each Federal check issued in making a supplementary or mandatory minimum supplement or on the face of each such check the fact that State funds are a part of the payment or the amount of the check representing State funds; the choice of alternatives under this section M being with the Secretary.

ARTICLE III. FUNCTIONS TO BE PERFORMED BY THE STATE

The State:

A. Shall provide to the Secretary the name and mailing address of each individual residing in the State who is an aged, blind, or disabled individual and for the month of December 1973 was eligible to receive and did receive for such month aid or assistance, in the form of money payment, pursuant to a State plan in effect for the month of June 1973, and approved under title I, X, XIV, or XVI of the Act, including any individual who makes application prior to January 1, 1974, and is subsequently found to be eligible for a money payment with respect to all or any portion of the month of December 1973 under such approved State plan. The State will process and make a determination of eligibility on all such cases.

B. Shall provide to the Secretary the amount of the December 1973 income of each individual described in paragraph A above. Such income may be reduced, at the option of the State, in accordance with the provisions of section 10 of P.L. 93-233 and regulations promulgated thereunder.

C. Shall provide to the Secretary, on its own initiative or at the Secretary's request, the amount of income which must be considered in determining the mandatory minimum supplement for any month after December 1973 of each individual described in section A above in order for the Secretary to perform his acquired functions under the agreement.

(If the State elects not to apply these deductions, then delete the following provision.)

D. Shall furnish the Secretary with any changes in the special needs or circumstances of individuals entitled to the mandatory minimum supplement whose December 1973 income included an amount payable solely due to special needs or circumstances, and if such change had occurred in December 1973 would have caused a reduction in the amount of aid or assistance such individual would have received for December 1973.

E. Shall provide a list to the Secretary of the names of individuals and their titles who are authorized to act on behalf of the State with respect to matters covered under this agreement. The State shall keep such list current.

F. Shall provide the Secretary with such additional data at such times as the Secretary may reasonably require in order to properly, economically, and efficiently carry out his functions under this agreement. If the State desires reimbursement by the Secretary pursuant to Article VIII-B of this agreement, the State shall obtain the written consent of the Secretary before performing such other functions under this section.

G. Shall make payments to the Secretary in accordance with Article VI.

H. Shall comply with regulations promulgated by the Secretary relating to the terms and conditions under which supplementary payments and mandatory supplements are payable; provided however that in the event any such regulation is promulgated during the term of this agreement the State shall have the right to terminate this agreement upon 45 days written notice to the Secretary which must be given within 30 days of the effective date of such regulation. The State shall, however, comply with any such regulation until the effective date of such termination. With respect to regulations which alter specific Federal and State responsibilities for administration and fiscal responsibilities as stipulated in this agreement, promulgated during the term of this agreement, the State shall not be required to comply therewith until the agreement is extended or renewed for any additional period or periods. The State and Secretary may mutually agree, however, to comply with any such regulation during the current agreement period.

I. Shall perform such other functions as the State may deem necessary to carry out the provisions of this agreement. If the State desires reimbursement by the Secretary pursuant to Article VIII–B of this agreement, the State shall obtain the written consent of the Secretary before performing such other functions in this section.

J. In determining the amount of reimbursement of indirect costs related to functions approved by the Secretary, the State shall use the State's administrative cost allocation plan approved by the cognizant Federal agency.

ARTICLE IV. STATE AUDIT/STATE QUALITY ASSURANCE

A. The Secretary recognizes the right of the State (including its authorized representatives) to conduct audits and in connection with any such audit, to examine any pertinent books, documents, papers, or records of the Secretary related to payment and denial of claims and to expenditures made by the Secretary on behalf of the State for State supplementary payments and mandatory minimum supplements. The audit shall be at State expense except that those books, documents, papers, or records customarily provided free of charge for audit purposes shall be so provided by the Secretary. No such audit shall extend to any inquiry into the Secretary's administrative or operational activities and practices. The results of such audits shall not be used for determining FFL for erroneous payments. The State shall initiate its request to conduct any audit no later than 1 year from the close of the fiscal year to be audited. The audit shall be completed within 3 years of the close of the fiscal year to be audited. The Secretary and the State further agree that there shall be a cooperative exchange of audit working papers between the HEW Audit Agency and the State. The State may elect to conduct its own audit, to participate in a joint audit with other States, or to have an independent public accountant represent the State in conducting such audit. The Secretary shall, within 60 days after the State notifies the Secretary of its intention to conduct any audit, propose a reasonable time and place for the conduct of the audit.

B. If in conducting its own quality assurance review the State desires access to the Secretary's records, the State may perform a quality assurance review on a sample of cases selected by the State from the SSI quality assurance sample provided that such review is coordinated and conducted simultaneously or concurrently with the quality assurance review of the same cases performed by the Secretary. The Secretary and the State shall cooperate in arriving at the time for conducting their respective samples. Such sample review performed by the State shall be at State expense.

C. Neither the results of the State audit nor of the quality assurance review by the State shall be used as a basis for assigning fiscal liability determinations except as may be agreed to by the Secretary.

ARTICLE V. AMOUNT OF AND PAYMENT OF SUPPLEMENTARY PAYMENTS AND MANDATORY MINIMUM SUPPLEMENTS

A. Payments shall be made monthly by the Secretary.

B. The Secretary may make payments under this agreement to the eligible individual, or such individual's eligible spouse, or partly to each or to any such other person including an appropriate public or private agency (representative payee), which he determines is interested in or concerned with the welfare of such individual (or spouse) in accordance with the provisions of section 1631(a) (2) of the Act. Where the Secretary selects a representative payee to receive the basic Federal payment, if any, the same representative payee shall be selected to receive the supplementary payment or mandatory minimum supplement, or both, on behalf of such individual.

C. The amount of supplementary payments shall be determined in accordance with Article I of Appendix A of this agreement and eligibility with respect thereto shall be determined in accordance with title XVI of the Act and regulations promulgated thereunder.

D. The amount of mandatory minimum supplements which shall be paid for any individual referred to in Article II of this agreement shall be equal to the amount by which the individual's December 1973 income exceeds the amounts of his title XVI benefits plus other income

for such month (or such greater amount as the State may specify in Appendix A of this agreement); provided, however, that the mandatory minimum supplement paid to any individual for whom a change is reported pursuant to section D of Article III shall be reduced by an amount equal to the amount by which the amount of aid or assistance such individual would have received for December 1973 would have been reduced if such change had occurred in December 1973, provided further, that the mandatory minimum supplement may be reduced based on such reported change by such lesser amount as the State may specify.

E. No mandatory minimum supplement or supplementary payment shall be payable to an individual for any month after:

1. The month in which the individual dies, or
2. The first month in which such individual ceases to be an aged, blind, or disabled individual as defined in section 1614 of the Act.

F. No mandatory minimum supplement or supplementary payment shall be payable to an individual for any month:

1. In which such individual was ineligible to receive a basic Federal payment under title XVI of the Act by reason of the provision of section 1611(e)(A), (2), or (3), 1611(f), or 1615(c) of such Act, or
2. For which such individual is not a resident of the State.

G. For purposes of this agreement, an individual will cease to reside in a State if he leaves the State with the present intention to abandon his home there. In the absence of evidence to the contrary,

1. If an individual leaves the State for a period of 90 calendar days or less, his absence from the State will be considered temporary and he will be considered to continue to reside in such State; and
2. If an individual leaves the State for a period in excess of 90 calendar days, he will no longer be considered to reside continuously in such State.

ARTICLE VI. STATE FUNDING AND FINAL SETTLEMENTS

A. Until the amount specified in section B of Article II of Appendix A of this agreement is reached in any fiscal year, the State shall pay monthly to the Secretary, on or before the date payment is to be received in the month by recipients, or 5 days after delivery to the State, of the SDX payment data file issued in conjunction with the monthly SSI treasury tape, whichever is later, an amount equal to the expenditures made by the Secretary as supplementary payments and mandatory minimum supplements for that month as specified in Article V hereof. Such amount shall reflect adjustments, if any, made by the Secretary including adjustments for accounting errors to the extent that they have been identified by audit or other means and verified by the Secretary. Thereafter, the State shall only pay for each remaining month in the fiscal year the total of the Unprotected Payments which are payable for such month and such payments shall be made in accordance with the same time schedule described in the preceding sentence. *Notwithstanding the foregoing provisions of this section, the State may elect to pay monthly during each fiscal year an amount equal to one-twelfth of the total non-Federal share of expenditures for aid or assistance for calendar year 1972 as specified in section B, Article II of Appendix A, plus the Unprotected Payments which are payable for such month.*

B. As soon as possible after the close of the fiscal year, the Secretary shall submit a statement to the State showing total amounts expended as supplementary payments and mandatory minimum supplements by the Secretary on behalf of the State during the fiscal year, the State's total liability therefor, and the end-of-year balance of the State's cash on deposit with the Secretary (if any). Any such balance shall be applied as a credit against the State's liability for future expenditures made by the Secretary under this agreement. If for such fiscal year the Secretary's statement to the State shows a deficit, the State shall thereupon include an amount equal to such deficit in its payment to the Secretary for expenditures made by the Secretary for the next succeeding month following receipt of the statement.

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* The clause between the asterisks is optional and may be used by the State.

C. As soon as possible after the submission of the statement referred to in section B above, negotiations on a final determination of State liability for supplementary payments and mandatory minimum supplements paid on behalf of the State in the fiscal year shall be undertaken by the Secretary and the State. A closing agreement with respect to the State's liability upon which the State and the Secretary agree shall be incorporated into a memorandum signed by the Secretary and the State, and such closing agreement shall constitute a final determination of total liability of the State for that fiscal year.

D. If the Secretary and the State are unable to agree upon any matter in dispute arising under this agreement, the State may request the Associate Commissioner for Program Operations, SSA, to make an initial determination. Within 90 days from the receipt of such request, the Associate Commissioner for Program Operations, SSA, or his designee, shall make an initial determination in writing with a full explanation thereof, or provide written notification of the reason such determination cannot be made, what further information or actions by the parties may be required, and within what time period a determination is expected to be made. This determination shall be final and conclusive unless within 30 days the State appeals to the Commissioner of Social Security to reconsider the initial determination. Within 90 days the Commissioner shall inform the State, in writing, of his determination with a full explanation thereof, or provide written notification of the reasons such determination cannot be made and what further information or actions by the parties may be required. This determination shall be final and conclusive unless the State files a written appeal to the Secretary within 30 days. If the State appeals the Commissioner's determination, the Secretary shall review and render a decision affirming, modifying, or reversing such determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Secretary's review, the parties shall be afforded an opportunity to be heard and to offer evidence in support of their positions before the Grant Appeals Board of the Department of Health, Education, and Welfare. Pending the decision of the Secretary, the State and the Secretary shall proceed diligently with the performance of this agreement.

Nothing in this agreement shall be construed to waive the State's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision, or to enforce its rights under this agreement by any available remedies. Nothing in this agreement shall be construed as waiving the Secretary's right to assert lack of jurisdiction with respect to any suit brought under this agreement, or to enforce the Secretary's rights under this agreement by any available remedies.

E. After the final determination of the fiscal liability of the State for the fiscal year either by mutual agreement between the Secretary and the State, or after application of the provisions of section D of this article, the Secretary and the State shall make such adjustments as may be necessary in accordance with the provisions of the following subsections:

1. If for the fiscal year the amount of funds reimbursed by the State, as specified in this article, is in excess of the amount of such final determination of liability, the Secretary shall apply such excess as a credit toward subsequent monthly payments, or, if there are no funds presently due the Secretary by the State under the agreement, the Secretary shall, upon request of the State, refund such excess to the State within 90 days.

2. If for the fiscal year the amount of funds reimbursed by the State, as specified in this article, is less than the amount of such liability, the State shall pay the difference to the Secretary within 90 days.

ARTICLE VII. CONFIDENTIAL NATURE AND LIMITATION ON USE OF INFORMATION AND RECORDS

The Secretary and the State shall adopt policies and procedures to ensure that information contained in their respective records and obtained from each other or from others in carrying out their functions under this agreement shall be used by them and disclosed solely as provided in section 1106 of the Act and the regulations promulgated thereunder.

ARTICLE VIII. ADMINISTRATIVE COSTS

A. It is the general intent of this agreement that the Secretary, in performing his functions and duties under this agreement, shall (subject to Article II of Appendix A) be paid by the State only an amount equal to the amounts paid by the Secretary as supplementary payments and mandatory minimum supplements on behalf of the State. The cost of administration incurred by the Secretary in carrying out his functions under this agreement shall constitute cost to the Secretary subject to the application of Article II H hereof.

B. Administrative expenses incurred by the State which shall be reimbursed by the Secretary are limited to expenses incurred in performing the functions specified in Article III (A), (B), (C), (D), (F), and (I) and any functions of the Secretary which relate solely to mandatory minimum supplement and State supplementary payment processes which the Secretary requests the State to perform. Notwithstanding the foregoing, the State shall not be reimbursed for any activity related to the determinations of an optional supplement variation as identified in Appendix A. In addition, the costs of furnishing the Secretary with data related to current State programs (or such programs of political subdivision thereof), e.g., established under the Social Security Act, the General Assistance programs, or the Food Stamp program, shall not be reimbursed under this agreement. These expenses shall be reimbursed by the Secretary not less frequently than quarterly, or funded through the general letter of credit if such Department of Health, Education, and Welfare letter of credit is available to the State for funding other programs, on the basis of the cost principles set forth in subpart 1-15.7 of part 1-15 of the Federal Procurement Regulations (41 CFR 1-15.7) in effect as of the date of this agreement. Except as provided in section D below, reimbursement shall be made within 90 days after receipt of the quarterly report, SSA-8713. The costs are subject to audit by the Secretary. Reports of the audit will be released by the Secretary's audit agency simultaneously to program officials of the Department and to cognizant State officials. If the audit results in exceptions, the State and the Secretary shall seek to negotiate the differences.

C. The State shall submit its budget request to the Secretary for reimbursable administrative costs for the term of this agreement in such manner as may be requested by the Secretary by July 15 of the fiscal year preceding the fiscal year to which such budget pertains. Provided, however, that the State may submit its budget request at such later date that the Secretary specifies for fiscal year 1977. After considering all pertinent information, the Secretary will determine the amount of funds that are necessary for the State to carry out its performance of the reimbursable work under this agreement (specified in paragraph B). The Secretary will, within 60 days from the State's submission of its budget request, notify the State of the amount which will be made available to it. The State agrees to use its best efforts to perform its functions within the amount approved by the Secretary. If at any time the State has reason to believe that the costs which it expects to incur in its performance hereunder will exceed the amount approved by the Secretary, it shall notify the Secretary, in writing, to this effect, giving its revised estimate of such total cost. The Secretary will provide the State with the additional amount needed by the State for reimbursement of administrative costs for activities required and approved by the Secretary. After the close of the fiscal year, the State shall submit a report of total expenditures made (and obligations incurred) for such period. Negotiations on a final determination of costs shall commence promptly after audit or upon acceptance of the report by the Secretary for such purposes. A closing agreement with respect to such final determination shall be incorporated into a memorandum signed by both parties, and shall constitute a final cost settlement for the fiscal year. Financial adjustments, if necessary, shall be made in the same manner as provided for in section E of Article VI.

D. If the Secretary and the State are unable to agree upon any matter in dispute relative to administrative costs, the final determination of reimbursable administrative costs shall be achieved through the procedures set forth in section D, Article VI, of this agreement. The Secretary will provisionally pay all claimed amounts not in dispute, subject to audit and settlement after the close of the agreement period.

ARTICLE IX. FEDERAL LIABILITY FOR ERRONEOUS PAYMENTS

The parties take notice that the Secretary and the States are endeavoring to jointly develop a new system or systems for assuring comparable principles of quality performance under the program of Aid to Families with Department Children (AFDC), the SSI program, and other related means-tested programs. It is recognized that as a result of such endeavors, and after recommendations flowing therefrom, the Secretary will in due course promulgate regulations establishing a new system or systems of quality assurance for AFDC, SSI, and/or other programs. The provisions set forth in this article for determining Federal liability for erroneous SSI payments shall apply until the final date of publication or effective date, whichever is later, of any such regulations affecting the SSI program. At the time such final regulations are promulgated by the Secretary, the parties shall renegotiate the provisions for determining Federal fiscal liability for erroneous SSI payments in accordance with such regulations. The new provisions so negotiated shall be effective retroactive to final date of publication, or effective date, whichever is later, of the regulations promulgated by the Secretary. Until the parties agree on provisions in accordance with the regulations, Federal liability for erroneous SSI payments shall apply only for periods to the final date of publication or effective date of regulations, whichever is later.

A. For the period beginning January 1, 1974, and ending December 31, 1974, the Secretary shall be liable for any State-funded supplementary payments and mandatory minimum supplements made on behalf of the State which are erroneously paid to any individual provided that:

1. Any such erroneous payment is identified on an individual basis. This provision will apply only to cases identified or discovered during quality assurance reviews or reported by the State in writing and verified by the Secretary.

2. The data furnished to the Secretary as conversion data were adequate to make the determination of eligibility for the mandatory minimum supplement or the supplementary payment. If upon redetermination these data are found to be erroneous and do not support such original determinations of eligibility, then the State shall be liable for any erroneous mandatory minimum supplement or supplementary payment which occurs between the time of the State furnishing the erroneous data and the first redetermination by the Secretary.

3. The Secretary shall not be liable for any erroneous payment if such payment is based upon erroneous initial payment data (with respect to mandatory minimum supplements certified by the State), erroneous amounts of income which must be considered in determining the mandatory minimum supplements, or caused by changes in circumstances of individuals and recomputations of minimum income level amounts which the State erroneously reported or failed to report to the Secretary.

4. For purpose of this section A, the term erroneous payment means any payment made to an ineligible individual and/or any overpayment to an eligible individual (as such terms are hereinafter defined).

B. Thereafter, the Secretary's liability for any State-funded mandatory minimum supplement or supplementary payment made on behalf of the State which was erroneously paid to any individual shall be determined in a manner similar to that for determining the State's liability for erroneous payments made to ineligible recipients and for overpayments, as provided for in 45 CFR 205.40 and 45 CFR 205.41 (the Social and Rehabilitation Service's regulations applicable to the State's program of Aid to Families with Dependent Children). However, if the Secretary makes a formal determination that the State is not in compliance with the provisions of 45 CFR 205.40 and 45 CFR 205.41 with respect to the State's program of Aid to Families with Dependent Children for any 6-month period set out in this article, then the Secretary shall not be liable to the State for erroneous payments of State supplementation for such 6-month period. In determining the Secretary's liability, there shall be established a base period beginning July 1, 1974, and ending December 31, 1974. During such base period the Secretary shall

compile accurate data for such period to establish the incidence of, and costs associated with, State funded mandatory minimum supplements and supplementary payments provided to ineligible individuals and overpayments to eligible individuals. The data for this period shall provide a standard against which such subsequent activities by the Secretary to reduce errors will be measured. After the base period there shall be excluded from State payments of State funded mandatory minimum supplements and supplementary payments to the Secretary for his use in making such mandatory minimum supplements and supplementary payments of State funds on behalf of the State to individuals eligible thereto the proportions of the State expenditures of such payments for ineligibles or for overpayments represented by the following percentages of cases in error:

1. With respect to payments to ineligible individuals for the 6-month period commencing:

a. January 1, 1975, one-third of the difference between the Secretary's rate of ineligibility cases for the period July 1, 1974, to December 31, 1974, and 3 percent;

b. July 1, 1975, two-thirds of such difference;

c. January 1, 1976, all of such difference.

1.1 With respect to the period commencing July 1, 1976, and ending September 30, 1976, error rate data, relating to payments to ineligible individuals, derived through quality assurance reviews shall be obtained by sampling the period from July 1, 1976, through December 31, 1976. Such error rate data from the whole of such sampling period shall be applied to State funded mandatory minimum supplements and supplementary payments expended in the period July 1, 1976, through September 30, 1976, to determine Federal fiscal liability for payments to ineligible individuals with respect to that period.

1.2. With respect to payments to ineligible individuals for the 6-month period commencing October 1, 1976, and successive subsequent 6-month periods, all of the difference between the Secretary's rate of ineligibility cases for such period and 3 percent.

2. With respect to overpayments for the 6-month period commencing:

a. January 1, 1975, one-third of the difference between the Secretary's rate of overpayments in the eligible caseload for the period July 1, 1974, to December 31, 1974, and 5 percent;

b. July 1, 1975, two-thirds of such difference;

c. January 1, 1976, all of such difference.

2.1. With respect to the period commencing July 1, 1976, through December 31, 1976. Such error rate date from the whole of such sampling period shall be applied to State funded mandatory minimum supplements and supplemetary payments expended in the period July 1, 1976, through September 30, 1976, to determine Federal fiscal liability for overpayments with respect to that period.

2.2. With respect to overpayments for the 6-month period commencing October 1, 1976, and successive subsequent 6-month periods, all of the difference between the Secretary's rate of overpayments in the eligible caseload for such period and 5 percent.

3. In addition:

a. If the Secretary's rate of ineligible cases or overpayments for any such 6-month period exceeds that for the period July 1, 1974, to December 31, 1974, the difference between such rates.

b. Until the date the Secretary performs the first redetermination, or July 1, 1975, if later, the Secretary shall not be liable for any erroneous payment to inelibible individuals or for any overpayment to any eligible individual if such erroneous payment or overpayment is based upon incorrect conversion data or initial payment data (with respect to mandatory minimum supplements certified by the State).

c. The Secretary shall not be liable for any erroneous payment to ineligible individuals or for any overpayment to any eligible individual if such erroneous payment or overpayment results from erroneous amounts of income which must be considered in determining the mandatory minimum supplement, or caused by changes in

circumstances of individuals and recomputations of minimum income level amounts erroneously reported or not reported to the Secretary by the State.

C. The amount of such erroneous payments to ineligible individuals or overpayments to eligible individuals for which the Secretary is liable shall be excluded for purposes of applying the "hold-harmless" provision of section 401 of P.L. 92–603.

D. The Secretary shall, nevertheless, undertake recovery, adjustment or recoupment of any such erroneous payments to ineligible individuals or overpayments to eligible individuals pursuant to regulations adopted by the Secretary with respect to overpayments of basic Federal payments.

E. For purposes of this article:

1. An ineligible individual is a person who, if a correct determination had been made in his case, would not have received any payment (basic Federal payment or mandatory minimum supplements or supplementary payments) or part or parts thereof under the supplemental security income program; and

2. An overpayment to an eligible individual is the amount paid to an individual, who, if a correct determination had been made in his case, would have received a lesser payment than the amount actually paid less the amount of such lesser payment. An erroneous payment of less than $5.00 shall, for purposes of this article, not be considered an overpayment.

F. Nothing in section B of this article shall be construed as waiving the State's objection to the imposition by the Secretary of the fiscal sanctions provided for in 45 CFR 205.40 and 205.41.

ARTICLE X. TERM OF AGREEMENT

This agreement shall begin on October 1, 1976, and end on September 30, 1977. It will automatically be renewed for successive periods of one year unless the State or the Secretary gives written notice not to renew at least 90 days before the end of the then current period.

ARTICLE XI. TERMINATION AND MODIFICATION OF AGREEMENT

A. The State or the Secretary may terminate this agreement at any time upon 90 days written notice to the other party provided the effective date of the termination is the last day of a quarter.

B. This agreement may be modified at any time by a written modification mutually agreed upon by the parties hereto.

C. If this agreement is terminated by the State in any manner, including nonrenewal, the provisions of sections F through J of this article shall apply.

D. Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 90 days if the State fails to materially comply with the terms of sections A, B, C, or G of Article III of this agreement and fails to cure such noncompliance, or fails to request an opportunity to show cause why such agreement should not be terminated, within a period of 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds for the proposed termination. If the State fails to comply with paragraph G of Article III of this agreement, the Secretary may immediately suspend making further supplementary payments and mandatory minimum supplements pursuant to Article II-B of this agreement, provided that the cumulative amount of the unpaid funds by the State is greater than one-third of the total amount which was paid by the State for the calendar quarter immediately preceding the month in which the State does not make payment as required by paragraph G of Article III.

(If the State has signed Agreement No. 1, then delete the following provision.)

E. If this agreement is terminated by the State or Secretary in any manner, including nonrenewal under Article X, the State will thereafter be precluded from eligibility for Federal payments pursuant to title XIX for any quarter beginning after the effective date of termination

or nonrenewal; provided, however, that if the State thereafter elects to administer its own mandatory minimum supplement program and executes an agreement with the Secretary to carry out such a program, the State would retain its eligibility for title XIX payments.

F. In the event of termination under this article, the Secretary will discontinue all State supplementary payments and mandatory minimum supplements to recipients on the effective date of termination. The Secretary shall notify the State of underpayments of State supplementary payments and mandatory minimum supplements to recipients which occured prior to termination.

G. Within 90 days following termination the Secretary will provide the State with a final Financial Accountability Statement (SSA-8700). If this statement reflects a balance in favor of the State, payment will be made to the State promptly. If this statement reflects a balance in favor of the Secretary, the State will promptly pay the amount to the Secretary. These payments constitute a tentative reconciliation pending final settlement.

H. For a period of one year following the effective date of termination the Secretary will continue to make adjustments to Federal/State accounts where an incorrect distribution of State and Federal funds occurred in the payment to the recipient prior to termination. The Secretary shall also credit the State account for overpayments recouped during this one year period. Negotiations on a final determination of State liability for supplementary payments and mandatory minimum supplements paid on behalf of the State in the agreement period terminated, and for recoupments, and adjustments between Federal/State accounts in the one year following termination shall be undertaken by the Secretary and the State one year after issuance of the final Financial Accountability Statement.

I. The Secretary and the State agree that, both prior and subsequent to the closing agreement (section J below) only the Secretary will undertake to recoup overpayments to recipients made by the Secretary. The Secretary shall credit the State account for overpayments recouped during the one year following termination of the agreement.

J. A closing agreement with respect to the State's liability upon which the State and the Secretary agree shall be incorporated into a memorandum signed by the Secretary and the State, and such closing agreement shall constitute a final determination of the total liability of the State. If such liability exceeds payments made by the State, the State shall promptly pay the difference to the Secretary. If payments made by the State exceed such liability, the Secretary will promptly refund to the State the excess amount.

K. If the State and the Secretary are unable to agree upon a final determination of the total liability of the State, the final determination of such liability shall be achieved through the procedures set forth in section D of Article VI.

L. Notwithstanding the provisions of sections F through J of this article, the mechanisms set forth in Article IX of this agreement shall provide the basis for assigning fiscal liability for erroneous payments.

ARTICLE XII. EXAMINATION OF STATE RECORDS

The State agrees that the Secretary and the Comptroller General of the United States (including their duly authorized representatives) have access to and the right to examine any directly pertinent books, documents, papers, and records of the State for purpose of verifying: administrative costs paid by the Secretary to the State, the amount of Adjusted Payment Levels, calendar year 1972 non-Federal expenditures, and establishment or recalculations of Minimum Income Levels and countable income.

(If the State has signed Agreement No. 1, Article XIII must be inserted.)

ARTICLE XIII. OTHER AGREEMENTS

The Secretary and the State have previously entered into an agreement under section 212(a) of P.L. 93-66. For so long as this agreement remains in effect, it shall supersede the prior agreement. In the event this agreement is terminated in any way (including nonrenewal) the prior agreement shall be restored to full force and effect.

ARTICLE XIV. LIMITATION OF LIABILITY

The Secretary shall not be responsible for any financial loss incurred by the State, whether directly or indirectly, through the use of any data by the State furnished pursuant to this agreement.

ARTICLE XV. APPENDICES

Appendix A (Determination of Supplementary Payment Amounts and Limitation of Fiscal Liability of the State) and Appendix B (Commentary on Federal Liability for Erroneous Payments) attached hereto are included as part of this agreement.

ARTICLE XVI[1]. LIMITATION OF FISCAL LIABILITY OF THE STATE

In recognition of the fact that the State will not exceed the non-Federal share of expenditures as aid or assistance for quarters in calendar 1972 under the plans of the State approved under Titles, I, X, XIV, and XVI of the Act, and that the State cannot avail itself of the limit of fiscal liability afforded by section 401 of the Act, the State waives the application of this provision. The State shall pay the Secretary on a monthly basis for those expenditures made by the Secretary for State supplementary payments and mandatory minimum supplements in accordance with section A of Article VI, on or before the date payment is to be received in the month by recipients or 5 days after delivery to the State of the SDX payment date file issued in connection with the monthly treasury tape, whichever is later.

In Witness Whereof, the parties hereby execute this agreement this __ day of _____, 1976.

The Secretary of Health Education, and Welfare.

By _____

_____

_____

(Title)

_____

(State)

By _____

_____

(Title)

_____

_____

(Address)

I, _____, certify that I am the Attorney General[2] of the State of _____; that _____, who signed this agreement on behalf of the State, was then _____ of said State, and that he is authorized to enter into agreements of this nature on behalf of the State and that there is authority under the laws of the State of _____ to carry out all the functions to be performed by the State as provided herin and comply with the terms of this agreement.

_____

Signature of Attorney General

APPENDIX A

DETERMINATIONS OF SUPPLEMENTARY PAYMENT AMOUNTS AND LIMITATION OF FISCAL LIABILITY OF THE STATE

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1. Insert this article where the State desires to waive "hold-harmless".
2. or legal counsel for the State Agency.

ARTICLE I

In determining the amount of any supplementary payments payable to eligible individuals or eligible spouses of such individuals, the Secretary shall apply all of the income exclusions provided in subsection 1612(b) of the Act, and shall make such payments in accordance with the payment levels in the Schedule of Payments attached. The payment levels shown include the basis Federal payment.

ARTICLE II. LIMITATION OF FISCAL LIABILITY OF THE STATE

A. The amounts payable to the Secretary by the State for making supplementary payments and mandatory minimum supplement payments on behalf of the State shall be limited to the amount determined in accordance with the application of section 401 of P.L. 92–603. (The State shall pay such amounts determined payable as provided in Article VI-A of this agreement).

B. For purposes of administering this agreement, the non-Federal share of expenditures for aid or assistance for calendar year 1972 (referred to in such section 401) shall be determined in accordance with the Act and regulations promulgated by the Secretary, and pursuant thereto is provisionally[3] established as _____.

C. For purposes of administering this agreement, the State's adjusted payment levels shall be determined in accordance with regulations promulgated by the Secretary, and with reference thereto are provisionally[1] established as—

1. With respect to an aged eligible individual, _____;
2. With respect to a blind eligible individual, _____;
3. With respect to a disabled eligible individual, _____;
4. With respect to an aged eligible individual and such individual's aged eligible spouse, _____;
5. With respect to a blind eligible individual and such individual's blind eligible spouse, _____;
6. With respect to a disable eligible individual and such individual's disabled eligible spouse, _____;
7. With respect to an aged eligible individual and such individual's blind eligible spouse, _____;
8. With respect to an aged eligible individual and such individual's eligible disabled spouse, _____;
9. With respect to a blind eligible individual and such individual's disabled eligible spouse, _____;

SCHEDULE OF PAYMENTS (PAYMENT LEVELS) FOR THE PERIOD OCTOBER 1, 1976, TO SEPTEMBER 30, 1977

Geographic Area (List Counties)

_____ _____

_____ _____

Category of[1] Eligible Individual(s)	Living Arrangements				
	Column A	Column B	Column C	Column D	Column E
Aged					
Blind					
Disabled					

3. If this figure has been finally determined, delete the word "provisionally".

Category of[1] Eligible Individual(s)	Living Arrangements				
	Column A	Column B	Column C	Column D	Column E
Aged and Aged Spouse					
Blind and Blind Spouse					
Disabled and Disabled Spouse					
Aged and Blind Spouse					
Aged and Disabled Spouse					
Blind and Disabled Spouse					

1. The terms used in this column shall have the following meanings:
   1. "Aged"—an aged eligible individual;
   2. "Blind"—a blind eligible individual;
   3. "Disabled"—a disabled eligible individual;
   4. "Aged and Aged Spoused"—an aged eligible individual and such individual's aged eligible spouse;
   5. "Blind and Blind Spouse"—a blind eligible individual and such individual's blind eligible spouse;
   6. "Disabled and Disabled Spouse"—a disabled eligible individual and such individual's disabled eligible spouse;
   7. "Aged and Blind Spouse"—an aged eligible individual and such individual's blind eligible spouse;
   8. "Aged and Disabled Spouse"—an aged eligible individual and such individual's disabled eligible spouse;
   9. "Blind and Disabled Spouse"—a blind eligible individual and such individual's disabled eligible spouse.

Definition Of Categories

Column A:
Column B:
Column C:
Column D:
Column E:

Exclusions

(Other than required by law or regulations.)

APPENDIX B

Commentary on Federal Liability for Erroneous Payments

The language of Article IX has been modified to reflect that the provisions of the prior agreement of Federal fiscal liability (FFL) shall be carried forward to the present agreement period. These provisions shall be effective until the effective date of any new regulations promulgated on quality assurance for the AFDC and SSI programs. At the time of promulgation this article will be renegotiated, with no liability accruing for the Secretary under the SSI program until mutual agreement at which time liability will be effective retroactively to the effective date of the new regulations.

The States will be considered to be in compliance for any 6-month period where the Secretary has not made a formal finding of noncompliance. Absent such a finding, the Secretary will be liable for erroneous payments under the SSI program for such periods.

This language is provided by way of clarification of the Secretary's position with respect to the following items:

1. Maryland v. Mathews cannot be used as a defense against the Secretary's liability for erroneous payments under the SSI program;

2. The Secretary would continue to be liable for erroneous payments above a 3 percent case error level for ineligibles and a 5 percent case error level for overpayments.

3. A State will be in compliance with 45 CFR 205.40 and 45 CFR 205.41 for any 6-month period until the Secretary makes a formal determination of non-compliance with any such determination being applicable only to the 6-month period for which the determination is made.

4. The fact that a State has an error rate in the AFDC program above the tolerance level established will not in itself constitute the State being in noncompliance. If a State pays the appropriate penalty for any period of noncompliance, the State will be then found to be in compliance for purposes of FFL under the SSI program.

Section C of Article IV provides that neither the results of State audit nor the results of the State's quality assurance reviews may be substituted for the provisions of Article IX as the basis for determining Federal fiscal liability for erroneous payments. The Secretary will, however, take into account those results as they pertain to the accuracy of determinations of erroneous payments in the SSI quality assurance process specified in Article IX.