A CASE FOR ELIMINATING PENALTIES FROM FEDERAL HIGHWAY SAFETY AID PROVISIONS*

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President Johnson set the need for standardizing and federalizing national transportation policies and programs in proposing the cabinet level Department of Transportation, saying, "Our transportation system has not emerged from a single drawing board, on which the needs and capacities of our economy were chartered . . . . As a result, American today lacks a coordinated transportation system that permits travelers and goods to move conveniently and efficiently from one means of transportation to another, using the best characteristics of each."[1]

Soon after making that statement the President sent three bills to the Congress that through enactment have aggressively asserted federal leadership in transportation with particular emphasis upon the highways. The Department of Transportation Act[2] concentrated all major federal transportation programs under common administrative control; the National Traffic and Motor Vehicle Safety Act of 1966[3] introduced federal protection of consumer safety in automobile design and manufacture; and the Highway Safety Act of 1966[4] supplanted virtual state autonomy in highway safety regulations with a federal-state partnership. Three years have elapsed since the programs created by this legislation began business, and they are due for appraisals. This paper limits its coverage to the Highway Safety Act (HSA) and focuses upon the legislative glue binding the federal-state partnership[5] together.

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1. Message from the President of the United States transmitting a proposal for a cabinet level Department of Transportation consolidating various existing transportation agencies, 89th Congress, 2d Session, H.R. Doc. No. 399, p. 3.

2. Pub. L. 89-670, 80 Stat. 931, Oct. 15, 1966.

3. Pub. L. 89-563, 80 Stat. 718, Sept. 9, 1966.

4. Pub. L. 89-564, 80 Stat. 731, Sept. 9, 1966.

5. This term is used deliberately since a recent congressional report endorsed it as properly describing the federal-state relationship under the Federal-aid Highways program. See Federal-State Highway Management Practices and Procedures, H.R. Rep. No. 1506, 90th Cong. 2d Session (1968). That report criticized the management practices—both state and federal—in the program and argued that the relationship being contractual in nature justifies federal standards which require the states to manage the

RATIONALE FOR COMPLIANCE

The self-proclaimed purpose of the HSA is "to provide for a coordinated national highway safety program through financial assistance to the States to accelerate highway traffic safety programs. . . ." developed by the states "in accordance with uniform standards" issued by the Secretary of Transportation. The Secretary is authorized to bear up to 50% of the costs of approved state programs and up to 100% of the costs of special projects. On the other hand, he is granted authority to withhold funds from and impose penalties on non-conforming states.

The federal highway safety program is administered by the National Highway Safety Bureau (NHSB) of the Department of Transportation (DOT). The NHSB began working vigorously as soon as created in the fall of 1966 and produced a set of proposed safety program standards within six months. After consulting with the states, the DOT officially issued the first thirteen standards in June of 1967 but because of the Vietnam cutback in appropriations, little further progress was made in forming programs around the 13 cryptic standards (a few hundred words at most) until the spring of 1968. Then in May under pressure from above, the NHSB began a crash effort to prepare manuals as guidelines for the states in developing approvable programs before the first penalty deadline: December 31, 1968. Using the manpower of Booz, Allen and Hamilton and their consultants, the NHSB produced first drafts on May 31 with plans to issue final versions in August. The states were to be given the "opportunity" of review during the intervening period. In the meantime, the Congress slipped the penalty deadlines by one year[6] and raised the 1969 appropriations to $50 million[7] from $25 million[8] of the year before, (far less than $100 million for each year as originally authorized[9]). Apparently these measures relieved the pressure for immediate issuance of the manuals since they were not out in September of 1968.[10]

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program in a prescribed way (eg. 23 USC § 302 requiring that states establish State highway departments in order "to avail" themselves of the provisions of the program). Analyzing the relationship as that report does supports the objections made in this article to the provisions for administering the safety program.

6. Federal-Aid Highway Act of 1968, Pub. L. 90-495; 82 Stat. 815, § 13.
7. Dept. of Transportation Appropriations Act, 1969, Pub. L. 90-464; 82 Stat. 654.
8. Dept. of Transportation Appropriations Act, 1968, Pub. L. 90-112; 81 Stat. 311.
9. Pub. L 89-564 (1966), § 104.
10. In the meantime NHSB has ranked the 13 issued standards plus 3 contemplated standards according to priority. See Status Report, Federal Role in Traffic Safety,

Assuming the Congress is now serious about supporting its highway safety program, what motivations do the states have for going along with it? The basic rationale for compliance is the ultimate good sense of the program. The fearful highway crash toll paid in the coin of wasted human and economic resources makes its own best brief. Moreover, the sheer magnitude and the innate complexities of the highway traffic system make improving safety so difficult that reducing the terrible losses seems possible, if at all, only through a directed program coordinating the activities of the most capable workers in the field. Since the toughest problems are more or less common to the fifty states, an alliance for pooling their resources into common strength, rather than squandering them in individual weakness, seems particularly sensible. But efforts of that kind proved barren, possibly for lack of effective leadership,[11] so the Congress stepped in with the HSA to provide both a coordinated effort and central leadership. The anticipated benefits of the approach provide the altruistic rationale for compliance. The goal is a safer, happier society.

From a more practical standpoint, the prospect for federal aid carries its own peculiar motivation for compliance. Even though the federal share must be matched by the states, the program brings the opportunity of injecting new money into state and local economies. Moreover, the states aren't necessarily required to increase their spending, although in fact none are expected to be able to comply with all of the required safety programs without some new costs.

Avoiding the statutory penalty—a 10% reduction in Federal-aid highway funds—is a second very practical reason for complying, since such a cut would be a severe loss in most states. For example, the Congress appropriated more than $4 billion[12] for the Federal-aid highways program in fiscal 1969: losing 10% of one-fiftieth of that—$8 million—would be a blow to an "average" state. (Notwithstanding that, some have said that suffering the cut would be cheaper than the costs of complying.)

Insurance Institute for Highway Safety, Washington, No. 66, October 11, 1968. The manuals were issued in Jan. 1969.

11. For example, the Vehicle Equipment Safety Commission, a compact among the states for promoting uniform vehicle equipment standards, apparently accomplished little in its short life between its beginning in 1962 up until the federal pre-emption of its business in 1966. Moreover, the Uniform Vehicle Code, produced by the National Committee on Uniform Traffic Laws and Ordinancies since 1926, has not resulted in uniformity in traffic laws throughout the country, although it has widely influenced them.

12. Dept. of Transportation Appropriations Act, 1969, Pub. L. 90-464, 82 Stat. 654.

In sum, coupling the basic goal of safer highways with the double purposes of obtaining federal funds while avoiding Federal-aid highways penalties makes a persuasive case for complying.

RATIONALE FOR DISSENT

Despite the rationale for compliance, the DOT's efforts have not yet vibrantly reinvigorated the states' highway safety programs. Congress's parsimony in appropriations, fundamental difficulties in creating meaningful new programs, and inertia in the process have all contributed to the lag. Even so, the accomplishments so far have received less than enthusiastic endorsement from the states, and universal compliance seems far off.

In view of the worthy purpose (and aside from the broken promise of federal funds), what is the rationale for dissent? A review of the program's short history suggests two related reasons for reluctance. The first is basic and springs from the substance of the HSA itself: Do the enforcement powers given DOT by the statute diminish both the quality of programs developed and the enthusiasm of the states in receiving them by placing an artifical tension on the federal-state partnership? The second is practical and has to do with implementation under these strained conditions: How "honest" are the safety requirements being imposed on the states?

TENSIONS CREATED BY ENFORCEMENT PROVISIONS

The more fundamental objections are those raised by the nature of the penalty and its effects upon the form and substance of the standards. The statute requires that: "(T)he Secretary shall not apportion any funds under this (legislation) to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section. Federal aid highway funds . . . shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State . . . ."[13] Under this provision avoidance of the penalty is completely at the discretion of DOT in "approving" the states' safety programs. Although the statute requires certain designated program elements, it gives no guidelines for judging whether a given proposal meets the standard. Thus, a State could develop a complete program which it believes to be sound, and

13. 23 USC § 402(c).

yet see it rejected by DOT. If the HSA is enforced as written, DOT's disapproval would require mandatory imposition of the penalty. Neither administrative nor judicial review for a state aggrieved in a case like that is provided in the statute.[14] (This kind of situation could arise. Would Michigan stand to suffer the penalty for failing to enforce a motorcycle helmet law even though the Michigan courts have held the requirement to be unconstitutional?)[15]

Moreover, the extent of the penalty is in no way proportional to the degree of failure. The Congress's direction to DOT is clear and straightforward: apply the penalty if a state's program isn't approved. Thus a conscientious state lacking approval on one small element of a single standard area would perforce be treated exactly as would a state defaulting totally. As between private parties, that sort of contractual arrangement was long ago ruled unenforceable by our civil courts. If civil justice precludes disproportionate penalties, what is the legislative justification for them in joint federal-state endeavors?

To DOT's credit, the states have been assured that such inequitable consequences won't befall those making reasonable efforts to comply.[16] However, administrative grace cannot excuse legislative arbitrariness so long as the threat exists. At best, another situation of winking at the letter of the law is encouraged.

The Congress showed its step-child attitude toward the states by a second aspect of the penalty provision. Not only does it deny all apportionments under the HSA, but it also reduces Federal-aid

14. Despite the lack of relief in the statute, the Supreme Court decided as long ago as 1947 that the Federal-aid Highway Act creates in states "a legal right to receive federal highway funds by virtue of certain congressional enactments and under the terms therein prescribed. Violation of such a statutory right normally creates a justiciable cause of action even without a specific statutory authorization for review." Oklahoma v. U.S. Civil Serv. Com'n, 330 U.S. 127, 67 S. Ct. 544, at 136. Even so, significant questions remain as to what is reviewable and how to raise the questions. The Administrative Procedure Act (5 USC § 701 et. seq.) covers part of the ground, but not the whole as pointed out by a recent article saying, "Perhaps because of the uncertainties as to the precise scope of A.P.A. coverage, it is becoming increasingly common for aid statutes to require formal review procedures for any decision of the granting authority which terminates aid for failure to comply with programs requisites." Skoler, D., Lynch, R., and Axilbund, M., "Legal and Quasi-Legal Considerations in New Federal Aid Programs," 56 Geo. L. J. 114 (1968), at 1163.

15. See *American Motorcycle Association v. Davids*, 158 N.W. 2d 72 (Mich. 1968). Michigan has enacted a second helmit statute to become effective Sept. 1, 1969, House Bill 3114, 1969.

16. The H.S.A. authorizes the Secretary to suspend the application of the Federal-aid highway penalty when it is in "the public interest" to do so. 23 USC § 402(c).

highways funds by 10%. The Federal-aid highway program[17] is antecedent to the safety program and serves a different purpose: aid in building a coordinated highway system throughout the United States. Federal-aid highway funds pay 90% and more of the costs of our magnificent Interstate Highway System and bear a major share of the costs of our fine primary and secondary road systems. But none of the Federal-aid highway money goes unguarded to the states; DOT issues standards and approves projects in advance. What then is the reason for imposing the new standards of an entirely different program in order to continue receiving full support for this important task?[18] Is it any more than an added leverage to help the states in understanding that what the federal government says is good for them, is indeed good for them? Isn't it possible that a state of limited resources, which in its best efforts could afford to qualify under only one of the programs, could be doubly penalized by failing to satisfy the other—if the penalty is to be applied as written? Despite the sorry record compiled by some state governments in providing needed programs for their citizens, shouldn't the federal government eschew grade school methods for inducing performance in areas where it cannot or does not choose to act directly? The hickory stick may be recompense for delinquent pupils; but argument with merit can be made that the ballot box should be retained as the source of retribution for delinquent public servants.

As a practical matter, DOT is very self-conscious about the penalty clause and this self-consciousness shows in the draft safety program manuals that have been issued. When the Secretary prescribes programs dealing with traffic courts or codes and laws, he would understandably be uneasy about the wording; he might be going beyond the limits of his jurisdiction. As a result, DOT's draft manuals issued to guide the states fall far short of the mark. Safety advocate Jeffrey O'Connell has judged them a "waste of time"[19] and he is not grossly in error. Part of

17. 23 USC Chap. 1.

18. The Supreme Court has recognized that the Congress has the power to make the right to receive funds under one statute contingent upon meeting the standards of another, at least where the second fixes "the terms upon which its money allotments to the states shall be disbursed." Therefore, when a state fails to comply with the Hatch Act, Federal-aid highway funds may be docked because "The end sought by the Congress through the Hatch Act is better public service, by requiring those who administer the funds for national needs to abstain from active political partisanship." Oklahoma v. U.S. Civil Svc. Com'n, supra note 14, at 143. No such reasoning supports the penalty provisions in the H.S.A.

19. Status Report, Federal Role in Traffic Safety, Insurance Institute for Highway Safety, Washington, No. 60, July 5, 1968.

the fault is attributable to the unrealistic scheduling forced upon DOT by Congress and to the compounding handicap of under-staffing. But a large measure of the blame resides with the timid approach forced by the penalty clause. The terms "recommended" and "suggested" and "should consider" recur time and again throughout the manuals, piecing together a patchwork of program elements often times neither clearly required nor clearly optional. Consequently, the documents fail to provide what is really needed: solid and complete model programs which by their quality would encourage adoption.

A specific example well illustrates the point. The May 31 draft of the "Alcohol in Relation to Highway Safety"[20] manual contained sections for treating problem drinkers and for educating the public about drinking drivers.[21] Even though DOT officials would surely view these as crucial areas in solving the drunk driver problem, those sections were deleted from the August draft of the manual. The unstated explanation may be that those program elements went beyond the wording of the standard itself, which could raise cries of "too much" from hard pressed states. Objections to recommending programs of more substance than required by the standards need not be raised if the penalty clause were not a threat. Clearly, the punitive potential can constrain the Secretary to be less thorough and less creative than he wants to be and this constraint may be the strongest argument against retaining it.

HONESTY IN STANDARDS

The more practical matter of honesty in standards is largely a by-product of the penalty provision although not entirely dependent upon it. So long as the penalty exists, the federal-state relationship will be forced into an adversary rather than a cooperative posture. So long as there is bargaining, the motivation for and the legitimacy of proposed standards will be questioned. Some of the issues which have already come up illustrate this point, and although removing the coercive penalty would not necessarily prevent their arising, it could change the tone of the debate.

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20. Highway Safety Program Standard 4.4.8. The others of the original 13 were: Periodic Motor Vehicle Inspection; Motor Vehicle Registration; Motorcycle Safety; Driver Education; Driver Licensing; Codes and Laws; Traffic Courts; Identification and Surveillance of Accident Locations; Traffic Records; Emergency Medical Services; Highway Design, Construction and Maintenance; and, Traffic Control Devices.

21. Draft Highway Safety Program Manual, Vol. 8 Alcohol in Relation to Highway Safety, U.S. Depart. of Trans. May 31, 1968, §§ v.5 and v.6.

To what extent should general agreement that the social benefits of a given program are worth is costs be prerequisite to its issuance as a mandatory standard? The acrimony over periodic motor vehicle inspection raised this issue very early. Despite a history of dispute about the merits of inspections, despite the public's dislike of it, and despite the lack of convincing scientific evidence of its efficacy,[22] inspection has been given special emphasis from the beginning of the program[23] and DOT has defended and reasserted[24] its standard in the face of significant challenge and dissatisfaction.[25]

Moreover, the hard-headed approach on inspection seems to ignore even the degree of administrative flexibility available under the Act. DOT has the authority temporarily to "amend or waive standards . . . for the purpose of evaluating new or different highway safety programs . . . on an experimental, pilot or demonstration basis . . . where the public interest would be served. . . ."[26] Both California and Michigan planned random inspecting programs well before the federal standard was issued. Although the random programs process only a small proportion of a state's vehicles in a given year, California and Michigan authorities believe the constant threat of being inspected can create a public safety consciousness fully as beneficial as that created by periodic inspection, and at far less cost. Wisconsin has gone one step further in combining a statewide random system with an experimental periodic system in selected counties.

All three states argue that their programs ought to meet the inspecting standard, or, at least, should be approved temporarily under the experimental waiver. Yet, at the moment they are in the dark as to

22. See, for example, "Highway Safety Programs and the Public Trust," Traffic Quarterly, October 1968, at 469.

23. The Highway Safety Act directed DOT to issue a standard for vehicle inspection. 23 USC § 402(a). However, the statute did not limit the standard to mandatory periodic inspections.

24. See DOT news release of July 2, 1968 citing the Secretary of Transportation's report to Congress, "Safety for Motor Vehicles in Use."

25. As of the end of May 1969 only 31 states had provided for periodic inspection; of these 19 were pre-HSA programs and compliance of some of the remaining 12 was on paper only. California raised the most persuasive objections in its 1967 comments to the proposed standard. State Highway Safety Program Standards, Vehicle Inspection, State of California, California Highway Patrol, Sacramento.

26. 23 USC § 402(a). In Jan. 1969, DOT issued guidelines (FHWA Order 7-3) for approving experimental, pilot or demonstration inspection programs so long as the "purpose and intent is to improve the safety quality of the *total* vehicle population during the trial period."

whether their programs comply. Moreover, officials in those states view DOT as being antagonistic to their operations. For example, DOT summarily brushed aside a Michigan proposal for evaluating the random operations and, according to a research consultant, refused even to discuss the proposal by telephone. In the meantime California is going ahead with an evaluation which it hopes will provide unimpeachable data supporting the random inspecting concept.

DOT's apparent attitude toward inspection opens sores of contention in its dealings with the states. Under pain of the penalty some state authorities are forced to promote programs which they neither have faith in nor believe the public wants. In addition, there have been recent complaints that the whole federal grant program is bogging down in red tape.[27]

A whisper of a different concern has been heard recently. It suggests DOT is using the standards as a means for generating huge quantities of research data to help measure the efficacy of various programs. A pinned down DOT worker practically admitted research to be behind the hard line toward inspection, according to a west coast authority. The same theme recurs in the alcohol-safety program. The latest draft manual outlines a program, (which the states "should establish by statute") for making tests for alcohol on the remains of virtually all fatally injured crash victims and for making tests for intoxication on virtually all drivers surviving crashes in which someone else is killed.[28] The unstated reason for requiring every community in all fifty states to equip itself for making those tests is that local communities need to know just how much drunk drivers are costing locally and they need a warning system to alert them of changes in trends. In view of the reliability of sampling procedures and of the validity of extrapolations among similar communities, one may wonder if the states should not be given some alternative to requiring "by statute" that practically all cases be processed. The purpose of the requirement is not questioned: what is questioned is whether it has been formulated as a research rather than as an operational project. DOT has definite research missions[29] mandated by the Congress apart from state highway safety program. However, no matter how commendable tte hoped-for ends, the standards should not be used for treating the states as guinea pigs

27. Status Report, supra note 19, No. 68, November 15, 1968.

28. Draft Highway Safety Program Manual, Vol. 8. Alcohol in Relation to Highway Safety, US. Dept. of Trans., Aug. 2, 1968.

29. 23 USC § 403.

for research, at least so long as the penalty remains available to enforce participation.

No-one should be surprised that pure "state's rights" objections have been made to the HSA, since it clearly opens up a path to federal footprints where the states have traditionally trod alone. Therefore, it is legitimate to ask how far DOT should go in issuing highway safety standards which affect internal state functions.[30] Putting the question slightly differently: what relationship must programs required of the states under the HSA bear to highway safety, per se?

Let it first be granted by way of demurrer that the DOT could directly regulate the use of highways bearing interstate commerce. Then attention may be concentrated on programs related only peripherally to highway safety. The "Traffic Courts" program provides a good example. Finding a meaningful link between changes in traffic court operations alone and significant improvements in highway safety would be extremely difficult. And yet the May 31 draft of the Traffic Courts manual stated that "the following program elements should be considered as inherent parts of any proposed state plan": a requirement that all persons charged with hazardous moving traffic violations appear in court; that the fee system for financing traffic courts be dropped; that traffic court services be expanded for "better administration of justice"; that business practices in traffic courts be made uniform; that uniform rules of procedure in traffic cases be adopted; and, that administration, procedures and accounting manuals be distributed to all traffic courts.[31] It may be acceptable for the federal bureaucracy to recommend court reform to the states (and certainly better administration of justice seems desirable whatever the benefits for safety): but it seems indefensible to coerce the reorganization of the courts within a state, or any element of them, under the guise of highway safety buttressed with threats of reprisals, no matter how veiled and no matter how beneficial the changes. Similar requirements touching matters tenuously associated with highway safety appear in other programs.

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30. Of course, the Supreme Court has long held that the mere fact that meeting the requirements for federal aid has an effect upon internal activities in a state does not invalidate the statutes or the requirements. See, for example, Stewart Machine Co. v. Davis, 301 U.S. 548, 57 S. Ct. 883. Nevertheless, it would seem that such an arrangement could be invalid if there were no rationale link between the goals of the aid program and the substance of the standard imposed.

31. Draft Highway Safety Program Manual, Vol. 7 Traffic Courts, U.S. Dept. of Transportation, at 4, May 31, 1968.

In fairness to DOT, the draft manuals were frequently, but not always, posed permissively by using terms like "recommended" or "suggested" as if the drafters were unsure of their ground (which, of course, resulted in the poor quality charge discussed earlier). But there was no clear separation of requirements from recommendations, and so far as the states are concerned, the manuals must be treated as mandatory until the issuing agency delineates what is "standard" and what is not.

The process of drafting the alcohol safety manual demonstrates how well-meant overextensions of highway safety jurisdiction can occur. The May 31 draft required the states to "establish by statute . . . that no person having custody of the body (of certain traffic crash victims) shall perform any internal embalming procedures" until authorized to do so by "authorities charged with performing postmortem examinations."[32]

The ostensible purpose was to assure making tests for alcohol, discussed earlier, before the specimen are spoiled by embalming. But upon close analysis, it is clear that even a large percentage of the eligible bodies could be missed without denying the purposes of the program. The real reason for the provision's appearing as it did was that some of DOT's scientific consultants were fed up with outdated and inept coroner systems which too often allowed evidence to be spoiled by premature embalming. In their minds the alcohol program could force states to modernize their procedures for examining the dead; highway safety per se was ancillary. Although modernizing coroner systems would be a commendable public health goal, it bears little relation to making highways safer and the undertaking profession might be more concerned about new regulations than highway safety benefits alone could justify. In response to arguments like these, the redrafted manual "encourages" such provisions.[33] Nevertheless, the point was made. If left unrestrained, the bureaucratic process is likely to be overreaching of its jurisdiction, so long as the requirements are enforceable by penalty.

RATIONALE FOR CHANGE

The Highway Safety Act of 1966 potentially provides one of the most salutary federal-state programs ever to come out of Washington.

32. Supra note 21, at 19.
33. Supra note 28, at 9.

Virtually every citizen could benefit from it. Not only does it provide a lens for focusing national resources in creating solutions for a continuing cause of national tragedy, but it also provides help for the states in developing and paying for safety operations. Regrettably, however, the program seems unlikely to reach prime strength so long as the shadow of a bureaucratic whip falls over the states. Already the governors' representatives, who coordinate the programs within the states, have planned an organization to aggrandize their power in dealing with DOT.[34] The weight of their numbers may balance off the threat of penalties in bargaining; but the very process of bargaining is sure to detract from the creative and leadership potential of DOT.

Considerable pressure was brought to eliminate the penalty clause in the last Congress, and, indeed, its application was delayed for a year. Moreover, a reliable Washington observer recently reported that a House Public Works Subcommittee is "fairly certain" to investigate the administration of the HSA in 1969.[35]

I would urge that there be a reappraisal and that it consider whether the matters discussed here have affected the benefits accruing from the HSA. And, I would further urge that the Act be amended to produce the following changes.

1. Delete the Federal-aid highway penalty entirely.
2. Qualify the withholding of matching funds (and grants) under the Highway Safety Act by making each standard area individually eligible for support on its own merits.
3. Provide or direct the Secretary to provide a set of uniform performance criteria against which compliance is to be measured.
4. Direct the Secretary to develop and continually bring up to date model safety programs representing the best knowledge and latest technology available. Direct him to delimit the threshold eligibility requirements for receiving matching funds while encouraging the states to conform with the total packages.

Finally, the annual appropriations should be enough to allow the states to develop their programs as fast as they are able to, and to allow the Secretary fully to support purely experimental and demonstration programs in a limited number of states or localities.

No doubt some hardened state watchers will view these notions as

34. Status Report, supra note 19, No. 63, August 22, 1968. Later information suggests that the organization has not yet grown as anticipated.

35. Status Report, supra note 19, No. 65, September 26, 1968.

bunk—the end of the highway safety program. I contend the opposite; it could bring an era of vigorous progress. Most state authorities want help in making their highways safer, and the public deserves it. Removing the penalty would take with it nagging concerns of the states about being forced to do something that is none of DOT's business and doubts by DOT about whether its programs outstrip its jurisdiction. It would allow the DOT to assume real leadership in recommending the best available programs, and it would allow the states to use independent judgement in treating their most urgent needs. It would remove the ugly spectre of the Congress's officially brandishing a bludgeon before the states while the federal bureaucracy unofficially whispers that it really isn't dangerous. And most satisfying of all, it would puncture the irony in the Congress's saying to the states, "Highway safety is so important that the federal government will punish you if you don't comply", while failing itself to provide the promised support.[36] In short, the amended highway safety program could become a model for leadership of the kind the federal government should find itself assuming as our society ever increases in complexity: that is, leadership on the merits.

36. Similar treatment should be given the Highway Beautification Act of 1965 (Pub. L. 89-285; 79 Stat. 1028). That Act has two separate 10% Federal-aid penalty clauses, enough theoretically to cut $800 million from Federal-aid highways in fiscal 1969 if all 50 states fail to comply. Yet the maximum combined aid possible to the states for beautification in fiscal 1969 is $1 million (the 1969 appropriation, supra, note 12). This ludicrous situation is reason enough for dropping the penalties.