Energy Equity for the Poor: The Search for Fairness in Federal Energy Assistance Policy

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High energy costs present serious financial problems for many Americans. These problems have become especially acute since 1973, when an embargo by the Organization of Petroleum Exporting Countries (OPEC) triggered a sharp increase in petroleum prices. The federal government's recently completed decontrol of oil prices, and the phased decontrol of natural gas prices now under way, promise that energy prices will continue to rise in coming years. Although temporary reductions in energy price levels may sometimes occur, such as the recent decline in petroleum prices, the overall movement since 1973 has been, and is likely to continue to be, relentlessly upward.

The greatest hardships from increased energy costs fall on poor people and on those who live on fixed incomes, such as retired persons.
Programs designed to alleviate these hardships are frequently based on the goal of "equity,"5 the development of policies that will provide fair treatment for poor Americans faced with rising energy costs.6 Although "equity" or "fairness" toward the poor is a widely agreed-upon goal, no one has yet developed a clear definition of these terms in the context of energy policy for the poor.7 This lack of understanding of what energy equity means has created confusion in the objectives, as well as the methods, of the recent government efforts purporting to serve the broad equity goal.

During the past decade the federal government has pursued the goal of energy equity through two principal approaches:8 programs for the "winterization" or "weatherization" of the residences of poor people,9

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6. In theory it may be possible to stem or reverse the tide of increasing fuel prices by returning to some price regulation scheme. Few advocate this approach nowadays for at least three reasons: (1) higher energy prices are widely considered to be a good thing for the promotion of domestic energy production; (2) higher energy prices are believed to inhibit energy consumption, i.e., to promote energy conservation; (3) the Reagan Administration's emphasis on deregulation and reliance on free market forces makes renewed energy price regulation politically improbable. See H. LANDSBERG & J. DUKERT, supra note 4, at 60-61. But see R. STOBAUGH & D. YERGIN, Energy Future: Report of the Energy Project at the Harvard Business School 9-10, 56-78 (1981) (questioning the actual extent to which decontrolled oil and gas prices will increase domestic production).

7. Several commentators have declared the need for such a definition. See sources cited supra note 5.

8. An additional approach is to modify various rates and practices of regulated energy utilities in order to lower rates for needy households, to allow averaged or deferred payment plans, and to avoid abrupt terminations of service. Cf. Memphis Light, Gas, & Water Division v. Craft, 436 U.S. 1 (1978) (municipal utility's termination procedures held to violate due process); H. LANDSBERG & J. DUKERT, supra note 4, at 61-63 (evaluation of "lifeline rates"). Many of the regulated energy utilities have also recently begun their own financial assistance programs to help poor customers pay their bills. These efforts usually combine corporate contributions with voluntary contributions from other customers; frequently a utility's program is administered in coordination with an established charitable service organization. See Utilities, Customers Chip In to Help Needy Pay for Heat, L. A. Times, Jan. 30, 1983, at 1 col. 5. Some utilities, under the supervision of state regulatory commissions, are also subsidizing conservation measures for low-income customers. See Roe, Utilities and the Poor, N.Y. Times, Feb. 11, 1983, at 27, col. 3.

and programs of "direct assistance" or "energy assistance." In most weatherization programs, the government provides insulating materials and arranges for their installation. These structural changes can help permanently decrease home heating costs to poor owners and renters, although they do not directly address other types of energy needs such as lighting, cooking, and transportation. Weatherization programs have significantly improved energy efficiency in participating residences, though federal funds for these programs have been limited and only a small percentage of qualifying residences has been weatherized.

The direct assistance approach provides subsidies to the poor to help them meet their energy needs. The principal forms of such subsidies are cash payments to needy households and payments to the suppliers of energy to such households. Additionally, some use has been made of "in kind" assistance, such as blankets and warm clothing. Because of their more immediate and visible results, direct assistance programs have received a much higher level of federal funding than have weatherization efforts.

A variety of policy choices has shaped direct assistance programs through the past decade. An examination of the premises on which these programs rest is essential for understanding and evaluating the direct assistance efforts. Analysis of these premises also helps to provide a conceptual framework in which to determine the best legislative approaches for the future.

This article attempts to provide such an analysis. Part I briefly explores the implicit and explicit policy premises that have motivated federal energy assistance legislation. Part II discusses four chronological phases in energy assistance programs: 1973–79, 1980, 1981, and 1982–present. Part III re-examines the policy premises in depth, and concludes that the concept of energy equity entails multiple, overlapping objectives that both justify energy assistance to the poor and help to delineate its scope and form. Finally, Part IV offers a recommended synthesis of these premises for future policy design.

14. National Council of Senior Citizens, supra note 4, at 24 n.22 (for fiscal years 1981 and 1982, appropriations for energy assistance exceeded $1.8 billion, while those for weatherization were less than $200 million).
15. This article emphasizes federal direct assistance programs because few policy deliberations have focused on weatherization. Even if it is determined that weatherization offers the best long-term hope for the poor, there will still be some pressure for interim aid to alleviate present hardships. As is noted above, see supra text accompanying note 11, conservation programs also leave some energy needs untouched. There thus probably will be a continuing need for direct assistance regardless of future weatherization programs.
I. OVERVIEW OF THE POLICY PREMISES OF ENERGY ASSISTANCE

Looking at the decade of developments in energy assistance policy, we can identify six underlying premises at work. The influence of the different premises has varied considerably from one year to the next, and some have had greater overall influence than others. Part of the confusion that has characterized the programs has arisen because these various premises have been pursued simultaneously, without any acknowledgement of their tensions and inconsistencies.

Two of the underlying policy premises are most fundamental: first, the need to alleviate poverty, and second, the need to alleviate hardships caused by deliberate energy policy choices. The other four premises are more instrumental in character; they relate largely, though not exclusively, to how and when energy assistance efforts should be undertaken. These four are the need to protect Americans from foreign price control, to redistribute undeservedly high profits, to allocate social welfare decisions to the local level, and to balance alleviation of current needs with maximum long-term reduction of need.

These six policy premises have been applied at different times, in different measures, and in different combinations in the energy assistance programs from 1973 through 1982. Each of them has important, distinctive implications for the design of energy assistance. After examining the energy assistance programs of the last decade, this article will more closely examine these premises and will offer a suggested synthesis.

II. A DECADE OF ENERGY ASSISTANCE PROGRAMS

A. 1973–1979

1. 1973–1974

The 1973–74 OPEC oil embargo, and the accompanying shortages and price shock, provided the impetus for the first federal government efforts at energy assistance for the poor. From that time through fiscal year 1979, most program design was undertaken by administrative agencies, most notably the Office of Economic Opportunity (OEO) and its successor agency, the Community Services Administration (CSA). Congress provided some statutory guidance, but most of the ideas were generated within this “war on poverty” bureaucracy. The people most evidently hurt by the rapid price increases were the poor, and the most visible and readily apparent vehicle for delivering direct assistance to them seemed to be the existing institutions devoted to the war on poverty.

16. See infra text accompanying note 22.
In 1973 and 1974 Congress took no action aimed at helping the low income energy consumer. OEO, however, did take some small steps. In establishing OEO, Congress had included among its goals "opening to everyone the opportunity to live in decency and dignity."\(^{18}\) Apparently in pursuit of decent living conditions for the poor, OEO in 1973 and 1974 used the authority granted it by the Economic Opportunity Act to support demonstrations of ways to cope with increased energy costs to the poor and the elderly.\(^{19}\)

Much of the work of the war on poverty was designed and executed through Community Action Agencies (CAAs), local organizations that were required to include extensive participation by the poor themselves.\(^{20}\) A few local energy programs were initiated through CAAs.\(^{21}\) One congressional committee later described the early efforts, albeit with some exaggeration:

> Upon its own initiative and using previously appropriated funds, OEO/CSA originated a comprehensive weatherization and energy-saving program for the poor at the time of the fuel crisis in 1973 . . . . The agency later initiated an energy voucher subsidy program to test this method of providing the poor with money to buy fuel. Revolving loan funds, crisis centers, and emergency fuel depots were also set up by CAA's.\(^{22}\)

The initial federal involvement in direct assistance thus was limited to funding some local efforts. In retrospect, the logic of this approach is clear: the hardship to the poor was most evident to the poor themselves and to the agencies seeking to serve their needs. OEO, state poverty agencies, and the CAAs could begin to do something without the creation of any new bureaucracy and without any new authority or funding from Congress.\(^{23}\)

2. 1975

Early in 1975 Congress explicitly addressed the energy needs of low income Americans by passing the Headstart, Economic Opportunity, and Community Partnership Act of 1974.\(^{24}\) The Act renamed OEO as the Community Services Administration,\(^{25}\) and created a new Emergency Energy Conservation Services (EECS) program under the authority of

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18. Id.
21. See FOMAC REPORT, supra note 4, at 24. As early as the winter of 1973–74, for example, such programs were underway in Wisconsin and Maine. S. Rep. No. 434, supra note 19, at 7.
the Director of CSA. As the program name indicates, major emphasis was given to conservation. However, the legislation also authorized emergency loans, grants, and revolving funds to respond to increased housing expenses resulting from energy price hikes. It also authorized CSA assistance for programs involving alternative fuel supplies, special fuel voucher or stamp programs; ... alternative transportation activities designed to save fuel and assure continued access to training, education, and employment; [and] ... nutrition, health, and other supportive services in emergency cases.

Three features of the statute are especially noteworthy. First, it focused upon not only the needs of the poor, but also the needs of the elderly and the near poor, thus requiring at least three levels of administrative line-drawing. Second, it included no authorization for cash payments to these energy consumers; instead it allowed more indirect types of assistance, such as alternative supplies, vouchers, or stamps. Third, it recognized the transportation needs of the poor, at least for the limited purpose of continued access to training, education, and employment.

Some members of Congress anticipated an annual appropriation of about $100 million per year for the EECS program for fiscal years 1975 through 1977. They also expressed concern "about the effect of the energy crisis on the poor during the winter months, and the special hardships which the poor will face this winter [1974-75] as a result of the economic situation." Despite this concern, Congress did not appropriate funds for the EECS program until June, 1975 and then only appropriated $16.5 million for fiscal 1975, ending September 30, 1975.

26. Id. § 5(c), 88 Stat. at 2294-95.
27. Emphasis was placed on enabling "low-income individuals and families, including the elderly and the near poor, to participate in energy conservation programs designed to lessen the impact of the high cost of energy on such individuals and families and to reduce individual and family energy consumption." Headstart Act, supra note 24, § 5(c), 88 Stat. at 2294-95.
29. Headstart Act, supra note 24, § 5(c), 88 Stat. at 2294-95.
30. Id.
31. Id.
33. Id. at 12.
34. Second Supplemental Appropriations Act of 1975, Pub. L. No. 94-32, 89 Stat. 173, 181 (1975). See also S. REP. NO. 434, supra note 19, at 10; 40 Fed. Reg. 31,602 (1975). The legislative history of the appropriations bill foreshadows some of the thorny issues which have persisted through the various phases of energy assistance. One such issue is the extent to which funds actually reach needy consumers, rather than end up contributing to expanded bureaucracy. In considering the 1975 funding, the Senate Appropriations Committee declared its intention "that this appropriation be used for winterization and financial relief of the poor and near poor, not for expansion of administrative machinery." The Committee directed that "[n]o Federal employees should be added and local agency
Enactment and funding of the EECS program paved the way for the promulgation of the first set of administrative regulations on energy assistance.\textsuperscript{35} Those regulations set forth the purposes of the EECS program as follows: "\textquote{T}he long-range goal is to conserve energy and lessen the impact of the high cost of fuel for poor people, particularly through programs to increase the thermal efficiency of their dwellings . . . \textquote{E}nthe ECs \textquote{P}rogram would cover "emergency cases calling for programs of crisis intervention to restore utility service or prevent cutoff, provide emergency fuel deliveries or support other activities to assist those suffering serious hardships which endanger their health . . . .\textquote{36}"

This statement envisions a narrow role for direct assistance, limiting it to "emergency cases" to prevent danger to health or interruption of energy delivery. Arguably this focus would not include poor energy consumers who reallocated their meager resources in such a way as to avoid cutoffs or energy-related health threats, yet who suffered from this reallocation in other ways.\textsuperscript{38} Direct assistance was referred to in the regulations as emergency assistance, and defined as "intervention to prevent hardship or danger to health due to utility shut-off or lack of fuel."\textsuperscript{39} Energy assistance included "grants, loans, or payment guarantees; mediation with a utility company or fuel supplier and financial counseling; and maintenance of emergency fuel supplies, warm clothing, and blankets."\textsuperscript{40} CSA thus interpreted Congress's mandate for direct assistance as essentially limited to life-threatening, emergency situations. In view of the limited appropriation Congress had made, any attempt to establish a more comprehensive program would have been financially doomed from the start.\textsuperscript{41}

\textsuperscript{35} 40 Fed. Reg. 31,602 (1975) (originally codified at 45 C.F.R. §§ 1061.30-1 to -10 (1975)) [hereinafter cited as 1975 Regulations]. These regulations were occasionally referred to as CSA Instruction 6143-1. Although promulgated by CSA, the regulations were described as the result of consultation between CSA and the Federal Energy Administration. 40 Fed. Reg. 31,602-03 (1975) (preamble to proposed regulations).

\textsuperscript{36} 1975 Regulations, supra note 35, § 1061.30-3, 40 Fed. Reg. at 31,603.

\textsuperscript{37} Id.

\textsuperscript{38} The bulk of the regulations explained the process by which CSA would grant funds to CAAAs and other public or private non-profit organizations and agencies for "weatherization" or "emergency assistance" programs. The regulations drew the eligibility line for "near poor" recipients at 125% of the poverty thresholds set by CSA. Id. § 1061.30-5, 40 Fed. Reg. at 31,603.

\textsuperscript{39} Id. § 1061.30-6, 40 Fed. Reg. at 31,603.

\textsuperscript{40} Id.

\textsuperscript{41} Most of the total $44 million appropriated for the EECS program in 1975 and 1976 was used for weatherization. See S. REP. No. 434, supra note 19, at 10.
3. 1976

Congress took no action on energy assistance in 1976 other than to appropriate $27.5 million for it.\(^{42}\) In the absence of any substantive congressional statements on the subject, CSA had no apparent reason to change its 1975 EECS program regulations. Yet in July 1976 CSA did revise them, claiming that experience had indicated the need to clarify agency policy.\(^{43}\) In addition to some minor reworking of the statement of EECS program purposes, the revision included an ambitious addition to that statement: that the program was to assure “participation of the poor and near poor in the decision making processes that will determine the pricing structures and availability of increasingly scarce energy resources.”\(^{44}\) The major emphasis remained on what were now called “weatherization” projects, rather than “winterization” as in 1975; “crisis intervention” fully supplanted the earlier “emergency assistance” label.\(^{45}\)

Even though CSA asserted that it was making no major substantive changes, the 1976 revisions did implicitly broaden the program. First, the change to “weatherization” allowed the possibility of assistance to persons suffering from heat rather than cold; in fact, the regulations did mention weatherization work related to “heating or cooling.”\(^{46}\) Second, the addition of “fuel voucher or stamp programs expanded the possible components of crisis intervention projects.”\(^{47}\) This addition simply put into the regulations methods which were expressly mentioned in the EECS statute itself in 1975, but which were omitted from the earlier regulations. The additions tended to give the crisis intervention approach a somewhat broader perspective.

This broadening was also reflected in a new definition of crisis intervention as “immediate, short-term assistance, consisting of intervention to prevent hardship or danger to health due to utility shut-off or lack of fuel.”\(^{48}\) The provision also stated that such intervention “should be

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\(^{45}\) Id. §§ 1061.30-9(a), 1061.30-9(b), 41 Fed. Reg. at 29,126.

\(^{46}\) Id. § 1061-30-10(c)(3), 41 Fed. Reg. at 29,127.

\(^{47}\) Id. § 1061-30-9, 41 Fed. Reg. at 29,126.

\(^{48}\) Id. § 1061-30-10(d)(1), 41 Fed. Reg. at 29,127. Another new feature that suggests the broader significance of energy assistance was the inclusion of “consumer information, education, and legal assistance” projects among the activities eligible for CSA grants under the EECS program. Such projects could include “the representation of the interests of the poor in public proceedings involving, for example, energy policy and utility rate structures.” Id. § 1061.30-9, 41 Fed. Reg. at 29,126.
followed with program efforts that will have a long-range effect on the individual's ability to conserve energy and pay fuel bills.49

Lest it be thought that crisis intervention was to be transformed into an on-going benefits program for the poor, however, the regulations hastened to add:

In any case, actual payment of utility or fuel bills by this program should be a one-time crisis intervention resource to be considered only as a last resort after negotiation with utility or fuel companies; and care must be taken to avoid having the grants looked upon as a source of on-going subsidy for energy costs of the poor.50

The regulations thus touched upon the desirability of long-term energy assistance, while expressing fear of an "on-going subsidy for energy costs of the poor." In this ambivalence, we find the first hint that major questions of income redistribution might be involved in energy assistance programs.

In addition to expanding the scope of crisis intervention, the regulations acknowledged for the first time that some poor people rent their dwellings, rather than own them.51 This was done only with respect to weatherization projects. No attention was given to the problems involved in direct assistance when renters and landlords have various kinds of arrangements for paying fuel bills.

Unlike the regulations for the preceding year, the 1976 regulations recognized the transportation needs of the poor.52 The revision defined as eligible activities those "designed to offset the increased costs to the poor of transportation needed for access to essential services and employment."53 This language is even broader than the statutory focus upon "access to training, education, and employment,"54 and suggests that CSA was beginning to think that energy needs extended beyond the objectives of the poverty program itself. Again, however, CSA was reluctant to go too far. The regulations cautioned that "projects designed to provide assistance in the purchasing of [transportation] fuel shall do so only as a last resort, thereby minimizing the subsidy of high cost fuel."55

Finally, the revisions included a provision for projects for developing alternate energy sources to meet the energy needs of the poor.56

49. Id. § 1061.30-10(d)(1), 41 Fed. Reg. at 29,127.
50. Id. § 1061.30-10(d)(2), 41 Fed. Reg. at 29,127. It is difficult to know what kinds of "program efforts that will have a long-range effect" could be undertaken under the first provision after reading the second. The single possibility would seem to be weatherization, which deals only with the home heating and cooling aspects of energy consumption.
51. Id. §§ 1061.30-10(c)(2), -10(c)(3), 41 Fed. Reg. at 29,126-27.
52. Id. § 1061.30-9(d), 41 Fed. Reg. at 29,126.
53. Id.
54. Headstart Act, supra note 24, § 5(c), 88 Stat. at 2295.
55. 45 C.F.R. § 1061.30-10(f), 41 Fed. Reg. at 29,126.
56. The regulations referred generally to "technology that capitalizes on non-fossil
striking thing about this provision was that it was to be implemented by CSA and its state and local grantees, raising again the question of the most appropriate type and level of government agency for dealing with energy needs of the poor.\textsuperscript{57}

These developments in 1976 suggest that members of Congress and some CSA officials were beginning to recognize that the energy problems of the poor might call for more than just weatherization and the provision of some emergency financial aid.

4. \textit{1977}

In April of 1977 President Carter presented the first National Energy Plan, which declared that “[g]overnment at all levels has the responsibility for protecting low-income citizens from the most severe effects of the energy crisis.”\textsuperscript{58} To provide this protection, the Plan relied upon the weatherization program, among other methods.\textsuperscript{59} To deal with the harm to low-income people resulting from sharp energy price increases, the President stated that he was submitting a revised emergency assistance program to Congress,\textsuperscript{60} but noted that “[f]or the longer run, protection for low-income people from the gradually increasing cost of energy, lies in a reformed welfare system . . . .”\textsuperscript{61}

In response to this presidential initiative, Congress appropriated $200 million for a Crisis Intervention Program to be administered by CSA as part of its Emergency Energy Conservation Service (EECS) program for fiscal 1977.\textsuperscript{62} Activities under this appropriation were referred to as the

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\item fuels and renewable energy sources such as solar and wind power or methane digesters; or that can make conventional fuels available to the poor at substantially decreased cost and/or increased efficiency." Id. § 1061.30-9(e), 41 Fed. Reg. at 29,126.
\item 57. Actually the Senate committee considering the 1976 EECS appropriation had recommended that up to $3 million of EECS funds be used by CSA for a National Center of Appropriate Technology, whose primary purpose would "be to work with Community Action Agencies and other appropriate local groups to develop and implement innovative energy technology and energy systems appropriate to the needs of the elderly, poor, and near poor." S. REP. No. 366, supra note 42, at 94. Whether this type of research and development effort should be undertaken by an agency such as CSA, as opposed to a technical, energy-oriented agency, is open to question.
\item 58. 13 \textit{WEEKLY COMP. PRES. DOC.} 566, 577 (Apr. 20, 1977).
\item 59. \textit{Id.} Ironically, in view of the President’s own later proposals for decontrolling oil prices, see infra text accompanying notes 136-40, the President cited price controls on natural gas and oil as means to “protect low-income consumers whose homes are heated” with each of these fuels. 13 \textit{WEEKLY COMP. PRES. DOC.} 566, 577 (Apr. 20, 1977). This reference, however, was not present in the Plan as presented to Congress nine days later.
\item 60. 13 \textit{WEEKLY COMP. PRES. DOC.} at 578.
\item 61. \textit{Id.} at 577.
\end{itemize}
Special Crisis Intervention Program (SCIP). SCIP was intended to provide “emergency energy/fuel assistance” pursuant to the original EECS program statutory authority.\(^6\)

CSA did not issue any new regulations for SCIP, but instead continued to operate on the basis of the 1976 regulations.\(^5\) In administering the program, CSA apparently took into account the views expressed in the Senate Report on the Appropriations Bill.\(^6\) That report gave CSA more detailed program guidance, which seemed to begin to remove the effort from the usual poverty program format by frequently interposing congressional directives and state government agencies between CSA and the local grantees.

Specifically, the Report directed that funds that could not effectively be spent for crisis intervention could be utilized for weatherization.\(^7\) It also included the first reference to an allocation formula for the division of the $200 million among the states.\(^6\) The Report also urged the local administering agencies to “give particular consideration to those cases in which emergency assistance can be coordinated with weatherization assistance.”\(^6\) Payments under SCIP were also declared not to constitute income for purposes of determining eligibility for income maintenance programs such as public assistance or food stamps.\(^7\)

In addition, the Senate Report stated that grants should be provided to the states, which were to distribute the funds through CAAs and other appropriate state and local groups in the public or private sector.\(^7\)

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\(^{63}\) CBO REPORT, supra note 28, at 45. See also STAFF OF HOUSE COMM. ON APPROPRIATIONS, 96TH CONG., 1ST SESS., REPORT ON COMMUNITY SERVICES ADMINISTRATION ENERGY ASSISTANCE PROGRAMS FOR 1977 AND 1978 (Comm. Print 1979).

\(^{64}\) S. REP. No. 64, supra note 62, at 101.

\(^{65}\) Late in 1976 CSA did promulgate procedures for CSA grantees to follow in submitting required data on the services provided. 41 Fed. Reg. 52,876 (1976) (CSA Instruction 6143-2).

\(^{66}\) S. REP. No. 64, supra note 62, at 101. According to the Congressional Budget Office, “82 percent of the funds available were obligated under SCIP, and over one million households received benefits that averaged an estimated $140.” CBO REPORT, supra note 28, at 46. But see STAFF OF THE HOUSE COMM. ON APPROPRIATIONS, supra note 63, at ii (“The proportion of funds spent to funds allocated has little value when trying to determine if the programs have truly served those intended. An analysis of program statistics coupled with CSA’s inability to provide more definitive data seems to indicate otherwise.”). A brief discussion of the non-binding nature of congressional reports may be found in Simer v. Rios, 661 F.2d 635, 690 (7th Cir. 1981) (Swygert, J., dissenting.)

\(^{67}\) S. REP. No. 64, supra note 62, at 101.

\(^{68}\) Id. The formula contained four components — "heating degree days" squared, the number of poverty households, the number of people over 65 with incomes below 125% of the poverty level, and the relative cost of fuel in the region. Heating degree days are the number of degrees the daily average temperature is below 65 degrees Fahrenheit. CBO REPORT, supra note 28, at 37 n.8. See also 44 Fed. Reg. 4485, n.2 (1979).

\(^{69}\) S. REP. No. 64, supra note 62, at 101. Although the Report did not define coordination, one might assume that the intent was to assist households interested in weatherization, perhaps by means of giving temporary assistance to meet their energy needs until weatherization reduced those needs.

\(^{70}\) Id. at 102.

\(^{71}\) S. REP. No. 64, supra note 62, at 101.
1976, eligibility was restricted to individuals with incomes no higher than 125% of the federal poverty guidelines. Payments under the program could not exceed $250 per household. Governors of states receiving grants were to assure that the greatest household needs were met first.

The preferred form of assistance under SCIP was direct payments to energy or fuel suppliers, on behalf of eligible individuals who proved their inability to meet outstanding bills, as well as those who had paid their bills "at great sacrifice." In addition, cash grants of up to $50 could be made directly to a household if the administering agency found that there was an energy-related need that could be met in no other way. Renters who paid for home energy indirectly through their rent, however, were not eligible for benefits.

Despite the additional funding and guidance, SCIP was fundamentally a continuation of the earlier crisis intervention efforts, particularly in its continued uncertainty over the relative emphasis to be given to the various components of the EECS authority. In part this extended the original EECS approach of allowing local CAAs to determine the best uses of funds. Under SCIP Congress still contemplated that local agencies could decide how much of their grants could "be effectively spent for crisis intervention," with the rest used for weatherization.

5. 1978

Although Congress enacted a few minor amendments to the EECS program statute in November 1978, in most respects the program continued along the same lines as in 1977. Congress appropriated $65 million for EECS, which was intended primarily for weatherization projects. CSA continued to rely upon its 1976 regulations in administering EECS activities.

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72. Id.
73. Id.
74. Id.
75. Id. Apart from this exception, CSA decided "that the only form of money assistance that should be allowed was a voucher system with vouchers redeemable for fuel or other needed goods or services." COMMUNITY SERVICES ADMIN., RESPONSE TO THE HOUSE APPROPRIATIONS COMM. REPORT ON THE ENERGY ASSISTANCE PROGRAMS 2 (April 10, 1979).
76. CBO REPORT, supra note 28, at 45.
77. S. REP. No. 64, supra note 62, at 101.
78. See Economic Opportunity Amendments of 1978, Pub. L. No. 95-568, 92 Stat. 2425 (1978), repealed by Pub. L. No. 97-35, § 683(a), 95 Stat. 519 (1981). One provision of the amendments stated that "[e]ligibility for any of the programs authorized under this section shall not be based solely on delinquency in payment of fuel bills." Id. § 5(d), 92 Stat. at 2426–27. This addition presumably was intended to remove any incentive for recipients of energy assistance to refrain from paying fuel bills in order to qualify for federal help. At about the same time, Congress also enacted the package of five statutes known collectively as the National Energy Act. Pub. L. Nos. 95-617 to -621, 92 Stat. 3117 (1978).
79. S. REP. No. 434, supra note 19, at 10.
In March 1978, CSA promulgated additional regulations, which referred to the Emergency Energy Conservation Service as the Emergency Energy Conservation Program. The regulations principally addressed the allocation of the funds. For the first time, CSA formally set out the formula it was using in allocating funds to the states. CSA also stated that Emergency Energy Conservation Program Plans, which had been developed by each state's economic opportunity office, would form the basis for each state's use of 1978 funds unless the states and CSA agreed on plan amendments. The states had developed these plans jointly with the CAAs and regional CSA offices for using the 1977 funds. The development of such plans reflects growing state involvement in distributing funds, subject to federal supervision. Grantees were encouraged to develop proposals for comprehensive energy conservation programs that could include not only weatherization but also crisis intervention, conservation education, alternate energy, and other activities. In essence, CSA was reiterating its "flexible funding" orientation, leaving it to the states and local grantees to choose the best uses of funds. The new regulations, however, do not provide a clear sense of the program at that time or of how CSA perceived its function.

81. 43 Fed. Reg. 9818 (1978) (amending 45 C.F.R. § 1061.30-11(b) and adding 45 C.F.R. §§ 1061.52-1 to -9) [hereinafter cited as 1978 EECP Regulations]. CSA stated its intent to allocate about $40 million of its $65 million appropriation immediately, along with almost $37 million of unobligated SCIP funds from the prior year, for a total of $77 million to be made available for grants. The remaining $25 million was to be set aside for farm-worker energy programs ($4 million), Native American energy programs ($3 million), other projects ($2.1 million), and future plans not yet prepared ($16 million). Id. § 1061.52-8, 43 Fed. Reg. at 9819.

82. The allocation formula assumed that each local project would receive a base amount of $18,000, which would be used to hire supervisory personnel for each project. 45 C.F.R. §§ 1061.52-7(b) to -7(c), 43 Fed. Reg. at 9819. The remaining funds were then allocated in accordance with the following formula: (0.587 x population-weighted heating degree days + 0.033 x population-weighted cooling degree days) x (number of poverty households in the State + number of elderly below 125 percent of poverty threshold). The resulting number for each state was next "divided by the total of such numbers for all States, yielding a percentage which was applied to the balance available after subtraction of the sum of the per-project allotments." Id. §§ 1061.52-8(d) to -8(e), 43 Fed. Reg. at 9819. Appended to the regulation was a list of amounts to be allocated to each state from the almost $77 million.

83. 45 C.F.R §§ 1061.52-2(a) to -2(b), 1061.52-4, 43 Fed. Reg. at 9818.

84. Id.

85. Id. § 1061.52-3(a), 43 Fed. Reg. at 9818. The new regulations instructed eligible grantees to continue to submit proposals according to the provisions of the 1976 regulations. Id. § 1061.52-4(b), 43 Fed. Reg. at 9818.

86. Id. § 1061.52-3(b), 43 Fed. Reg. at 9818.

87. On the one hand, both the new regulations and the old ones emphasize weatherization projects. Both also recognize, however, that grantees may wish to devote some of their funds to projects other than weatherization, including crisis intervention. It is striking in this regard that the new promulgation recites that "the fiscal year 1977 level of funding increased the size of the Emergency Energy Conservation Program four-fold." Id. § 1061.52-6, 43 Fed. Reg. at 9818. This refers to the jump from $27.5 million in 1976 to $110 million in 1977 for weatherization; it does not pertain to SCIP. However, as pointed
In addition to these revised EECP regulations, CSA also issued regulations governing a new Emergency Energy Assistance Program (EEAP). The new program, for which Congress had just appropriated $200 million, provided crisis intervention funds for 1978. During 1978, then, CSA executed both the EECP and EEAP programs pursuant to the statutory authority for the EECS program first enacted in 1975. The EECP program was administered through states and local grantees, with the principal emphasis on weatherization, even though a substantial quantity of the funds to be used for this came from the unused 1977 SCIP amounts. The supplemental EEAP funds of $200 million were to be distributed to the same grantees as the EECP funds, but with the addition of some new requirements.

The EEAP regulations contained a number of novel features. First, the regulations went to great lengths to establish the program’s non-precedential nature, describing it as a one-time program that “is not intended to be an income transfer program; nor does it entitle any person or household to a certain amount and/or form of assistance.” The regulations narrowed the circumstances under which funds could be expended by requiring that there be an “Energy Related Emergency” in the recipient state or locality that “creates a need for direct assistance and which exceeds presently available resources.” The regulations specified in detail the kinds of circumstances that would qualify as Energy Related Emergencies, emphasizing danger to health or severe hardship because of inadequate fuel or energy supply. Finally the rule provided that, “as in the past, cash assistance will be limited to voucher payments and payments directly to suppliers of fuel or other assistance.”

The EEAP regulations also explicitly limited eligibility. No one could receive EEAP assistance if other support services, such as welfare, could meet the need. The regulations clarified previous income eligibility

out above, almost $37 million of unobligated SCIP funds were redirected to the 1978 Emergency Energy Conservation Program. See supra note 81. Thus, of the $77 million being made available initially for 1978 by CSA for the “conservation” program, $37 million were funds Congress had appropriated for crisis intervention. On its face there was nothing wrong with this result, especially given that SCIP was intended to allow funds to be diverted to weatherization if they could not effectively be spent for crisis intervention. Nothing indicates, however, that clear policy choices actually were being articulated regarding the redirection of these funds.

90. The EEAP regulations, which governed distribution of funds that Congress appropriated on March 7, were issued on March 8, while the EECP revisions were issued on March 10.
91. See supra note 87.
93. Id. § 1061.51-3(a), 43 Fed. Reg. at 9476.
94. Id. §§ 1061.51-3(a)(2), 1061.51-3(b), 43 Fed. Reg. at 9476.
95. Id. § 1061.51-5, 43 Fed. Reg. at 9477.
96. Id. § 1061.51-7, 43 Fed. Reg. at 9477.
requirements for recipients, and tightened program eligibility by requiring that an applicant had to show that he or she lacked financial resources to meet an emergency energy need.

Apparently in recognition of problems associated with reprogramming the 1977 SCIP funds, the regulations also required that EEAP funds be returned to CSA for refund to the U.S. Treasury if they were not obligated before the expiration date. That date, May 1, 1978, was a controversial one, for it was well before the end of the fiscal year. CSA attempted to justify that early date, which was not statutorily required, by referring to "congressional intent that this program [operate] during the winter months." This cutoff date and some other features of the EEAP regulations were challenged in litigation, and in September of 1978 a Federal District Court held that CSA had improperly declared the early termination.

6. 1979

In 1979 the overlapping weatherization efforts by CSA and the Department of Energy (DOE) ended when DOE became the sole

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97. Elderly persons were defined as those over age 60. Income limits for them were raised from 125% of CSA Poverty Guidelines to 150%. Id. § 1061.51-7(b)(1), 43 Fed. Reg. at 9477. These limits were subsequently returned to the 125% applicable to non-elderly low income persons and households. 43 Fed. Reg. 14,317 (1978). Instead, elderly persons receiving Supplemental Security Income (SSI) were eligible. Id.

98. 1978 EEAP Regulations, supra note 88, § 1061.51-7(b)(3), 43 Fed. Reg. at 9477. The regulations also stated, "[a] person should be asked to provide proof of program eligibility where the need can be documented (e.g. notice of disconnection, overdue fuel bills, notice of refusal to deliver, etc.) If such documentation does not exist, it will be the responsibility of the grantee to determine program eligibility." Id. This suggests a return to a requirement that applicants must prove unpaid energy bills before qualifying for assistance. The Congressional Budget Office described the 1978 EEAP program as one which, "unlike its predecessor, permitted payments only on behalf of households with large unmet home energy bills." CBO REPORT, supra note 28, at 46. The regulations actually are more flexible than this description suggests, but the emphasis on emergencies and on the need to demonstrate that available resources are exceeded by energy needs does bespeak a shift back to a stricter crisis assistance mode. In line with this, the $250 per household maximum benefit limitation is reiterated. 1978 EEAP Regulations, supra note 88, § 1061.51-14(a), 43 Fed. Reg. at 9478. In contrast, however, the regulations do include an extensive list of types of assistance permissible, such as "blankets and warm clothing, temporary loan of space heaters, emergency furnace repairs, fuel oil delivery, temporary shelter, nutrition, health and other supportive services, ... as well as the payment of outstanding utility/fuel bills ...." Id. § 1061.51-5, 43 Fed. Reg. at 9477.


100. Id. § 1061-51.8.


103. The court ordered the unspent funds, which amounted to over one-fourth of the original EEAP funding, to be made available in fiscal 1979. Those funds were spent during the first six month of fiscal 1979. CBO REPORT, supra note 28, at 46; see also STAFF OF THE HOUSE COMM. ON APPROPRIATIONS, supra note 63, at iii (questioning whether CSA supported and tacitly approved the court action, rather than opposing it).
This change left energy assistance as the central focus of CSA’s activities, and CSA’s continuing experimentation with this program produced a number of new features in the fiscal 1979 program.

CSA promulgated its final rules for administering 1979 crisis intervention funds on January 22 of that year. The regulations eliminated the distinction between EEAP and EECP that had been in effect during 1978. In doing so, CSA left standing the basic 1976 EECS program regulations and their reporting requirements. In discussing the purposes of the program, CSA cited not only the EECS program legislation, but also Congress’s statement of purpose for community action agencies and programs under the Economic Opportunity Act. CSA declared:

> Activities initiated under [the Act] are also governed by the basic purpose of Title II which is to ... stimulate a better focusing of all available local, state, private, and federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities for them to become fully self-sufficient. These legislative goals were used by CSA as the major guideline in developing the rule which will govern its FY79 program to address poor people’s winter-related energy emergencies.

CSA is not, and was not created to be, a Federal agency administering income transfer programs, nor is the intent of its authorizing legislation that any of its programs be such.

It is curious that not until its fifth year of promulgating regulations on this subject did CSA explicitly justify its efforts in terms of the basic purposes of the poverty program’s community action strategy. It is even more curious that CSA would cite statutory objectives relating to “skills, knowledge, and motivations” and “opportunities ... to become fully self-sufficient,” since the energy assistance program CSA was adminis-

104. CBO REPORT, supra note 28, at 55.
107. See infra note 114.
tering in 1979 seems to have very little to do with those goals. Perhaps self-sufficiency is served by weatherization efforts, which reduce dependence on outside sources for energy. The irony is that in 1979, for the first time, CSA was no longer involved with weatherization. A more pertinent statutory objective would seem to be "the opportunity to live in decency and dignity," but CSA did not mention that.

The 1979 regulations continued to declare the same policy objectives that had been stated for EEAP in 1978. CSA wanted to make funds available for response to energy crises that endangered the health and survival of low-income households. The 1979 regulations repeatedly made clear that aid was only available for "winter-related energy crises," even though past regulations had acknowledged possible assistance to persons suffering from extreme heat.

Because the regulations and funds were available relatively early in the 1979 heating season, CSA had the opportunity to devise a more sophisticated, three-tiered strategy for allocating the crisis intervention funds. CSA stressed its desire to encompass preventive activities in addition to crisis intervention. CSA thus was prepared to use some of its crisis intervention funds for energy needs not arising out of crises.

The non-crisis needs were covered by the first tier program, called the Regular Crisis Intervention Program. This program addressed the needs of "areas of the country whose normal winter weather may be severe enough" to cause energy-related winter emergencies. Appendix B to the regulations indicated that all but a few of the warmest states would receive funds under this program.

112. Perhaps CSA was anticipating the strong criticism shortly thereafter to appear in the report of House Appropriations Committee Staff, supra note 63. That report charged, inter alia, that "SCIP and EEAP have in themselves created a sense of constituent dependency." Id. at ii.


116. Congress appropriated the funds in early January. See supra note 105. As with the 1978 program, and despite the litigation aimed at the May 1978 cut-off date, see supra note 102, the 1979 regulations declared "[a]ll grant funds may be committed by grantees to provide assistance to . . . households after May 31, 1979 . . . . All grants will have a termination date of June 30, 1979." 1979 Regulations, supra note 106, § 1061.52-4(b), -4(c), 44 Fed. Reg. at 4482.


118. Id. § 1061.52-7, 44 Fed. Reg. at 4482.

119. Id. § 1061.52-5(b), -7(a), 44 Fed. Reg. at 4482.

120. 44 Fed. Reg. 4485 (Appendix B to 1979 Regulations); see CBO REPORT, supra note 28, at 46.
By means of the Regular Crisis program, CSA implicitly acknowledged the predictable and on-going nature of the hardships many low-income people face in normal winter weather given recent energy price levels. This seemed to lay the conceptual foundation for an on-going assistance program. CSA gave no indication of willingness to endorse that step, however, and even explicitly denied that income transfer or entitlement programs were created by its "one-time" allocations under the Regular Crisis Intervention Program.\textsuperscript{121}

The second tier of crisis intervention funding was the Supplemental Crisis Intervention Program, which supplied one-time grants to states and localities that could demonstrate a winter-related energy need.\textsuperscript{122} The regulations included a variety of alternative tests under which the governor of a state could declare that a winter-related energy need existed, either throughout the state or within a specified area.\textsuperscript{123} CSA contemplated that funds under this program would provide supplementary assistance when the normal hardships in cold winter locales were aggravated by conditions such as unusually cold weather or sharp increases in fuel or utility prices.\textsuperscript{124}

The third tier of aid was the Winter-Related Disaster Relief Program, designed to provide short-term assistance to meet disaster-related energy needs of the poor and the elderly. CSA wanted to ensure that low-income persons' emergency energy needs, arising from winter-related disaster conditions, were met pending receipt of other disaster-relief resources.\textsuperscript{125} The regulations, however, did not clearly define such disasters to distinguish them from the winter-related energy needs qualifying for the second-tier Supplemental Program.\textsuperscript{126} Nonetheless, the narrower emphasis of the disaster program was reflected in references to the pre-existing process by which states could request declaration of disaster areas and associated federal relief.\textsuperscript{127}

Eligibility for assistance under the 1979 program remained basically the same as it had been in 1978. The new regulations did make proof of income eligibility more stringent, however, where the aid sought was cash for paying outstanding bills.\textsuperscript{128} In those instances, documented proof of income was mandatory. This requirement was one of a number of new

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\textsuperscript{121} See supra text accompanying note 111. Perhaps even more telling is the fact that only $15 million was allocated to the Regular Program. 1979 Regulations, supra note 106, § 1061.52-7(a), 44 Fed. Reg. at 4482. This money, as well as the funds under other parts of the overall 1979 program, was to be granted to local community action agencies in accordance with state-developed allocation plans, using essentially the same approach to this process as in the prior years.

\textsuperscript{122} 1979 Regulations, supra note 106, § 1061.52-8, 44 Fed. Reg. at 4482.

\textsuperscript{123} Id. §§ 1061.52-8(a)(1) to -8(a)(2), 44 Fed. Reg. at 4482.

\textsuperscript{124} Id. § 1061.52-5(b), 44 Fed. Reg. at 4482.

\textsuperscript{125} Id. § 1061.52-9, 44 Fed. Reg. at 4483.

\textsuperscript{126} See id. § 1061.52-5(b), 44 Fed. Reg. at 4482.

\textsuperscript{127} Id. § 1061.52-9(b), 44 Fed. Reg. at 4483.

\textsuperscript{128} Id. § 1061.52-10(b)(2), 44 Fed. Reg. at 4483.
restrictions on CSA's policy regarding payment of outstanding bills. CSA announced that to be eligible, "the applicant must have received a notice to disconnect, or, in the case of non-regulated fuel, have less than one week's supply of fuel on hand."129 This requirement appeared to violate the statutory prohibition added to the basic legislation in 1978.130 For this and other reasons, the 1979 program was subjected to litigation similar to that raised against the 1978 effort.131

It should be noted that outstanding energy bills were not an absolute prerequisite to assistance. Such events as broken heating equipment or water pipes could warrant aid. Even beyond those cases, the regulations acknowledged that if a family had "paid at great sacrifice a large energy bill and as a result had insufficient money to buy needed food or other necessities, then they would be eligible for assistance."132 This last possibility, however, raised the specter of administrative unworkability, in that the verification requirements imposed on the local agency might be so extensive as to delay timely distribution of assistance.133

In summary, the 1979 program followed the 1978 approach closely, but attempted to apply a more sophisticated allocation system to the varying levels of need that might occur in different areas during winter. It also attempted to adopt a clearer stance on the different kinds of assistance available, and in particular tried to specify the circumstances in which outstanding bills would be paid. In making these changes, the 1979 program came closer than any of the previous efforts to recognizing the continuing nature of the overall problem, yet it still was labeled a program of "emergencies" and "crises." The 1979 approach also raised the possibility that its greater complexity built in administrative delays to such an extent that the program would be self-defeating by postponing payment past the time of winter needs.

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129. Id. § 1061.52-10(b)(3)(ii), 44 Fed. Reg. at 4483; see also id. § 1061.52-3(c), 44 Fed. Reg. at 4481. As in 1978, see 43 Fed. Reg. 9476 (1978), money payments were limited to voucher payments and direct payments to suppliers of fuel or other assistance. 1979 Regulations, supra note 106, § 1061.52-3(e), 44 Fed. Reg. at 4481. The $250 limit on assistance of all forms to a household remained. Id. § 1061.52-15(a), 44 Fed. Reg. at 4484.

130. See supra note 78.

131. See Simer v. Olivarez, No. 79-C-3960 (N.D. Ill., filed Sept. 24, 1979), discussed in 13 CLEARINGHOUSE REV. 712 (1980). Subsequently the parties to the case worked out a Stipulation and Agreed Order to resolve the suit and allocate the funds unobligated at the end of the 1979 program. Following the raising of questions about the settlement in the press, Congress, and elsewhere, the District Court judge vacated the Order months later. He indicated doubts about his authority to direct the expenditure of the funds in the absence of clearer congressional authority and concluded that the parties had misled him in this respect. This action was appealed, and the judge's final order rejecting the settlement was affirmed by the Court of Appeals on other grounds. Simer v. Rios, 661 F.2d 655 (7th Cir. 1981).

132. 1979 Regulations, supra note 106, § 1061.52-10(b)(3)(iii), 44 Fed. Reg. at 4484.

133. Verification was to be done in a variety of respects, e.g., regarding income eligibility, id. § 1061.52-10(b)(2), 44 Fed. Reg. at 4483, individual household fuel supplies, id. § 1061.52-10(b)(3)(i), 44 Fed. Reg. at 4483, and availability of support from other support service networks, id. § 1061.52-10(b)(3)(i), 44 Fed. Reg. at 4483.
B. 1980

The program for fiscal year 1980 represents a critical transition. Congress authorized the program only after it became clear, in the early autumn of 1979, that the key elements of a permanent program could not be worked out in Congress in time for the coming winter. The program was declared to be an interim approach, and perhaps this explains, or partially excuses, its unusually great complexity. It was proposed that a permanent program would follow, based upon a link between energy assistance for the poor and new taxes to be levied upon the windfall profits of American oil companies.

The 1980 effort contained many new features which distinguished it from the 1973–79 developments. These features also foreshadowed a new orientation toward energy assistance for the poor, an incipient recognition of the continuing nature of the problem and of the need for large financial resources.

1. The Carter Initiative

President Carter’s April 5, 1979 Energy Address to the Nation marks the starting point for the 1980 program. The President announced his decision to begin a program for phasing out price controls on all domestically produced crude oil by September 30, 1981. The stated goals of decontrol were to increase domestic oil production, discourage energy waste, and promote national energy independence. Recognizing that decontrol would be likely to increase significantly the profits of oil companies, and to burden low income energy consumers severely, the President proposed a windfall profits tax and declared “part of the proceeds . . . will go to help those . . . who will be hurt most by rising energy prices.” That effort, along with several others, was to be financed

134. See infra text accompanying notes 144-45.
135. See infra text accompanying notes 138-39.
136. 15 WEEKLY COMP. PRES. DOC. 609 (Apr. 5, 1979) [hereinafter cited as Carter Energy Address]; see also U.S. DEP’T OF ENERGY, NATIONAL ENERGY PLAN II (May 1979).
137. Carter Energy Address, supra note 136, at 610. Although this gradual decontrol decision is usually attributed to presidential power alone, in fact the President was acting pursuant to a statutory grant of authority. In 1975 Congress passed the Energy Policy and Conservation Act, which terminated all such oil price controls by September 30, 1981. Pub. L. No. 94-163, § 461, 89 Stat. 871, 897. The Act allowed the President the discretion to terminate the controls earlier, in whole or in part, beginning June 1, 1979. This discretionary power was exercised in the April 1979 Address.
138. Carter Energy Address, supra note 136, at 612. He also pledged to “channel the tens of millions of dollars we are already winning in lawsuits against oil companies for price gouging into further energy assistance for lower-income citizens.” Id. In succeeding years some of the funds recovered by the government from oil companies that were found to have violated the pre-existing price control regulations have been directed to low income energy assistance. Most recently Congress included energy assistance as one of five “energy conservation programs” for which oil overcharge funds could be used. Congress directed the Secretary of Energy to disburse these “petroleum violation
through a new Energy Security Fund from the windfall profits tax revenues.139 Responding to an OPEC oil price hike of about forty percent in June 1979, the President increased the amount of aid requested from $800 million to $1.6 billion annually.140

That September the President revised his proposal, calling for Congress to create a Low Income Energy Assistance Program (LIEAP) to provide $1.6 billion in aid that winter and $2.4 billion annually thereafter.141 The proposal had two components: an Energy Crisis Assistance Program, which would provide $400 million to help states operate emergency programs; and a Special Allowance Program, which would supply energy assistance to needy households.142 The latter program was intended to reach all households with income below 125% of the federal poverty threshold.143

As late as September 27, 1979, the Carter Administration was telling Congress that the President’s support for the Low Income Energy Assistance Program was contingent on enactment of a windfall profits tax.144 Congress was still embroiled, however, in major disagreements on the windfall profits tax legislation. In October the Administration acquiesced to this reality and removed its stipulation. Congress then “rushed to meet the winter’s deadline.”145 By this time the Carter Administration was receiving intense pressure from many of its political allies, particularly those in the Northeast, to do something quickly about the effects of the

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139. Carter Energy Address, supra note 136, at 612.
140. 15 WEEKLY COMP. PRES. DOC. 1241, 1244 (July 16, 1979) (remarks on energy crisis and windfall profits tax); see also Memorandum from S. Eizenstat to Pres. Carter 1 (July 11, 1979) (on file with author).
141. See President Carter’s Proposal for Low-Income Energy Assistance, 15 WEEKLY COMP. PRES. DOC. 1639, 1639-1640 (Sept. 12, 1979) [hereinafter cited as Carter Proposal]. These amounts did not seem consistent with the President’s statement regarding the “major purpose” of the Fund, because most of its revenues were planned for uses other than low income assistance. See Hill, Energy Problems Facing the Poor, 16 CLEARINGHOUSE REV. 219, 221 (July 1982).
143. Carter Proposal, supra note 141, at 1640; see infra notes 164-65.
145. URBAN SYSTEMS REPORT, supra note 142, at 19.
near doubling in heating oil prices that had occurred in some areas between 1978 and 1979.\textsuperscript{146}

Even before enactment of the main elements of the 1980 program, CSA had received funds for continued activities under its existing authority. The Administration had requested $250 million for the CSA program, which was to be called the Energy Crisis Assistance Program (ECAP) in 1980.\textsuperscript{147} A Conference Committee had approved this request on July 31, 1979,\textsuperscript{148} and CSA had then issued ECAP regulations.\textsuperscript{149} On October 12 a Continuing Resolution provided the $250 million for CSA’s 1980 program.\textsuperscript{150}

2. The 1980 Appropriations Act

The program took shape with the enactment of the 1980 Appropriations Act on November 27, 1979.\textsuperscript{151} The Act provided $1.35 billion for low income energy assistance, $150 million of which was to be added to ECAP.\textsuperscript{152} Adding the prior $250 million for ECAP to the new funds meant that energy assistance for fiscal 1980 would reach a level of $1.6 billion, roughly an eight-fold increase over the two immediately preceding years.

In addition to the $400 million allocated to ECAP, $1.2 billion was to go to the Department of Health, Education, and Welfare (HEW)\textsuperscript{153} for distribution in accordance with a formula that represented a legislative compromise on a number of major points. $400 million was to be paid “as a special one-time energy allowance to recipients of Supplemental Security Income” (SSI).\textsuperscript{154} States were to receive the remaining $800

\textsuperscript{146} Id. at 18. See also Memorandum from C. Edley, Jr. to Secretary P.R. Harris (Oct. 1, 1979) (discussing the timing for “decoupling Low Income Energy Assistance and the windfall profits tax”) (on file with author); Memorandum from J. Watson to President Carter (Sept. 8, 1979) (“No governor or other political leader in the Northeast with whom I talk these days ever fails to mention the price problem . . . it is virtually impossible to overstress the political importance and implications of the issue for us.”) (on file with author).

\textsuperscript{147} Testimony of Patricia Harris, supra note 144, at 3; Testimony of Patricia Harris, Secretary of Health, Education, & Welfare, before the Subcomm. on Labor-HEW of the House Comm. on Appropriations, 96th Cong., 1st Sess. (Oct. 18, 1979).


\textsuperscript{149} 44 Fed. Reg. 51,780 (1979). These regulations, and their subsequent development into the broader 1980 program, will be analyzed below. See infra text accompanying notes 173–206.

\textsuperscript{150} See Office of Assistant Secretary for Planning & Evaluation, U.S. Dep’t of Health, Educ. & Welfare, Current Federal and State Funding Authorities Which Can Be Used for Energy Assistance and Weatherization 1 (Oct. 30, 1979); see also 125 CONG. REC. H10,470 (daily ed. Nov. 8, 1979). The Administration also sought a supplemental $150 million for the CSA effort, as part of its “interim plan.” See URBAN SYSTEMS REPORT, supra note 142, at 18.


\textsuperscript{152} 1980 Appropriations Act, Pub. L. No. 96-126, 93 Stat. at 978.

\textsuperscript{153} Id. HEW was to make payments for “energy grants and allowances and related administrative costs.” Id.

\textsuperscript{154} Id. The SSI program is the federal cash transfer program for the aged, blind,
million for distribution according to State Funding Plans that would provide "assistance for those who pay fuel bills indirectly as well as directly."\textsuperscript{155} The formula for allocating these block grants among the states was based upon only the first two elements of the formula for the SSI-based funds.\textsuperscript{156} It thus excluded consideration of the number of SSI recipients in a given state and had the effect, even more so than the three-part SSI formula, of strongly favoring the colder Northern states.\textsuperscript{157} This effect did not go unnoticed in Congress, and Western and Southern members opposed both versions of the formula.\textsuperscript{158}

It is striking that, after all the years of congressional appropriations for the CSA energy crisis intervention programs, members of Congress did not become involved in the details of spending these funds until the 1980 program. The increased need for energy assistance, the increased political visibility of the issue, and the tremendous increase in funding all help to explain this sudden attention. Unfortunately, once Congress began to legislate on the specifics of energy assistance, it did so by creating complex allocation formulae supported by no discernible rationale.

and disabled. \textit{Levitan, supra} note 4, at 35–38. This money was to be allocated among the states according to a formula giving equal weight to the following three factors:

- (1) the number of heating degree days squared, times the number of households below 125\% of the poverty level;
- (2) the difference in home heating expenditures between 1978 and 1979; and
- (3) the number of SSI recipients in each state relative to the national total.


Applying each of these three factors to each state, and the resulting ranking of the states, indicated how the $400 million for SSI recipients would be divided among the states. \textit{See CBO Report, supra} note 28, at 47. The statute provided that no SSI recipient was to receive more than $250 from these funds. Assuming that the allocation formula might award a state more than $250 times the number of its SSI recipients, the legislation indicated that any such excess was still to go to the state for distribution to recipients of Aid to Families with Dependent Children or in accordance with other state distribution plans for energy assistance funds. \textit{See H.R. Rep. No. 604, infra} note 187, at 38.

155. Pub. L. No. 96-126, 93 Stat. at 979. Actually only $792.6 million was to be allocated, apparently because the balance was to be allowed for federal administrative costs. \textit{See 44 Fed. Reg. 69,032 (1979)}.


157. \textit{Urban Systems Report, supra} note 142, at 21; \textit{see also} A. Meadows, \textit{White House Memorandum for E. Helminski on Low-Income Energy Assistance & the South}, (Sept. 26, 1979) ("Basing allocations to states on heating degree days and low-income consumption of fuel oil instead of on energy costs harms states such as Florida that are heavily dependent on fuel oil, which is burned to produce electricity, but that do not have many heating degree days.").

158. Senator Bentsen of Texas, for example, vigorously objected to the formulae, referring to them as "two proxies for need" which "do not correlate with need." 125 Cong. Rec. S16,429 (daily ed. Nov. 9, 1979). He also asserted that "the numbers for making such a distribution are simply not available . . . . [T]he fact remains that we are pretending to allocate money on a need basis, when we simply do not have the data to back that claim up." \textit{Id.} The absence of reliable data regarding relative home heating energy expenditures among states was acknowledged by Patricia Harris, Secretary of HEW. \textit{See} letter from Patricia Harris to Sen. Byrd (Nov. 1, 1979).
The 1980 Appropriations Act did contain some more lucid declarations on other details, such as the directive that "the States shall, in awarding funds, give priority to those households experiencing significant increases in heating fuel costs over the levels of the previous year."159 It also specified that the states should determine "the extent to which increases in rents are caused by increases in heating fuel costs and consider such portions of increases in rents to be increases in heating costs."160 Additionally, Congress directed that "proof of income eligibility shall be required of all applicants"161 and that no awards would be made after June 30, 1980.162 Finally, the Act called for the funds appropriated to be reimbursed to the Treasury from any windfall profit taxes "imposed by Federal law on producers of domestic crude oil."163

Although the $1.6 billion appropriation amount was what the Carter Administration had requested for 1980, Congress's decision that the funds would be distributed through ECAP, SSI, and block grants to states departed from the original proposal. While that proposal had sought $400 million for ECAP, the remaining $1.2 billion had been intended for recipients of SSI164 and Aid to Families with Dependent Children (AFDC),165 "individuals that Congress ha[d] already determined to be in need of help from the government."166 The main justification for the SSI-AFDC emphasis was time: direct payments to recipients of those benefits could be issued through existing administrative channels quickly enough to help meet upcoming winter needs.167 The Carter Administration thus was giving serious, advance attention both to the magnitude of the need for assistance and to the requirement that effective aid be supplied promptly.

In suggesting that three-quarters of the requested funds be administered by existing public assistance programs, the Administration was making a major conceptual shift in the emphasis of energy assistance for the poor. "In contrast to earlier years' programs, in which all households had to apply for aid and attempts were made to relate benefits to households' actual energy needs, the 1980 programs also provided automatic

160. Id.
161. Id.
162. Id.
163. Id. at 979.
165. Testimony of Patricia Harris, supra note 144, at 1.
166. Id. AFDC is the "largest, costliest, and most controversial public assistance program." LEVITAN, supra note 4, at 28. It is primarily funded by the federal government, although its administration, including eligibility standards and benefit levels, is controlled by the states. Id. at 29–30. AFDC "provides income assistance to needy families in which the children have been deprived of support because at least one parent is deceased, disabled, absent from the home, or (at State option) unemployed." S. Rep. No. 394, 96th Cong., 1st Sess. 110 (1979), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 500, 519.
167. Carter Proposal, supra note 141, at 2. In contrast, "a large-scale block grant program could not be properly implemented in time for the forthcoming winter." URBAN SYSTEMS REPORT, supra note 142, at 19.
payments to all recipients of certain types of public assistance, regardless of their actual energy expenses. Once again — as in the allocation formulae — new perspectives were at work identifying persons most in need of energy assistance.

The Carter proposal’s emphasis on using existing public assistance categories of recipients became a major source of contention. Ultimately a compromise was reached for the three different avenues of distribution described above: the CSA program would continue for another year at a higher funding level ($400 million), each SSI recipient automatically would receive up to $250 in direct payments ($400 million), and the states would receive block grants which they could use as they wished, either for further funding of ECAP efforts, for direct payments to public assistance recipients, or for other energy aid programs of their own design (approximately $800 million). As a result, “roughly half of all the 1980 energy assistance funds were distributed as automatic payments to public assistance recipients, and therefore served as cash assistance supplements rather than as crisis assistance payments.”

Thus the 1980 program substantially embodied the notion that an effective energy assistance policy could allow individuals to decide for themselves which of their energy needs — or other needs for that matter — to meet with the cash payments awarded. This approach stands in contrast to more energy-focused, yet arguably paternalistic, approaches such as vendor payments, which channel government aid directly to the supplier of the poor individual’s fuel or energy source.

3. CSA’s ECAP Regulations

As noted above, CSA had begun to promulgate regulations to govern ECAP even prior to the final funding of any 1980 efforts. It also devised its own formulae for allocating among the states the $250 million appropriated initially and without specific congressional formulations for its disbursement. The July Conference Report did provide some guidance

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168. CBO REPORT, supra note 28, at 49.
169. URBAN SYSTEMS REPORT, supra note 142, at 19.
170. See supra text accompanying notes 151–55.
171. CBO REPORT, supra note 28, at 49.
172. CSA had followed the vendor payment approach in SCIP and EEAP, as discussed above. See supra text accompanying note 74. Vendor payments also had been recommended strongly in the 1979 draft of the FOMAC Report, supra note 4. See Draft FOMAC REPORT 31 (July 1979).
173. 44 Fed. Reg. 51,780 (1979). But see Memorandum from J.L. Palmer, Deputy Asst. Secretary for Planning and Evaluation, Dep’t Health, Educ., & Welfare, to J. Sawhill, Deputy Secretary-Designate, Dep’t Energy (Oct. 3, 1979), indicating “CSA is under a mandate from the Senate Appropriations Committee to utilize [some measure of the actual increase in energy costs faced by the poor at the state level] for this winter’s crisis program.” See also U.S. Dep’t Health, Educ., & Welfare, Low-Income Energy Assistance Programs for FY 1980 (Nov. 27, 1979), listing state-by-state allocations of the ECAP funds and indicating that CSA’s formula for the original $250 million differed from Congress’s formula for the supplemental $150 million as follows: CSA’s formula allocated half of the funds
for allocating the funds;\textsuperscript{174} the conferees directed “that an allocation formula be developed immediately based on past severity of weather, relative increase in the cost of fuel, and the numbers of low-income individuals residing within the state.”\textsuperscript{175} These factors formed the groundwork for CSA’s formula.

The Conference Report also observed that the states ultimately receiving the CSA funds could use them “as either cash grants or emergency assistance such as heaters, blankets, food, alternate shelter, and the like.”\textsuperscript{176} It permitted either direct payments to households or direct vendor payments for fuel costs. The report limited eligibility to households at or below 125\% of the federal poverty level and to persons eligible for SSI, adding that “[h]ighest priority should be placed on serving the low income elderly.”\textsuperscript{177} As before, payments under this program were not to be considered as income for purposes of determining eligibility for public assistance and similar programs.\textsuperscript{178}

On the basis of this guidance, and Congress’s expressed intent to fund another year of CSA’s emergency energy assistance program under the old statutory authority,\textsuperscript{179} CSA proposed its 1980 ECAP regulations on September 4, 1979.\textsuperscript{180} On October 11, 1979, CSA amended some aspects of these regulations, responding to comments that had been submitted after the September 4 notice.\textsuperscript{181} Most significantly, CSA rejected the many comments urging it to compel governors of recipient states to use community action agencies as the local administering agencies.\textsuperscript{182} It did so even though the ECAP program was still based on the Economic Opportunity Act authority, with its strong emphasis on the local poverty agencies.\textsuperscript{183} The Conference Report, however, had directed that governors be “given the flexibility to designate specific local delivery

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\item according to heating degree days multiplied by a state’s low-income population and the other half according to the 1978-79 change in overall home “energy” expenditures, while Congress’s formula allocated half based on heating degree days squared multiplied by the number of households below 125\% of the poverty level and the other half on the 1978-79 change in home “heating” expenditures.
\item \textsuperscript{174} H.R. Rep. No. 400, supra note 148, at 27-28.
\item \textsuperscript{175} Id. at 28.
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id.
\item \textsuperscript{179} Headstart Act, supra note 24, § 5(c), 88 Stat. at 2294-95.
\item \textsuperscript{180} 44 Fed. Reg. 51,780 (1979) (proposed regulations later amended at 44 Fed. Reg. 58,876).
\item \textsuperscript{181} 45 C.F.R. §§ 1061.70-1 to -16 (1982), 44 Fed. Reg. 58,876 (1979).
\item \textsuperscript{182} CSA said, “[i]t would not be consistent with congressional intent to compel Governors to utilize a specific local administering network. CSA does anticipate that Governors will utilize Community Action Agencies where they have demonstrated the capability to effectively implement energy assistance programs. CSA wishes to remind prospective grantees that they must provide for the participation of the poor,” 44 Fed. Reg. 58,876 (preamble to regulations).
\item \textsuperscript{183} See supra text accompanying notes 17-23.
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systems." CSA thus conformed to congressional preference to let the states shape many of the details of energy assistance.

Following passage of the Appropriations Act, CSA again amended its ECAP regulations. This final set of amendments governed not only the supplemental $150 million added to ECAP, but also the original $250 million and such portions of the $800 million in block grants to the states as the various governors wished to have administered by CSA under ECAP. CSA also explicitly acknowledged that Congress had directed it to make certain changes in its regulations.

In some respects the amended regulations resembled those for prior years, but they differed from previous regulations in acknowledging the detailed attention Congress was finally giving to energy assistance. The most striking new characteristics were the de-emphasis on community action agencies and the increased emphasis on the roles of the states and their governors. The governor of a state was given the flexibility to choose local administering agencies from among such sources as community action agencies, aging offices, and welfare offices. The governor was explicitly not precluded, however, from using only the initial state grantee.

The regulations did require that any local agencies selected have "experience in operating programs that serve the poor." The increased emphasis on state authority under ECAP is best illustrated by the requirement that a governor request funds by submitting a State Funding Plan to the appropriate CSA Regional Office. Each such plan was to include specified elements reflecting the various congressional concerns already identified. This use of state plans as the vehicle for

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185. CSA also tacitly may have recognized that the Community Action Agencies were no longer as important in the war on poverty as they earlier had been.
187. CSA referred to some of the program details spelled out in the 1980 Appropriations Act, Pub. L. No. 96-126, 93 Stat. 954, 978 (1980), such as the June 30, 1980 payments termination date and the priority to be given to households experiencing heating fuel cost increases. Additionally, CSA noted some of the directions provided in the Conference Report on that Act, such as that CSA should amend its regulations "to provide equal treatment of paid fuel bills and unpaid fuel bills," and "to allow the Governor of each State to request the authority to increase [the] ceiling" that CSA could impose on payments to an eligible household. H.R. Rep. No. 604, 96th Cong., 1st Sess. 38 (1979).
189. See supra text accompanying notes 180-85.
190. 45 C.F.R. § 1061.70-6, 44 Fed. Reg. at 58,877.
191. Id. One commentator has argued that in fact CSA "evidenced a strong preference for utilization of community action agencies by states for ECAP, the organizations serving as grantees for most other CSA programs and subject to CSA regulatory control." Laramey, The National Response to Energy-Related Needs of the Poor, 12 Urb. L. Rev. 526, 530 (1980).
192. 45 C.F.R. § 1061.70-6, 44 Fed. Reg. at 58,877.
193. Id. § 1061.70-4(c), 44 Fed. Reg. at 58,877.
194. Id. § 1061.70-16, 44 Fed. Reg. at 58,879. There was a very short timetable allowed for the submission of plans. They were to be presented within 15 days of the regulations' effective date, which originally was October 11, 1979. Failure to submit a plan
energy assistance conformed to the primary intent of the program: "to make funds available to states to enable Governors to respond to energy-related crises affecting poor and near poor households, which are caused by the high cost of energy and an anticipated severe winter." In prior years CSA’s regulations had never clearly declared such a major role for the states.

As in earlier years, the regulations continued to emphasize the onetime nature of the program. They complied with congressional guidance by calling for extensive outreach efforts by local agencies, including attempts to contact persons receiving unemployment compensation who might be eligible. The elderly received highest priority in the program, which also covered renters, including those who paid for fuel indirectly as well as directly. CSA set a maximum limit of $400 per household on assistance payments under ECAP, subject to the governor’s power to include in the State Funding Plan a higher maximum justified on specific grounds such as climate and fuel costs. Regardless of the maximum established in a given state, the regulations repeatedly emphasized that other energy allowances — such as those provided to SSI or AFDC recipients — were not to be considered as income for purposes of determining ECAP eligibility. The regulations also declared, however, that the “total amount of the energy allowances and/or assistance under this program shall not exceed the amount needed to ameliorate the household energy-problem[sic] or the maximum level of assistance in the state, whichever is lower.” CSA thus attempted to ensure that all payments to a household under the various 1980 programs correlated with need, and to honor the November Conference Report directive “that there be no duplication of payments from any funds contained in this program.”

The focus of ECAP on “household energy” was clearly delineated in the uses of funds allowed by the regulations. The regulations also

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allowed CSA to develop a plan for the state. Id. §§ 1061.70-11(b), -11(d), 44 Fed. Reg. at 58,879. One commentator argued that the short time period for state plan submission effectively would emasculate the states' power by necessarily subjecting them to CSA’s preferences. Laramey, supra note 191, at 529–30.

195. 45 C.F.R. § 1061.70-3(a), 44 Fed. Reg. at 58,877.
196. Id. § 1061.70-3(b), 44 Fed. Reg. at 58,877.
199. Id.
200. Id. § 1061.70-7(b), 44 Fed. Reg. at 58,878.
201. Id. § 1061.70-9(a), 44 Fed. Reg. at 58,878.
202. Id. § 1061.70-7(b), 44 Fed. Reg. at 58,878.
204. Allowable uses of funds included payments directly to "vendors and suppliers of fuel, goods, and other services," "establishment of lines of credits [sic] with fuel/utility vendors for the benefit of eligible households," "direct money assistance not to exceed $50 . . . in those cases where a household is without resources to pay for other necessities
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explicitly excluded the use of ECAP funds for weatherization projects.\(^{205}\)

Apparently CSA had decided to keep its efforts and those of the Department of Energy quite separate.\(^{206}\)

4. HEW's Block Grant Regulations

On November 30, 1979 HEW issued its regulations for the almost $800 million that was to be distributed among the states as block grants.\(^{207}\)

The regulations were not particularly informative, since they were intended to combine two different approaches to energy assistance, neither of which required much explanation by the federal government. The first approach consisted of automatic payments to persons already identified as needy by virtue of their participation in an income maintenance program such as AFDC.\(^{208}\) The second approach awarded block grants to the states, and left it to them to fill in most of the substantive details.\(^{209}\)

HEW gave the states until December 27, 1979 to submit plans that would govern the block grant funds. States could choose from among four options under what HEW called its Energy Allowance Program (EAP).\(^{210}\) Plan A consisted of a flat payment, no later than February 1980,

\(^{205}\) 45 C.F.R. \S 1061.70-8(d), 44 Fed. Reg. at 58,878.

\(^{206}\) While CSA was at work on these regulations, it and other agencies were looking ahead to appropriation of the larger amounts the Administration had requested. In particular, they were providing some early guidance to the states for preparation of the state funding plans to be used under both ECAP and the expected HEW block grant programs. The Conference Report on Pub. L. No. 96-126 recognized that this work could expedite the distribution of the almost $800 million in block grant funds to the states. The conferees thus directed "that HEW consider any plan that has been submitted by a State for energy assistance to CSA and that has been approved be automatically considered as approved for the purpose of that State's participation in the HEW block grant program." H.R. Rep. No. 604, supra note 187, at 38. In fact CSA had approved most state plans under ECAP by December 1. See U.S. Dep't Health, Educ., & Welfare Fact Sheet, Energy Crisis Assistance Program 2 (Nov. 27, 1979).


\(^{208}\) Id.

\(^{209}\) Id.

\(^{210}\) This short time period was prescribed by the Conference Report on the 1980 Appropriations Act. H.R. Rep. No. 604, supra note 187, at 38. The idea was that, since Congress was taking action so late in the autumn, no more than thirty days could be allowed to the states. HEW was then given fifteen days in which to approve or disapprove the state plans. It was feared that longer periods for developing and approving plans would mean that the funds could not be distributed until winter was mostly over. HEW accepted the conferees' recommendation that state plans approved by CSA under ECAP automatically be approved for purposes of state participation in the HEW program. 44 Fed. Reg. 69,035 (1979).
to all AFDC recipients.\textsuperscript{211} The payment was to be unrestricted, with the state determining a uniform, state-wide amount.\textsuperscript{212} Plan A reflected the Carter Administration’s original insistence that energy assistance for the winter of 1980 could only be provided in time if it were linked to the SSI and AFDC administrative machinery.\textsuperscript{213} Plan A appeared to give each state an opportunity to accept that view. Instead of using that approach, however, it could design its own scheme, subject to the various congressional requirements.\textsuperscript{214}

Plan B offered an option similar to Plan A, except that it allowed a state to choose an income-based program other than AFDC for identifying eligible recipients, or to base eligibility on a combination of AFDC and other programs, such as Food Stamps or General Assistance. Unlike Plan A, benefit levels under Plan B could vary within a state according to “demonstrable differences in circumstances of the assistance unit such as family size or established differentials or changes in shelter or heating costs (including those related to geography and climate).”\textsuperscript{215}

Plan C allowed a state to transfer all or part of its EAP money to the state agency administering the ECAP funds.\textsuperscript{216} The combined funds would then be administered within the state in accordance with the State Funding Plan approved by CSA.\textsuperscript{217} As noted above, almost half of the block grant funds actually were turned over to ECAP.\textsuperscript{219} “Most of the remaining funds were sent by the states in automatic payments to AFDC, food stamps, or other public assistance recipients.”\textsuperscript{220}

The final option, Plan D, allowed a state to develop its own plan, employing distribution or payment mechanisms of its choice.\textsuperscript{221} Eligibility was still limited, however, to persons below 125% of poverty level, although states again could extend eligibility to recipients of AFDC, Food

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\item \textsuperscript{211} 44 Fed. Reg. 69,032 (1979).
\item \textsuperscript{212} Single-person assistance “units,” however, were only to receive half of what multi-person units were to get. Provisions were included to ensure that if SSI and AFDC recipients shared a household, payments to the latter could be reduced so that the combined total would not exceed the state’s payment level for a multi-person AFDC household. \textit{Id.} at 69,035.
\item \textsuperscript{213} \textit{Id.} See \textit{supra} text accompanying notes 166-67.
\item \textsuperscript{214} The requirements included: eligibility at 125% of poverty level or below; mandatory proof of eligibility; a payment cutoff date of June 30, 1980; priority to households with significant heating fuel cost increases; and inclusion of renters paying for fuel indirectly or directly. 44 Fed. Reg. at 69,036.
\item \textsuperscript{215} \textit{Id.} at 69,037.
\item \textsuperscript{216} Fifteen states put all their funds into Plan C, and 26 did so with part of their grants. \textit{URBAN SYSTEMS REPORT}, \textit{supra} note 142, at 26.
\item \textsuperscript{217} 44 Fed. Reg. 69,037 (1979).
\item \textsuperscript{218} See \textit{supra} text accompanying notes 186–187.
\item \textsuperscript{219} Hill, \textit{supra} note 141, at 221.
\item \textsuperscript{220} \textit{URBAN SYSTEMS REPORT}, \textit{supra} note 142, at 26.
\item \textsuperscript{221} 44 Fed. Reg. 69,038.
\end{itemize}
Stamps, or a statewide program of regularly paid General Assistance. Twenty-one states chose Plan D; ten of these designed what were essentially Plan B programs, under which funds were distributed automatically to public assistance recipients. The remaining eleven states developed a variety of approaches.

Through these options, HEW offered the states the opportunity to make quick decisions, employing as little or as much additional planning as they desired. As one study observed,

[t]he states, [HEW], and CSA were very successful in getting state ... plans submitted, approved, and operational on schedule. The timetable was met by the vast majority of states. By April of 1980, well over half of the $800 million allocated to states had been passed on to low-income households, with many of the payments issued in January and February.

5. HEW's SSI Payments Regulations

On December 21, 1979, HEW issued its regulations for administering the $400 million that the 1980 Appropriations Act directed to be paid to SSI recipients. As with the HEW block grant regulations, these added little of substance to the 1980 energy assistance program. The regulations reiterated two statutory provisions: the three-part allocation formula, and the provision that if the $250 limit left a state with excess funds, those funds would be added to the amounts granted to the state under the block grant EAP program.

The regulations clarified the automatic eligibility of SSI recipients, including eligible spouses. Eligibility was to be determined as of December, 1979, and no separate application for the energy allowance was necessary. Eligible persons would receive a one-time federal energy allowance check in the mail early in 1980. The amounts, as listed in the Federal Register notice, would vary by state.

222. Id.
223. URBAN SYSTEMS REPORT, supra note 142, at 26.
225. Id. at 75,728; see supra text accompanying notes 116-27. The regulations explained that “the amount paid an SSI recipient will vary from State to State because it is determined by the amount allocated to the State divided by the estimated SSI recipient population in the State,” 44 Fed. Reg. at 75,727.
226. Id. at 75,727.
228. Id.
229. Recipients in Hawaii would get $34 and those in Florida $39. The maximum amount, $250, was to be received in 11 states. The disbursement of these payments reportedly went smoothly. Hill, supra note 141, at 221 n.13. The only aspect of the program which received adverse publicity was “the fact that some recipients (a small percentage) lived in publicly funded homes, where they were effectively protected against the rising costs of home heating energy.” Id. Although this problem had been anticipated, and could not be avoided because of the shortness of time, operators of some care facilities “put pressure on SSI recipients to turn checks over to the homes and many recipients were unsure of their rights.” Id.
6. The 1980 Program in Perspective

The 1980 program introduced several new perspectives on the size, purposes, and implementation of energy assistance for the poor. The Carter Administration attempted to link this aid to new tax revenues from domestic oil producers. The numerous programs developed by the states served almost as "experiment[s] with various approaches in preparation for the larger, FY 1981 program." Nonetheless, the latitude afforded to the states, and the three-part compromise embodied in the 1980 Appropriations Act, indicate a continuing lack of clear congressional perspective on the energy cost problems facing the poor. One result was that the treatment of recipients in various states often differed without any clear justification. Although Congress was finally becoming actively involved in low income energy assistance, no clear direction for the effort had yet emerged.

C. The 1981 Low Income Energy Assistance Program

1. The Home Energy Assistance Act of 1980

Early in 1980 a windfall profits tax finally was enacted. In line with President Carter's original proposal, the legislation included provisions aimed at directing some of the new tax revenues to energy assistance for the poor. In this respect the new program appeared to achieve the basic objective of linking energy assistance with oil company profits. Although the President had also urged that the program be made permanent, however, this was not done.

In the months following the Carter initiative in 1979, numerous energy assistance bills had been presented in Congress. The major provisions of one such bill were eventually enacted as Title III of the Crude Oil Windfall Profit Tax Act, which became law on April 2, 1980. Although Title III was officially named the Home Energy Assistance Act of 1980, it was more often referred to as LIEAP, for the Low-Income Energy Assistance Program that it established. The legislation has been described as "a modified block grant approach to energy assistance."

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230. Id. at 221.
231. Id.
233. See infra text accompanying notes 246-49.
234. See FOMAC REPORT, supra note 4, at Appendix A (list of bills). See also S. REP. No. 378, 96th Cong., 1st Sess. 4-5 (1979).
238. Hill, supra note 141, at 222.
The Act authorized $3.115 billion in federal funds, $100 million of which was to be transferred to CSA for energy crisis programs under its Economic Opportunity Act authority. Ninety-five percent of the total authorization was to be allocated among the states for distribution in accordance with plans that they were to submit to the Secretary of Health, Education, and Welfare. The Secretary was to approve or disapprove state plans in the light of criteria detailed in the statute, as well as on the basis of implementing regulations that the Secretary was required to issue within 60 days after enactment.

With regard to the proposed link between energy assistance and the windfall profits tax, the original House version of the tax would have created an Energy Trust Fund into which all revenues from the tax were to be deposited. This version, however, would have left to future legislation the specifics of how the revenues would be spent. The Senate version would have established a Taxpayer Trust Fund to receive revenues from the tax. Although the Senate bill called for more energy assistance funding than the annual $2.4 billion sought by President Carter, it also provided for lower revenues from the windfall profits tax than either the President or the House proposed.

The compromise ultimately enacted established an account at the Treasury Department to keep track of the revenues from the tax and their disposition. The Conference Committee recommended the following formula for allocation of the revenue: twenty-five percent of net revenue was to be for low income energy assistance, sixty percent for reduction of income taxes, and fifteen for energy and transportation programs. Net revenues in excess of the projected revenues would be


240. LIEAP, supra note 237, §§ 306(a)(1), 308, 94 Stat. at 289, 294. HEW soon thereafter became the Department of Health and Human Services (HHS).


243. Id.

244. Id. Appropriations were proposed at the following levels: $3.025 billion for fiscal year 1981, $4.025 billion each for fiscal years 1982 and 1983. See id. at 153, 1980 U.S. Code Cong. & Ad. News at 704.


247. Id.
allocated one-third for low income energy assistance and two-thirds for income tax reductions.\(^\text{248}\) Section 102 of the Act included these percentages, but declared they were to be only “for accounting purposes.”\(^\text{249}\)

The legislative history clearly indicates that the allocation formula was not a binding commitment of Congress. In debate over the conference bill, Senator Long, one of its chief supporters, explained that the formula was simply an expression of where Congress thought the money should go and was not binding on either the Appropriations Committees or the Budget Committees.\(^\text{250}\) This resistance to enacting a binding allocation formula seemed to be based on a concern over maintaining budgetary control. Senator Bellmon expressed this strongly during the debate, asserting that “earmarking” the funds would increase the number of expenditures not controlled through the budget process.\(^\text{251}\)

Even though the allocation formula was not binding, many observers initially expected that the actual appropriations would reflect the twenty-five percent figure. This was based on the comments of some members of Congress that the allocation preference was a non-binding “commitment,” clearly indicating the prevailing attitude of Congress.\(^\text{252}\) This hope was short-lived. Although LIEAP was authorized to be funded at $3.115 billion,\(^\text{253}\) in the fall of 1980 Congress passed Continuing Resolutions making available only $1.85 billion for fiscal year 1981.\(^\text{254}\)

A number of features of the Act distinguished it from all the previous congressional actions on energy assistance. First, Congress included a set of eight findings at the outset of the Act. These findings acknowledged that “the cost of essential home energy imposes a disproportionately larger burden” on some Americans than on others.\(^\text{255}\) Instead of limiting this finding to the poor, however, Congress said the burden fell on “fixed-

\(^{248}\) Id.

\(^{249}\) Id.

\(^{250}\)

Mr. President, let me just speak to the earmarking in the conference report. That is simply a statement that the Treasury will keep a record of how much is collected and will attempt to keep some record of where the money goes. We say in the law that we think 25 percent ought to go to lower income households, 60 percent for income tax reductions, and 15 percent for energy and transportation programs. But that is not binding.

Those Appropriations Committees can recommend appropriations the way they want to do it. The taxwriting committees can either recommend or not recommend tax cuts. And the Budget Committee can recommend whatever it pleases about any of this.

So that while that is stated as a statement of desire, it is not binding. The Senator can use it all to balance the budget, if he wants to, provided the Senate will support him on that.


\(^{252}\) 126 CONG. REC. S2853 (daily ed. Mar. 24, 1980).


\(^{254}\) See supra text accompanying note 239.

income, lower income, and lower middle income households." 256 Congress also found not just that "adequate home heating is a necessary aspect of shelter," but also that "adequate home cooling is necessary for certain individuals to avoid a threat to life, health, or safety." 257

As in the 1980 legislation, Congress included a basic formula for allocating funds among the states. 258 Several other provisions, however, could increase or decrease the amount that a state actually received. 259 For example, HEW could reduce a state's allotted funds if it determined that the amount allocated to the state under the formula was more than the state actually needed to carry out its particular plan. 260

The Secretary

256. Id.
257. Id. § 302(a)(5)-(6), 94 Stat. at 288. The Act broadened the types of energy needs that might be funded to include not only heating costs but also cooling costs where excessive heat was a threat to life and health. LIEAP, supra note 187, §§ 302(a)(6), 303(2), 94 Stat. at 288, 288. Congress was somewhat reluctant to include cooling costs; a motion to strike the cooling provisions was defeated in the Labor and Human Resources Committee by one vote. S. Rep. No. 378, supra note 234, at 38. The senators who offered the motion feared that the cooling provision might divert funds from the "major purpose" of the program — to provide life-saving heating assistance. From their viewpoint the need for cooling assistance had not been sufficiently established and there were no clear criteria to assure that funds needed to keep people alive in cold weather would not be diverted to keeping people "comfortable" in hot weather. Id. at 86.

This hesitancy was reflected in the allocation formula's emphasis on heating needs and the restrictions on the use of funds for subsidizing cooling costs. One of the main factors in the allocation formula was the number of heating degree days per year in the state, i.e., a measurement of the number of cold days requiring heating. LIEAP, supra note 237, § 306(a)(2), 94 Stat. at 290. See also CBO REPORT, supra note 28, at 52. Cooling needs received no such special recognition.

Even if a state elected to have a cooling plan, funds would be granted only to households that could show that cooling was a medical necessity. LIEAP, supra note 237, § 308(c), 94 Stat. at 297. Cooling was seen as such only if there was a threat to life or health due to a particular illness or medical condition which could be ameliorated by cooling facilities. 1981 Regulations, supra note 241, § 260.156(b), 45 Fed. Reg. at 66,694. A discussion of the severity of health effects of heat waves may be found in Jones, et al., Morbidity and Mortality Associated With the July 1980 Heat Wave in St. Louis and Kansas City, Mo., 247 J. A.M.A. 3327, 3331 (1982) ("Unless a coordinated community effort is mounted during the next major heat wave, the remarkable loss of life in 1980 and previous major heat waves will be repeated.").

258. This formula directed that half of the funds would be allocated according to a state's "aggregate residential energy expenditure" as compared with that of other states, and the other half according to the each state's total number of heating degree days for a state squared, and multiplied by the "number of households in such State having incomes equal to or less than the lower living standard income level." LIEAP, supra note 237, § 306(a)(1)-(2), 94 Stat. at 289-90.

Congress based this formula on several assumptions: "1) low and lower middle income households are in need of energy assistance; 2) the assistance should be designed to offset a portion of the rising costs of home energy, and 3) the problem is most critical in areas with high heating costs." S. Rep. No. 378, supra note 234, at 12.

259. LIEAP, supra note 237, § 306(a)(3)-(4), 94 Stat. at 290, provided for the allocation of additional funds to a state to ensure that it received an amount necessary to provide at least $120 to each SSI, AFDC, and Food Stamp household. Some states would be subject to pro rata reductions in funds in order to permit that minimum amount to be allocated to other states. See H.R. Rep. No. 817, supra note 242, at 153.

260. In addition, the statute directed the Secretary to take into account climatic
also was to take into account the state’s option to reserve up to three percent of its allocated funds for weather related and supply shortage emergencies.\textsuperscript{261} If the state chose to set aside this reserve, it was to treat the reserve separately in order to avoid reallocating the funds prematurely.\textsuperscript{262} Congress apparently intended these allocation provisions to insure that funds would not lie unused in one state when there was need for them in another state.\textsuperscript{263}

2. The State Plans

States had to submit their plans within thirty days after publication of final regulations.\textsuperscript{264} By January 1, 1981, forty-five state plans had been submitted and approved.\textsuperscript{265} In order to obtain approval, state plans had to meet the requirements of the statute and regulations, which set forth a large number of detailed factors to be addressed by the states.\textsuperscript{266}

First, section 305 set out criteria for identifying eligible households, starting with those in which there were recipients of AFDC, SSI, Food Stamps, or certain veterans pensions.\textsuperscript{267} Eligibility also extended to other households with incomes below the “lower living standard income level.”\textsuperscript{268} This shift from the “poverty level” baseline of the 1980 legis-

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\textsuperscript{261} LIEAP, supra note 237, § 308(b)(14), 94 Stat. at 296.


\textsuperscript{263} Id. at 14. In addition to the funds allocated by these provisions, a state might also be eligible for “incentive grants.” LIEAP, supra note 237, § 306(b)(3)(A), 94 Stat. at 292. The Act authorized a portion of the funds to be allocated to states which provide fuel assistance with state funds. Federal grants could match up to 25\% of the state program. The purpose of the federal grants would be to encourage states which already had fuel assistance programs to continue them, and to provide an incentive to states without such programs to begin them. Id.


\textsuperscript{265} HHS REPORT TO CONGRESS, supra note 239, at 3.

\textsuperscript{266} 1981 Regulations, supra note 241, §§ 260.26, 260.28, 45 Fed. Reg. at 66,688-89. HHS could waive plan requirements if requested to do so by a state; waivers were to be granted where HHS determined that it was necessary for the state administration of the program and likely to assist in promoting the objectives of the program. LIEAP, supra note 237, § 308(d)(2), 94 Stat. at 297; 1981 Regulations, supra note 241, § 260.26(a), 45 Fed. Reg. at 66,688.

\textsuperscript{267} LIEAP, supra note 237, § 305(a)(1), 94 Stat. at 289.

\textsuperscript{268} Id. §§ 303(3), 305(a)(2), 94 Stat. at 288, 289; 1981 Regulations, supra note 241, § 260.150, 45 Fed. Reg. at 66,694. The “lower living standard level” was determined by the Secretary of Labor based upon the most recent “lower living standard family budget” issued by the Secretary. That standard:

takes more of a family’s normal living expenses into account, and it is adjusted by geographic area. While applying the poverty index suggests that there have been between 24 and 25 million “poor” Americans at any given time in recent years, the LLS standard yields a larger number — about 45 million persons in some 13 or 14 million households. To be specific, in the fall of
lation to the “lower living standard” broadened the category of eligible recipients. Congress was taking a wider view of the segment of the American public deserving help in meeting energy needs. The statute also continued the 1980 policy of extending eligibility to renters and required that state plans assure that owners and renters would be treated “equitably.”

This expanded number of potential recipients was balanced by the flexibility given the states in applying the eligibility standards. States did not have to provide benefits for every household defined as eligible, and thirty-two states chose to apply more restrictive income eligibility standards. The statute required, however, that a state using this option make sure that households with the lowest incomes were not excluded from the state’s plan.

States also had to guarantee that eligible households with the lowest incomes and those with elderly or handicapped persons would be given priority for assistance. This goal could be met by special application procedures, timing of benefits, or guarantees of assistance if program funds were inadequate. Furthermore, to insure that receipt of energy assistance under this plan would not jeopardize a household’s eligibility for other assistance programs or tax benefits, the Act prohibited counting energy assistance payments as income.

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1980 the national average income needed to provide the Lower Living Standard for a family of four living in an urban metropolitan area was $14,044 — nearly 170 percent of the poverty index for a household of that size.

H. LANDSBERG & J. DUKERT, supra note 4, at 19.

269. LIEAP, supra note 237, § 308(b)(10), 94 Stat. at 295. The Labor and Human Resources Committee described equitable treatment as requiring the provision of “generally comparable relief from energy cost burdens to both classes of recipients.” S. REP. No. 378, supra note 234, at 18. When information on the actual energy costs of indirect purchasers was not available, the state was to estimate the cost based on the energy expenses of similarly situated direct energy purchasers. See CBO REPORT, supra note 28, at 54.


271. HHS REPORT TO CONGRESS, supra note 239, at ii; see also CBO REPORT, supra note 28, at 53. Thus it is not surprising that LIEAP assistance only reached an estimated 36% of the number of statutorily eligible households. HHS REPORT TO CONGRESS, supra note 239, at ii.


275. LIEAP, supra note 237, § 313(c)(1), 94 Stat. at 299. This prohibition applied whether the payments were made directly to the household or in the form of a vendor payment. H.R. REP. NO. 817, supra note 242, at 154. In addition, each state plan had to ensure that the level of benefits in other federally assisted cash assistance programs would not be reduced as a result of energy assistance. LIEAP, supra note 237, § 308(b)(18), 94 Stat. at 296.
The Act further specified that the states had to provide the highest levels of assistance to households with the lowest incomes and the highest energy costs in relation to income. The regulations specified that states could do so through higher benefit levels or through favorable methods of income calculation for households with priority. Benefits were to be closely correlated with each household’s energy burden. This emphasis on the particular situation of each household necessarily shifted the program away from automatic payment amounts.

A state still could elect, however, to use automatic payments to categories of eligible households such as those receiving SSI, AFDC, Food Stamps, or veterans benefits. States could make such payments without requiring a separate application, but they had to establish procedures to ensure that payments would not be made to households not actually in need. Furthermore, if a state did choose this approach, other payment mechanisms in its plan had to ensure that priority would still be given to the lowest income households and that the levels of assistance would vary according to the factors set out in the statute.

States could provide assistance through direct payments to the eligible households, through payments to suppliers of the energy, or through a combination of the two approaches. Before assistance could be given

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277. 1981 Regulations, supra note 241, § 260.154(b), 45 Fed. Reg. at 66,694–95. Payment amounts were to vary according to differences of individual circumstances or of categories of households. In computing the benefit amounts, states were to take into account: (1) the average home energy expenditure for the households in the state; (2) the proportional burden of energy costs in relation to income; (3) any regional variations, if significant, in heating degree days; and (4) the extent to which households are vulnerable to or are protected from the rising costs of energy through other government programs. LIEAP, supra note 237, §§ 308(b)(6)(A)-(B), 94 Stat. at 294–95; 1981 Regulations, supra note 241, § 260.154, 45 Fed. Reg. at 66,694–95.
278. See CBO REPORT, supra note 28, at 53.
280. Id.
282. Id. § 260.154(f), 45 Fed. Reg. at 66,694–95. To ensure that individuals in need of energy assistance but not already part of an existing government assistance program would receive benefits, a stated plan was to include outreach activities. LIEAP, supra note 237, § 308(b)(16), 94 Stat. at 296. Special emphasis was to be placed on reaching the elderly, the handicapped, those in remote areas, those unable to leave their residences, migrants, individuals with limited English-speaking ability, the working poor, and families with children. Id. The only specific funding for the outreach activities was $3 million out of CSA’s $100 million allotment. That funding was to be used to notify the elderly of the assistance available under the Act. Id. § 306(b)(4)(A), 94 Stat. at 292.

Where eligible households were living in certain types of federally assisted housing projects, the states also could make benefit payments to the building operators, provided such operators gave assurances that tenants eligible for assistance were not discriminated
through energy suppliers, each state was to enter into agreements with the suppliers to ensure prompt and fair payment procedures. The supplier also had to agree not to terminate energy supplies unless the household had both failed to pay its charged amount for at least two months and had received a notice of termination no less than thirty days prior to termination. The household also had to be afforded a pre-termination hearing by an agency designated by the state.

Another major requirement imposed by the statute was coordination of LIEAP with other energy programs, including CSA's crisis intervention program and the weatherization program. This provision reflected Congress's recognition that subsidizing home fuel costs is only one approach to alleviating the energy burden. States had to ensure that, to the maximum extent possible, individuals would be referred to existing weatherization and energy conservation programs. This requirement seems to have been an attempt to reconcile the tension between the weatherization and subsidy approaches. Weatherization arguably contributes to a long-term solution of the energy problem by increasing home energy conservation, while subsidies may have the opposite effect. By requiring coordination between the two programs, Congress seemed to express a hope that they could complement each other.

against with respect to their rent. LIEAP, supra note 237, § 308(b)(3)(B), 94 Stat. at 294. The regulations set out detailed instructions on which specific building operators were covered by the statute, how the payments should be calculated, and the required administrative duties of the State in overseeing these payments. 1981 Regulations, supra note 241, §§ 260.200–260.208, 45 Fed. Reg. at 66,696-97.

284. LIEAP, supra note 237, § 308(b)(7), 94 Stat. at 296; 1981 Regulations, supra note 241, § 260.250(a), 45 Fed. Reg. at 66,697. The state had to pay the suppliers on a "timely" basis through installments, as reimbursements, or as a line of credit, and had to notify each participating household of the amounts being paid on its behalf. LIEAP, supra note 237, § 308(b)(7)(A), 94 Stat. at 295; 1981 Regulations, supra note 241, §§ 260.250(b)–(c), 45 Fed. Reg. at 66,697. The supplier was to charge the participating household through its regular billing process any difference between the actual costs of the energy supplied and the assistance payment made by the state. LIEAP, supra note 237, § 308(b)(7)(B), 94 Stat. at 295; 1981 Regulations, supra note 241, § 260.250(a)(1), 45 Fed. Reg. at 66,697. The supplier was required not to discriminate against any eligible household in regard to terms and conditions of sale, delivery, or price of the energy supplied. LIEAP, supra note 237, § 308(b)(7)(C), 94 Stat. at 295; 1981 Regulations, supra note 241, § 260.250(a)(2), 45 Fed. Reg. at 66,697.


286. Id. To ensure that these provisions would not place an undue burden on the ability of a small vendor to continue in business, states could exempt a small energy supplier from the termination restrictions if compliance would seriously jeopardize the ability of the vendor to continue in business. LIEAP, supra note 237, § 308(f), 94 Stat. at 297; 1981 Regulations, supra note 241, § 260.260(a), 45 Fed. Reg. at 66,698; see also S. Rep. No. 378, supra note 234, at 18.

287. LIEAP, supra note 237, § 313(e), 94 Stat. at 299.


289. See CBO REPORT, supra note 28, at 22.
3. The 1981 Program in Perspective

The 1981 program appeared to be a culmination of the earlier, sporadic efforts to develop a comprehensive energy assistance program for the poor. Congress enacted the program earlier in the year than the previous efforts, although this was a result of the 1979 deadlock over the windfall profits tax. Nonetheless, early enactment permitted more careful advance planning by states and local agencies. That planning was done under intensive federal supervision, in accordance with an unusually comprehensive statutory mandate covering a myriad of program details.

LIEAP offered the states flexibility in mixing automatic payments with application-based payments, recognizing that the latter make it more likely that payments will correspond to need, but that the former are more administratively manageable and probably cover a substantial segment of the needy households. Preventive aid was to be provided in a more orderly fashion than ever before. Only three percent of a state's funds were to be available for emergencies arising from weather conditions and supply shortage, and even the $100 million directed to CSA was primarily for outreach and other activities supporting the broad LIEAP effort.290 Congress appropriated more funds than ever, even though the statute's recommended share of the new tax revenues was not approached. In short, Congress seemingly had overcome the earlier emphasis on one-time emergency aid and had committed to large-scale funding with broader income maintenance concerns in mind.

D. The 1982 Low Income Home Energy Assistance Program

1. The Block Grant Proposal

The arrival of the Reagan Administration in Washington introduced some new elements into the legislative deliberations on energy assistance. The Administration sought to reduce the funding available for many social programs and to shift their administration from the federal government to the states.291 Both of these emphases had important impacts on the 1982 energy assistance effort.

The Administration proposed that low income energy assistance be merged with other existing programs that provide households with emergency financial aid or other forms of crisis support.292 The result was to be a combined "Energy and Emergency Assistance Block Grant," one of many new block grants proposed.293 The program would not require state matching funds, and states would have "complete flexibility" in

290. See supra text accompanying note 261.
293. Id.
delivering fuel assistance and other emergency services.\textsuperscript{294} As one commentator described it:

The Administration’s aim was to give states the open-ended authority to expend monies, without any required plan approval or thorough explanation of intent, on a wide ranging list of possible emergency matters, of which an energy crisis would only be one.\textsuperscript{295}

Although the proposal offered the states great flexibility in using federal funds, at the same time it would significantly cut that funding. The Reagan Administration budget proposed to fund the combined energy assistance and emergency assistance programs at $1.4 billion, approximately a twenty-five percent reduction from the 1981 level.\textsuperscript{296} The Administration’s primary concern, of course, was to reduce projected budget deficits.\textsuperscript{297} The Administration’s perspective on “the special case of the poor” was stated as follows:

This problem must not be overlooked, but it is a broad social problem that does not relate exclusively to energy and should not prevent a national energy and economic recovery program that is designed to help all Americans and restore a sound economy that is most helpful to the poor.

The special burdens placed on the poor by higher energy prices are best addressed by agencies most sensitive to people’s overall income and housing needs. In view of great price variations by region and by fuel form, the means of relief may best be gauged by agencies close to those in need.\textsuperscript{298}

The Administration’s emphasis on broad budgetary concerns largely shifted the legislative initiative with regard to energy assistance to the congressional budget committees. On August 13, 1981, following turbulent legislative battles, Congress passed the Omnibus Budget Reconciliation Act, Title XXVI of which was the Low Income Home Energy Assistance Act of 1981.\textsuperscript{299} The legislation as enacted differed significantly from the proposed $1.4 billion, consolidated block grant. It made energy assistance an entirely separate block grant program and authorized annual funding of $1.875 billion.\textsuperscript{300}

\textsuperscript{294} Id.
\textsuperscript{295} Hill, supra note 141, at 224.
\textsuperscript{296} See Petrini, supra note 245, at 12 n.34; STAFF OF THE CONGRESSIONAL JOINT ECONOMIC COMM., supra note 4, at 52.
\textsuperscript{297} See STAFF OF THE CONGRESSIONAL JOINT ECONOMIC COMM., supra note 4, at 52.
\textsuperscript{300} Id.
In many respects the Act continued substantive features previously embodied in the now-repealed 1981 legislation. The most important new feature was a greatly altered relationship between federal and state authorities in developing and executing the program. Furthermore, for the first time, Congress authorized multi-year funding, something that President Carter had urged in his 1979 proposals. The 1982 effort was to be the first year of a three year authorization of $1.875 billion annually.

2. The Low Income Home Energy Assistance Act of 1981

In contrast to the 1981 legislation, the statute for 1982-84 no longer requires that the states obtain federal approval of their plans for use of federal energy assistance funds before those funds are distributed. The new program, known either as LIEAP or as the Low Income Home Energy Assistance Program (LIHEAP), requires only that each state provide “assurances” that its plan meets the specific requirements of the statute. Although the state must “certify” its intention to conform to the statutory criteria and to carry out its assurances, the statute explicitly declares that “the Secretary may not prescribe the manner in which the States will comply with the provisions of this subsection.”

The legislative history behind these provisions makes it quite clear that Congress intended to depart substantially from the 1981 strategy. The Senate Labor and Human Resources Committee, commenting on a bill very similar to that which was finally enacted, emphasized the wide discretion Congress wished the states to have: “[T]he committee intends that States be provided with the broadest possible latitude in the use of block grant funds and be free from all but the most minimal and necessary federal administrative and regulatory direction.” It is difficult to imagine a stronger mandate for a federal hands-off policy.

302. See infra text accompanying notes 307–08.
303. See supra text accompanying note 141 (regarding Carter proposal).
305. Id. § 8624(a).
306. Id. § 8624(b).
307. S. REP. No. 139, 97th Cong., 1st Sess. 909 (1981), reprinted in 1981 U.S. CODE CONG. & AD. NEWS 933. The requirement for submission of a plan was designed to provide the public and “secondarily the Secretary” of HHS, with a description of how the State intends to satisfy the “assurances” contained in the application. Id. at 908, 1981 U.S. CODE CONG. & AD. NEWS at 932. The committee went on to add:

No provision for secretarial approval is provided or intended and no elaborate plans are contemplated, except when a State on its own initiative chooses to have one. Under no circumstances does the committee want the Secretary to make normative judgments about a plan. Ultimately the plan requirement is to create a public record, but one which is to be fluid to reflect changes in the States [sic] needs and attitudes. Accordingly, the Governor may alter his State’s plan at any time and the deficiencies in a plan cannot, by itself [sic], be utilized as a basis for withholding of a state’s funds.

Id.

308. In keeping with this shift of authority to the states, reporting requirements to

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As noted above, the Act authorized annual funding at a level of $1.875 billion. Congress, however, initially appropriated only $1.75 billion for 1982, by means of a Continuing Resolution. In addition, not all of that funding was made immediately available to the states. Despite indications from Congress that it intended that the funds should be released as needed to the states, the Administration withheld 10% of the initial state allocations until March, after Congress had passed a supplemental appropriation of $123 million, which brought the total to the authorized level. Thus even though the basic legislation was in place in August, 1981, the states were left in considerable uncertainty well into the winter regarding the precise level of funding they could expect. As a result, many states devised programs based on overly conservative assumptions regarding funding and accordingly reduced benefit levels and restricted eligibility.

The only regulations under the Act issued by the Department of Health and Human Services (HHS) are a set of procedural provisions governing all seven HHS block grant programs. As a graphic indication of the Administration’s dedication to removing federal restrictions on certain state activities, regulations for the seven HHS block grants occupy only six pages in the Code of Federal Regulations, whereas regulations for the predecessor programs totaled 318 pages. Furthermore, HHS reportedly “has declined not only to issue substantive guidance, or enunciate model state approaches, but has even withheld views on the legality of certain approaches when asked for them by the states.”

The federal government also were considerably reduced. See HHS Block Grant Programs Interim Final Rules, 45 C.F.R. § 96.82 (1982), 46 Fed. Reg. 48,583 (1981).


311. Hill, supra note 141, at 226–27; National Consumer Law Center, Key Energy Developments Affecting Low-Income Consumers 3 (Oct. 5, 1982) (many states significantly decreased their benefit levels or eligibility ceilings for the 1982 program, in “response to fears of diminished funding from the federal government and poor planning in a number of states.”)


314. Hill, supra note 141, at 225. Hill goes on to observe that this means

that the states, and beneficiaries, have been denied the accumulated wisdom and expertise of HHS officials, developed over the last several years. This approach, coupled with the late release of the evaluation of the 1980 program [see URBAN SYSTEMS REPORT, supra note 142] and only limited information regarding the 1981 program, has effectively cut off states and interested parties from an important body of valuable information on the development of state plans and the implementation of state programs.

Id. at 223–24. See also 46 Fed. Reg. at 48,583 (“The Secretary is not prescribing any particular format for the submission or elaborating its contents beyond what is specified in the Act. Each State should simply insure that its submission satisfies the statutory requirements.”).
This increased flexibility for state energy assistance activities exists within a statutory scheme that is substantively very similar to the 1981 program legislation. The new Act distributes grants among the states according to the same formula as for 1981. Although the primary emphasis remains preventive energy assistance, the Act allows the states more latitude in allocating funds for emergency needs. The previous three percent limit on state reserves for emergency funds is replaced by a provision stating that "a reasonable amount based on data from prior years shall be reserved by each State for energy crisis intervention." Neither the Act nor the block grant regulations defines "reasonable amount," and the Senate Labor and Human Resources Committee indicated that the exact amount would be up to the state's discretion. CSA will no longer undertake any energy assistance functions, or any others for that matter; the Omnibus Budget Reconciliation Act eliminated CSA altogether as of October 1, 1981.

In accordance with the general thrust of the block grant approach, the Act gives states increased discretion over distributing funds among various kinds of low-income assistance activities. For example, a state may use up to fifteen percent of its allocation for weatherization or energy-related home repair. Almost all of the states exercised this option to some extent, with the total amount of funds transferred to weatherization or repair activities probably amounting to between $170 million and $184 million. Perhaps even more indicative of the increased state discretion is the option for a state to transfer up to ten percent of its LIHEAP funds to one or more of the six other HHS block grant programs.

315. National Consumer Law Center, supra note 311, at 3.
316. Compare 42 U.S.C.A. § 8623(a) (West Supp. 1982) with LIHEAP, supra note 237, § 306(a), 94 Stat. at 289-91 (discussed supra notes 258–63). As in the prior year, the 1982 Act has a provision for reallocating funds that the Secretary determines will not be used by a state during the fiscal year. 42 U.S.C. § 8626(b)(1). A new feature, however, is that a state may now request that up to 25% of its funds be held until the following fiscal year. 42 U.S.C.A. § 8626(b)(2); see also 45 C.F.R. § 96.14(b) (1982); 46 Fed. Reg. at 48,588.
320. 42 U.S.C.A. § 8624(k).
321. See National Consumer Law Center, Analysis of State Exercise of the Weatherization/Repair Option under the Energy Assistance Program 1 (Nov. 10, 1982).
322. 42 U.S.C.A. § 8623(f). HHS has estimated that about $99 million would be transferred out of LIHEAP in 1982 under this option. U.S. Dep't of Health & Human Servs., Results of the July Telephone Survey on the Low Income Home Energy Assistance Program 3 (Aug. 20, 1982). This report also estimates heating assistance under LIHEAP's first year at $1.164 billion, cooling assistance at $77 million, and crisis assistance at $147 million. Id. at 5–7. A listing of the other block grants appears at HHS Block Grant Programs.
As in the 1981 program, eligibility is based upon two major approaches. Households including recipients of AFDC, SSI, Food Stamps, and certain veterans benefits are automatically eligible. Other households are eligible if their income falls below one hundred fifty percent of the poverty level for each state or sixty percent of the state’s median income. The states retain the freedom to determine the precise eligibility level, provided it remains within the statutory ceiling. As in the earlier statute, LIHEAP still requires that the highest level of assistance be furnished to households with the lowest incomes and the highest energy costs in relation to income.

The new Act does not contain the previous guidance on factors the states should consider in computing benefits. It does, however, retain the “income disregard” provision: LIHEAP benefits may not be considered income for other purposes, such as taxation and determining eligibility for other assistance programs. This approach did not continue without dispute, as the Senate version of the 1982 legislation originally had not contained such a provision.

In most other respects, the 1982 legislation follows the substantive direction of the prior year. The 1982 program still allows cooling assistance and no longer even restricts the circumstances under which it can be given. States may still make payments directly to eligible households or to suppliers of energy, but the Act omitted the extensive termination protections found in the 1981 legislation. Renters are still entitled to be treated “equitably.”

Finally, the states must still provide for public participation in the development of their plans. Although public hearings are not statutorily required for the 1982 plans, they are required for the succeeding years of funding under the Act. This greater emphasis on public involvement

[323. 42 U.S.C.A. § 8624(b)(2)(A).]
[324. Id. § 8624(b)(2)(B).]
[325. Many states set ceilings at 125% of the poverty level, while some opted to restrict their basic programs to households which are categorically eligible. Hill, supra note 141, at 226; National Consumer Law Center, supra note 311, at 3.]
[326. 42 U.S.C.A. § 8624(b)(5).]
[327. See supra text accompanying notes 266–89.]
[328. 42 U.S.C.A. § 8624(f).]
[329. See Hill, supra note 141, at 224.]
[330. The statute broadly aims “to assist eligible households to meet the costs of home energy,” with “home energy” being defined as a “source of heating or cooling in residential dwellings.” 42 U.S.C.A. §§ 8621(a), 8622(3).]
[331. Id. § 8624(b)(7)]
[332. See supra text accompanying notes 285–86.]
[333. 42 U.S.C.A. § 8624(b)(6). In addition, payments will no longer be made directly to building operators under federally assisted housing programs. Id. Cf. supra note 238.]
[334. Id. § 8624(b)(12).]
[335. Id. § 8624(a)(2); see also 46 Fed. Reg. at 48,583.]
in the formulation of the plans may be seen as a counterweight to the diminished federal supervision. The statutory language urging the states, when designating administering agencies, to give “special consideration” to local agencies previously involved in energy assistance or weatherization further evinces a shift away from centralized federal control.\textsuperscript{336}

3. The 1982 Program in Perspective

Despite the markedly reduced federal involvement in energy assistance under the new Act, Congress’s commitment to energy assistance appears strong. That commitment is reflected in the retention of the major substantive features of the 1981 approach, in the multi-year authorization, and in the appropriation of the entire authorized amount for fiscal 1982. It could be argued, on the other hand, that an authorization that provides the same funding for three years ignores likely energy price increases and thus guarantees inadequate benefits.

Despite Congress’s commitment, the Reagan Administration continues to be reluctant even to seek funding at the authorized level. The Administration’s budget proposal for fiscal 1983 included only $1.26 billion for energy assistance.\textsuperscript{337} The Administration again urged that this program should be merged into a block grant with other emergency assistance at a total funding of $1.3 billion.\textsuperscript{338} In setting funding for fiscal year 1983, however, Congress showed little interest in the reiterated Reagan approach. A Continuing Resolution initially provided 1983 funding for LIHEAP at the 1982 level,\textsuperscript{339} and in December 1982 Congress raised this amount to $1.975 billion, largely in response to recent natural gas price increases.\textsuperscript{340} Nonetheless, the Reagan Administration budget proposal for fiscal 1984 has again requested only $1.3 billion for energy assistance.\textsuperscript{341}

III. The Policy Premises of Energy Assistance

A. Alleviation of Poverty as an End in Itself

Energy assistance efforts from 1973 through 1979 were closely tied to the federal anti-poverty program. They embodied the premise that

\begin{itemize}
  \item \textsuperscript{336} 42 U.S.C.A. § 8624(b)(6).
  \item \textsuperscript{337} See Office of Management and Budget, supra note 291, at 5-159 to -160.
  \item \textsuperscript{338} See id. See also Budget Message of President, 18 WEEKLY COMP. PRES. DOC. 129, 138 (Feb. 15, 1982).
  \item \textsuperscript{341} Office of Management and Budget, Budget of the United States Government, Fiscal Year 1984, at 5-113 (1983).
\end{itemize}
alleviating poverty in this country is in itself a worthy end. At times, as from 1977 to 1979, the emphasis has been on alleviating the most extreme hardships: those that accompany weather emergencies and some households’ resulting inability to obtain the minimum energy needed for survival. At other times, such as under the 1981 Home Energy Assistance Act, programs have emphasized more general income maintenance. Such programs recognize that high energy prices make it difficult, even in ordinary weather, for poor people to meet their energy needs and to pay for other goods and services, many of which are more costly as a result of energy price rises.

This premise corresponds to the statutory declaration in the original Economic Opportunity Act that everyone should have “the opportunity to live in decency and dignity.” Under this view, some minimum amount of energy must be available to satisfy the basic needs of every individual. More recently, the Reagan Administration has characterized the energy needs of the poor as “a broad social problem that does not relate exclusively to energy,” one that is “best addressed by agencies most sensitive to people’s overall income and housing needs.” This recent return to the earlier stance is illustrated both by the emphasis on state and local decisionmaking found in the 1982 Act, and by the Reagan Administration’s proposal to combine energy assistance with other forms of emergency assistance for the poor. The attempt to eliminate the “income disregard” provision in the current legislation also suggests this direction, for it would have the effect of lumping energy assistance benefits together with other kinds of income maintenance payments.

In the broadest sense, this first premise simply reflects an unwillingness to allow the conditions of poverty, including the unavailability of minimum energy, to continue without an ongoing community effort to alleviate them. This premise fostered the federal government’s initial involvement in energy assistance, and it has continued to have an important role in shaping the programs. It has influenced the choice of administering agencies for energy assistance, with OEO-CSA and the local community action agencies being the preferred agencies from 1973 through 1980. This premise also has significant implications for determining appropriate funding levels, but the specific implications depend largely on empirical data, such as the number of people who face substantial difficulty in meeting basic energy needs, and the overall costs of meeting those needs. Collecting reliable data on these questions is obviously problematic, as is obtaining full funding to meet the entire need identified. Other issues, such as the fairest source of the money and the

342. See supra note 18 and accompanying text.
345. See supra text accompanying notes 17, 319.
soundest means of distributing it, also are not illuminated by this criterion. Nonetheless, the alleviation of poverty continues to be one of the strongest premises underlying energy assistance programs.

B. Alleviation of Hardships Caused by Explicit Energy Policy Choices

One particularly troubling aspect of the burden of high energy prices on the poor is that the burden appears to result largely from deliberate congressional and presidential policy choices to rely upon replacement-cost pricing for energy. Compelling national interests, it is now widely agreed, call for terminating energy price controls and their counterproductive effects on conservation and domestic energy supply. After controls are removed, domestic production should increase, both in traditional fuels and in new energy resources, and energy prices should eventually stabilize and perhaps even fall. Until that goal is reached, however, this premise dictates that the poor should not be saddled with a new burden on top of those they already bear.

In implementing this policy shift, decisionmakers have found themselves choosing to make their constituents' lives more difficult in the short term, with only a long-range prospect of increased domestic supply offered to ease the pain. A basic tenet of American government is that our elected representatives should act for the public welfare. Present energy policy thus creates a dilemma because the long-term public welfare conflicts with the short-term welfare of the most economically disadvantaged segment of our society. Energy assistance efforts have been initiated to help reduce the short-term burdens and thus obviate this dilemma.

Even if it were argued that the poor are not so much bearing a new burden as losing the privilege of energy subsidies, we may still realistically respond that the poor needed the subsidies and came to rely upon them much more than other groups. This second major policy premise thus declares that we must provide energy assistance in order to escape the dilemma and avoid creating disastrous consequences for the well-being of many Americans through explicit government policy choices. As one Senator put it, "[t]hose of us who favor decontrol have a special obligation to limit adverse impacts on the poor."
Just precisely how this "special obligation" should be discharged is not readily apparent. Logically, assistance efforts should alleviate only those new energy price burdens that can be attributed to government policy choices, such as oil and natural gas decontrol. This implication of the second premise stands in contrast to the first premise's emphasis upon alleviating the conditions of poverty, including basic energy cost burdens that the poor cannot meet regardless of the origin of those burdens.

Commentators have offered several proposals for identifying the extent of the energy burden to which the "special obligation" should apply. One frequently stated view is that "[the poor should not suffer more than the rest of society while the economic system adjusts to higher energy prices."

Another formulation holds that the poor should receive enough aid to "keep them even with the decrease in their real income caused by past and future energy price increases."

Some observers also have recognized that recent energy assistance programs have not clearly articulated whether their objective is "to help low income people cope with the recent rise in energy prices or is ... to assure the perceived high absolute cost of energy ..." These contrasting emphases have distinct implications for determining eligibility for energy assistance and for setting the proper benefit levels over a period of years. These complexities highlight the fact that acceptance of this second premise as a justification for energy aid does not eliminate the necessity for extensive data on actual needs for assistance and on the probable impacts of various program formats.

C. Protection of Americans from Foreign Price Control

The energy supply and price disruptions of the past decade have illustrated the great degree to which the cost and availability of petroleum, and occasionally even of natural gas, depend on the actions of

One study has concluded that a similar stance is also mandated as a practical or political matter: "any attempt to deny that a problem exists for the poor ... will invite a renewed deadlock on price regulation ... In the final analysis, we cannot expect the poor in this country to support a free-market pricing policy for energy unless the nation is willing to cushion them against the effects of those higher prices." The study adds, "Any other policy is unfair." ENERGY PRICES AND PUBLIC POLICY, supra note 4, at 16-17.

349. ENERGY PRICES AND PUBLIC POLICY, supra note 4, at 17.

350. Id. Presumably programs for keeping the poor "even" with their own loss of real income resulting from higher energy prices would also satisfy the goal of making sure that the poor do not suffer disproportionately. Assuming that the rest of the public would not be similarly aided in staying "even," however, other groups actually might end up bearing a greater relative portion of energy cost increases than would the poor. Equal treatment for the poor would then become preferred treatment, which may be justifiable under the first premise, but logically is not called for under the second.

351. A. COHEN & K. HOLLENBECK, supra note 9, at 39 (emphasis in original).

352. Id. at 39-44. ("An equitable benefit level structure would take both the rise in price and the level of cost into account. The use of the rise in price would reflect the unanticipated burdens suddenly inflicted upon people. The use of the level of cost would reflect the movement towards a longer-run equilibrium." Id. at 44 (emphasis in original)).
foreign powers. A third premise underlying energy assistance for the poor is the need to protect Americans from foreign control of major aspects of their living conditions. The need for “energy independence” has become a central feature of U.S. energy policy. The energy assistance efforts similarly seem at times to be grounded in the notion that foreign energy producers should not be permitted to inflict real suffering on any American. This premise offers a partial justification for assistance and helps illuminate the timing and amount of such aid.

Both President Carter’s 1977 proposal for a revised emergency assistance program,353 and his mid-1979 increase in assistance proposals following large OPEC price hikes,354 suggest that this premise was operating. Policies designed to further this premise presumably would require action on an ad hoc basis each time foreign powers raise prices or tighten supplies. The resulting burden on those harmed most then should be alleviated.355

D. Redistribution of Undeservedly High Profits

The link that President Carter envisioned between revenues generated by the crude oil windfall profits tax and energy assistance programs suggests that income redistribution has also been a motivating factor in energy assistance. Beginning with the 1980 program, the premise that it is unfair for some groups to profit greatly from higher energy prices while others suffer extreme hardship from the same cause began to influence policy greatly.356

353. See supra text accompanying note 58–61.
354. See supra text accompanying note 140.
355. Arguably this justification would call for help to all affected Americans, not just the poor. When the limits on available funds are recalled, and when this premise is seen in conjunction with the first premise for the alleviation of the conditions of poverty, the choice to help only those hardest hit by foreign control becomes more understandable.

356. This argument can derive some support, and perhaps greater precision, from theories in the domain of welfare economics. As noted above, the energy assistance problem reflects a policy dilemma in which long-term public welfare goals conflict with the short-term basic welfare needs of the poor. See supra text accompanying notes 347–48. The dilemma is aggravated because the added burden on the poor is mirrored by increased profits of the oil producers. Economic theory, however, readily recognizes that “most economic decisions involve just such combinations of loss and gain.” C. Price, Welfare Economics in Theory and Practice 19 (1977).

One approach to evaluation of these decisions is the Kaldor-Hicks compensation criterion.

Kaldor argued that . . . if as a result of some policy some people are made economically better off while some others are made worse off than before it might still be possible for the economist to make a value-free recommendation of the policy provided the gainers were able to compensate the losers and yet be better off themselves than they had been originally. Kaldor went on to elaborate that whether the compensation was actually paid or not was a political or ethical decision. However, the possibility of adequately compensating the losers established, for him, the potential superiority of the policy under discussion.

S. Nath, A Reappraisal of Welfare Economics 95–96 (1969) (emphasis in original). This proposition has received considerable later refinement. Id. at 96–101; see also W.
There are two major ways of explaining this premise. First, it can be seen as a pragmatic concern. Under the first or second premises discussed above, high energy prices create a need for assistance for poor people; the windfall profits of oil producers offer a convenient source of funds for this purpose. Presumably producers will not miss the money lost through the new tax. The new profits did not exist before decontrol and should not have been anticipated, given that they resulted from domestic government actions and peremptory OPEC determinations.357

The second possible view of this premise is that windfall profits simply should not be permitted.358 Although the proceeds from a tax to recapture windfall profits could be applied to any worthy cause, the energy needs of the poor are a logical or at least somewhat symmetrical repository. This perspective has radical implications, for windfall gains are a central feature of many speculative business and investment activities. Accordingly, this approach is unlikely to gain widespread acceptance in this country. Nonetheless, the development of the crude oil windfall profits tax suggests a congressional sentiment that it just was not fair for businesses suddenly to receive apparently vast monetary benefits from foreign manipulations and domestic government energy policies.359

BAUMOL, WELFARE ECONOMICS AND THE THEORY OF THE STATE 162–65 (1967). It also has been criticized, particularly because it justifies policy changes on the basis of possible compensation, but without requiring such compensation actually to be undertaken. See Zeckhauser & Schaefer, Public Policy and Normative Economic Theory, in THE STUDY OF POLICY FORMATION 27, 59 (R. Bauer & K. Gergen eds.) (1966).

This analysis seems to support the argument, under either the second or the fourth premise, that the added energy burden on the poor should be ameliorated. Given Congress’s failure to appropriate funds out of the windfall profits tax revenues at the levels originally authorized, it is somewhat striking that Congress, in effect, followed the Kaldor-Hicks approach quite literally: it estimated what adequate compensation out of those revenues could be, but failed to make the hypothetically preferred solution a reality.

357. This explanation probably conforms most closely to the thinking of President Carter and the Congress in enacting the new tax and making a gesture in the direction of a link between the tax revenues and energy assistance.

Similar suggestions for a windfall profits tax on some natural gas producers are surfacing now regarding the prospect that complete, expedited decontrol of natural gas will be implemented, see supra note 2. See Natural Gas Working Group, Memorandum for the Cabinet Council on Natural Resources and the Environment (Jan. 4, 1983), reprinted in 11 ENERGY USERS REP. (BNA) 55 (Jan. 13, 1983).

358. One recent study suggests that oil company profits resulting from decontrol have been applied to purposes very different from the main intended objective of promoting increased domestic exploration and production. Citizen/Labor Energy Coalition, Spending the Windfall: An Analysis of Post-Decontrol Oil Company Acquisitions and Investments I (Research Report by the Citizen/Labor Energy Coalition, June 28, 1982). The accuracy of this report has been disputed. See [10 Curr. Rep.] ENERGY USERS REPORT (BNA) 719 (July 8, 1982).

359.

The impetus for this legislative endeavor was the President’s decision to decontrol crude oil, an action which will ultimately result in tremendous financial gain for some, and hardship to others. Therefore, the committee set out to devise a plan to be implemented through our system of taxation which would rectify some of the injustices which would otherwise result.

One obvious implication of this premise — whether it is viewed as identifying a convenient source of funds or as a broader economic principle — is that the source of energy aid for the poor becomes readily discernable. This premise also has implications for the method of calculating the overall level of energy assistance: the question becomes not how much assistance is needed, but rather what portion of the producers' profits is undeserved. The complex formulae of the crude oil windfall profits tax illustrate that the latter determination is a very difficult one to make.360

E. Allocation of Social Welfare Decisions to the Local Level

The Reagan Administration proposals for 1982, and LIHEAP as enacted for that year, emphasized state and local control of decision-making for energy assistance and other social programs. The proposals focused on the organization of power and responsibilities as among the federal, state, and local governments. The underlying premise was that social welfare decisions should be made at local levels because decision-makers there would be closer to and therefore more sensitive to people's needs.361 This premise is probably the most purely instrumental of the six premises discussed. It addresses only the format of energy assistance and not its basic desirability. Nonetheless, this premise was a major influence on the LIHEAP legislation for 1982–84.

Although this shift in responsibilities toward more localized decisionmaking is now usually considered an outgrowth of conservative political thinking about federalism, the effect may strongly resemble a return to the original poverty program approach. The 1982 program's urging of "special consideration" for continued use of local poverty agencies illustrates this.362 As mentioned in the discussion of the first premise, the suggestions for merging energy assistance with other types of emergency aid also point in the same direction.363 The result is that "the problem of energy assistance merges into that of alleviating poverty generally."364 Accordingly, this premise points not only toward a shift in decisionmaking power, but also toward recasting the energy problem in the broader context of poverty.

361. See supra text accompanying note 298; see also H. Landsberg & J. Dukert, supra note 4, at 75 ("Each state government would decide how to help the disadvantaged within its own borders withstand the buffeting of rising energy prices.").
362. See supra text accompanying note 35.
363. See supra text accompanying note 343.
364. H. Landsberg & J. Dukert, supra note 4, at 76.
F. Balancing Alleviation of Current Need with Maximum Long-Term Reduction of Need

The sixth and last premise is that a balance should be struck between energy assistance and conservation efforts. Some argue that the best way to help the poor cope with high energy costs is to provide just enough direct aid to alleviate extreme current suffering, while providing as much aid as possible for long-term reduction of energy needs. Putting this premise into effect would require extensive information on the levels of basic energy needs in different localities. It would also require that direct assistance be strictly limited to meeting those levels. All additional available funds would go for long-term efforts such as residential weatherization and alternative transportation methods. This kind of thinking underlies the various approaches taken to mixing and transferring funds between the energy assistance and weatherization programs.

This premise is largely instrumental in character. It could be viewed as a means of implementing the first premise — that of alleviating hardship as an end in itself — but the first premise blends the energy burden into the overall poverty problem, whereas this premise approaches the energy problems of the poor as a part of the overall national effort to promote conservation and reduce energy demand. It thus is more closely akin to the second premise, which views energy assistance as necessary for mitigation of the hardships of national energy policy. In effect, the sixth premise would call for a somewhat less charitable view of the degree to which current hardships must be ameliorated than would the first premise.

This last premise has been an intermittent aspect of the energy assistance programs of the past decade. The early EECS efforts wrestled with the problem of allocating funds between weatherization and crisis intervention needs. More recently, the option in LIHEAP for transfer...
of up to fifteen percent of funds to weatherization and energy-related home repair indicates that this search for a balance is still an important part of the overall effort to aid the poor.\textsuperscript{368}

IV. Energy Equity as a Synthesis of Concerns

The six policy premises identified here are those that have had the greatest impact on the formation of energy assistance programs over the past decade. These premises will undoubtedly continue to shape policy in the future, perhaps with the added influence of new concerns that have not yet come to light. Just as each of the programs thus far has embodied overlapping objectives, future program design similarly will be based on a synthesis of concerns.

The process of policy design and implementation of course will continue to be affected by political, economic, and budgetary considerations that may frequently frustrate a rational approach.\textsuperscript{369} Chaotic as the decisionmaking process of government may be, it is still important to understand the multiple values at work in these decisions, particularly the premises most relevant to the problems at hand. Only through careful attention to these premises can rational policy design be achieved.

Although future legislators and administrators will strike different balances among the concerns relevant to energy assistance, it is nevertheless possible to suggest a synthesis. This synthesis should provide a realistic, practical, and enduring perspective from which specific program details can be developed. It is not possible here to identify all such details, though some major program implications can be discerned. This recommended synthesis is obviously not the only possible blend of policy premises. It is not only inevitable but desirable in a democratic society that future decisionmakers should reconcile these concerns in different ways over time, according to the perceived necessities and values predominant at the moment of legislative choice.

Although it is tempting to emphasize the first premise — the alleviation of poverty as an end in itself — as the overriding goal of energy assistance, there are serious risks in doing so. Such a perspective would tend to equate the energy burden problem with other aspects of poverty that government and community leaders have been largely unable to alleviate. We are not conceptually compelled to view high energy prices primarily in the context of poverty and avoiding that perspective allows

\textsuperscript{368} See supra text accompanying note 320.

\textsuperscript{369} Many commentators have argued forcefully that woefully inadequate funds are being devoted to energy assistance. See, e.g., Energy Prices and Public Policy, supra note 4, at 16 (suggesting approximately $5 billion per year needed); FOMAC Report, supra note 4, at 51 (suggesting $5.1 billion per year needed); Staff of the Congressional Joint Economic Comm., supra note 4, at 5, 54 ("The loss of purchasing power of the poor not offset by energy assistance programs [during 1979–81] was $11.1 billion, or 76 percent of the total loss.").
us to obtain a more precise picture of the nature of the problem and its possible solutions.

One of the features of the energy burden that distinguishes it from other problems of poverty is its relatively recent origin. Unlike some aspects of poverty such as housing, education, and employment, the energy cost problem has only been severe for about a decade. More importantly, its solution may come about, at least in part, through a combination of technological advances, increased domestic production, and major shifts in population densities in various parts of the country within a few decades. Additionally, unlike other basic human needs such as food, housing, and health care, energy demand can be substantially reduced through conservation efforts. Evidence is mounting that technology and common sense could permit most energy consumers to live comfortably with much less energy. Whether or not this conclusion is valid for the poor is not yet known, but preliminary indications of the effectiveness of conservation programs among poor households warrant continued pursuit of this approach. Accordingly, to view energy assistance as just one more antipoverty tool is to overlook the distinctive features of the problem, as well as the possible unique and separate avenues to its solution.

The second premise, calling for the alleviation of hardships caused by explicit energy policy choices, offers a much sounder orientation for energy assistance. It recognizes that the nation is apparently in a period of transition leading to the achievement of our national energy goals, and that, during this time, we should minimize the hardships on the people who otherwise would suffer most severely from our new national direction. This emphasis would eliminate the lingering confusion over whether energy assistance is to be labelled a "one time" exercise each year — as it was during the first few years — or a "permanent" program, which early efforts explicitly disavowed, but the Carter proposals explicitly accepted. The second premise calls for neither of these extremes, but rather for a transitional program that would last as long as it takes to achieve the national energy objectives.

Under this premise the energy assistance issue can be seen as a facet of national energy policy. If conservation efforts and increased domestic production can reduce demand and increase supply, prices should stabilize and fall. This would alleviate the energy burden on all Americans, including the poor. If instead it should become clear that the national energy program cannot attain these goals, it would then be appropriate to reconsider approaching the the energy burden problem as another,

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370. See, e.g., R. STOBAUGH & D. YERGIN, supra note 6, at 136-82.
371. See generally CONSUMER ENERGY COUNCIL, supra note 10. Another, minor distinguishing feature of the energy problem is its substantial weather-dependence. This obviously creates greater needs and hardship at some times, but also permits suffering to be avoided at much less expense when a mild winter or moderate summer comes along.
lingering aspect of poverty. It would be premature, and probably self-defeating, to do so now.

This approach has several identifiable program implications. It is preferable to keep management of energy assistance programs separate from the administration of other income maintenance efforts, thus focusing attention on the distinctive aspects of the problem and its possible solutions. This does not mean, however, that energy assistance programs should shun the use of methods such as categorical eligibility mechanisms for promoting administrative efficiency. If such methods can help identify suitable recipients in an economical and timely way, programs should use them.

Another implication of this approach is that most energy assistance should be channeled through devices such as vendor payments, two-party checks, and vouchers, all of which have been used widely in recent years. Although this does have a certain paternalistic aspect, it again serves the important goal of keeping energy assistance benefits linked to energy needs, and, ultimately, to national energy policy.

Finally, perhaps the most important implication of adopting an approach based on the second premise is the appropriateness of linking to it the sixth premise, which seeks a balance between short-term and long-term energy needs. As has been noted above, both of these premises tend to view the energy problem for the poor as a part of the overall national energy picture. Striking this balance can be viewed as one of the most important and difficult tasks in furtherance of the goals of the second premise.

The remaining premises should be seen as supplementing this main focus. The alleviation of poverty must certainly remain a background concern during the transition to a new energy future. Decisionmakers should not fail to recognize that high energy prices tend to merge into the overall hardships of poverty for many Americans. This recognition, however, should not become the major shaping influence on policy.

Similarly, adopting an approach primarily based on the fourth premise — linking energy assistance with taxation of undeservedly high profits — would be to risk considerable confusion and failure. Even accepting the pragmatic interpretation of that premise, revenue sources such as the windfall profits tax on oil are not reliable foundations for energy assistance. For one thing extraneous fiscal concerns may work to reduce the tax. Shifting petroleum market forces may diminish these revenues considerably. They may also deprive the windfall profits notion of some of its earlier appeal if profits should fall because oil producers need to replenish inventories at higher cost during times of diminished demand. Perhaps most significantly, the fourth premise diverts attention from the

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372. See supra text accompanying notes 352, 366.
issue of national energy policy choices and societal responsibility to those suffering most from those choices. Consideration should be given to this premise only with recognition that it is supplementary and instrumental in nature, suggesting one source for energy assistance funding, but not a necessary or exclusive source.

The third premise, relating to foreign control of energy prices, also should be seen as subsidiary. The energy price problem is not necessarily episodic or sporadic in character, as reliance on this premise assumes. It is probably even safe to speculate that if OPEC were to disband now, American energy policy and the needs of the poor would not be fundamentally changed. Furthermore, some experts believe that domestic energy pricing policies have caused a greater percentage of the recent increase in energy costs than have foreign price manipulations. This premise thus should come into play only in a supplementary role, influencing the timing and amount of energy assistance when distinct foreign price developments cause harsh impacts here.

The fifth premise, regarding allocation of social decisions to the local level, should also continue to be viewed as instrumental. It should not detract from the basic justification of energy assistance programs found in the second premise. In theory, the fifth premise is neutral regarding the goals of energy assistance, simply leaving it to state and local government to clarify and implement whatever goals are chosen. This concern thus need not present an obstacle to fulfillment of the “special obligation” under the second premise, provided state and local decision-makers shape their program decisions in accordance with the purposes of that premise as supplemented by the sixth premise.

In this regard, the 1982 and later Reagan Administration proposals for energy assistance are cause for concern. As discussed above, these proposals have tended to merge energy assistance into the poverty problem. The federalism concerns of the fifth premise can and should be addressed within the context of energy assistance efforts linked to the broad national energy objectives emphasized by the second premise. The federalism debate must not blur those objectives and throw the energy assistance effort back into the broad antipoverty format.

CONCLUSION

The synthesis just described attempts to harmonize the six premises that have shaped the past decade of energy assistance programs. The

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375. See, e.g., STAFF OF THE CONGRESSIONAL JOINT ECONOMIC COMM., supra note 4, at 4 (“The major oil price increases of the 1979-1981 period were primarily due to domestic oil pricing decisions — not high oil import costs.”).
376. See supra text accompanying notes 362-64.
synthesis further attempts to provide a sound direction for future policy development. It postulates that social justice requires a national commitment to bear collectively the transitional burden of the new energy policy path we have chosen, rather than to let this burden fall unmitigated on the poor. By linking energy aid to that choice, this approach is most likely to provide a clear perspective on the distinctive causes and solutions of the energy burden problem.

Whether this synthesis or some other blend of policy premises is adopted by decisionmakers charged with designing energy aid for the poor, careful attention must be given to the critical social issues these premises represent. Thorough evaluation of these premises and their relationships will contribute to rational policy development, for they have critical implications for the substance and form of energy equity for the poor.