10-1982

Bell v. New Jersey

Lewis F. Powell Jr.

SUPPLEMENTAL MEMORANDUM

Summer List 13,Sheet 1 Levene

No. 81-2125 Cert to CA3

BELL

v.

NEW JERSEY and
PENNSYLVANIA Federal/Civil Timely

SUMMARY: The State of New Jersey has filed a brief in opposition to the petition for cert.

CONTENTIONS: New Jersey makes the same arguments in opposition that Pennsylvania did in its brief: (1) The CA3 was right on the merits; (2) The split between the CA3 and CA4 does not require resolution by this Court; and (3) The SG's fears that the

This adds little to the preliminary memo (attached).

CA3 opinion will undermine the administration of other federal programs are unwarranted.

DISCUSSION: I recommend denial for the reasons stated in the Preliminary Memorandum.

August 2, 1982 Levene Opn in petn

9/21

Grant

27 cases are pending

This is a consolidated suit by the Fed Govt. to recover funds granted to Resp. States under the Elementary & Secondary Education Act, & mis-spent by the States.

Not until an amend. to Act in 1978 did it expressly provide for recovery of mis-spent grant money. CA3 held the 1978 Amend. was not retroactive to funds mis-spent prior to its enactment.

CA4 has reached a contrary result.

PRELIMINARY MEMORANDUM

Summer List 13, sheet 1

No. 81-2125

Bell (Secretary of Education)	Cert to CA3 (Adams, Rosenn; Higginbotham, concurring)	
v.		
New Jersey and Pennsylvania	Federal/Civil	Timely

SUMMARY: The CA3 held that petr had neither the statutory authority nor a common law right to require resps to repay funds advanced to them under Title I of the Elementary and Secondary Education Act of 1965 that petr determined in an administrative hearing had been misspent.

Grant. I am not convinced that this is an issue on which it would be particularly helpful to wait for "a carefully reasoned opinion" that presents a conflict. The issue is straightforward. And I disagree with the memo author that since there are →

FACTS AND HOLDING BELOW: Title I of the Elementary and Secondary Education Act of 1965, now codified, as amended, at 20 U.S.C. §§ 2701 et seq. (Supp. IV 1980), provides for federal funding to states with heavy concentrations of children from low income families. The statute sets forth specific criteria to ensure that funds are spent only for the benefit of "disadvantaged children."

Grant payments may be made either in advance or by reimbursement. In the instant cases, the payments were all made in advance.

The Secretary may conduct an audit at any time to determine whether Title I monies were properly expended. 20 U.S.C. § 2835 (Supp. IV 1980). (The authority to audit was previously contained in 20 U.S.C. § 1232c(a)(2) (1976).)

When the Secretary determines that funds have been misspent, the statute sets forth several remedies. The original act authorized the Secretary to withhold funds or refuse to approve applications. Pub.L.No.874, tit. II, §§ 206, 210, codified as amended at 20 U.S.C. §§ 2832, 2836 (Supp. IV 1980).

In 1978, Title I was extensively amended and revised. Section 185, 20 U.S.C. § 2835 (Supp. IV 1980), was added to permit the Secretary to require states to reimburse the government for funds the states have misspent. It authorizes the Secretary to hear appeals on audit findings and to determine when Title I funds have been misspent or misapplied. Where he

'78 Amend

so determines, "the Secretary shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied." *Id.*

In the early 1970's, the Department of Health, Education, and Welfare audited Pennsylvania for the fiscal years 1968-1973 and New Jersy for 1971-73. The final audit reports, issued in 1975, found that both states had misapplied Title I funds. Both states filed applications for review with the Title I Audit Hearing Board.

The Audit Hearing Board was administratively established in 1972 to provide states with an opportunity to challenge audit findings. It was succeeded on June 29, 1979, by the Education Appeal Board, which was created by the 1978 Amendments to Title I. The Education Appeal Board assumed jurisdiction over resps' appeals.

In February 1980, the Education Appeal Board found that New Jersey should repay $1,031,304 to the government. In May 1980, it found that Pennsylvania should repay $422,424. The resps each petitioned the CA3 for review, arguing that the petr lacked both statutory authority and a common law right to administratively recoup Title I funds misspent prior to the 1978 Amendments. (The petitions were consolidated in the CA.)

The CA3 granted the petitions for review and remanded with instructions to vacate the orders requiring repayment. 662 F. 2d 208 (CA3 1981). Relying on Pennhurst State SChool

and Hospital v. Halderman, 451 U.S. 1 (1981), it held that Section 185 could not be applied retroactively to authorize the Secretary to recoup funds misspent prior to 1978:

> [T]he overarching principle of Pennhurst -- that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant -- precludes us from giving retroactive effect to a statute passed five years after the last disputed funds were received. Such a result would require repayment of misspent funds out of a state's general treasury. Section 185 does not confer authority on the Department to impose the sanctions it adopted in these cases.

Without deciding whether resp had a common law right to recoupment, the CA3 held that such a right could not be enforced administratively but "only by an action in a court of competent jurisdiction." It distinguished Mt. Sinai Hospital v. Weinberger, 517 F. 2d 329 (CA5 1975), cert. denied, 425 U.S. 935, which had held the government had a common law right to administratively recoup misspent Medicare funds. The Medicare funds in Mt. Sinai were distributed as reimbursement for monies already spent by the state; the Title I funds here were advanced to the states prior to the state's expenditure of monies for Title I services. The CA3 argued that use of the offset remedy where funds are advanced would "result in the failure of the school districts to provide Title I services during the year for which funding was withheld." By contrast, if the government uses its common-law right of setoff when it finds Medicare funds have been misspent, "Medicare beneficiaries still receive treatment. ..."

CONTENTIONS: Petr suggests three reasons for granting cert. First, the decision below squarely conflicts with the CA4's opinion in State of West Virginia v. Secretary of Education, 667 F. 2d 417 (CA4 1981)(per curiam). In West Virginia, the CA4 held that the Secretary had both statutory and common law authority to administratively recoup Title I funds that had been misspent prior to 1978. Petr notes that there are 27 cases pending before the Education Appeal Board involving audit claims for $60 million in funds received by the states before 1978.

Second, petr argues that "[t]he disruptive effects of the decision below can be expected to extend beyond Title I." Grantees under other statutes have already begun to use the CA3's decision as a basis to challenge the recoupment procedures of other federal agencies. Petr notes that "as of June 30, 1981, at least $374 million of audit-related debts were outstanding."

Third, petr contends that the CA3 misinterpreted controlling legal principles, in particular, the inherent authority of the United States government to recover public funds illegally paid. Petr argues that the CA3 incorrectly distinguished cases like Mt. Sinai Hospital, and that the Secretary's recoupment authority should not turn on whether he advances monies to the states or reimburses them for funds they have spent.

Resp Pennsylvania (New Jersey has not filed a brief in opposition) contends that the split between the CA3 and CA4 does not justify plenary review by this Court. The CA4 opinion is short (2 pp), ill-considered, and conclusory. It was filed as an unpublished order without benefit of oral argument two days after the CA3 opinion came down. It was later published as a per curiam opinion on the motion of the SG.[1] The West Virginia court did not mention the CA3 opinion. In holding that the 1978 Amendments applied retroactively, it did not discuss Pennhurst. It did not explain why the Secretary had common law authority to administratively recoup misspent funds, but merely cited Mt. Sinai Hospital.

Second, resp contends that only a "small and decreasing number of disputes" would be affected by a decision in this case. The CA3's decision only applies to disputes over Title I funds received by the states prior to 1978.

Third, resp discounts petr's predictions that application of the CA3's decision would have dire effects on many other federal grant-in-aid programs. "Application of this decision to other federal grant-in-aid programs is not likely unless a similar enforcement structure can be shown to be part

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[1]West Virginia did not file a petition for cert when the unpublished order in West Virginia was filed. After the CA4 granted the SG's motion to publish the order, West Virginia moved this Court to direct the clerk to accept for filing an untimely petition for cert. This Court denied that motion on April 26, 1982.

of the statutory scheme in those programs."

The states of Maryland and West Virginia each filed briefs as amicus curiae in support of the petition for certiorari. They urge the Court to grant cert and affirm.

DISCUSSION: Although this is a strong case for cert, I recommend denial. The CA4 decision is very short and conclusory. The Court should wait until some CA rejects the CA3 position in a carefully reasoned opinion. Moreover, the matter is not pressing, despite the SG's claim of imminent disaster for the federal government. Only 27 cases involving pre-1978 funds await resolution. The amount of money claimed by the federal government -- $60 million -- is likely to be drastically reduced in the appeals process.[2] As for the SG's claim that the CA3 decision threatens the administration of other federal grant-in-aid programs, the Court can cross that bridge when it comes to it.

Only,!

I recommend denial.

There is a response.

July 30, 1982 Levene Opn in petn

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[2]For example, the federal auditors initially claimed $10,000,000 from Pennsylvania. That figure was ultimately reduced to $422,424.

September 27, 1982

Court .... *Voted on*................., 19...

Argued ...., 19... *Assigned* ...., 19... No. 81-2125

Submitted ...., 19... *Announced* ...., 19...

BELL, SEC. OF ED.

vs.

NEW JERSEY

~~[illegible]~~ BW & B says that new statute doesn't solve problem.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

Reviewed 4/17 - Inclined to agree with Mark that U.S. has right to recover funds misspent - need by Pa + N.J.

men 04/16/83

BENCH MEMORANDUM

No. 81-2125:

Bell v. New Jersey

From: Mark

April 16, 1983

Questions Presented

Whether the Department of Education has authority, under statutory or common law, to issue an administrative order requiring states to repay federal grant funds that were misspent.

I. Background

This case involves Title I of the Elementary and Secondary Education Act of 1965, which provides federal funds to the states for the purpose of improving the education of children of low-income families. The amount given to any local educational agency (LEA) depends on the number of low-income families in the area. And the funds are distributed only after the state educational agency (SEA) provides assurances that the money will be spent in accordance with statutory conditions.

In 1975 DOE auditors determined that resps New Jersey and Pennsylvania had misapplied substantial sums -- $1.1 million and $1.3 million, respectively -- between 1970 and 1973. These findings were affirmed on administrative appeal in 1980, though the amounts were reduced to $1 million and $.4 million. The agency found that resps improperly used funds in districts with insufficient numbers of low-income children and for general aid purposes rather than for the special needs of educationally deprived children. See Brief for SG at 11 n.18. Resps were ordered to repay this amount to the Federal Government.

Resps sought review in CA3. Judge Rosenn, joined by Judges Adams and Higginbotham, held that the Government lacked authority to compel repayment. In 1978, §185 was added to Title I, 20 U.S.C. §2835, expressly giving this authority to the Secretary of Education. But CA3 declined to apply this retroactively, relying on the principle established in Pennhurst I, 451 U.S. 1 (1981), that "if Congress intends to impose a condition on a grant of federal moneys, it must do so unambiguously." CA3 then rejected

the Government's alternative argument that it could order repayment under its "common-law right" to recover money distributed under a contract. CA3 declined to decide precisely what right of recovery existed, holding that whatever that right was, it could be enforced only through a civil action in a court of competent jurisdiction. DOE has no independent authority to order repayment of misspent federal grant funds.

This Court granted cert in light of a square conflict with CA4. The Government is supported by an amicus brief from the Lawyers Committee for Civil Rights under Law. Resps are supported by numerous states, local government organizations, and educational organizations.

II. Discussion

The issues here are (i) whether the Department of Education is entitled to recovery of money that a state recipient has spent in violation of the grant conditions, and (ii) whether the Department can recoup such funds through the administrative process. In my view the answer to both questions is "yes," and I therefore recommend that CA3 be reversed.

A

This is a complex case, and it is important to have a general understanding of the statutory developments. Before 1978, no statutory provision expressly authorized DOE to recover misapplied funds. Rather, the statute provided two sanctions for non-compliance with grant conditions: (i) disapproval of a SEA's application, and (ii) withholding of payments until compliance is

Prior to 1978, two sanctions

achieved. The agency's regulations tracked the statute, providing for disapproval of an application or withholding of funds, but not providing for repayment.

In 1978 Congress adopted §185, which gives the Department authority to require "the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied." 20 U.S.C. §2835. Under this provision, the Department clearly had authority to order resps to make repayments. But CA3 refused, however, to apply §185 retroactively.

B

In my view, the decisive issue in the case is whether, prior to 1978, the Government had a "right to recover", in any forum or proceeding, funds that were misspent. Let me explain why I think this is critical. If the Department did not have such a right, then retroactive application of §185 would amount to retroactive imposition of a new and unanticipated substantive liability, and this would be contrary to the principle of Pennhurst I. If, on the other hand, the Government did have some enforceable right to obtain repayment of misspent funds, then I think a retroactive application of §185 is permissible. In that case, the substantive liability would be unchanged; all that would be new is that an additional enforcement device would be created. And, of course, if the Government already had a right to recovery through the administrative process, then §185 merely would have codified this right.

Yes

The question thus is from what pre-1978 source the Govern-

ment derived authority to recover misspent funds. The SG relies on three sources of authorization: (i) the Federal Claims Collection Act of 1966, 31 U.S.C. §§951 et seq., (ii) the Government's inherent, common-law right to recoupment, and (iii) implicit statutory authorization.

1. As to the first argument, I think nothing in the Federal Claims Collection Act bears on the existence of this particular right to recovery. The Act directs the head of each agency, acting under regulations established by the Attorney General and the Comptroller General, to "attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency." 31 U.S.C. §952(a). Nothing in the Act appears to create any substantive right to recovery of misspent grant money; the Act merely permits collection of claims that do exist.

2. As to the second argument, I am unconvinced that the Government has a "common-law right of recoupment" that necessarily authorizes it to demand repayment of misapplied grant funds. The cases cited by the SG are from 1890, 1896, 1938, 1920, 1841, etc. I have not had time to read all of these cases, but my impression is that they deal essentially with basic contractual situations, e.g., United States and a contractor have a dispute. None of them deals with the more recent, and more sensitive, situation of grant-in-aid funds to the states. In short, I do not think that this is an issue to be decided by reference to an alleged overarching principle of the "common law."

SG relies on old case

3. That leaves the SG's final argument that the pre-1978

statute contained implicit authorization for a right of recovery. Resps and amici contend that the express statutory authorization for withholding of funds or disapproval of application is sufficient to enforce Title I, and therefore no other remedies should be implied. The SG argues, however, that the following factors demonstrate that Congress intended that DOE be able to recover misspent funds:

-In 1970 Congress enacted §424, 20 U.S.C. §1232d, giving DOE the authority to audit state programs. The Senate Report stated that "exceptions have been taken to certain expenditures of title I," that these exceptions "appear to be well founded," and that "[e]ven though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer." S. Rep. No. 91-634, p. 83-84 (1970). This suggests Congress thought repayment could be ordered.

-In 1972 the agency established the Title I Audit Hearing Board for the purpose of hearing audit disputes and enforcing repayment.

-In 1974 Congress enacted a 5-year statute of limitations on state obligations to repay misspent funds: "No state or local education agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized." 20 U.S.C. §884 (1976). This is an extremely strong suggestion that

Congress thought it clear that the agency had authority to order refunds of Title I funds.

-In 1978, when Congress adopted §185, there were several indications in the legislative history that Congress thought it was confirming the preexisting powers of the agency. (See, e.g., Brief for Lawyers Committee at 15-16.)

I find these arguments persuasive. These congressional actions, combined with their legislative history, convince me that Congress wanted DOE to be able to recover misspent funds. They also suggest that the states had reason to be aware that misspent funds might have to be refunded. I conclude that the statute implicitly authorized the Government to recover these funds. Accordingly, there is no unfairness in permitting the Department to use the specific administrative remedy provided in §185.

C

I should note, however, that this is the type of argument you have found unpersuasive in the context of implying causes of action and/or remedies available to private beneficiaries of federal programs. JUSTICE WHITE's opinion in Guardians Association, No. 81-431, is a good example. He states (citing Pennhurst I):

> "Remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance. ... Thus, declaratory and injunctive relief ordering future compliance with the declared statutory standards are presumed to be the only proper remedies in such cases. Absent clear congressional intent or valid regulatory or contractual provisions to the contrary, additional relief in the form of money or otherwise based upon past violations

that a court might identify should be withheld." (Op. at 10-11.)

Still, I believe this case is distinguishable because it involves the remedies available to the Federal Government rather than to private litigants. A major concern in Pennhurst I and other private right of action cases is that by implying a right of action for private parties, or by retroactively imposing unforseen obligations on the use of the funds, the federal courts will expand vastly the potential liability of the recipient of the funds -- indeed, the relief imposed by a federal court could far exceed the amount of the grant. In contrast, the issue here is simply whether the state must give back money it spent improperly. The amount of the liability is limited to the amount that was misspent. And the remedy is one that is directly related to the Government's ability to control the use of the granted funds. Again, I think the legislative background sufficient to indicate that Congress acted on the assumption that the agency would be able to recover misspent funds.

D

There is one final point worth mentioning. One of resps' basic complaints is with the substantive determination that they misspent the funds. They believe that they spent the Title I money in good faith under ambiguous criteria, and that therefore it is an unfair penalty to require large reimbursements. The issue of whether the states actually violated the statutory conditions, however, is not before the Court. (New Jersey, but not Pennsylvania, challenged this substantive finding in CA3, but the court did not reach the issue.) Rather, the issue is whether DOE

has a right to recover funds that were misspent. This issue is the same regardless of whether the states' violations were technical or grossly unlawful.

I also note that there is a "grantback" provision under which a state may receive back 75% of the funds it is forced to repay to the Federal Government. See 20 U.S.C. §1234e(a)(2). This strikes me as a reasonable provision that prevents serious injustice -- and serious financial crises for states that must repay funds -- from occurring. I therefore think the Court should ignore the suggestion that the states did not actually misspend the money involved here.

III. Conclusion

The decision below should be reversed. The Court should hold that from the time resps misspent these funds Title I has permitted DOE to recover money spent improperly by the states. Because the statute has always permitted the Government to recover misapplied funds, there is no unfairness in permitting the agency to use §185's administrative process to recover funds that were misspent prior to the adoption of §185. The case should be remanded to CA3 for further proceedings, including consideration of New Jersey's challenge to the substantive violation found by the agency.

Marks

81-2125 BELL v. NEW JERSEY CA 3 Argued 4/18/83

Q - May Dept of Ed. recover funds mis-spent by a State?

Geller (SG).

There is an appeal from an Adm. decision. It is not a suit to collect the money claimed. If the Adm. decision is upheld, Secretary may sue or off-set.

CA3 held no right to "off-set"

Geller said Secretary was relying on common law right

Q not yet reached - assume right to recoup exists - is how right is implemented: by suit, off-set, or under Collection Act.

O'Connor said CA3's opinion said off-set would be appropriate. Geller disagreed. He said CA3 thought Q not before it but did say there would have to be decided in a separate DC suit.

Relies on analogy of a contract (State obl. to comply with conditions)

Gellar (cont)

Evidence of congressional intent:
- Fed. Claims Collection Act
- 1970 Audit Act
- 1972 Audit Review Bd.
- 1974 St/Limit
- 1978 Expense audits – Legislative

Ms. Hunting (SG of Pa.)

Have not challenged the amounts claimed, but deny right of Fed Govt to recover & the legality of the Adm. procedures

"Fed Govt's proper remedy is to "withhold" funds" – but on questioning by JPS she conceded that under Act ~~as~~ prior to 1978 provided no ~~right~~ right of recovery or recoupment.

Counsel agreed facts are irrelevant

Cole (ant AG 2. 2).

Geller (SG - Reply)

The remedy suggested by Pa

2. § 241 f. is a drastic one.

~~Post~~

Their is a final determination of amount due — though no "Order" to repay

See ¶ 3a of appendix for type of misapplication - usually an inadvertence

Powell

81-2125 Bell, Sec. of Education v. N.J. & Pa.

Pre-Cf Notes

Facts: Audits showed that Resp. States had misapplied fund granted for aid of deprived children, under Education Act.

The misapplication is not denied.

Issue: Whether Fed Gov't may compel repayment of the money, and

Even if there is a common law right to recover - an "inherent right" - money wrongfully expended, may recovery be made on basis of an administrative procedure provided by Dept. of Ed. - rather than by a suit in fed. ct..

CA 3 held no right to recover.

The Act provided certain remedies, but not until Amend. of '78 was recovery explicitly authorized. Act could not be applied retroactively.

If common law rt. exists, can be asserted only in a DC.

SG argues: There is an "inherent right". Can be enforced administratively where appeal to CA exists.

Relies also on Fed Claims Collection Act of '66.

Certainly may off-set vs grants otherwise payable.

81-1125 Bell v N.J. (pre-Cl)

Inclined to Reverse. May not limit.

The Act (1965) expressly provided only two ~~remedies~~ sanctions against States failing to comply: Disapproval of a State's application, & withholding payments until compliance.

* * *

Congress clearly thought it had a necessarily implied right to recover money illegally applied:

1970 - Authorized "audits"

1972 - ~~Created~~ Dept created Audit Hearing Board

1974 - Enacted 5 yr. S/Lim. on a state's obligation to repay

1978 - When suit to recover was expressly auth., leg. history indicated "confirming existing power."

Implying a right to recover granted funds mis-spent is quite different from implying private cause of action

(No need to consider a "remedies law" right; now to consider Fed. Claims Collection Act (doesn't apply)

Rev 9-0

No. 81-2125 Bell v. New Jersey Conf. 4/20/83

The Chief Justice Rev.

On record, must assume funds were mis-spent.

N.J. appeared to concede right to recover, but disapproved procedure. ?

Govt has, inherent ~~—~~ common law right to recover. Agree with S.G.

Justice Brennan Rev.

There is a final order - ~~—~~ in effect a command that states repayment.

Agree with C.J.

Power to make binding Administration findings is inherent, subject to judicial review

May go to court to recover or off-set. Agree with SG

Justice White Rev.

Not a test as to effect of administrative determination. A state must have chance to be heard on facts. At least on facts here, agree with SG. ~~If~~ If states deny accuracy of facts must be given opp. to be heard.

Justice Marshall Rev.
No difficulty with final judg reind
Not sure as to procedure. Prefer
not to get to procedure

Justice Blackmun Rev. & Remand

Justice Powell Rev. OK to Remand
See my notes
Agree with W J B.

Justice Rehnquist Rev,

There is a substantive right to recover.

Agree with BRW that statute must have right to challenge whether money was misspent & how much. We should not view the Administrative action as equal to an enforceable ~~order~~ judg.

Justice Stevens Rev.

The statute has not provided for a recovery. Qs of remedies are not before us.

CA#3 was wrong in saying procedure was a nullity.

Justice O'Connor ~~Rev~~ Rev & Remand

Need not rely on a "common law" right

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: MAY 17 1983

Recirculated: _____

1st DRAFT

Renewed

Join

SUPREME COURT OF THE UNITED STATES

No. 81–2125

TERREL H. BELL, SECRETARY OF EDUCATION, PETITIONER *v.* NEW JERSEY AND PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May ——, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider both the rights of the Federal Government when a State misuses funds advanced as part of a federal grant-in-aid program under Title I of the Elementary and Secondary Education Act and the manner in which the Government may assert those rights. We hold that the Federal Government may recover misused funds, that the Department of Education may determine administratively the amount of the debt, and that the State may seek judicial review of the agency's determination.

I

The respondents, New Jersey and Pennsylvania, received grants from the Federal Government under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. 89–10, 79 Stat. 27, as amended, 20 U. S. C. §2701 *et seq.* (1976 ed. Supp. V). Title I created a program designed to improve the educational opportunities available to disadvantaged children. §102, 20 U. S. C. §2701 (1976 ed. Supp. V). Local educational agencies obtain federal grants through state educational agencies, which in turn obtain grants from the Department of Education[1] upon providing

[1] The Department of Education was not created until 1980. Pub. 96–88,

assurances to the Secretary that the local educational agencies will spend the funds only on qualifying programs. § 182(a), 20 U. S. C. § 2734 (1976 ed. Supp. V).[2] In auditing New Jersey for the period September 1, 1970 through August 1973, and Pennsylvania for the period July 1, 1967 through June 30, 1973, to ensure compliance with ESEA and the regulations promulgated under ESEA, federal auditors determined that each State had misapplied funds. After review requested by the States, the Education Appeal Board (the Board) modified the findings of the auditors and assessed a deficiency of $1,031,304 against New Jersey and a deficiency of $422,424.29 against Pennsylvania. The Secretary declined to review the orders establishing the deficiencies,

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93 Stat. 668, 20 U. S. C. §§ 3401 *et seq.* (1976 ed. Supp. IV). The agency involved in many of the events relevant to this litigation was the predecessor, the Office of Education, and the official involved was the Commissioner of Education. For simplicity, unless the distinction is significant, we will refer to both the Office of Education and the Department of Education as the Department of Education and to both the Commissioner of Education and the Secretary of Education as the Secretary of Education. Similarly, we refer to both the Title I Audit Hearing Board and its successor, the Education Appeal Board, as the Education Appeal Board. By a regulation, 44 Fed. Reg. 30528, 43807 (1979), specifically authorized by statute, 20 U. S. C. § 1234a(f) (1976 ed. Supp. V), the Department transferred to the Education Appeal Board appeals pending before the Title I Audit Hearing Board when the Education Appeal Board was created.

[2] Section 182(a) provides in part:

"The Secretary shall not approve an application . . . until he has made specific findings in writing . . . that he is satisfied that the assurances in such application and the assurances contained in its general application under section 435 of the General Education Provisions Act (where applicable) will be carried out."

Section 435(b), 20 U. S. C. § 1232d(b) (1976 ed. Supp. V) requires assurances "that each program will be administered in accordance with all applicable statutes, regulations, program plans, and applications."

Section 182 was added in 1978, Pub. 95–561, 92 Stat. 3188, but a substantially similar provision was in effect from the date of the enactment of ESEA. See § 206, 79 Stat. 31.

and, after a period for comment, the orders became final. See App. to Pet. for Cert. 57a, 86a–87a. Both States filed timely petitions for review in the United States Court of Appeals for the Third Circuit, which consolidated the cases and held that the Department did not have the authority to issue the orders. It therefore did not reach New Jersey's arguments that the State had not in fact misapplied the funds, App. to Pet. for Cert. 3a, or Pennsylvania's arguments challenging the agency's rulemaking procedures and its application of ESEA's limitations provision, *ibid.*

II

The threshold question in this case, one that need not detain us long, is whether the court below had jurisdiction. Since federal courts are courts of limited jurisdiction, the court below could hear the case only if authorized by statute. It premised its exercise of jurisdiction alternatively on § 195 of ESEA, 20 U. S. C. § 2851 (1976 ed. Supp. V), and on § 455 of the General Education Provisions Act (GEPA), Pub. 95–561, 92 Stat. 2350, 20 U. S. C. § 1234d (1976 ed. Supp. V). The first provision permits judicial review in the courts of appeal of the Secretary's final action with respect to audits, and the second permits judicial review in the courts of appeal of actions of the Board.[3] Although only § 195 explicitly re-

[3] Both provisions were originally enacted as part of the Education Amendments of 1978 (1978 amendments), Pub. 95–561, §§ 195, 455, 92 Stat. 2143, 2196–2197, 2350. We agree with the Court of Appeals that those provisions apply retroactively, though we pretermit the question whether the substantive provisisons of the 1978 amendments also apply retroactively, see *infra*, at ——. Under the pre-1978 version of ESEA, there was no explicit provision for judicial review of decisions of the Title I Audit Hearing Board. The presumption that review is available, see 5 U. S. C. §§ 701(a), 702, 704; *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967), coupled with the absence of any indication in the statute that the decision is committed wholly to the discretion of the agency or that review is otherwise precluded, see 5 U. S. C. § 701(a), leads to the conclusion that the district courts would have had jurisdiction under the general

quires "final" action, we think that a final order is necessary under either section. The strong presumption is that judicial review will be available only when agency action becomes final, *FPC* v. *Metropolitan Edison*, 304 U. S. 375, 383–385 (1938); see generally 5 U. S. C. § 704; 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure § 3942 (1977), and there is nothing in § 455 to overcome that presumption. Indeed, § 455 provides judicial review of decisions made under § 452, § 453, and § 454, 20 U. S. C. §§ 1234a, 1234b, 1234c (1976 ed. Supp. V), each of which includes a subsection dealing with finality and suggesting that only a "decision" of the Board is subject to review. See §§ 452(d), 453(d), 454(d). 20 U. S. C. §§ 1234a(d), 1234b(d), 1234c(d) (1976 ed. Supp. V). Consequently, we conclude that, at least in the absence of an appealable collateral order, *Mathews* v. *Eldridge*, 424 U. S. 319, 331, n.11 (1976); *Cohen* v. *Beneficial Finance Corp*, 337 U. S. 541, 545–547 (1949), the federal courts may exercise jurisdiction only over a final order of the Department. We therefore must determine whether this case meets that requirement.

The Board's order, which became the agency's decision, merely established the amount of the deficiency owed by the States to the Federal Government, leaving for further "discussion" the method of repayment.[4] See App. to Pet. for

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grant of jurisdiction over cases involving federal questions, 28 U. S. C. § 1331 (1976 ed. Supp. V). See generally 4 K. Davis, Administrative Law Treatise § 23:5 at 135 (1983); C. Wright, Law of Federal Courts § 103 (3d ed. 1976). Once the Department transferred the cases of the Title I Audit Hearing Board to the Education Appeal Board, 44 Fed. Reg. 30528, 43807 (1979); see § 451, 20 U. S. C. § 1234(f) (1976 ed. Supp. V) (authorizing transfer), the effect of the 1978 amendments was merely to change the forum for review. As Justice Holmes explained for the Court in *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916), a change of forum "takes away no substantive right" and thus can apply retroactively.

[4] New Jersey seems to take the view that the Secretary has settled the method of collection by demanding repayment. See Brief for Respondent

Cert. 88a, 90a. The possibility of further proceedings in the agency to determine the method of repayment does not, in our view, render the orders less than "final." The situation here corresponds to the ordinary adjudication by a trial court that a plaintiff has a right to damages. Although the judgment in favor of the plaintiff is not self-executing and he may have to undertake further proceedings to collect the damages awarded, that possibility does not prevent appellate review of the decision, which is final. Our cases have interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process. See, *e. g.*, *FTC* v. *Standard Oil Co.*, 449 U. S. 232, 239 (1980); *Port of Boston Marine Terminal Assn* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 71 (1970). Review of the agency's decision at this time will not disrupt administrative proceedings any more than review of a trial court's award of damages interferes with its processes. Indeed, full review of the judgment may expedite the collection process, since the States know their ultimate

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New Jersey 16, n. 1, 28, n. 15, 33–34. In fact, the record shows that each State received notice of the Board's decision, stating, "[The State] should refund [the amount] to the Department of Education. Appropriate authorities within the Department will be in touch with you at an early date to discuss the method of repayment of the funds in question." App. to Pet. for Cert. 88a, 90a.

New Jersey has reproduced as an appendix to its brief a letter demanding immediate repayment, App. to Brief of Respondent New Jersey 1a–2a, suggesting that the Secretary has already determined the manner of collection. That letter is not part of the record, and we are inclined, in any event, to view it as an initial proposal of a means of collection. Cf. 4 CFR § 102.2 (1983) (regulation under Federal Claims Collection Act, Pub. 89–508, 80 Stat. 309, 31 U. S. C. § 952, requiring agency to make written demand for repayment in attempting collection of claims). Moreover, the Secretary, who is the petitioner, has not asked us to decide what means of collection are available to him, but only whether he is a creditor. Since the case does not present the issue of available remedies, we do not address it.

liability with certainty. The agency's determination of the deficiency here represented a definitive statement of its position, determining the rights and obligations of the parties, see *Standard Oil Co., supra*, 449 U. S., at 239 (explaining *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967)); *Port of Boston, supra*, 400 U. S., at 71; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, 205 (1960). Therefore, the Court of Appeals properly took jurisdiction of the case, and we too have jurisdiction to address the merits.

III

Turning to the merits, the States first challenge the Secretary's order by asserting that, even if the Board properly determined that they misused the funds, the Federal Government cannot recover the amount misused. Thus, we must decide whether, assuming that a State has misused funds granted to it under Title I of ESEA, it becomes liable to the the Federal Government for those funds. The Education Amendments of 1978 (1978 amendments), Pub. 95–561, 92 Stat. 2143, 20 U. S. C. §§2701 *et seq.* (1976 ed. Supp. V), rendered explicit the authority of the Secretary to recover funds misspent by a recipient. 20 U. S. C. §2835(b) (1976 ed. Supp. V), 92 Stat. 2190. Although the final determination of the Board in each of these appeals occurred after the enactment of the 1978 amendments, the audits reviewed periods before 1978. Both States take the position that, before the 1978 amendments, the Secretary's sole remedy for noncompliance was prospective: he could withhold funds from a State that did not comply, until the State brought its program into compliance, §146, 20 U. S. C. §241j, or he could deny applications for funds for noncomplying programs, §142, 20 U. S. C. §241f.[5] Further, they contend that the

[5] New Jersey explains now that it does not object to what it characterizes as a "setoff" by the Secretary but that the Secretary did not request

1978 amendments operated prospectively only.[6] The Secretary has argued both that the 1978 amendments had retroactive effect and that the right of recovery existed in the pre-1978 version of ESEA. Since we are persuaded that the

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that remedy in the Court of Appeals. Brief for Respondent New Jersey 16, n. 10. That is, if the Secretary properly determined that New Jersey misused funds, he could, in New Jersey's view, withhold part of the funds that the State would otherwise be entitled to receive under Title I of ESEA in future years, and the State would undertake a smaller Title I program in those years. New Jersey's proposal does not, however, amount to a "recovery" by the Federal Government. Ordinarily, a State would obtain a certain sum in Title I funds by giving its assurances that it would expend *that sum* for Title I programs. § 142(a)(1), 20 U. S. C. § 241f(a)(1). New Jersey, however, proposes that it receive a smaller amount of money than it would otherwise be eligible to receive and that it give assurances that it would use only that smaller amount for Title I programs. See Brief for Resp. New Jersey at 16, n. 10, 28, n. 15, 34, Tr. of Oral Arg. 48. In other words, the Federal Government would pay itself back by cutting back on the Title I program at no cost to New Jersey. The Secretary does not view this form of "setoff" as satisfactory. *Id.*, at 13–14. Thus, despite New Jersey's assertion that there is no longer any dispute between it and the Secretary over the availability of some remedy, Brief for Respondent New Jersey 17, n. 10, a controversy remains.

[6] Pennsylvania has suggested that the Education Consolidation and Improvements Act of 1981 (ECIA) governs this case. Brief for Respondent Pennsylvania at 44. It does not, however, seek the application of anything but the substantive standards introduced by that Act for determining compliance. On the contrary, it explicitly argues for the application of the procedures and remedies of the pre-1978 ESEA. *Id.*, at 42.

In any event, even if we misapprehend Pennsylvania's argument and it seeks full retroactivity of ECIA, our result would not differ, for the remedies of the ECIA clearly include a repayment remedy. See Pub. 95–561 § 452(e), 92 Stat. 2348, 20 U. S. C. § 1234a(e) (1976 ed. Supp. V), made applicable to ECIA by § 400(b), 20 U. S. C. § 122(b); see also 47 Fed. Reg. 52348 (1982) (requiring repayment of funds misused under ECIA). We decide here only whether the States can be held liable for the misuse of funds, and we leave for the Court of Appeals on remand the question whether the substantive standards of the ECIA or the 1978 amendments can apply to grants approved and paid under the pre-1978 ESEA.

pre-1978 version contemplated that States misusing federal funds would incur a debt to the Federal Government for the amount misused, we need not address the possible retroactive effect of the 1978 amendments.[7]

Section 207(a)(1) of ESEA, Pub. 89–10, 79 Stat. 27, 32, originally provided:

> "The Commissioner shall, subject to the provisions of § 208 [dealing with inadequate appropriations], from time to time pay to each State, in advance or otherwise, the amount which the local educational agencies of that State are eligible to receive under this part. Such payments shall take into account the extent (if any) to which any previous payment to such State educational agency under this title (whether or not in the same fiscal year) was greater or less than the amount which should have been paid to it."

This provision, which remained substantially unchanged as part of Title I until 1970, in our view, gives the Federal Government a right to the amount of any funds overpaid. The plain language of the statute recognizes the right,[8] and the

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[7] This disposition also permits us to pretermit decision on the alternative argument offered by the Secretary—that the Government has a common law right to recover funds any time the recipient of a grant fails to comply with the conditions of the grant. Compare 2 R. Cappalli, Federal Grants and Cooperative Agreements §§ 8:12, 8:15 (1982) (suggesting statutory or regulatory authorization necessary); Willcox, The Function and Nature of Grants, 22 Ad. L. Rev. 125, 131 (1970) (same), with *Mount Sinai Hospital* v. *Weinberger*, 517 F. 2d 329 (CA5 1975) (suggesting that authority exists in the absence of statutory provision to the contrary), cert. denied, 425 U. S. 935 (1976); *West Virginia* v. *Secretary of Education*, 667 F. 2d 417 (CA4 1981) (per curiam) (specific statutory authority unnecessary). *Cf. California* v. *Block*, 663 F. 2d 855 (CA9 1981) (regulation requiring repayment of misspent funds invalid where statute required repayment of funds misspent with "gross negligence"). See generally *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981); *United States* v. *Wurts*, 303 U. S. 414 (1938).

[8] The only other remotely plausible reading is that suggested by New Jersey, see n. 5, *supra*—that the Secretary is to reduce grants below the

legislative history supports that natural reading. The Senate Report explained, "Since the State is given no authority to retain excess sums paid to it under the title, any excess paid to a State would have to be returned or taken into account in making subsequent payments to the State." S. Rep. No. 146, 89th Cong, 1st Sess., 14 (1965). Indeed, the Committee obtained asurances from the Department that it would recapture these payments, and the debate on the floor termed those assurances "an essential condition for enacting the proposed legislation." 111 Cong. Rec. 7690 (1965).[9]

In 1970, Congress enacted GEPA, Pub. 91–230, 84 Stat. 164, the main function of which was to bring the general provisions of prior law together into a single title. See H. R. Conf. Rep. No. 91–937, p. 97 (1970). Its provisions apply to programs under Title I, 20 U. S. C. § 1221(b), and it was in

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amount that the State would otherwise be eligible to receive, and the State is to undertake a less extensive Title I program, so that the Federal Government recovers nothing: it pays less, but it receives correspondingly less in the way of Title I programs. Under that reading, the State would have no liability to the Federal Government for misspent funds.

That reading is no more than remotely plausible. First, it is hardly likely that Congress intended disadvantaged children to suffer twice: once when the State misspent the funds and once when the State cancels an otherwise eligible program because of the Secretary's refusal to fund it. Second, § 207 required the Secretary to use as his starting point the amount "the local educational agencies of that State are *eligible* to receive" and to adjust that amount for past misuses. But a State only becomes "eligible" by giving its assurances that it will expend the grant on Title I programs. See S. Rep. No. 146, 89th Cong., 1st Sess., 14 (1965); 142(a)(1), 20 U. S. C. § 241f(a)(1). Section 207, then, must contemplate that the Federal Government will receive the same amount in Title I programs but will pay the State something less than that amount—a net recovery.

[9] The debates in the House also suggested such a concern and a desire to hold the States accountable in every way possible:
"It would seem . . . that *insofar as the Congress can accomplish this end,* rules of accountability, economy, and efficiency will be insisted upon, so that no Federal funds are improperly or wastefully used or diverted to uses not permitted by the act." 111 Cong. Rec. 6146 (1965) (emphasis added).

force for some of the years at issue here. Section 415 of GEPA is substantially the same as the original § 207(a)(1) of Title I,[10] and its language likewise creates a right to impose liability on the States. In enacting GEPA, Congress again made clear its intention that States return misused funds. The Senate Committee explained, "Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer." S. Rep. No. 91–634, p. 84 (1970).[11]

Moreover, this interpretation of § 207(a)(1) and § 415 enjoys the support of later Congresses, of administrative practice, and of commentators. Of course, the view of a later Congress does not establish the meaning of an earlier enactment, but it does have persuasive value. See, *e. g.*, *Bowsher* v. *Merck*, —— U. S. ——, ——, n. 12 (1983). The discussion of the 1978 amendments to ESEA reveals that Congress thought that recipients were already liable for any funds they misused. Rep. Corrada explained:

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[10] Section 415 reads:

"Payments pursuant to grants or contracts under any applicable program may be made in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments, as the Secretary may determine." 20 U. S. C. § 1226a–1 (1976 ed. Supp. IV).

Section 415 was originally numbered § 425.

[11] The quoted language comes from the Senate Committee's discussion of "Sections 422, 423, and 425 [since renumbered as § 415]." The Court of Appeals concluded that the heading reflected a typographical error, and that the discussion referred to §§ 422, 423, and 424. See App. to Pet. 15a–16a. It does seem likely that the intended reference was § 424, but we fail to see why that feature should, as New Jersey argues, render this language any less relevant. Section 424 required certain types of record-keeping of recipients and gave the Secretary power to audit. Auditing the required records would reveal whether or not the Secretary had overpaid a recipient, and the Senate Committee clearly thought that overpayments would lead to a recovery, as provided by the former § 425.

> "[T]itle I, ESEA . . . and [the] regulations currently provide for two main enforcement mechanisms at the Federal level: First the withholding of title I funds from a State or local educational agency when a violation is discovered; and second, the repayment of misspent funds after an audit.
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> "[The] repayment authority has been used in the last couple of years on a number of occasions and has been an effective measure. . . . Approximately one-third of these cases have reached final resolution and have required repayment.
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> . . . . . .
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> "The proposed amendments would . . . solve the problems with the *existing* audit repayment . . . authority." 124 Cong. Rec. 20612 (1978) (emphasis added)."

Later, in 1981, Senator DeConcini introduced an amendment that would have prevented collection of any debts arising from misuse of Title I funds before 1978. 127 Cong. Rec. S5427 (May 21, 1981). The chair ultimately ruled the amendment out of order, *id.*, at S5430, S5442, but the discussion preceding the ruling clearly reflects the view of the participants that States were liable for misused funds. As Senator Stennis observed, "It has to be paid back." *Id.*, at S5428; see *id.*, at S5427 (remarks of Sen. DeConcini). Not only have members of Congress stated their views, but Congress has acted on those views.[12] In 1974, it enacted a provision limiting the liability of state and local educational agen-

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[12] "Here we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean." *Mount Sinai Hosp.* v. *Weinberger*, *supra*, 517 F. 2d, at 343.

cies for refunds to those payments received by them within five years before the final written notice of liability. Pub. 93–380, § 106, 88 Stat. 512, 20 U. S. C. § 884.[13] Pennsylvania has argued that this provision has general applicability, and that Congress drafted it to cover other programs, which explicitly impose liability on recipients for misused funds. Brief for Respondent Pennsylvania 32. While the provision by its terms does apply to a number of programs administered by the Secretary, the State's argument fails, for both the statutory provision and the legislative history specifically refer to grants under Title I of ESEA, and the legislative history identifies the recent audits under Title I as the source of the Committee's concern. See H. R. Rep. No. 93–805, pp. 79, 156 (1974).

The Department has long held our view of the statute, for it sought repayment of misused funds. See *e. g.*, Department of Education, ESEA Audit Files 09–20033 (refund requested October 6, 1975 for fiscal years 1970 and 1971, and received May 25, 1978), 05–90178 (refund requested Septem-

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[13] This aspect of the provision was eliminated in the 1978 amendments, by Pub. 95–561, § 901(b), 92 Stat. 2305.

The Senate version of the 1974 bill included a new remedy: specific performance. The bill provided that, as long as the recipient retained funds, the Secretary could seek specific performance of the grant "contract" in the federal courts. See S.1539, 93d Cong., 2d Sess., § 434(c)(2) (1974). Although the Conference Committee eventually eliminated the provision, H. R. Rep. No. 93–1211, p. 184 (1974), the Senate approved the remedy because it gave the Secretary a means of inducing compliance without the interruption of Title I programs involved in applying the withholding remedy. S. Rep. N. 93–763, pp. 63, 211 (1974). The Senate's version addresses a different question than § 415. The concern addressed by the proposed § 434(c)(2) was that beneficiaries not lose services in the future because of the failure of the recipient of the grant to live up to its duties. Once the beneficiaries have *already* lost the services because of past misuse of funds, as opposed to current noncompliance, the Senate Committee's discussion of remedies is no longer applicable. Particularly in the light of the contemporaneous enactment of § 884, we view the Senate's version of the 1974 bill as complementing, rather than undermining, our construction of § 415.

ber 3, 1971 for period September 1, 1966-August 31, 1967, and received by October 26, 1971), 04–10001 (refund requested January 29, 1973 for period July 1, 1965-June 30, 1969, and received by April 27, 1973); H. R. Rep. No. 93–805, *supra*, p. 79 (discussing recent audits); Washington Research Project of the Southern Center for Studies in Public Policy & NAACP Defense and Educational Fund, Inc., Title I of ESEA: Is it Helping Poor Children? 52 (rev. ed. 1969). Indeed, in the discussion of Senator DeConcini's proposed amendment, Senator Schmitt cited some 44 instances of repayments by recipients of misused Title I funds. 127 Cong. Rec. at S5428-S5429 (May 21, 1981). Finally, it is worth noting that commentators on the pre-1978 version of ESEA assumed without discussion that the Department possessed the power to request refunds, although they frequently castigated the Department for its failure to exercise that power more often.[14]

Arguing against this consistent understanding of the pre-1978 ESEA, the States attempt to explain § 415 as a provision covering payments made "accidentally." Tr. of Oral Arg. 36. Even accepting that interpretation, we remain convinced that the provision covers payments misused as the Board determined these to have been. Grants of misused funds result from the "accident" of the Secretary's reliance on assurances by the State that the recipient will use the funds in a program that complies with Title I, when in fact the recipient misuses the funds.[15]

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[14] Comment, Federal Aid to Education: Title I at the Operational Level, 1971 L. & Soc. Order 324, 350; Washington Research Project of the Southern Center for Studies in Public Policy & NAACP Defense and Educational Fund, Inc., Title I of ESEA: Is it Helping Poor Children? 52 (rev. ed. 1969); see Berke & Kirst, The Federal Role in American School Finance: A Fiscal and Administrative Analysis, 61 Geo. L. J. 927, 944 and n. 71 (1973); Murphy, Title I of ESEA: The Politics of Implementing Federal Education Reform, 41 Harv. Educ. Rev. 35, 44–45 (1971).

[15] Pennsylvania also suggests that "overpayment" means only funds that are not expended but remain in the State's treasury. Brief for Respond-

A more substantial argument against our interpretation of § 415 is suggested by the opinion of the Court of Appeals.[16] The 1978 amendments make it crystal clear that, at least for any period governed by the amendments, the recipient will be liable for misused funds. The amendments included § 185(b), which provides:

> "The Commissioner shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits. . . . Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Commissioner shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability of which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years." 20 U. S. C. § 2835 (1976 ed. Supp. IV).

The Court of Appeals feared that interpreting the pre-1978 version of ESEA as providing liability for misused funds rendered § 185 "plain[ly] redundan[t]." App. to Pet. for Cert.

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ent Pennsylvania at 31. We see no indication of such a limitation in the statutory language or in the legislative history, and, indeed, we would find it difficult to believe that Congress meant to permit States to obtain good title to funds otherwise owing to the Federal Government by the simple expedient of spending them.

[16] The Court of Appeals relied on the argument in deciding that § 424 of GEPA, now renumbered as § 437, did not recognize the liability of the States to refund misused funds. The argument applies equally to § 415.

18a. We share the reluctance of the Court of Appeals to construe a statute in a fashion that leaves some provisions superfluous, but we cannot agree that our construction presents that problem. Section 185 and the accompanying provisions of the 1978 amendments were, in the words of the Senate Report, designed to "*clarif[y]* HEW's legal authority and responsibility to audit applicant programs" and to "specif[y] certain minimum standards concerning the resolution of outstanding audits." S.Rep. No. 95–856, p. 137 (1978) (emphasis added); see H. R. Rep. No. 95–1137, p. 53 (describing the amendments as requiring that the Secretary "regularize" the process"). As the House Report explained, "[N]othing in these new provisions should be interpreted as radically changing the present relationship of the Federal government to the States. . . . These amendments, rather, are meant merely to lay out responsibilities more clearly. . . ." *Id.*, at 142. Section 185 itself requires the Secretary to set timetables for each step of the audit resolution process, and it requires an appeals process. Further, the provision requires that the Secretary demand repayment once liability is established, rather than leaving the method of collection entirely to his discretion from the beginning. And it limits the Secretary's discretion with regard to installment payments, imposing a maximum period of 3 years. Construing the pre-1978 ESEA to provide for liability, then, does not leave § 185 meaningless. On the contrary, § 185 plays an important role in specifying the procedures to be followed in the determination of the amount of the debt and in the collection of the debt. Thus, the enactment of the 1978 amendments does not undermine our construction. Indeed, the legislative history of the 1978 amendments strongly supports viewing the pre-1978 ESEA as we do. As we have discussed, *supra*, at ——, the debates in the House proceeded on the assumption that the liability existed. The House Report also identified as one of the problems with existing law the failure of the agency in many cases to seek restitution and to recover the

funds misused. H. R. Rep. No. 95–1137, *supra*, p. 50. In sum, not only does our conclusion give meaning to the efforts of the 95th Congress, it gives meaning to their understanding of the law that they were amending. Accordingly, we adhere to our view that the pre-1978 version of ESEA requires that recipients be held liable for funds that they misuse.[17]

IV

New Jersey, relying on our decision in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), also urges that the imposition of liability for misused funds interferes with state sovereignty, in violation of the Tenth Amendment. It views our construction of the statute as presenting it with "unpalatable" alternatives: making a special appropriation to repay the misused funds, or cutting back its budget for education by the amount owed to the Federal Government. Brief for Respondent New Jersey 28–29. Either alternative, it asserts, infringes its sovereignty.

We cannot agree. Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the

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[17] The States have also argued that *Pennhurst State School* v. *Halderman*, 451 U. S. 1 (1981), requires a different view of the effect of the pre-1978 version of the statute. *Pennhurst* required that Congress act "unambiguously" when it intends to impose a condition on the grant of federal money. *Id.*, at 17. The States argue that Congress did not speak unambiguously before 1978 in imposing liability and it therefore was not effective in imposing liability. We disagree. As our discussion shows, we think that the plain language of the statute is sufficiently clear, and ESEA meets *Pennhurst*'s requirement of legislative clarity. Moreover, *Pennhurst* arose in the context of imposing an unexpected condition for compliance—a new obligation for participating States—while here our concern is with the remedies available against a noncomplying State.

conditions of Title I. See generally *Pennhurst State School* v. *Halderman*, 451 U. S. 1, 17 (1981); *Quern* v. *Mandley*, 436 U. S. 725, 734 (1978); *Rosado* v. *Wyman*, 397 U. S. 397, 408 (1970); *Oklahoma* v. *United States Civil Service Comm'n*, 330 U. S. 127, 143–144 (1947); 1 R. Cappalli, Federal Grants and Cooperative Agreements § 1:09 (1982). As we must assume at this stage of the litigation, the State failed to fulfill those assurances, and it therefore became liable for the funds misused, as the grant specified. New Jersey has not challenged the program itself as intruding unduly on its sovereignty, see Brief for Respondent New Jersey 19–20, but challenges only the requirement that it account for funds that it accepted under admittedly valid conditions with which it failed to comply. If the conditions were valid, the State had no sovereign right to retain funds without complying with those conditions.

V

Once we have established the right of the Federal Government to recover funds misused by the States, we are confronted with the question how, under the statutory scheme, the Federal Government must assert its rights. Again, we agree with the Secretary's view that the initial determination is to be made administratively. The statute clearly assigned to the agency the duty of auditing grant recipients, see GEPA § 437, 20 U. S. C. § 1232f, and it is in the auditing process that the misuse of funds, and its magnitude, will surface. Further, the provision that supports the Secretary's right to recover funds, § 415 of GEPA, 20 U. S. C. § 1226a–1 (1976 ed. Supp. V), refers to adjustments to be made for overpayments "as the Secretary may determine." Consequently, we conclude that the determination of the existence and amount of the liability are committed to the agency, in the first instance.

The States, of course, had an opportunity to present their view of the facts and any justifications for their expenditures

to the agency. After the initial determination by the auditors, the Department provided the States an opportunity for review before the Board, see App. 137–138, 144–145, 158–165, and, once that body rendered its decision, the Department invited the States to submit comments before the Board's decision became the final decision of the Secretary, App. to Pet. for Cert. 57a, 86a–87a. Also, the agency's decision is subject to judicial review. The 1978 amendments explicitly provide for review in the courts of appeal. Even without an explicit provision for judicial review, review was also available under the pre-1978 version of ESEA, for in the absence of strong indications that a statute commits a decision irrevocably to agency discretion, 5 U. S. C. §§ 701(a), 702, 704; *Abbot Laboratories* v. *Gardner*, *supra*, 387 U. S. 136, the propriety of the agency's action presents a federal question cognizable in the district courts, see n.3, *supra*. Review of the Education Appeal Board lies in the courts of appeal, ESEA § 195, 20 U. S. C. § 2851 (1976 ed. Supp. V); GEPA § 455, 20 U. S. C. § 1234d (1976 ed. Supp. V), so, in cases like the present ones, which began before the Title I Audit Board and which were transferred to the Education Appeal Board, judicial review is available in the courts of appeal. See *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916) (change of forum can be applied retroactively); n.3, *supra*. Thus, on remand, the States will have an opportunity to litigate in the Court of Appeals whether the findings of the Secretary are supported by substantial evidence and reflect application of the proper legal standards. § 455, 20 U. S. C. § 1234d(c); 5 U. S. C. § 706.

VI

In these cases, then, we conclude that the Secretary has followed the proper procedures. He has administratively determined the amount of the debt owed by each State to the Federal Government, see note 4, *supra*, as he is empowered to do. Whether that determination is supported by substan-

tial evidence and by the application of the proper legal standards is a question for the courts, if the affected parties seek judicial review. Here, New Jersey and Pennsylvania sought that review, and we remand to the Court of Appeals to permit it to undertake to review the Secretary's determination. Accordingly, the case is reversed and remanded for further proceedings consistent with this opinion.

It is so ordered.

May 18, 1983

81-2125 Bell v. New Jersey

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 18, 1983

Re: No. 81-2125

Bell v. New Jersey & Pennsylvania

Dear Sandra,

I agree.

Sincerely,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 18, 1983

Re: 81-2125 - Bell v. New Jersey and Pennsylvania

Dear Sandra:

Please join me.

Respectfully,

JPS

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 19, 1983

Re: 81-2125 - Bell v. New Jersey and Pennsylvania

Dear Sandra,

I join you and may write a few words on the side.

Sincerely,

Byron

Justice O'Connor

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 19, 1983

Re: No. 81-2125 - Bell and New Jersey and Pennsylvania

Dear Sandra:

Please join me.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 25, 1983

Re: No. 81-2125 Bell v. New Jersey

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 25, 1983

Re: No. 81-2125, Bell v. New Jersey and Pennsylvania

Dear Sandra:

I join.

Regards,

WEB

Justice O'Connor

Copies to the Conference

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
								5/2/83
Join SOC 5/25/83	Join SOC 5/18/83	Join SOC 5/19/83	Join SOC 5/19/83	Join SOC 5/19/83	Join SOC 5/18/83	Join SOC 5/25/83	Join SOC 5/18/83	1st draft 5/17/83
		1st draft Con opinion 5/21/83						2nd draft 5/24/83

81-2125 Bell v. New Jersey