The Relations between the Organization of the Judiciary and Criminal Procedure

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Recommended Citation
B.J. George Jr., The Relations between the Organization of the Judiciary and Criminal Procedure, 38 DePaul L. Rev. 967 (1989)
Available at: https://via.library.depaul.edu/law-review/vol38/iss4/6

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INTRODUCTION

This Article generally addresses the relations between the "organization of the judiciary" and the criminal law process in the United States system of criminal justice. "Organization of the judiciary," as defined by the International Association of Penal Law ("AIDP"), includes all institutions involved in the administration of criminal justice. Where appropriate, differences between the organization of the United States judicial system and that of other countries are pointed out.

Specifically, this Article discusses the authorities involved in the administration of criminal justice in the United States. These authorities include judges, laypersons, special courts, the highest courts, prosecuting authorities, defense elements, police and various other governmental bodies. This Article describes the methods used by those authorities, the powers of those authorities, the financial support for those authorities, and relevant political considerations. In addition, responses by authorities in the United States to various developments in the pattern of criminal activity are analyzed.

This Article is divided into three sections. Section I provides a brief overview of the structure of the criminal justice system in the United States, with an emphasis on the balkanized nature of the criminal law in the United States. Although inefficient, this balkanization is a requisite, given the federated nature of the union. It is also the principal difference between criminal law in the United States and that of other countries in the AIDP.

Section II focuses on the authorities responsible for enforcing the criminal law in the United States. It points out unique aspects of the actors in the United States criminal law process. Section III concludes this Article by summarizing some recent congressional forays into criminal law which have an impact on both national and international activity. While the United

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States is not a likely candidate for a comprehensive body of national criminal law, the statutes discussed in Part III indicate a desire on the part of Congress to nationalize certain aspects of crime that transcend state boundaries.

I. INFRASTRUCTURE OF CRIMINAL JUSTICE

A. Introduction

The organization of the subsidiary topics as presented by the AIDP reflects, almost exclusively, concepts of governmental organization and functions based on the civil or Roman law tradition. This is understandable in light of the membership of the organization. However, in order to discuss these topics from the standpoint of United States law and practice, the federated system under the United States Constitution must be discussed. Because the United States has a federal system and separate state systems, problems that can be addressed singularly in unitary governmental systems (as exist in France or Japan for example) through a cabinet, parliament and government ministries must be left in the United States to a minimum of fifty five jurisdictions. Only in very limited circumstances can the Congress create uniformity in an area by "occupying the field" through legislation, thus precluding the exercise of state powers. Also, if the United States Supreme Court interprets the federal Constitution in a certain way, all states are required to conform. In fact, however, that process sets only certain minimum constitutional standards affecting criminal investigations and trials and, therefore, only peripherally affects the creation of substantive criminal law provisions and their subsequent effectuation. Uniformity in state criminal law, therefore, is not likely to occur as a by-product of constitutional interpretation.

2. The 55 jurisdictions are comprised of the federal jurisdiction, the 50 states, the District of Columbia, the Virgin Islands, and Puerto Rico.


4. This tradition is deeply rooted in American jurisprudence. The Supreme Court is considered the final interpreter of the Constitution and federal law. To ensure the uniform interpretation and application of the Constitution, state courts must adhere to Supreme Court rulings on constitutional questions. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337-48 (1816); U.S. Const. art. VI, § 2; see also Ex parte Royall, 117 U.S. 241, 251 (1885) (state courts as well as federal courts are "equally bound to guard and protect rights secured by the Constitution").
B. Legislative Competence

In the area of substantive criminal law, Congress can define crimes only in relation to the powers delegated to it in the Constitution. Those powers, of course, are quite sweeping—the commerce clause, for example, is the foundation upon which a large percentage of specialized federal criminal legislation rests. Nevertheless, every federal criminal statute (like all other federal legislation) must rest on a delegated power or it will be invalidated. It is for that reason that theft alone is not a federal crime, but theft of federal property, theft of funds of federally-regulated financial institutions, theft by federal employees, and theft within areas otherwise subject to overriding federal authority are federal crimes. In addition, robbery as a federal crime is limited to those crimes which occur in federal enclaves or buildings, forced takings from federal employees, and robberies committed against federally-regulated financial organizations and carriers. Generally, homicides are not federal crimes except in those cases in which the victims 1) are found within the special maritime and territorial jurisdiction of the United States; 2) are officials or employees of the United States; or, 3) are foreign officials, official guests or internationally protected persons.

The corollary to the limited power of federal government is, of course, that each state has the power to legislate a plenary criminal code and can include in it anything that does not 1) interfere with the foreign relations of the United States; 2) impinge upon the exercise of a paramount delegated power; or 3) conflict with the foreign relations of the United States.

5. U.S. Const. art. I, § 8, cls. 1-18. But cf. U.S. Const. amend. X (all powers not delegated are reserved to the states and to the people).
6. U.S. Const. art. I, § 8, cl. 3 (providing Congress with power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).
9. Id. §§ 655-658.
10. Id. §§ 652-654.
11. Id. § 661 (providing that it is a crime to commit theft “within special maritime and territorial jurisdiction of the United States”); see also id. § 7 (defining terms).
14. Id. § 1114.
15. Id. § 1116.
16. The District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands all have their own legislative bodies, but Congress retains at least formal powers of approval or disapproval over their statutory enactments. U.S. Const. art. I, § 1.
17. See generally Skiriotes v. Florida, 313 U.S. 69, 72-74 (1941) (international treaty cannot be nullified by state enactment); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (same);
power by Congress;\textsuperscript{18} 3) encroach on the legitimate sphere of sovereignty of another state;\textsuperscript{19} or, 4) infringe upon individual rights conferred by the Bill of Rights or other provisions of the federal Constitution.\textsuperscript{20} Although these limitations are significant, they leave vast areas for the exercise of state legislative powers. In other words, plenary penal codes lie within the sphere of state legislative competence,\textsuperscript{21} so that ordinary crimes are normally defined according to state statutory law and most criminal prosecutions occur in state courts.

Finally, local governmental bodies may be authorized by a state constitution and implementing legislation to pass laws of purely local application, including substantive penal provisions.\textsuperscript{22} However, if local laws conflict with legislative actions at the state level,\textsuperscript{23} they are invalid under an equivalent to the occupation-of-the-field principle.\textsuperscript{24} Consequently, local criminal ordinances are predominantly regulatory in character governing health,\textsuperscript{25} safety,\textsuperscript{26} traffic control,\textsuperscript{27} and local public order.\textsuperscript{28} In this context, local units of government are not separate sovereignties in relation to state government. But, while local power to legislate and to enforce legislation can theoretically

\textsuperscript{2} \textsc{Restatement of Foreign Relations Law of the United States} § 722 (Revised 1987) (aliens are entitled to all constitutional guarantees though reasonable distinctions between equal rights protections may be permitted).

\textsuperscript{18} \textit{See supra} text accompanying note 3 for a discussion of how Congress can preempt state law in those specified areas over which it has been given power by the federal Constitution.


\textsuperscript{20} This is the conceptual basis for almost the entire body of United States Supreme Court and lower federal court precedent reviewing, and on occasion invalidating, state criminal legislation and its administration, a corpus too bulky to cite here. \textit{See generally} W. Erickson, W. Neighbors & B. George, \textit{United States Supreme Court Cases and Comments: Criminal Law and Procedure} ch. 1-5A (rev. ed. 1988). Article 1, section 10, clause 1 of the United States Constitution contains specific prohibitions against state legislation constituting a bill of attainder or an ex post facto law. \textit{See U.S. Const.} art 1, § 10, cl. 1.

\textsuperscript{21} The most convenient source for a comprehensive understanding of American criminal law, therefore, is the \textit{Model Penal Code} (Permanent ed. with revised commentaries, 1981, 1985).

\textsuperscript{22} \textit{See, e.g., Ill. Const.} art. VII, § 6, cl. a. A home rule unit is allowed to exercise any power deemed necessary to a functioning government. Such powers include, "but [are] not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." \textit{Id.}

\textsuperscript{23} \textit{See, e.g., City of Lorain} v. Tomasic, 59 Ohio St. 2d 1, 391 N.E.2d 726 (1979); City of Spokane v. Portch, 92 Wash. 2d 342, 596 P.2d 1044 (1979); \textit{cf.} Joslin v. 14th District Judge, 76 Mich. App. 90, 96, 255 N.W.2d 782, 786 (1977) (invalidating local ordinance prohibiting municipal peace officers from enforcing a state law because local legislative body believed the conduct in question should be decriminalized).

\textsuperscript{24} \textit{See supra} text accompanying note 3 for a complete discussion of this point.

\textsuperscript{25} \textit{E.g.,} Chicago, Ill., \textit{Municipal Code} Part VI (1983) (Health & Sanitation).

\textsuperscript{26} \textit{E.g., id.} Part IX (Public Safety, Morals, and Welfare).

\textsuperscript{27} \textit{E.g., id.} Part III (Traffic and Vehicles).

\textsuperscript{28} \textit{E.g., id.} Part IV (Public Ways and Places).
be destroyed through amendments to a state constitution, such a result will never occur due to the presence of various political factors.

C. Law Enforcement (Police) Competence

Under the federal system, federal law enforcement agencies have powers only to enforce valid federal criminal statutes. Federal officers only have the arrest powers of private citizens under federal and state law unless there is special legislation conferring on them the arrest powers of peace or police officers. Moreover, there is no single federal police agency. Federal law enforcement powers are exercised by such diverse agencies as the Federal Bureau of Investigation, the Drug Enforcement Administration, the Secret Service, the Division of Postal Inspectors, the Immigration and Naturalization Service, and the United States Customs Service, the powers of which are defined by federal statute. In addition, these agencies are assigned to different federal departments, primarily the Department of Justice and the Treasury Department. But even within the same department, for example, in the Department of Justice, the enforcement agencies often fall within the supervisory jurisdiction of different divisions. Consequently, in many respects liaison channels must be developed among these several agencies almost as if they were agencies of different governments.

Essentially an equivalent fragmentation of law enforcement agencies exists within the states. Each state, of course, is a separate sovereignty, so that in legal contemplation the police services of adjacent states (for example New Jersey and New York) are as autonomous as if they were police forces of different nations (for example France and Italy). Moreover, under the traditional United States political structure, the responsibility for providing comprehensive police services lies at the county and city level. State level law enforcement agencies are limited to state traffic law enforcement on

29. See, e.g., ILL. CONST. art. XIV, § 2 (power to amend).


33. See, e.g., supra note 30 for a discussion of some of the statutory regulations.

34. For example, even though the Federal Bureau of Investigation is formally an enforcement arm of the Department of Justice, it may also act under the scope of powers granted to the United States Secret Service, an enforcement arm of the Treasury Department. Compare 18 U.S.C. § 3052 (1988) (Federal Bureau of Investigation powers) with id. § 3056 (United States Secret Service powers).

highways and roads outside the boundaries of towns and cities,36 and to the enforcement of state criminal laws solely outside the boundaries of incorporated areas (towns and cities).37 They may also provide technical services, such as providing computerized records of criminals, stolen vehicles and stolen property,38 as well as laboratory services. However, these services are provided only when requested by local police agencies. The great majority of law enforcement officers in the United States, therefore, are employed by county sheriffs or police departments and city police departments.39

D. Competence of Prosecuting Authorities

The prosecutorial structure of the United States is balkanized as well. The United States Department of Justice is the principal federal prosecuting agency,40 but it is not the sole entity with the competence to prosecute. For example, the Treasury Department, within which the Internal Revenue Service lies, is the principal investigating and referring agency for the enforcement of federal tax laws.41 In addition, most powers of federal prosecution are exercised by United States Attorneys in each federal district.42 Each United States Attorney is nominated by the President and confirmed by the Senate,43 and has no guaranteed tenure. Indeed, if a President is elected with a different political affiliation than the predecessor President, there will be a complete turnover in the United States Attorney's office in each district.44 Similarly, staff members serve essentially at the pleasure of the incumbent United States Attorney,45 so that career staff prosecutors are relatively rare in the federal judicial districts. The Department of Justice, acting through the Attorney General, controls the United States Attorneys' administrative powers46 and also establishes general policies that they are expected to follow.47 However, there is not the direct supervision and control in the form of a hierarchical public prosecutorial apparatus within a ministry of justice that is standard in most of the world.

37. E.g., 24 COLO. REV. STAT. § 33.5-205 (Bradford Supp. 1986); 29 CONN. GEN. STAT. ANN. § 7 (West 1975); 4 MICH. STAT. ANN. § 4.436 (1985); N.Y. EXEC. LAW § 223 (McKinney 1982); PA. STAT. ANN. tit. 71, § 250 (Purdon Supp. 1987).
39. See id. at 5-32, 45-47.
43. Id. § 541.
44. Cf. id. § 541(c) (President has discretion to remove any United States Attorney).
46. Id. § 519.
47. Id. § 528.
At the state level, a state attorney general (usually elected, but sometimes appointed by the governor) functions as the principal prosecuting official and legal counsel. However, the bulk of the activities of a typical state attorney general's office is civil and administrative; the criminal division is likely to act only when criminal activities directly affect the exercise of state governmental powers or state officials, or where state employees are accused of criminal misconduct.

The end result of this system is that county level prosecuting attorneys, district attorneys, or solicitors are the principal prosecuting officials to enforce state penal laws. In most states they are elected by county voters at two-year or four-year intervals. As a result, the professional staff, and perhaps the service staff as well, will change at the same time unless they happen to be covered by a county civil-service system. The local prosecutor can continue to serve until removed by the voters in an election. Normally, the state attorney general cannot intervene in the disposition of individual cases and cannot relieve a local prosecutor from the exercise of prosecutorial duties in such cases. Only if a local prosecutor defaults in the exercise of official powers does suspension, removal from office, or removal from a case become possible. Removal usually requires judicial consideration or administrative action by the state governor or attorney.

50. E.g., Ill. Const. art. VIII, § 4, cl. c.
52. In New Jersey, for example, the attorney general may supersede the county prosecutor only when requested to do so in writing by the governor, by a grand jury, by a duly-elected county board, or by the assignment judge of the county court system. N.J. Stat. Ann. § 52:17B-109 (West 1986).
53. See, e.g., State ex rel. McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 (1939) (use of quo warranto proceedings). Removal should be distinguished from a disqualification in individual cases because of bias or conflict of interest. See, e.g., In re April 1977 Grand Jury Subpoenas, 573 F.2d 936 (6th Cir. 1978); People v. Superior Court (Greer), 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977); State v. Brandt, 253 N.W.2d 253 (Iowa 1977); State ex rel. Moran v. Ziegler, 161 W. Va. 609, 244 S.E.2d 550 (1978).
54. E.g., N.Y. Exec. Law § 63 (McKinney 1982). Compare People ex rel. Tooley v. District Court, 190 Colo. 486, 549 P.2d 774 (1976) (unless governor intervenes pursuant to statute, the attorney general may not interfere with prosecution by district attorney) with People ex rel. Wilche v. District Court, 190 Colo. 483, 549 P.2d 778 (1976) (after governor's order, attorney general had right to assume prosecution of district attorney's case). See generally Piller, Superseding the District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55, 41 Fordham L. Rev. 517 (1973) (discussing governor's power to supersede district attorney's authority).
general. This authority must be provided by state statute. Municipalities of any size will have a city or municipal attorney whose principal duties are civil and administrative in character. The prosecutorial functions of these officials generally are limited to the enforcement of local penal ordinances such as automobile parking violations. Municipal or city attorneys are not usually under the legal or administrative control of either the county prosecutor or district attorney or the state attorney general.

E. The Judiciary

The judiciary in the United States is as compartmentalized as are other organs within the criminal justice system. Federal judges are nominated by the President and their nominations must be confirmed by a two-thirds majority of the United States Senate. The federal judiciary adjudicates exclusively federal matters. State criminal matters come into federal courts only when they present a federal constitutional issue. The most direct way into the United States Supreme Court is through an application for certiorari from a final decision of the last state court to hear the matter on the merits. Acceptance of such a petition rests exclusively in the discretion of the Supreme Court. Four Supreme Court Justices must agree to hear it before it can be briefed, argued, and decided.

The avenue through which most state criminal law and procedural issues come before the federal courts, however, is through federal habeas corpus. Prisoners in state custody can seek habeas corpus by alleging that they are being held in violation of the Constitution, a treaty, or a statute of the United States. Because it requires little ingenuity to assert at least one

56. See, e.g., Otis, 257 N.W.2d at 365.
58. Cf. id. §§ 6-6 to-7 (corporation counsel has power to enforce ordinances).
59. Cf. id. § 6-2 (office of corporation counsel, which heads Chicago's law department, shall be appointed by mayor).
60. U.S. Const. art. II, § 2, cl. 2.
62. 28 U.S.C. § 1257(3) (1988); Sup. Ct. R. 17. If a state is a party to litigation under the Constitution, the Supreme Court has original jurisdiction, as it does over cases affecting ambassadors and other ministers. U.S. Const. art. III, §2, cl. 2. Because the eleventh amendment forbids suits against the states in federal courts unless they consent, the usual case of original jurisdiction in the Supreme Court involves one state suing another, for example, to resolve an issue of boundaries. See, e.g., Arizona v. California, 466 U.S. 144 (1984).
63. See generally J. Nowak, R. Rotunda & J.N. Young, CONSTITUTIONAL LAW § 2.7 (1986) (discussion of the “Rule of Four”).
65. Id. §§ 2241(c)(3), 2254(a).
federal constitutional infringement committed during the course of a state criminal proceeding, a large number of prisoners file these actions annually, and cause a substantial burden to the federal courts. However, the writ may be rendered unavailable by statute, or through tightened procedures to control abuse of the writ.

The overwhelming majority of criminal prosecutions are adjudicated in state courts. In contrast to the other governmental organs described above, each state has a single state court system. Depending on the state, the funding for a state's component trial courts may come primarily from county budgets. In many states, trial judges are elected at the county level; their terms of office, however, are usually longer than those of county officials.

The extent of administrative supervision by the highest state court over judges of inferior courts differs significantly from state to state, but in


67. U.S. Const. art. 1, § 9, cl. 2, provides that the writ cannot be "suspended" except in cases of rebellion or invasion when the public safety may require it. A plenary post-conviction review proceeding, such as the federal procedure authorized by 28 U.S.C. § 2255 (1988), avoids the problem by specifying that habeas corpus is not to be used unless the relief available under the special proceeding is inadequate in comparison with the habeas remedy—which it never is. See United States v. Hayman, 342 U.S. 205 (1952).

68. The Supreme Court has used certain aspects of the statutory habeas corpus system to restrict unduly easy access to federal courts by state prisoners: 1) the exhaustion of remedies requirement, 28 U.S.C. § 2254(b) (1988); Granberry v. Greer, 481 U.S. 129 (1987); Murray v. Carrier, 477 U.S. 478 (1986); Vasquez v. Hillery, 474 U.S. 254, 257-60 (1986); 2) the preclusion of issues that could have been litigated under a state procedure allowing a full and fair opportunity to do so, Kimmelman v. Morrison, 477 U.S. 365, 375-77 (1986); Cardwell v. Taylor, 461 U.S. 571 (1983) (per curiam); and a disability to relitigate fact issues that have been recently litigated fully before state courts, 28 U.S.C. § 2254(d) (1988); Miller v. Fenton, 474 U.S. 104, 111-12 (1985); Marshall v. Lonberger, 459 U.S. 422, 432-36 (1983); Sumner v. Mata, 455 U.S. 591, 596-98 (1982).


70. While funding at the municipal level for the criminal justice system is on a decline, county and state governments still shoulder the majority of the cost to maintain state courts. Id. at 88-89.


72. See Goals Courts Report, supra note 71, at 150-51.

73. See generally Institute of Judicial Administration, Standards Relating to Court Organization and Administration 18-25 (1980).
most states it does not approximate that which ministries of justice exercise over courts and judges in other countries.

Many municipalities also have their own courts, the powers of which are limited to the exercise of magistrate functions—for example, issuance of warrants and preliminary proceedings dealing with arrested persons—and proceedings to enforce municipal ordinances. However, municipal court powers are derived from state constitutions and legislation, so that, in an ultimate sense, they function as part of the state judiciary. Judges of municipal courts almost always are elected; in some states they can even be laypersons without formal legal education.\(^{74}\)

**F. Fiscal Support for Criminal Justice Administration**

Due to the complex organization of the criminal justice system of the United States, financial support of the system is not centralized. The legislative body for the jurisdiction within which an agency functions is responsible for budgetary and disbursement processes.\(^{75}\) Some costs of the criminal justice system are fixed. For example, regardless of the criminal caseload, a certain number of judges, public prosecutors and police will be employed, and buildings and logistical support provided for them.

Notwithstanding existing resources, crime rates in the United States are among the highest in the world.\(^{76}\) Accordingly, financial outlays have increased year by year. An early response to post-World War II crime, particularly in the 1960’s and 1970’s, was federal and state funding to increase substantially the numbers of police and the amount and quality of police equipment. That response, however, apparently did not succeed in reducing crime, or at least it proved an inadequate response to the incidence of crime. Crime rates increased despite increased rates in the budgets and personnel of law enforcement agencies and, perhaps more significantly, the frequency of arrests did not increase commensurately with expanded police services.\(^{77}\)

Similar increases in budgets and personnel occurred in public prosecutor’s offices\(^{78}\) and courts,\(^{79}\) but again without statistically measurable consequences


\(^{75}\) See generally CRIME AND JUSTICE REPORT, supra note 69, at 87-101 (discussing costs of the criminal justice system).


\(^{77}\) See H. Jacob & R. Lineberry, GOVERNMENTAL RESPONSES TO CRIME: CRIME AND GOVERNMENTAL RESPONSES IN AMERICAN CITIES 84-87 (1982) [hereinafter GOVERNMENTAL RESPONSES TO CRIME]. The studies reflected in the report suggest that in some major urban areas, the economies of which have been declining, additional officers were employed and police salary levels increased without concurrent augmented expectations of better police performance, including a greater number of arrests. Id. at 86.

\(^{78}\) See id. at 98-104.

\(^{79}\) See id. at 108-13.
in the form of a reduction in crime rates. In actuality, judicial backlogs have increased rather than declined, although that might be explained by a greater complexity of litigation, rather than a sheer rise in the number of cases that enter the court system.\(^{80}\)

When economic downturns occur, law enforcement and other criminal justice entity budgets either remain unchanged or decline. As a consequence, law enforcement agencies, in particular, have been forced to devise other strategies to augment their budgets. These strategies include programs of private donations to purchase needed equipment and supplies, increased presence of vehicles and other property forfeited because of their use in connection with controlled substances law offenses, user fees covering the use of police personnel at privately-sponsored events like concerts and sports contests, special assessments against convicted offenders, and reliance on private citizen volunteers to perform certain low-risk policing functions.\(^{81}\)

Based on the statistical evidence as well as anecdotal observations, doubt has been expressed as to whether any level of governmental expenditures in the United States would produce a significant decline in crime rates. Changes in the social environment have made many crimes national phenomena that are not even affected by augmented criminal justice resources.\(^{82}\) One such change is the entry of many more women into the workplace, which leaves dwellings unoccupied and exposes women to the risk of victimization outside the home. In addition, altered population patterns and movements create opportunity for crime, and rising affluence increases the supply of portable property vulnerable to theft.

Because crime now occurs in patterns that transcend city, county and state boundaries, a nationalized criminal justice system might, at least in theory, increase the efficiency and effectiveness of crime control programs.\(^{83}\) Such a dramatic shift, however, is impossible as long as the federated system of the United States remains in force. It is highly unlikely that the basic constitutional system that reached its bicentennial year in 1987 will be scrapped in an effort to combat high crime rates.

II. CRIMINAL JUSTICE SYSTEM AUTHORITIES AND THEIR ROLES

A. Selection of Judges

The governmental structure of the multiple political entities constituting the United States also affects the selection of judges. As noted, federal judges are nominated by the President and their nominations must be

\(^{80}\) See id. at 91-92, 113.

\(^{81}\) See generally L. STELLWAGEN & K. WYLIE, STRATEGIES FOR SUPPLEMENTING THE POLICE BUDGET (1985).

\(^{82}\) See GOVERNMENTAL RESPONSES TO CRIME, supra note 77, at 123 24. "Certainly there is no evidence that merely spending more resources on policing is likely to make a major change in our crime problem." Id. at 128.

\(^{83}\) See id. at 129-30.
confirmed by a two-thirds majority vote of the United States Senate. Some states also provide for judicial appointments by governors, at least to fill vacancies brought about by deaths, early retirements, or resignations by incumbent judges. However, in most such jurisdictions, the persons given interim judicial appointments must at some relatively early time be voted new terms at a general election. In the remainder of American states, all judges are elected to office at special or general elections.

The mechanism of judicial election differs from state to state. In some states, political parties nominate judges, so that contested judicial elections along party lines are standard. In others, the judicial election is nonpartisan; candidates for judicial office must present nominating petitions signed by a requisite number of registered voters, although incumbent judges may be allowed to stand for reelection without having to repeat the nominating petition process and sometimes benefit from the designation of "incumbent" on the judicial ballot. In still others, the so-called "Missouri plan" is in force, in which a special commission presents three names to the governor from which the governor selects one. Thereafter, the incumbent faces periodic voter review, at which voters respond affirmatively or negatively to the proposition: "Shall Judge X be retained in office?"

It is evident that an electoral system has a significant, although statistically unmeasurable, impact on the independence of the judiciary in deciding sensitive or difficult criminal cases. Judges who face an impending reelection are under subtle pressures to avoid judicial rulings that may cause their electoral opponents to characterize them as "soft on crime," or opposed to the maintenance of law and order. A recent illustration is the rejection by a majority of California voters of the continuation in office of the Chief Justice and two associate justices of the California Supreme Court.

84. See supra note 60 and accompanying text (citing U.S. Const. art. II, § 2, cl. 2).
85. See, e.g., Mich. Const. art. VI, § 23 (providing that governor shall fill vacancies in the office of judge caused by death, removal, or resignation); N.Y. Const. art. 6, § 27 (providing that governor may appoint extraordinary terms of Supreme Court when, in his or her opinion, the public interest so requires); N.Y. County Law § 400.7 (McKinney Supp. 1987) (providing that the governor may fill a vacancy of an elective county office which occurs for any reason other than expiration of term).
86. See, e.g., Ind. Code Ann. § 3-13-6-1 (Burns 1988).
87. See supra notes 71-72 and accompanying text for detailed discussion of the election of judges.
88. Id.
89. See, e.g., Tex. Const. art. V, § 6.
91. Normally, the list must include two names of members of the governor's political party and one name from the current minority party because the law imposes a restriction that the judicial nominating committee maintain a political party balance. See, e.g., Colo. Const. art. VI, § 24; Mo. Const. art. V, § 25(d).
92. E.g., Colo. Const. art. VI, § 25; Mo. Const. art. V, § 25(c)(1).
resulted from the public's dissatisfaction with the justices' position in capital cases. 

Of course, no system of judicial appointment is entirely immune to the phenomenon of political pressure. The controversy during the autumn of 1987 over the nomination of Judge Robert H. Bork as a candidate for Justice of the United States Supreme Court is evidence that political factors affect the appointment and confirmation process in the federal system as well. Nevertheless, a system of judicial appointments limits the point of political pressure to nomination and confirmation; thereafter, judges and justices are well-insulated against political pressures relating to specific cases or classes of cases.

B. Lay Participation in the Administration of Criminal Justice

1. Grand Jury Proceedings

In the Anglo-American culture, the grand jury, as the inquest of prosecution, has an ancient tradition. Although abolished in England, it is constitutionally required in the federal jurisdiction and a minority of American states. However, because the fifth amendment grand jury requirement has not been held by the Supreme Court to apply to the states under fourteenth amendment due process of law concerns, a strong majority of American states use a system of preliminary examinations conducted before inferior court judges, followed by the filing of an information by the public prosecutor, as the mode of instituting charges in major as well as minor criminal cases. In these states, there is no lay participation during the charging and pretrial phases of criminal proceedings. The system of private prosecutions, still recognized in England under which crime victims may retain private counsel and prosecute in the name of the Crown, does not exist in the United States and is not likely to be instituted.

97. Administration of Justice Act, 1933, 23 Geo. 5, ch. 36.
100. Hurtado v. California, 110 U.S. 516 (1884).
102. See id. at 350-51.
In legal theory, grand juries have plenary authority to investigate reports of crime, call witnesses and amass documentary and real evidence, and determine the appropriateness of instituting criminal charges. In fact, however, in almost all instances grand juries operate under the effective practical control of public prosecutors, so that rarely do they act contrary to the recommendations of the attendant prosecuting authority. Public prosecutors, who under American law lack independent power to coerce cooperation from witnesses and custodians of documents and evidentiary matters, find the grand jury a useful prosecution tool. Through grand jury subpoena and summons power, people can be compelled to cooperate in criminal investigations. Nevertheless, despite the utility of the grand jury in such instances, the cost of preserving the institution for occasional use in prosecution development is high. It is for that reason that a few states have instituted a system of judicial inquiries into crime which bear a close (although unintended) congruence to pre-charging procedures in Roman law-based countries.

2. Trial Juries

The sixth amendment to the United States Constitution guarantees a right to trial by an impartial jury in every criminal prosecution. The requirement has been construed by the Supreme Court to apply to the states through fourteenth amendment due process of law. However, there are no juries or lay participants in appellate proceedings. The traditional size of a common law jury has been twelve jurors, but states may reduce the number of jurors to as few as six persons without infringing federal due process of

107. The exception is the ability to seek arrest and search warrants. See Fed. R. Crim. P. 4(a)-(c), 41(a)-(c).
108. See id.
112. There is a limited exception to this proposition. In a few states, a form of appeal against jury verdicts of guilt in inferior courts that do not maintain a transcript or record of testimony is a de novo trial in a court of general trial jurisdiction, where appellants have a renewed right to a jury trial. If the second jury convicts, further appeal is to an intermediate appellate court composed of professional judges. See Bundy v. Wilson, 815 F.2d 125, 136-42 (1st Cir. 1987) (appendix summarizing appellate systems for states, District of Columbia and Commonwealth of Puerto Rico). See also Koski v. Samaha, 648 F.2d 790, 798-99 (1st Cir. 1981) (lack of prosecutorial influence over sentence during de novo trial).
Similarly, although jury verdicts must be unanimous under classical common law practice, the Supreme Court has approved the constitutionality of state systems which allow convictions or acquittals on the basis of a majority vote.

In Anglo-American criminal procedure, trial juries are the exclusive determiners of issues of fact. Control over the data they consider is achieved in two principal ways. One is by means of voir dire examination through which jurors are qualified or reviewed as to their capacity to serve in individual cases. This is designed to expose bias or extrajudicial familiarity with fact issues that might affect the juror’s evaluation of evidence. The second method of data control is through the comprehensive body of law known as the rules of evidence, which is used to screen the forms of evidence that jurors are allowed to hear. Moreover, because of the sixth amendment rights which allow the defendant to be present at trial and confront the prosecution’s witnesses, documentary evidence cannot be assembled and presented to jurors as an exclusive or major source of data on which a jury verdict may rest. Jurors are to assess the evidence based on the legal principles provided through instructions of law given by the judge before the onset of jury deliberations. If jurors disregard those instructions and convict, an appellate court can reverse the judgment of conviction in the course of appeal. However, if a jury acquits, the principle of double jeopardy bars further trial proceedings. Criminal trial juries are viewed to play such a

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113. Williams v. Florida, 399 U.S. 78, 102-03 (1970). The functions of juries bearing on minimum size are “to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.” Id. at 100. For a reaction that six persons are functionally insufficient for the purpose, see C. Whittbread, supra note 99, at 305-11. The Supreme Court has rejected five person juries even in misdemeanor cases. Ballew v. Georgia, 435 U.S. 223, 245 (1978).


116. There is a special dimension of voir dire in capital cases, called the “death qualification”—jurors are subject to challenges for cause if they are so unalterably opposed to the death penalty that they would not vote in favor of that sanction no matter how overwhelming the prosecution data in support of it. See Buchanan v. Kentucky, 107 S. Ct. 2906 (1987); Darden v. Wainwright, 477 U.S. 168, reh’g denied, 478 U.S. 1036 (1986); Lockhart v. McCree, 476 U.S. 162 (1986); Wainwright v. Witt, 469 U.S. 412, 433-35 (1985); Witherspoon v. Illinois, 391 U.S. 510, 521-23 (1968).


vital role in the determination of the issue of guilt or innocence that the jury system almost certainly would not be reduced in importance or abolished even if the federal Constitution were amended to make juries a legislative option.

C. Special Courts

Generally, courts of special criminal jurisdiction are not established in the United States.\textsuperscript{121} Accordingly, when one encounters, for example, special traffic courts, they are divisions of a municipal or local court and therefore bound by law to apply the general rules of procedure and evidence governing trials and adjudications of minor criminal offenses.\textsuperscript{122} There are two special tribunals that are competent in the early processing of matters falling under highly specialized legislation. One is a special court to receive and determine applications for electronic surveillance orders under the Foreign Intelligence Surveillance Act.\textsuperscript{123} This court has no competence to adjudicate any form of federal criminal prosecution, however. The second special tribunal is a division of the United States Court of Appeals for the District of Columbia Circuit which is empowered to appoint independent counsel\textsuperscript{124} under the federal Ethics in Government Act.\textsuperscript{125} However, the division itself has no trial competence, and its members are prohibited by the statute from participating in decisions involving the actions of an independent counsel whom they have appointed.\textsuperscript{126}

Finally, the United States Court of Military Appeals, composed of civilians, serves as the highest court of review over courts-martial within the armed services of the United States.\textsuperscript{127} Military offenses are governed by procedures established in the Uniform Code of Military Justice.\textsuperscript{128} However, civilian employees and dependents of service personnel who commit crimes abroad cannot be subjected to court-martial jurisdiction because court-martial proceedings do not use juries as required under the sixth amendment.\textsuperscript{129}

\textsuperscript{121.} A. EHRENZWEIG & P. LOUISELL, JURISDICTION STATE AND FEDERAL 74-76 (3d ed. 1973).
\textsuperscript{122.} Id. at 181.
\textsuperscript{124.} Originally designated a "special prosecutor."
\textsuperscript{128.} Id. § 801-76a.
\textsuperscript{129.} Grisham v. Hagan, 361 U.S. 278 (1960) (civilian employee serving overseas with the armed forces is not subject to court-martial proceedings for capital offense committed during peacetime); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) (civilian employee serving overseas with the armed services is not subject to court martial proceedings for non-capital offense committed during peacetime); Kinsella v. United States ex. re. Singleton, 361 U.S. 234 (1960) (civilian dependent accompanying an armed forces member overseas is not subject to court-martial proceedings for non-capital offense committed during peacetime). See
D. Highest Courts

Each of the American states has a high court, variously denominated a supreme court, supreme judicial court, or court of appeals. It should be noted that the United States Supreme Court has not held that an appeal from a judgment of conviction is an element of either fifth or fourteenth amendment due process of law, although state constitutions frequently incorporate such a right. If, as is true in a significant number of states, an intermediate court of appeals has been established, convicted defendants have, under state law, an appeal of right to that court. Further review in the highest court lies in the discretion of that tribunal.

In contrast to the Roman law tradition, criminal defendants are considered in jeopardy when a jury is empaneled and sworn, so that appeals by the prosecution against even an erroneous adjudication of innocence are not allowed under the fifth amendment double jeopardy clause. However, where trial courts resolve important pretrial motions, for example, dismissing the pleading or suppressing evidence on constitutional grounds in favor of generally Middendorf v. Henry, 425 U.S. 25 (1976) (holding no sixth amendment right to counsel exists in summary court-martial). Armed forces personnel may be tried by court-martial rather than civilian courts for offenses, whether committed on or off duty, even though offenses are committed within United States territory. Solorio v. United States, 483 U.S. 435 (1987). In a court-martial proceeding there is a counterpart to the jury system. While a court-martial proceeding is presided over by a military judge, the rest of a special or general court-martial panel is composed of nonlegal specialists of the same or higher rank as the defendant. See 10 U.S.C. § 802 (1988) (persons subject to Uniform Code Military Justice); id. § 825 (persons authorized to sit on panel). After persons have been discharged from military service, however, they can no longer be subjected to the exercise of court-martial jurisdiction. United States ex rel. Toth v. Quarles, 350 U.S. 11, 23 (1955).

132. See, e.g., CONN. CONST. art. 1, § 10; N.Y. CONST. art. 1, § 6; PA. CONST. art. 1, § 6.
133. See, e.g., CAL. CONST. art. VI, § 12.
134. Crist v. Bretz, 437 U.S. 28, 35-36 (1978). In bench trials, jeopardy attaches when the first prosecution witness is sworn. Id.
the defense, there is no constitutional bar to prosecution appeals.\textsuperscript{136} Even in situations where they are constitutionally permissible, prosecution appeals must be provided for by statute.\textsuperscript{137}

As a consequence, American state high courts do not discharge exactly the same functions of enforcing correct applications of procedural and substantive laws as courts of cassation do in Roman law nations.\textsuperscript{138} Only errors disadvantageous to defendants can be appealed after the defendant has been placed in jeopardy; a certain imbalance of reviewable issues therefore results. Nevertheless, because American constitutions protect only individuals,\textsuperscript{139} not governmental entities, officials or employees, the skewing of appellate issues in the direction of defense allegations alone is not viewed as a matter of theoretical or practical concern.

The United States Supreme Court is, of course, the ultimate source of definitive interpretations of the United States Constitution;\textsuperscript{140} the bulk of the exercise of that competence concerning the states rests on the fourteenth amendment.\textsuperscript{141} Notwithstanding the national threshold presented by the fourteenth amendment, states can set a higher standard under their own constitutions and laws,\textsuperscript{142} and in fact have done so frequently in recent years, particularly with reference to matters of search, seizure and interrogation.\textsuperscript{143}

\begin{itemize}
  \item \textsuperscript{138} Nevertheless, the Supreme Court noted in Ross v. Moffitt, 417 U.S. 600, 612-14 (1974), that discretionary review following an appeal of right in an intermediate appellate court is intended principally to regulate criminal trial and pretrial procedure, interpret penal legislation, and otherwise to contribute to improvement of the legal system, and not to benefit defendants. \textit{Id.} at 616. Consequently, it refused to extend the sixth amendment right to counsel to include discretionary appeals. \textit{Id.} The Court's description of the function of discretionary appellate review corresponds closely to cassation functions in Roman law systems.
  \item \textsuperscript{139} Entities also have protections under the due process clauses. as do noncitizens. Self-incrimination, in contrast, applies only to human beings. See Bellis v. United States, 417 U.S. 85 (1974); United States v. Kordel, 397 U.S. 1 (1970); Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968); United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906).
  \item \textsuperscript{140} U.S. Const. art. III, § 1.
  \item \textsuperscript{141} U.S. Const. amend. XIV, § 5.
  \item \textsuperscript{142} See, e.g., Oregon v. Hass, 420 U.S. 714, 722-24 (1975) (state courts cannot assert inconsistent interpretations of the federal Constitution, but are free to set higher state law standards); Cooper v. California, 386 U.S. 58, 62 (1967) (state has power under its own law to adopt higher standards than the United States Constitution requires). If state courts decide a case on state legal grounds, the United States Supreme Court will not accept the matter on review. Michigan v. Long, 463 U.S. 1032, 1043-44 (1983).
  \item \textsuperscript{143} See generally Brennan, \textit{State Constitutions and the Protection of Individual Rights}, 90 Harv. L. Rev. 489, 495-503 (1977) (state legislature and judiciaries are increasingly providing greater protections).
\end{itemize}
Nevertheless, the Supreme Court is a prototypical court of national constitutional review.

In addition, the Court is also at the apex of the federal judicial system, with ultimate power to interpret federal statutes, including penal legislation. In that role, it frequently decides issues of exclusively federal governmental significance, particularly when differences of interpretation or construction have emerged among the twelve federal courts of appeals. It thus discharges a court of cassation function in that respect.

In its federal constitutional role, the Supreme Court has manifested concern over the number of state prisoner cases coming before the federal district courts and courts of appeals in habeas corpus cases, and has taken certain measures to control them, usually based on an interpretation of the underlying federal legislation. It has also urged Congress to create a new level of federal court between it and the courts of appeals to resolve a significant number of cases which the Supreme Court itself now must review in the guise of screening applications for writs of certiorari. Congress has not been receptive thus far to that proposal.

E. The Prosecuting Authorities

Federal and state prosecutors decide whether particular cases will be brought to trial. This principle of discretionary prosecutions is so firmly rooted in United States federal and state laws and administrative practices that it will not likely be changed. The traditional practice of electing rather than appointing state prosecutors makes it inevitable that political pressures are much more substantial on prosecuting and district attorneys and state


145. See supra note 68 for a complete discussion of these limitations.

attorneys general than would be true if they were public officials appointed with protected status within a ministry of justice. However, public prosecutors are not legally considered to be quasi-judicial officers, but rather are exclusively executive branch officials. Furthermore, the election process may serve to root out corrupt local prosecutors. Meanwhile, the judiciary constitutes an independent third branch of government, and serves as the source of checks against abuses of prosecutorial powers pandering to voter predilections.

F. The Charging Function

As noted earlier, criminal charges in felony cases are generated in the federal and a minority of state jurisdictions by grand juries. These grand juries are authorized by statute to be convened by order of courts of general trial jurisdiction, either at stated time intervals or pursuant to the motion of a prosecuting authority. Although grand juries are empowered to issue, or cause to be issued, subpoenas and subpoenas duces tecum as a means of adducing evidence, only rarely do they do so on their own initiative. Thus, the evidence presented to them at the initiative of attending public prosecutors represents the results of criminal investigations conducted by law enforcement authorities, without formal or functional guidance from either the judiciary or public prosecutor’s offices.

Judicial review of and supervision over grand jury processes, including the legal sufficiency of indictments, are accomplished after indictments have been returned to the convening court and are based on motions to dismiss or quash the indictment. If an indictment is dismissed before jeopardy has attached, statutes generally allow the prosecution to appeal the order dismissing the charges, asserting legal error. If a defense motion to dismiss is denied, interlocutory appeal is generally not allowed and the legal issues advanced in the context of the motion to dismiss must abide an adjudication of guilt (if that ensues) and subsequent appeal in regular course. The process

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147. See supra text accompanying notes 49-52.
148. See supra text accompanying notes 52-57.
149. See supra text accompanying notes 96-110 for a discussion of the grand jury system.
152. See supra note 137 and accompanying text for illustrative statutes providing for such appeals.
of judicial review of the charging process is, as a consequence, indirect and delayed.

Many states do not require an indictment as a prerequisite to prosecution. These states allow prosecutors to file informations to commence prosecutions. Most of these states provide that a judge must first bind a defendant over for trial or that a defendant waive preliminary examination before an information can be filed in felony cases. This serves as the sole judicial control over the charging process in most information jurisdictions.

This is not a significant control in fact, because if a defendant is not committed or bound over after a preliminary examination, there is no legal barrier to the filing of a new complaint and conducting of another preliminary examination, which can be presided over by a different magistrate or judge. After a preliminary examination has been held that results in a commitment, and an information has been filed, defense counsel can move to dismiss the pleading on the basis of legal error. However, even if technical error is established, only seldom is the information dismissed on that basis. If dismissal is ordered, the asserted defect usually can be remedied swiftly by the prosecuting authority. In addition, relatively few pretrial errors survive for appellate review following conviction; hence, like judicial review of the grand jury charging process, appellate judicial supervision over the process of filing informations is remote and quite indirect.

**G. Defense Services**

The right to counsel is guaranteed under the sixth amendment to all felony defendants and to misdemeanants if a sentence of incarceration in any form ensues. The Supreme Court has allowed indigent defendants to receive designations of counsel at public expense. In addition, the right to counsel includes a right to retain one's own attorney. Therefore, courts cannot reject qualified lawyers who appear on retainers from criminal defendants or lawyers who are friends or relatives of defendants.

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155. However, some states allow the prosecutor to file an information directly. This has been allowed by the United States Supreme Court. See Lem Woon v. Oregon, 229 U.S. 586 (1930).

156. W. LAFAVE & J. ISRAEL, supra note 96, § 15.1, at 618.


161. The principle is so thoroughly enshrined in American criminal procedure that it is difficult to find direct authority on point. Its clearest acceptance in Supreme Court precedent is found in the Court's application of identical standards of professional competence to both retained and assigned counsel. See, e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980). The sixth amendment also embraces a right to self-representation that can be asserted by defendants
The Constitution is indifferent to the avenues by which counsel are provided for indigent defendants, as long as counsel is professionally competent by constitutional standards. A federal statute provides the power for federal district courts to utilize either a federal public defender organization subject to ultimate budgetary and administrative control through the Administrative Office of the United States Courts, or a community defender organization recognized by the district court in question and approved by the Judicial Conference of the United States. However, in lieu of or as a supplement to either form of defender organization, a federal trial court can appoint defense counsel from a panel of attorneys designated or approved by the court or furnished by a bar association or a legal aid agency. Although a state or federal public defender organization has the status of a governmental entity and its attorneys have a measure of immunity to civil suit under the Federal Civil Rights Act, that is not true of private attorneys appointed to represent indigent defendants. Accordingly, only public defender organizations directly financed from the public treasury can be viewed as governmental entities, and will appertain to the judicial branch only if that is provided for directly, as in federal statutes.

Nonetheless, the Supreme Court does not view public defenders as it does other classes of public employees. Aside from the source their salaries, the relationship with their clients does not differ from that of privately retained or appointed counsel and their clients. Moreover, although all attorneys on occasion are characterized as "officers of the court," they are not representatives of the state when they represent criminal defendants. Public
defenders owe their undivided loyalty to their clients and, like defense counsel generally, discharge that responsibility through procedural actions of an adversarial nature. This duty of loyalty is not altered by an abstract possibility that other county or state officials, with interests opposed to those of indigent defendants, might try to interfere with or retaliate against public defenders who are representing or have represented indigent clients. As lawyers, public defenders are bound by the same standards of professional responsibility as private counsel, which means they must exercise independent judgment on behalf of their clients.

The constitutional mandate of *Gideon v. Wainwright* requires states to provide competent counsel for indigent defendants. However, states cannot in any way control the professional activities of assigned counsel, whether or not on the public payroll, for to do so would deny defendants constitutionally fair trials. Accordingly, federal courts are not to assume that state or county authorities have acted contrary to federal constitutional requirements; defendants must plead and prove violations before federal judicial relief can be forthcoming. Consequently, systems for the delivery of criminal defense counsel services through public defender and legal assistance offices are and must be administered to guarantee the same independence from improper prosecutorial or other administrative influences that retained counsel, or assigned counsel provided by nonpublic entities, must enjoy.

### H. Law Enforcement Agencies

As discussed above, there is no centralized police or law enforcement agency within either the federal government or the government of any state.

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In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of [the] client." This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.

*Id.* at 318-19 (footnotes omitted).

172. *Id.* at 320.


174. 372 U.S. 335 (1963). See also *supra* text accompanying note 157 for a summary of the holding in *Gideon*.

175. 372 U.S. at 335.

176. *Polk County*, 454 U.S. at 322 (implicit in *Gideon* "is the assumption that counsel will be free of state control").

177. *Id.*

178. *Id.*

179. Basic assistance for assigned counsel in the preparation of an adequate defense or appeal must be provided at public expense. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (state must provide access to an expert psychiatric examination to aid in the insanity [mental nonresponsibility] defense).

180. See *supra* text accompanying notes 30-39 for a discussion of the fragmentary nature of federal and state police power.
Moreover, the American criminal justice system contains no equivalent to judicial police or judicial police officers endowed with official powers to undertake certain legally significant acts, as is encountered within the Roman law based systems. Consequently, law enforcement agencies function independently of either the prosecutorial administrative structure or direct judicial control. Indeed, most law enforcement activities are not closely regulated by statute, but instead are left to agency regulations and practice. Judicial control over investigative practices such as search and seizure and interrogation is exerted indirectly and after-the-fact through constitutional litigation. These constitutional challenges are chiefly based on defense motions to exclude prosecution evidence based on assertedly unlawful police investigative methods. An inevitable consequence of the American governmental system is that the police have almost unfettered discretion to divert criminal cases out of the criminal justice system, or at least out of the track leading to formal criminal prosecution.

I. Ministry of Justice Intervention

Intervention by a minister of justice in the administration of criminal justice does not exist in the United States. This is because of the fact that the concept of a minister of justice reflects a cabinet system of government not found in the United States. It is entirely possible that a United States president can affect an administrative decision concerning prosecution or nonprosecution through informal directives to or discussions with the Attorney General, who is a member of the Cabinet and the head of the Department of Justice. However, the powers of the Attorney General to direct a United States Attorney to move forward with a prosecution are doubtful, so that the hypothetical wishes of a President or Attorney General do not necessarily generate an immediate prosecutorial response. Moreover, even within such limits, only a directive not to prosecute would be significant. A directive to prosecute where such an action was unwar-

181. Powers of arrest are, of course, determined directly through legislation. N.Y. Cim. Proc. Law §§ 140.25, 140.27 (McKinney 1981), is a typical state statute of this type.

182. See Illinois v. Lafayette, 462 U.S. 640 (1983). In Lafayette, the Supreme Court held that federal courts are not to lay down specific rules or regulations governing police administrative practices. Id. at 647.

183. See supra note 20 for a discussion of the limits that the Bill of Rights place on state police investigative techniques.

184. This is a dimension of criminal justice administration addressed directly at the Thirteenth Congress of Penal Law in 1984 and beyond the scope of this Article. See George, Screening, Diversion and Mediation in the United States, 29 N.Y.L. Sch. L. Rev. 1, 2-5, 9 (1984) (American national report).

185. See supra text accompanying notes 45-47 for a discussion of the relationship between the Department of Justice and the United States Attorneys.

186. In fact, the independent counsel (or special prosecutor) system established under the Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1867 (1978) (codified at 28 U.S.C. §§ 591-598 (1988)), probably would apply to the hypothetical circumstances posited in the main text if the commission of any federal felony or misdemeanor should have occurred on the part of any of the listed senior federal officials. See 28 U.S.C. § 591(c) (1988); supra note 126.
ranted would not stand the test of the system. The return of an indictment not based on any data would result in its dismissal, and the inability of government prosecutors to establish guilt beyond a reasonable doubt requires a judicial entry of a judgment of acquittal. If the available evidence is sufficient to charge and ultimately to convict, courts reject claims of selective enforcement as long as impermissible criteria of race, ethnicity or national origin are not invoked. The principle of discretionary prosecutions by its nature involves a possibility of political influences on decisions to prosecute. Notwithstanding these difficulties, the United States system of government will not be revised to include compulsory prosecutions in order to forestall the possibility of political influence in decisions to prosecute.

III. SPECIAL LEGISLATION GOVERNING ORGANIZED AND TRANSNATIONAL CRIMINALITY

A. Introduction

It is unlikely that a truly comprehensive codification of federal criminal law will occur in the next decade or so. The structure of the United States system of justice will not allow for such a dramatic change. Congress, the body that would be charged with designing such a scheme, is limited to acting in those areas which the federal Constitution has designated as being within its competence. Consequently, the individual states are left to create the law under which most criminal activity falls. A comprehensive federal criminal code such as is employed in most civil law countries would most likely create a more efficient system. However, the barriers to the implementation of such a system are grounded in the United States Constitution and the jurisdictional system it creates. Nonetheless, Congress has some ability to legislate national criminal law and has recently enacted some far-reaching federal criminal statutes.

187. See FED. R. CRIM. P. 29(a), (c).
188. See George, supra note 184, at 7-8 & n.38.
189. At the state level, the very limited scope of authority of a state attorney-general over local prosecutors also means that gubernatorial influences would have minimum scope. This essentially leaves a local prosecutor's discretion unchecked. However, only rarely is there a county official in which powers of public administration are centered, so that influence of the sort hypothesized in the main text is exceedingly unlikely in relation to a county prosecutor. See supra text accompanying notes 48-56 for a discussion of the relationship between local prosecutors and state attorneys general.
190. The system of electing judges at the state level would not exclude all possibilities of political influence under the principle of compulsory prosecutions, but such pressures would be much diluted in comparison with those that might be exerted on elected public prosecutors. See supra text accompanying notes 72-73 for a discussion of elected judges' longer terms of office and greater administrative insularity.
191. See supra note 5 and accompanying text.
192. See supra notes 16-21 and accompanying text.
193. See supra notes 5-15 and accompanying text.
In 1984, Congress enacted the Comprehensive Crime Control Act. The Act embraces a large number of provisions which revised portions of federal penal law and altered substantially federal sentencing procedures and criminal sanctions. However, the statute contains no comprehensive general part, and adheres to the traditional framework of an alphabetical arrangement of the special part rather than a topical organization. Because this most recent foray by Congress did nothing to alleviate the organizational confusion, the present federal criminal code is likely to remain substantially unaltered in the years ahead, despite the obvious limitations and omissions of the federal code.

B. Economic Crimes

1. In General

White-collar or economic offenses have been a special target of federal criminal legislation and law enforcement activities. This is because economic crimes generally transcend state, and often national, boundaries and thus are beyond the abilities of state criminal justice systems to investigate, prosecute, and adjudicate. Recent changes in federal legislation are in the direction of increased penal law coverage and more severe sanctions, rather than alteration of the administrative structure of government to create new agencies responsible for overseeing and executing federal law enforcement activities. There are several major federal statutes that should be discussed in this context.

2. Racketeering Offenses

The Racketeer Influenced and Corrupt Organizations Act (“RICO”) has been one of the principal federal tools against organized criminal activities, including those that involve the infiltration of legitimate enterprises by criminal elements. Since the enactment of RICO in 1970, Congress has steadily augmented key definitions of the statute in order to keep pace with the changing patterns of organized criminal activity at the national and international levels.

There are two key definitions in the statute. The first is that of “racketeering activity,” which incorporates violations of a long list of federal statutes including bribery, theft, embezzlement, extortion, and narcotics offenses. An illustration of the expansion process which has been lengthening this list may be found in the Comprehensive Crime Control Act, which

197. Id. § 1961(1).
added "dealing in obscene matter" under state law as a predicate offense. This addition occurred because of the congressional belief that organized crime was substantially implicated in the pornography trade and that RICO should reach large-scale, commercial pornography distribution operations.

The second principal definition is that of "enterprise," which "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The Supreme Court gave the statutory language a rather broad interpretation so that it includes completely illegal entities and organizations as well as lawful enterprises that are manipulated by criminals.

The prohibited activities under RICO include:

(a) The use of the income or proceeds from racketeering or collection of unlawful debts or the proceeds of such income to acquire any interest in or to establish or operate any enterprise which is engaged in, or the activities of which affect, interstate commerce.
(b) Use of such funds to acquire or maintain, directly or indirectly, an interest in or control of an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(c) Conduct or either direct or indirect participation by a person employed by or associated with an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, in the activities of that enterprise through a pattern of racketeering activity or collection of unlawful debts.
(d) Conspiracy to accomplish any of the above acts.

199. See generally B. George, supra note 195, at 387-88.
201. Russello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576 (1981). In Turkette, the defendants claimed that they engaged in, and intended to engage in, no lawful activities of any sort, so that they should not have been viewed as being equivalent to a partnership, corporation or other form of legal entity. The Court, however, thought the second clause, "any union or group of individuals associated in fact although not a legal entity," was intended by Congress to strike at criminal enterprises, as a way of eradicating organized crime from the social fabric, whether an enterprise was ostensibly legitimate or admittedly criminal. Id. at 581-85.
202. 18 U.S.C. § 1962(a)-(d) (1988). The term "unlawful debt" is defined as a debt incurred in unlawful gambling activity or a usurious transaction, usury being defined as twice the enforceable rate under applicable state law. Id. § 1961(6). The statute is aimed at "loan-sharking," in which organized criminals lend money at very high rates of interest (sometimes 20% weekly, or 1,040% annually) and then coerce payment by physical violence or threats of violence. Some small business owners who become victims of loan-sharking have been forced to sign over their enterprises to criminal organizations. See generally U.S. President's Comm'n on Organized Crime Report, The Impact: Organized Crime Today 452-55 (1986) [hereinafter Organized Crime Report].

The person accused under RICO must have been a principal in the racketeering activity or collection of an unlawful debt. 18 U.S.C. § 1962 (1988). Open market purchases of securities are not included if done without the intent to control or participate in the control of the issuer, and if the securities held by the purchaser, members of the purchaser's immediate family and
A violation of the statute carries substantial criminal penalties and serves as a basis for forfeiture of the proceeds of racketeering activities. In addition, Congress authorized private persons to bring civil actions for up to three times the actual damages sustained, plus litigation costs and reasonable attorney's fees, against other persons who violate section 1962 of the RICO provisions. The Supreme Court gave a quite sweeping interpretation to the civil damages portion of the statute in Sedima, S.P. R. L. v. Imrex Co., confirming that it can be invoked even though the Department of Justice has not commenced or completed a criminal investigation, or a defendant individual or entity has not been prosecuted for and convicted of a RICO violation. There has been substantial criticism of this use of the statute by competitors, disgruntled customers, and the like, and the Department of Justice is concerned about the risk of interference by private persons with government criminal investigations. Bills have been introduced in Congress to amend section 1964 by requiring a completed criminal prosecution, or some level of government intervention in such private litigation. Enactment of amendments in some form appears highly likely at this writing.

3. Commerce Offenses

It is a crime to travel in interstate or foreign commerce, or to use any facility in interstate or foreign commerce, including the mail, with the intent to: "(a) distribute the proceeds of any unlawful activity; (b) commit any crime of violence to further any unlawful activity; or (c) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity. . . ." This provision has been a frequently invoked prosecution tool to strike at organized crime figures, some of whose acts clearly fall within the broad concept of economic or white-collar crime.
4. Banking Offenses

a. Currency Reporting

Congress has been concerned for several years about the illicit flow of currency as a result of narcotics trafficking and money-laundering schemes. Under the legislation currently in force, federal law requires persons to report the knowing transportation of monetary instruments valued more than $10,000: a) from a place in the United States to or through a place outside the United States; or b) to a place in the United States from or through a place outside the United States.\(^{210}\) A report must be made as well by anyone receiving at one time $10,000 or more with knowledge that it had been transferred into the United States from or through a place outside the United States.\(^{211}\) However, there was no attempt provision in the original statute. Persons had to be on the verge of boarding a plane or vessel, thus manifesting an intent to leave the United States, before they could be prosecuted under the 1981 statute.\(^{212}\)

Domestic financial institutions and their employees who violate the statute could receive a civil penalty of up to $1,000 per day of violation for each location where a violation occurred.\(^{213}\) Persons who fail to report or who file false reports also could receive a civil penalty.\(^{214}\) A primary violator can be punished only for a misdemeanor,\(^{215}\) but if the contravention occurs in conjunction with violations of other federal criminal laws or as a part of a pattern of illegal activities involving transactions of more than $100,000 in a twelve-month period, the crime is a felony.\(^{216}\) Although the currency-reporting statute was not originally included as a predicate offense under RICO,\(^{217}\) the RICO statute has since been amended to include currency reporting violations as a predicate offense.\(^{218}\)

In 1984, Congress used the Comprehensive Crime Control Act as an instrument to strengthen the coverage of the currency reporting statute. In that Act, Congress increased the civil penalty amount from $1,000 to $10,000,\(^{219}\) so that persons who make lucrative careers in the illicit drug trade and through organized crime would be less likely than before to write off

\(^{210}\) Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5316(a) (1988). The 1986 amendment to § 5316 increased the minimum value for required reporting from $5,000 to $10,000. Id.

\(^{211}\) Id.

\(^{212}\) See United States v. Rojas, 671 F.2d 159, 162-63 (5th Cir. 1982).


\(^{214}\) Id. § 5321(a)(3).

\(^{215}\) Id. § 5322(a).

\(^{216}\) Id. § 5322.


\(^{218}\) Id. § 1961(1).

the penalties as a cost of doing business.\textsuperscript{220} In contrast, the required amount for reporting was increased from $5,000 to $10,000 for record-keeping efficiency purposes and to reflect inflation, which could cause legitimate international travelers to carry with them amounts of currency greater than $5,000.\textsuperscript{221}

Congress also amended the statute to cover attempts to transport or have transported a monetary instrument when a report is required.\textsuperscript{222} Congress intended to criminalize transactions from the time an individual takes a substantial step toward violating the statute under circumstances evincing an intent to violate the law. This would include, for example, loading financial instruments onto a vessel or aircraft about to leave the United States. In keeping with the general strengthening of coverage, Congress increased the criminal penalties in all cases. Now, an offense under this statute carries the penalties of imprisonment for up to five years, fines of not more than $250,000, or both.\textsuperscript{223}

With respect to enforcement procedures, several changes should be mentioned. First, the revised statute confers on customs officials the powers to stop, intercept and search, without a search warrant: 1) vehicles, vessels, aircraft or other conveyances; 2) envelopes or other containers; and, 3) persons entering or departing from the United States, on the basis of a reasonable cause to believe that a monetary instrument is being transported in violation of the statute.\textsuperscript{224} Congress intended this revision to resolve legislatively a split in lower federal court decisions as to whether probable cause to arrest was necessary to legitimize searches and seizures involving vehicles, containers and persons outbound from the United States.\textsuperscript{225} Second, the revised statute empowers the Secretary of the Treasury to pay rewards to persons providing original information leading to the recovery of a civil penalty or forfeiture (exceeding $50,000) for a violation of the statute. The amount is twenty five percent of the net amount of the fine, penalty, or forfeiture, or $150,000, whichever is less.\textsuperscript{226}

\textit{b. Money Laundering}

Money laundering is a relatively new phenomenon, generated by large amounts of cash from illegal drug trafficking, gambling, prostitution, tax evasion and other white-collar and organized crime activities. Criminals must

\begin{itemize}
\item \textsuperscript{220} Id. § 5316(a).
\item \textsuperscript{221} 1984 U.S. Code Cong. & Admin. News 3482.
\item \textsuperscript{222} 31 U.S.C. § 5316(a) (1988).
\item \textsuperscript{223} Id. § 5322(a).
\item \textsuperscript{224} Id. § 5317(b).
\item \textsuperscript{225} See, e.g., United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981).
\item \textsuperscript{226} 31 U.S.C. § 5323 (1988). Officers or employees of federal, state or local governments who provide such information in the course of their duties are not eligible for rewards, however. Id.
\end{itemize}
"launder," that is, convert into apparently lawful assets, the cash they acquire through criminal activity.227 This laundering can occur through the purchase of interests in legitimate enterprises, or in the course of the operations of apparently lawful businesses, by which money can be processed in the form of large salary or dividend payments or actual or apparent purchases of commodities at inflated prices. Notwithstanding, the preferred method of laundering money has been to move it into legitimate bank accounts, many of them in foreign banks, and then to transfer the funds to yet other banks from which apparently legitimate withdrawals can be made.228

As part of the Anti-Drug Abuse Act of 1986, Congress closed a gap in earlier federal legislation through enactment of the Money Laundering Control Act of 1986.229 That statute prohibits engaging in financial transactions or transporting across United States borders monetary instruments that involve the proceeds of a specified unlawful activity,230 "(a) with the intent to promote the carrying on of specified unlawful activity; or (b) knowing that the transaction is designed in whole or in part to conceal or disguise the nature, source, the ownership, or control of the proceeds of the specified unlawful activity; or (c) to avoid a transaction-reporting requirement under State or Federal law. . . ."232 In addition to criminal penalties, persons who

227. Money laundering has been defined as "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate." ORGANIZED CRIME REPORT, supra note 202, quoted in Burnett, Money Laundering—Recent Judicial Decisions and Legislative Developments, 33 Fed. B. News & J. 372, 372 (1986).
230. The term "financial transaction" is defined as a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. Id. § 1956(c)(4). The statute also defines "monetary instruments." Id. § 1956(c)(5).
231. Specified unlawful activities is defined in id. § 1956(c)(7) to include a lengthy list of offenses relating to unlawful organized crime activities. In particular, the predicate offenses under RICO, 18 U.S.C. § 1961(1) (1988), are incorporated by reference, but the listing extends much more broadly to include offenses like concealment of assets in a bankruptcy case; bribery; counterfeiting; smuggling goods into the United States; theft of government property; theft, embezzlement or misapplication of funds by bank employees; espionage; disclosure of classified information; kidnapping and hostage taking; bank fraud; and bank and postal robbery and theft. Contrived bankruptcy has been a tool for organized crime to loot the assets of a legitimate business. See E. De Franco, ANATOMY OF A SCAM: A CASE STUDY OF A PLANNED BANKRUPTCY BY ORGANIZED CRIME (U.S. Dep't of Justice, L.E.A.A., Nov. 1973).
232. 18 U.S.C. § 1956(a) (1988). The government must prove beyond a reasonable doubt a scienter element—that the defendant knew the funds or monetary instruments involved in the transaction represented the proceeds of some form of unlawful activity constituting a felony under federal or state law, but does not have to prove the defendant's knowledge that the funds were derived from a specific illegal activity. Id. In other words, a government prosecutor does not need to prove that a defendant shared the criminal intent to promote further unlawful activity, conceal the source or ownership of the proceeds, or avoid a reporting requirement.
violate the statute are also subject to a civil penalty computed as the larger of "(1) the value of the property, funds, or monetary instruments involved in the transaction; or (2) $10,000." 233

The second activity designated a crime by the 1986 legislation is engaging in prohibited transactions. "Prohibited transactions" are defined as knowingly engaging or attempting to engage in a monetary transaction234 valued235 at more than $10,000, derived from specified unlawful activity.236 The scienter is that a defendant knew that the property involved in the transaction was criminally derived property, that is, property constituting or derived from proceeds obtained from a criminal offense.237 Violations are punishable by imprisonment for not more than ten years, a fine that cannot exceed twice the amount of the criminally derived property involved in the transaction, or both.238

Both the money laundering and the prohibited transactions provisions are extraterritorial in sweep. The laundering statute governs conduct outside the United States if perpetrated by a United States citizen; or, in the case of a non-United States citizen, where the conduct occurred in part within the United States, provided that the transaction or series of related transactions involved funds or monetary instruments of a value exceeding $10,000.239 The prohibited transactions provision covers offenses within the United States, in the special maritime and territorial jurisdiction of the United States,240 or offenses committed elsewhere, provided the defendant is a "United States person" as defined by federal law.241

The 1986 legislation created a third criminal statute outside the criminal code, designed to strengthen the reporting of transactions by financial institutions.242 It prohibits a person, for the purpose of evading the statutory reporting requirements, from 1) causing or attempting to cause a domestic financial institution to fail to file a required report of a transaction; 2)

233. Id. § 1956(b).
234. "Monetary transaction" is defined as the "deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument . . . by, through, or to a financial institution." Id. § 1957(f)(1). "Monetary instrument" is defined through cross reference to 31 U.S.C.A. ch. 53, while "financial institution" is defined in 31 U.S.C. § 5312 (1988).
235. The term "criminally derived property" is defined as "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2) (1988).
236. Id. § 1957(a). The unlawful activity is identical to that defined in id. § 1956(c)(7). Id. § 1957(f)(3).
237. The prosecution does not have to prove, however, that a defendant knew the property was derived from a specified unlawful activity. See supra note 232 for a discussion of the scienter requirement.
239. Id. § 1956(f).
240. Id. § 1957(d). The term is defined in id. § 7.
241. Id. § 1957(d). The definition of "United States person" is found in id. § 3077 (excluding (2)(D)).
causing or attempting to cause a domestic financial institution to file a required report that reflects a material omission or misstatement of fact; or, 3) structuring, assisting in structuring, or attempting to structure or assist in structuring any transaction with one or more domestic financial institutions. The crime is a felony punishable by a fine of up to $250,000, imprisonment for not more than five years, or both.

This statute is aimed at what is called “smurfing,” in which representatives (called “runners”) of criminal organizations go to several banks and convert large amounts of cash into negotiable instruments like cashier’s checks or money orders for amounts of less than $10,000, in order to avoid the currency reporting requirements of the Bank Secrecy Act. There had been a division of precedent in federal appellate courts over whether this was unlawful activity, a matter settled definitively by the 1986 statute. However, the total amount of individual “smurfing” transactions must reach or exceed $10,000; splitting $2,000 into four transactions of $500, for example, does not violate the statute.

The Money Laundering Act of 1986 also amended the RICO statute to list among RICO predicate offenses violations of section 1956 or section 1957, and acts violating specified sections of the Banking Law.

243. Id.
244. Id. § 5322.
245. Id. § 5316. This provision was amended by the Comprehensive Crime Control Act of 1984. See generally B. George, supra note 195, at 382-87. In the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 6184(b), 102 Stat. 4181 (in effect as of Nov. 18, 1988) (codified at 31 U.S.C.A. § 5325 (West Supp. 1989), Congress added a new provision prohibiting financial institutions from issuing or selling bank checks, cashier’s checks, traveler’s checks or money orders to individuals in connection with a transaction or group of such contemporaneous transactions involving United States currency or other monetary instruments (as prescribed by the Secretary of the Treasury) in amounts or denominations of $3,000 or more. The prohibition does not apply if 1) an individual has a transaction account with the financial institution, and the latter verifies that fact and records the method of verification in accordance with Treasury Department regulations; or, 2) the individual furnishes the financial institution with whatever forms of identification the Secretary of the Treasury requires through promulgated regulations, and the financial institution verifies and records that information according to Treasury regulations. Id. § 5325(a). A “transaction account” is defined according to § 19(b)(1)(C) of the Federal Reserve Act, codified as 12 U.S.C. § 461(b)(1)(C) (1988). 31 U.S.C.A. § 5324(c) (West Supp. 1989) deposit or account on which depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone transfers or other similar items for purpose of making payments or transfers to third parties, including demand deposits, negotiable order of withdrawal accounts, savings deposits subject to automatic transfers and share draft accounts).
246. See generally Burnett, supra note 227, at 373.
248. The crimes are willful violation of reporting requirements on domestic coin and currency transactions, 31 U.S.C.A. § 5313 (West Supp. 1988); willful violations of reporting requirements on foreign financial agency transactions, id. § 5314; and willful violation of reporting requirements on exporting and importing monetary instruments, id. § 5316.
C. Controlled Substances Legislation

1. In General

Federal legislative efforts to prevent substance abuse and to halt illicit traffic in narcotics go back nearly a century.\(^{249}\) Despite the expenditure of billions of dollars during this period to support efforts to reduce demand and interdict supplies, drug abuse continues at excessively high rates.\(^{250}\) Congress has responded by strengthening federal laws in 1984 through the Comprehensive Crime Control Act, again in 1986 through the Anti-Drug Abuse Act,\(^{251}\) and most recently through the Anti-Drug Abuse Act of 1988.\(^{252}\)

The changes wrought by the first two enactments in the governmental administrative structure went no further than to require consultation and coordination among Cabinet level officials and concerned government agencies, and did not create new overriding agencies. However, the 1988 legislation included a “National Narcotics Leadership Act,”\(^{253}\) which created an Office of National Drug Policy as part of the Executive Office of the President,\(^{254}\) superseding all existing executive branch agencies responsible for developing and administering drug control strategies.\(^{255}\)

Although the office and its director have a number of delineated duties,\(^{256}\) the most important of them is the responsibility of establishing policy

\(^{249}\) The government first considered the problem of drug abuse in the 1860's. See generally U.S. STRATEGY COUNCIL ON DRUG ABUSE: FEDERAL STRATEGY FOR DRUG ABUSE AND DRUG TRAFFIC PREVENTION (1975) (providing history of United State narcotics regulations).

\(^{250}\) See generally U.S. PRESIDENT'S COMM'N ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME (1986).


\(^{252}\) Pub. L. No. 100-690, 102 Stat. 4181 (in effect as of Nov. 18, 1988).


\(^{254}\) 21 U.S.C.A. § 1501(a) (West Supp. 1989). The staffing and internal structure are addressed in id. § 1501(b)-(c). The director and highest-level officials of the office are nominated by the President and confirmed by the Senate, id. § 1502(a)(1), but may be removed at the pleasure of the President, id. § 1502(a)(2). None can hold any other position in the federal government concurrently with such appointment, id., which forestalled the implementation of President Bush's initial desire to appoint Vice President Quayle to the position of director.

The director must report to the President and Congress not later than Jan. 15, 1990, concerning the necessity to group, coordinate and consolidate federal agencies and functions involved in supply and demand reduction in order to promote better execution of the laws, provide more effective management of the executive branch, reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the executive branch, and reduce the number of agencies through consolidation of agencies with similar functions and abolition of agencies unnecessary for the efficient conduct of the executive branch. Id. § 1505(a).


objectives and priorities for a national drug control program, the parameters of which are set in the legislation. The basic determination to be made is a national drug control strategy that is to reduce drug abuse, chiefly through supply reduction and demand reduction. A specified dimension is the establishment of "high intensity drug trafficking areas," to be determined on the following criteria: 1) the extent to which the area is a center of illegal drug production, manufacturing, importation or distribution; 2) the extent to which state and local law enforcement agencies have committed resources to respond to area drug-trafficking problems, thereby indicating a determination to respond aggressively to it; 3) the extent to which drug-related activities in the area are having a harmful impact in other areas of the country; and, 4) the extent to which a significant increase in allocation of federal resources is necessary to respond adequately to drug-related activities in the area. After such a designation has been made, the director can direct the temporary reassignment of federal personnel to the area, take other actions specified in the provisions governing the office's powers to respond aggressively to the problem, and coordinate actions with state and local officials.

The provisions of these three major enactments are complex and directed in large measure at domestic or internal activities; consequently, only those aspects of the legislation relating to international trafficking will be summarized here.


The Comprehensive Crime Control Act created a federal felony covering anyone a) who has received income derived from a felony-level offense under

257. Id. § 1502(b)(1). The director is responsible for developing and submitting budgets to the President and Congress. Id. § 1502(c). The President is to designate lead agencies with areas of principal responsibility for carrying out the national drug control strategy. Id. § 1504(d).

258. The basic definition in id. § 1507(5) is "programs, policies and activities undertaken by the National Drug Control Program agencies pursuant to the responsibilities of such agencies under the National Drug Control Strategy," as determined by the President or jointly by the director and the head of the department or agency concerned. Id.

259. See generally id. § 1504.

260. Supply reduction embraces any enforcement activity "intended to reduce the supply or use of drugs in the United States and abroad," including international drug control, foreign and domestic drug enforcement intelligence, interdiction and domestic drug law enforcement including law enforcement directed at drug users. Id. § 1507(3).

261. Demand reduction includes activity other than law enforcement activity intended to reduce the demand for drugs, including drug abuse education, prevention, treatment, research and rehabilitation. Id. § 1507(4).

262. See generally id. § 1504(c).

263. Id. § 1504(c)(2).

264. Subject to the approval of the administrative head of the department or agency that employs those personnel. Id. § 1504(c)(1)(A).

265. As delineated in id. § 1504(c)(1).
the Comprehensive Drug Abuse Prevention Control Act of 1970,\textsuperscript{267} b) who
is a principal in the felony transaction, c) and who uses or invests any part
of such income or its proceeds d) for the acquisition of any interest in the
establishment or operation of e) any enterprise which is engaged in, or the
activities of which, affect interstate or foreign commerce.\textsuperscript{268}

Congress also addressed aviation drug trafficking offenses by making it a
federal felony for anyone to serve knowingly in any capacity as an “airman”
without a certificate authorizing him or her to do so, in connection with the
felonious transportation of drugs by aircraft.\textsuperscript{269} It also is a felony to sell or
use, or attempt to use, or possess with intent to use, a fraudulent certificate
of aircraft registration in connection with a federal or state controlled
substances felony not involving simple possession.\textsuperscript{270} If the sale of the
certificate is the basis for a prosecution, the government must prove beyond
a reasonable doubt that the seller of a certificate knew that the purchaser
intended to use it in connection with a drug offense. However, that require-
ment does not apply to the other offenses under the section.

All forms of controlled substances are subject to a requirement of import
permits.\textsuperscript{271} Exporters must make clear that a shipment to another country
for forwarding to a third country will meet all requirements of the law in
the intermediate country. Schedule III substances are included.\textsuperscript{272} The At-
torney General has been given broader grounds to deny, revoke or suspend
import registrations, particularly on the basis that a registration would be
inconsistent with the public interest and with United States obligations under
international instruments.\textsuperscript{273} Stocks in trade can be seized or sealed when
registrations are revoked or suspended.\textsuperscript{274}

3. **Anti-Drug Abuse Act of 1986**

Before 1986, under the Mansfield Amendment, no officer or employee of
the United States could be present at or participate in an arrest or interro-


\textsuperscript{268} Id. § 854 (added by Comprehensive Crime Control Act, § 303). The United States
Supreme Court had applied the concept of “proceeds” in United States v. Russell, 464 U.S. 16 (1983),
in the context of RICO; Congress adapted the Court’s concept in the controlled
substances context. The term “interest” is comprehensively defined in 21 U.S.C. § 854(a)

\textsuperscript{269} 49 U.S.C. § 1472(g) (1988). The provision was not included in the Comprehensive Crime
Control Act, but was enacted in the Aviation Drug-Trafficking Control Act of 1984, Pub. L.
No. 98-499, 98 Stat. 2312 (Oct. 19, 1984), substantially contemporaneous with the Comprehen-
sive Crime Control Act.

\textsuperscript{270} 49 U.S.C. § 1472(b)(2) (1988). The statute also allows revocations of airman’s certificates
before conviction, id. § 1903(a)(9)(A), as well as aircraft registration certificates, id. §§ 1401(c),
1401(a)(2)(A), 1401(F).

\textsuperscript{271} 21 U.S.C. § 952(b)(2) (1988) (as amended by the Comprehensive Crime Control Act, §
521).

\textsuperscript{272} Id. § 953(e). Exporters of schedule V substances now must obtain registrations from
the Attorney General. Id. The earlier provisions covered only Schedules I through IV.

\textsuperscript{273} Id. § 958(d).

\textsuperscript{274} Id. § 985(d)(6).
gation action by authorities in another country. However, the Anti-Drug Abuse Act of 1986 created amendments to the provision which allow the Secretary of State in consultation with the Attorney General to permit participation in connection with narcotics control-related arrest transactions. Participation in arrests is allowed where adherence to the general prohibition would be “harmful to the national interests of the United States . . . .” Nor does the basic prohibition govern in the course of maritime law enforcement operations in the territorial waters of another country if that country agrees. However, a prohibition remains in place against the conduct of or participation by United States representatives in interrogation unless the person undergoing interrogation consents in writing.

Congress determined that interdiction of foreign registry vessels outside United States customs waters is very difficult unless the master of the vessel or government of the country of its registry consents, a process that often requires three or four days to accomplish. Therefore, Congress urged the Secretary of State in consultation with other designated federal officials to negotiate with foreign governments concerning agreements allowing United States Coast Guard personnel to board their vessels. If a country refuses to consider such an international agreement, the President is required to take appropriate action, including a denial of access to United States ports by vessels registered in that country. Also related to maritime activity, it is now a federal offense for any person onboard a vessel of the United States or subject to the jurisdiction of the United States, knowingly or intention-
ally to manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.\textsuperscript{283}

The 1986 law also contains a Customs Enforcement Act,\textsuperscript{284} which strengthens the provisions governing reports to the Customs Service of the arrival of vessels, aircraft and individuals within the United States.\textsuperscript{285} The penalties for violations, both civil and criminal, also have been augmented. Under these provisions, drug traffickers who fail to report can be prosecuted simply for this failure and must submit to inspection of belongings or goods. Similarly enhanced penalties govern failures to have a manifest or possession of a false manifest,\textsuperscript{286} and unlawful unloading of merchandise.\textsuperscript{287}

Congress further added the new crimes of aircraft smuggling, which includes the transportation of material by a pilot or passenger on an aircraft with knowledge or intent that it will be introduced unlawfully into the United States; and sea transfers of merchandise between an aircraft and a vessel on the high seas, without appropriate permission, if either the aircraft or the vessel is owned by a United States citizen or registered in the United States, or if, whatever its nationality of registry, the circumstances indicate an intent unlawfully to introduce the merchandise or substance into the United States.\textsuperscript{288} Aircraft owners have also been placed under much stricter controls when they employ uncertified personnel, allow the installation of unlawful or unapproved equipment, including auxiliary fuel tanks, or allow the operation of aircraft without display of navigation or anticollision lights.\textsuperscript{289} Transfers of ownership also must be reported under regulations established by the Secretary of the Treasury.\textsuperscript{290}

\begin{thebibliography}{99}
\bibitem{286} \textit{Id.} § 1584.
\bibitem{287} \textit{Id.} § 1986.
\bibitem{288} \textit{Id.} § 1590 (added by Pub. L. No. 99-570, 100 Stat. 3207, § 3120). An intent to transfer is established prima facie by showing a transfer within 250 miles of the territorial sea of the United States. A prima facie showing of intent to introduce merchandise into the United States unlawfully can be made by establishing that the aircraft or vessel was operating without lights, that the aircraft had an auxiliary fuel tank not installed in accordance with applicable law, that the person in charge failed to give correct registry information at the request of a customs officer or other federal government authority, that the vessel or aircraft displayed false identifying symbols or identification, that there were controlled substances on board not accompanied by the documentation required under the Single Convention on Narcotic Drugs or other international treaty, that there was a compartment or equipment on board built or fitted out for smuggling, or that the vessel did not stop when hailed by a customs officer or other governmental authority. 19 U.S.C. § 1590(g) (1988).
\bibitem{290} \textit{Id.} § 1509(f) (added by Pub. L. No. 99-570, 100 Stat. 3207, § 3401(d)).
\end{thebibliography}
With respect to enforcement procedures, the Customs Service is now authorized to obtain search warrants on expanded grounds,\textsuperscript{291} exchange information with foreign agencies,\textsuperscript{292} provide for stationing federal customs officers in other countries and foreign customs officials in the United States pursuant to international agreement,\textsuperscript{293} and conduct undercover investigative operations.\textsuperscript{294} Congress also provided that rewards of up to $100,000 are available for information concerning the killing or kidnaping of a federal drug law enforcement agent.\textsuperscript{295} This was a reaction to the murder of a Drug Enforcement Administration officer in Mexico, a crime which was not covered by federal legislation in force at the time. Thus, the 1986 statute confirmed United States jurisdiction in future cases of the same sort. Finally, the Customs Law was amended to make clear that substantial compensation may be paid to informers in connection with any customs law operation, including one directed at unlawful narcotics trafficking.\textsuperscript{296}


In the Anti-Drug Abuse Act of 1988,\textsuperscript{297} Congress addressed primarily administrative structural changes,\textsuperscript{298} but also expanded the penal provisions addressing drug trafficking and ancillary activities and strengthened collateral sanctions.

The sweep of controls over trafficking in chemicals has been expanded through various reporting requirements. Specifically, regulated persons\textsuperscript{299} engaging in regulated transactions involving a chemical listed in the federal Controlled Substances Act,\textsuperscript{300} tableting machines, or encapsulating machines, must maintain records relating to those transactions for specified periods,\textsuperscript{301} and must report promptly 1) regulated transactions involving extraordinary quantities of listed chemicals, uncommon methods of payment or delivery, or other circumstances a regulated person believes may indicate that a listed

\begin{itemize}
  \item \textsuperscript{292}  Id. § 1628 (added by Pub. L. No. 99-570, 100 Stat. 3207, § 3127).
  \item \textsuperscript{293}  Id. § 1629 (added by Pub. L. No. 99-570, 100 Stat. 3207, § 3128).
  \item \textsuperscript{294}  Pub. L. No. 99-570, 100 Stat. 3207, § 3131.
  \item \textsuperscript{295}  Id. §§ 1991-1992 (amending 21 U.S.C. § 881(e) (1988)).
  \item \textsuperscript{296}  Pub. L. No. 99-570, § 3125, 100 Stat. 3207 (amending 21 U.S.C. § 1619 (1988)).
  \item \textsuperscript{297}  Pub. L. No. 100-690, 102 Stat. 4181 (in effect from Nov. 18, 1988).
  \item \textsuperscript{298}  See supra notes 252-66 and accompanying text.
  \item \textsuperscript{299}  The "regulated person" means a person who manufactures, distributes, imports or exports a listed chemical (defined in 21 U.S.C.A. § 802(33) (West Supp. 1989 added by Pub. L. No. 100-690, § 6054, 102 Stat. 4181), a tableting machine or an encapsulating machine, \textit{id.} § 802(38).
  \item \textsuperscript{300}  19 U.S.C. §§ 801-866 (1988).
  \item \textsuperscript{301}  21 U.S.C.A. § 830(a) (West Supp. 1989) (added by Pub. L. No. 100-690, § 6052(a), 102 Stat. 4181). Confidentiality of the records is regulated through \textit{id.} § 830(c)(2), and improper disclosure subjects a regulated person to civil suit, \textit{id.} § 830(c)(4), but civil actions may not be brought against investigative or law enforcement personnel of the Drug Enforcement Agency, \textit{id.} § 830(c)(5).
\end{itemize}
chemical will be used in violation of the federal statute; 302 2) proposed regulated transactions with persons whose descriptions or other identifying characteristics the Attorney General has furnished in advance to the regulated person; 303 3) unusual or excessive losses or disappearances of listed chemicals under the control of the regulated person; 304 and, 4) regulated transactions in tableting and encapsulating machines. 305 Persons who act with the intent of evading the record-keeping requirements of the section are punishable by fine as determined generally according to the provisions of the federal criminal code, 306 imprisonment not to exceed ten years, or both. 307

In a new provision, 308 regulated persons 309 who import a listed chemical 310 are required to notify the Attorney General not less than fifteen days before any exportation or importation occurs pursuant to Department of Justice regulations. 311 If the Attorney General does not notify the regulated person to the contrary, the importation or exportation may occur, provided that the source or recipient, as the case may be, qualifies as a “regular customer” 312 or a “regular supplier.” 313 The Attorney General may bar the transaction with other than a regular customer or supplier, or disqualify the latter, on the ground that a chemical may be diverted to the clandestine manufacture

302. Id. § 830(b)(1).
303. Id. § 830(b)(2). The transaction cannot be completed unless the Attorney General approves it. Id.
304. Id. § 830(b)(3).
305. Id. § 830(b)(4). The Attorney General may disclose information otherwise exempted from disclosure under the federal Freedom of Information Act, 5 U.S.C. § 552(b) (1988), only (1) in connection with the enforcement of federal narcotics and customs laws, (2) when required to comply with United States obligations under a treaty or other international agreement, or (3) in conjunction with state or local law enforcement efforts directed at controlled substance or precursor chemical laws. 21 U.S.C.A. § 830(c)(1) (West Supp. 1989). The term “listed precursor chemical” is defined in id. § 802(34), while the term “listed essential chemical” is defined in id. § 802(35).
308. Id. § 971 (added by Pub. L. No. 100-690, § 6053, 102 Stat. 4181).
309. See supra note 299.
310. The term is defined in 21 U.S.C.A. § 802(33) (West Supp. 1989) to include listed precursor chemicals, as defined in id. § 802(34), and listed essential chemicals, as defined in id. § 802(35).
311. Id. § 971(a), (b)(1). The statute specifies the procedures to be followed in developing the regulations, Pub. L. No. 100-690, § 6052(b), 102 Stat. 4181, and regulated persons must provide regular reports covering their regulated customers and suppliers (see infra notes 312-13 and accompanying text) at specified intervals after the regulations become final, id. § 6052(b)(6).
312. The term, as defined in 21 U.S.C.A. § 802(36), refers to a customer with whom a regulated person has established a business relationship reported the Attorney General.
313. The term, as defined in id. § 802(37), refers to a supplier with whom a regulated person has an established business relationship reported to the Attorney General.
of a controlled substance. Those who fail to notify the Attorney General as required by regulation are subject to civil penalty and may be punished at the misdemeanor level for knowing and intentional violations. Persons who import or export a listed chemical with intent to manufacture a controlled substance in violation of title 21 or, in the case of an exportation, in violation of the law of the country to which the chemical is exported, or who know or have reason to know that either form of violation will occur, are convictable of a federal felony.

The new legislation added two new federal felonies as well. The first reaches those who, while illegally manufacturing or attempting to manufacture, or transporting or causing materials (including chemicals) to be transported for either purpose, create a substantial risk to human life. The second prohibits traveling from an American state or foreign country into any other American state, followed by acquisition, transfer or attempt to acquire or transfer a firearm in furtherance of a purpose to engage in conduct which violates the RICO statute or either federal or state controlled substances legislation, or which constitutes a crime of violence; contraventions constitute a serious felony.

In terms of basic penal philosophy, the 1988 legislation includes "sense of Congress" statements that proposals to combat the sale and use of illicit drugs by legalization should be rejected, and that consideration should be given only to proposals to attack directly the supply of and demand for such drugs, including proposals to strengthen and expand penalties for sale and use to encourage greater multinational cooperation in eradication and interdiction, and to promote educational programs for young people. With

314. Id. § 971(c)(1). A regulated person can request the Attorney General in writing to convene an expedited hearing concerning the disqualification. Id. § 971(c)(2). A transaction cannot be carried out from or after the time that the Attorney General provides a written notice of the order, including a statement of the legal and factual bases for it. Id. § 971(c)(1).
315. Id. § 961(1) (as amended by Pub. L. No. 100-690, § 6053(d), 102 Stat. 4181 (1988)).
316. Id. § 961(2).
317. Id. § 960(d) (added by Pub. L. No. 100-690, § 6053(c), 102 Stat. 4181). Punishment is a fine as determined according to 18 U.S.C. § 3571 (1988), imprisonment for not more than 10 years or both. 21 U.S.C.A. § 960(d).
318. Id. § 858 (added by Pub. L. No. 100-690, § 6301(a), 102 Stat. 4181). Punishment is a fine as determined according to 18 U.S.C. § 3571 (1988), imprisonment for not more than 10 years or both. 21 U.S.C.A. § 858.
319. 18 U.S.C.A. § 924(f) (West Supp. 1989) (added by Pub. L. No. 100-690, § 6211, 102 Stat. 4181 (1988)) (statute erroneously duplicated an existing subsection (f); this is the second of them). Persons who knowingly transfer firearms, knowing that they will be used to commit crimes of violence or controlled substances offenses as designated in id. § 924(f)(2) also commit a felony. Id. § 924(g).
320. Punishment for contraventions of either 18 U.S.C.A. § 924(f) or § 924(g) is a fine as determined according to id. § 3571, imprisonment for not more than 10 years or both. Id. § 924(f), (g).
322. Id. § 6201(2).
respect to penalties, the statute attempts to respond to its stated purpose through significantly increasing the sanctions for drug-related crimes.

The most notable aspect of this increase is the reintroduction in federal law of capital punishment in the context of the Controlled Substances Act. Under the new provision, persons who are engaging in or working in furtherance of a continuing criminal enterprise, or are committing specified major narcotics felonies, and who intentionally kill or stand in a specified accessorital relationship to the killer can be sentenced to death, life imprisonment, or imprisonment for a term of not less than twenty years. Similar penalties attach to those who, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for specified controlled substances felonies, intentionally kill or are accessories to the killing of a federal, state or local law enforcement officer while the latter is in the performance of official duties.

323. Because of the placement of the death penalty provision in Title 21, it has no applicability to the general body of federal crimes in Title 18; a separate provision would be necessary to reinstate capital punishment in that context, where no viable provisions currently exist. See, e.g., United States v. Harper, 729 F.2d 1216, 1224-16 (9th Cir. 1984) (death penalty provisions for espionage, 18 U.S.C. § 794(a) (1988), currently are inoperative because federal procedure provisions do not comport with eighth amendment requirements).


325. Defined in 21 U.S.C.A. § 848(e) (specified violations constituting part of a continuing series of controlled substances violations undertaken in concert with five or more others with respect to whom the convicted person occupies a position of organizer, a supervisory position or other position of management, and from which the convicted person obtains substantial income or resources).

326. The predicate offenses are found in id. §§ 841(b)(1)(A) (concerning traffic in narcotic drugs contained in schedule I or II), 960(b)(1) (specified import and export activities schedule I or II narcotic drugs). 21 U.S.C.A. § 848(e)(1)(A) (added by Pub. L. No. 100-690, § 7001(a)(2), 102 Stat. 4181).

327. The statutory language is “counsels, commands, induces, procures, or causes the intentional killing of an individual.” Id. This definition is probably too broad to satisfy United Supreme Court limitations on the applicability of capital punishment to accomplices. Compare Enmund v. Florida, 458 U.S. 782 (1982) (death penalty could not be assessed against accomplice who did not kill, attempt to kill or intend or contemplate that life would be taken; felony-murder accomplice was not present when victims were shot) with Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (accomplices may be sentenced to death based on “reckless disregard for human life in knowingly engaging in criminal activities known to carry a grave risk of death [which] represents a highly culpable mental state”).

328. 21 U.S.C.A. § 848(e)(1)(A). However, if a death penalty hearing is held and results in a jury determination not to impose that penalty, the court must then impose a sentence of life imprisonment without the possibility of parole. Id. § 848(g).


330. Defined as public servants authorized by law to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, including those engaged in corrections, probation and parole functions. 21 U.S.C.A. § 848 (e)(2).

331. Id. § 848(e)(1)(B).
The statute sets forth a number of aggravating and mitigating factors which the trier of fact must consider in a bifurcated death penalty hearing. Such a hearing can be convened only on the basis of a timely pretrial notice submitted by the government prosecutor. If a jury unanimously recommends the death penalty, following a formal hearing at which the government bears the burden of proving aggravating factors beyond a reasonable doubt and the defendant bears the burden of mitigating factors by a preponderance of the evidence, the court may accept that recommendation, but neither the jury nor the court is required to impose a death sentence. An expedited plenary appeal of right lies to the court of appeals competent to review determinations of the sentencing district court. Certain limitations are placed on classes of capital defendants who can be sentenced to death lawfully.

In addition to the death penalty, the statute provides for a mandatory life term for convicted felons who have committed designated felonies on three prior occasions. Moreover, penalties have been enhanced substantially for specified serious crack possession offenders. For those already serving time...
or who are out on parole or a release program, possession of controlled substances constitutes a basis for revocation of probation, parole, or supervised release.

The only significant reduction in penalties applies to mandatory minimum sentences for first offenders, such penalties no longer must be assessed for possession offenses involving five grams or less of marijuana.

In terms of ancillary penalties, public housing tenants can be evicted for drug-related or other criminal activity by a tenant, or a member of a tenant’s household, or a guest or other person under a tenant’s control occurring on or near the public housing premises in question, and federal benefits can be denied to persons convicted of federal or state offenses based on distribution or possession of controlled substances. Changes in forfeiture provisions are principally administrative in character, but a transfer of forfeited personal property or the proceeds from the sale of forfeited personal or real property can be authorized to a foreign country which participated directly or indirectly in the seizure or forfeiture of that property, and persons (other than offenders) holding ownership interests in vessels, vehicles or aircraft cannot lose those interests through forfeiture if the offense was committed without their knowledge, consent, or willful blindness.

IV. CONCLUSION

The United States and its component states devote substantial sums annually to crime prevention and control. If the results are not what one would determined according to 18 U.S.C. § 3571 (1988), imprisonment for not less than five nor more than 10 years, or both).

344. Id. §§ 4209(a), 4414(g) (as amended by Pub. L. No. 100-690, § 7303(c)).
345. Id. § 3583(d) (as amended by Pub. L. No. 100-690, § 7303(b). 102 Stat. 4181).
350. Id. § 853a(b). However, benefits relating to long-term drug treatment programs for addiction are not to be withheld for persons who submit to or have been rehabilitated in programs of that nature. Id. § 853a(a)(2), (b)(2). Periods of suspension of benefits also are to be suspended if the individual completes a supervised drug rehabilitation program after becoming ineligible for benefits, has otherwise become rehabilitated, or has made good faith efforts to gain admission to a supervised drug rehabilitation program but have been unable to do so because of inaccessibility or unavailability of such a program or the inability to pay for it. Id. § 853a(c).
351. Id. § 881(e)(E) (added by Pub. L. No. 100-690, § 6074, 102 Stat. 4181) (setting forth administrative prerequisites for such transfers).
forecast on the basis of expenditures for the nation's criminal justice system, much of the shortfall is the product of the United States Constitution, which creates a system of government of multiple jurisdictions. That structure, however, will not be altered in either concept or detail for the purpose of combatting crime.