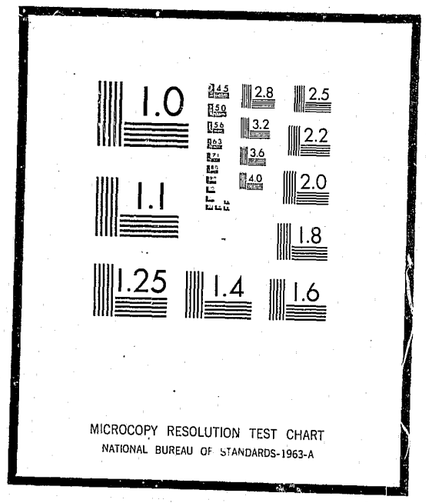

Organized Crime Control Legislation

January, 1975

The National Association of Attorneys General
Committee on the Office of Attorney General
A. F. Summer, Chairman

National Association of Attorneys General

Committee on the Office of Attorney General

ORGANIZED CRIME CONTROL LEGISLATION, JANUARY 1975

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January, 1975.

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PREFACE

The National Association of Attorneys General has a continuing interest in programs and legislation to control organized crime. In 1971, NAAG recommended that "in states which have an organized crime problem, the Attorney General should establish a special investigative and prosecutorial unit within his office to assist local offices or to act directly depending on conditions in that jurisdiction." Many Attorneys General have taken such action. Many have also taken leadership in working for the enactment of legislation to provide such prosecutorial tools as electronic surveillance, witness immunity and statewide grand juries for these units. This report examines some of these legislative approaches.

This report on Organized Crime Control Legislation is one of a series of studies by the Committee on the Office of Attorney General concerning state action to combat organized crime. The companion reports are Organized Crime Control Units and Organized Crime Prevention Councils. The three reports were first published in 1971 and have been updated periodically, to incorporate recent developments. Mr. Richard Kucharski, NAAG Organized Crime Control Coordinator, had primary responsibility for the 1974 revision of this report.

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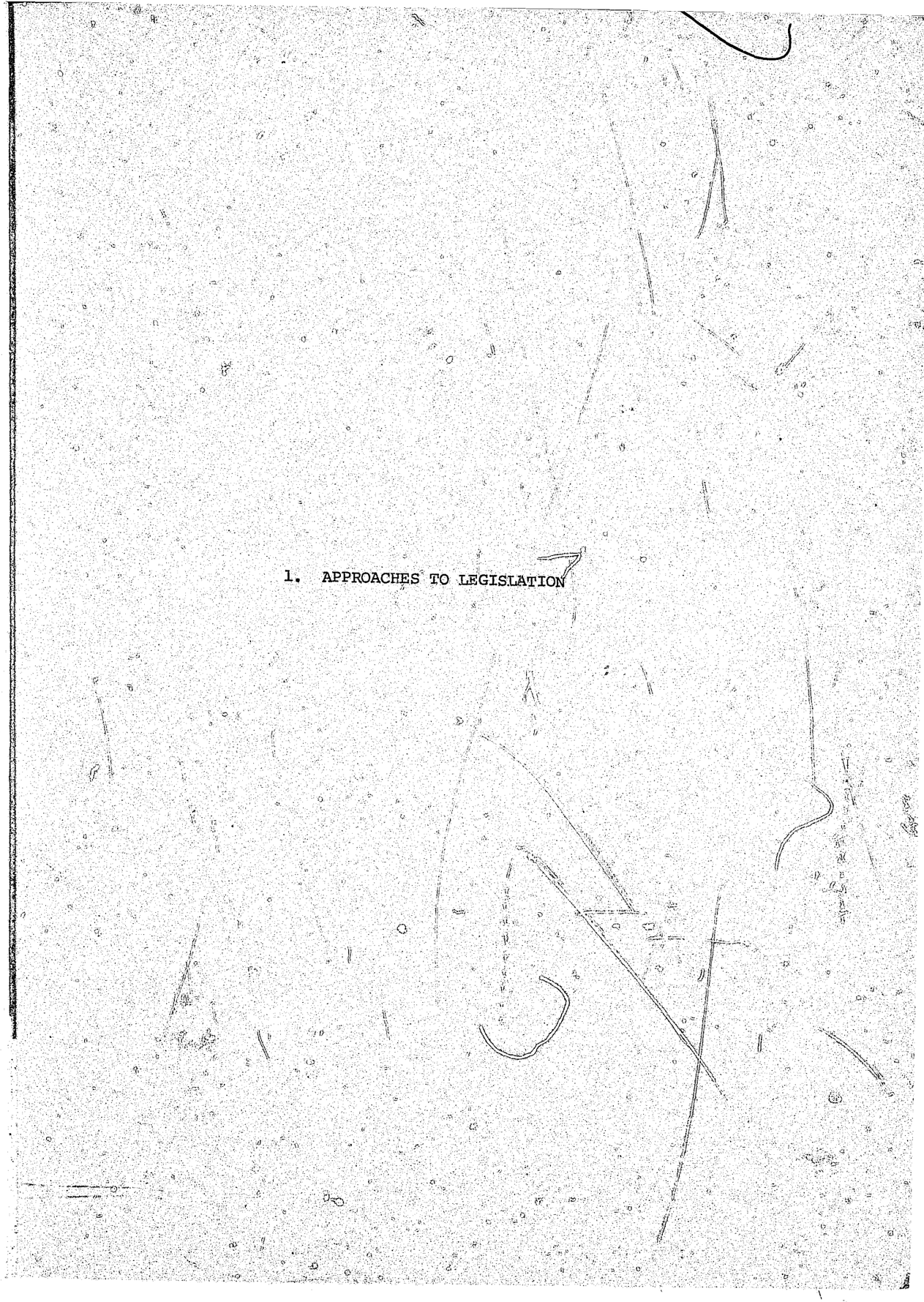

1. APPROACHES TO LEGISLATION

1. APPROACHES TO LEGISLATION

There is continued interest among the states in legislation to combat organized crime. State codes which have been developed to combat individual criminal activity may not be effective in combating syndicated or professional crime. The investigative and prosecutive approaches which have proved most successful in organized crime control may require special legislation. Traditional local law enforcement may prove inadequate to deal with organized crime, and new definitions of jurisdiction may be required. These and related reasons have generated interest in new legislative approaches.

The Organized Crime Control Act of 1970 gave federal authorities new laws concerning witness immunity, extended sentencing, actions against racketeer-infiltrated organizations, syndicated gambling, and protection of witnesses. The Omnibus Crime Control Act of 1968 had legalized court-authorized electronic surveillance. These laws have stimulated interest in laws to give state and local law enforcement and prosecutive officials comparable powers.

Recommendations adopted by the National Association of Attorneys General in 1971 included a statement that:

> Recent federal legislation has authorized wiretapping, witness immunity, civil actions against racketeer-operated businesses, etc. The constitutionality of such legislation is not firmly settled, but the Attorney General should assure that any similar state legislation conforms to existing constitutional law and allows his office supervisory authority, by requiring his approval of intercepts or immunity grants.[1]

To help provide information on which to base legislation, the Committee on the Office of Attorney General prepared a report on Organized Crime Control Legislation. This was issued in November, 1972. This report updates and expands that report.

A companion report, Organized Crime Control Units, discusses the organization and operation of intelligence and prosecution units.

Source of Data

Questionnaires were circulated to Attorneys General's offices in 1972 asking them to indicate the status of legislation on the subjects discussed herein, and to cite relevant case law. They were also asked to indicate whether such legislation was being or had been considered by the legislature, or was being drafted. Questionnaire responses were supplemented by searching the statutes. Court decisions, law review articles, and related materials were also reviewed.

A second questionnaire was circulated in 1973 and a third in 1974, asking for information on new legislation or case law. Additional information was obtained from Attorneys General's offices through correspondence and interviews. Relevant articles and reports have also been used.

Some errors or inconsistences may exist, because the statuory compilations available may not have always included the most recent enactments, or because indequate indexing may have resulted in a relevant statue not being identified. Hopefully, however, such omissions or inaccuracies are few, and the following chapters present an adequate analysis of state laws. It must be recognized, however, that most organized crime control laws are recent. There is usually not enough case law to evaluate their constitutionality or practical experience to evaluate their effectiveness. As in any emerging area of law, careful consideration must be given to the many problems involved.

Definition of Organized Crime

While the laws discussed in this Report may have been intended primarily for organized crime control, few are actually so limited. This lack of such limitation has drawn criticism, as in the following comment:

> The federal legislation enacted to deal with organized crime is somewhat of a sham because most of its provisions are not restricted to organized crime and the few that are do not adequately define the term organized crime. The application of these laws is left to the discretion is unfortunate because it is too easily subject to abuse which may be within the literal wording of a statue but not within its purported purposes.[2]

This definitional problem is exemplified by a recent U. S. district court decision concerning Title X of the Organized Crime Control Act of 1970.[3] This title contains special sentencing provisions for dangerous special offenders. Before a defendant can be sentenced under these provisions, he must be considered to be "dangerous". A defendant is considered to be dangerous only "if a period of confinement longer than that provided for [his] felony is required for the protection of the public from further criminal conduct by the defendant".[4] The court reviewed this statute in light of the defendant's constitutional attack on vagueness grounds and found the statute unconstitutional. The court argued that the statute "has ended up as a statute of general application to all persons convicted of any federal offense".

There are severe difficulties in attempting to limit laws to organized crime. Then Assistant Attorney General Will Wilson noted that: "legislation may be shaped so that it will tend to affect large organized, syndicated criminal activities, or, in the alternative, so that it will be sure to apply evenly to all criminal activities". The first approach is difficult, because, "As a threshold consideration":

> ...some judicially manageable standard or criteria upon which to make the segregation must be shaped. For most purposes the term "organized crime" has no precise legal configuration, although some specific attributes of syndicated criminal operations can be accurately defined. Also there must be some reasonable and rational justification for segregation (in terms of the resulting difference in treatment to be applied). The point has not yet been reached where there can be any justification for different treatment when the question is the availability of constitutionally guaranteed rights.[5]

For these reasons, most of the state and federal laws make no attempt to apply such segregation.

These problems of definition were reflected in a 1939 Supreme Court decision. An early legislative attempt to define organized criminal activity in a criminal statute was declared unconstitutionally vague and uncertain by the Court in Lanzetta v. New Jersey[6]. The statute in question made it a criminal offense to be a "gangster", defined as:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State...[7]

Lanzetta stands for the proposition that:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State condemns or forbids.[8]

The Federal Organized Crime Control Act of 1970, in its "Statement of Findings and Purpose", declares that its aim is "to seek the eradication of organized crime...by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime".[9] The term "organized crime" is not defined in the forty-page act, except that its activities are described in the preliminary statement noted above. Title I, which provides for a Special Grand Jury, says that such a jury may submit reports "regarding organized crime conditions" and concerning non-criminal conduct of appointed officials "involving organized criminal activity." Title V authorizes protection of witnesses in proceedings

against any person alleged to have participated in organized criminal activity." These terms are not defined.

The federal Omnibus Crime Control and Safe Streets Act of 1968 defines organized crime as:

> The unlawful activities of members of a highly organized, disciplined association engaged in supplying illegal goods and services, included but not limited to gambling, prostitution, loansharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.[10]

This statement is found in the Definitions Section of Title I, which establishes the Law Enforcement Assistance Agency; thus, it is not applied to matters of criminal procedure.

Few states have statutory definitions of organized crime, or attempt to limit the application of laws to that kind of crime. There are some exceptions. For example, the Model Law drafted by the Committee on Suggested State Legislation concerning the infiltration of legitimate business by organized crime defines organized crime as:

> any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood, or to violate, aid or abet the violation of criminal laws relating to prostitution, gambling, loansharking, drug abuse, illegal drug distribution, counterfeiting, extortion, corruption of law enforcement officers or other public officers or employees.[11]

This sets three requirements: that several people work together; that a significant amount of money is involved; and that specified laws are violated. Several states have adopted this definition, but its constitutionality has not been tested.

The revised Ohio code established the felony offense of engaging in organized crime. This statute defines a criminal syndicate in much the same terms as the Model Law. In essence, a criminal syndicate is defined as a combination of five or more persons collaborating to engage in extortion, prostitution, theft, gambling, illegal traffic in drugs, liquor or weapons, or any other offense for profit. The shifting membership of a syndicate does not affect its legal status since the statute provides that "[a] criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time."[12]

These problems of definition and application should be kept in mind when considering or drafting legislation.

Federal Committees to Study Organized Crime

Most federal organized crime control legislation, and some model state laws, have resulted from the work of special study committees. The Wickersham Commission, appointed by the President in 1929, made numerous recommendations. In 1965, the President's Commission on Law Enforcement and Administration of Justice was created. It issued a comprehensive report in 1968 which embodied the findings and recommendations of separate Task Forces as well as of the Commission.[13] The Task Force made twenty-two recommendations concerning organized crime. These included legislation to: clarify wiretapping laws; provide extended sentences for organized crime leaders; establish federal facilities to protect witnesses; impanel annual investigative grand juries; enact general witness immunity statutes; and extend the prosecutor's right to appeal.[14] In 1969 and 1970, Congress enacted legislation to implement these recommendations.

Congress has also been active in studying organized crime. The first major emphasis on the federal level resulted from a Conference on Organized Crime called by the U.S. Attorney General in 1950, which made some recommendations and stressed the need for study. A Senate Select Committee to Investigate Organized Crime in Interstate Commerce, chaired by Senator Estes Kefauver, was established in 1951. It held hearings across the nation and took testimony from about eight hundred witnesses. Some legislation resulted, including anti-gambling laws, and public interest in the problem was intensified.

The American Bar Association, as a result of the Kefauver Committee's work, formed a special committee which formulated recommendations for organized crime control. In more recent years, the Senate Select Committee on Improper Activities in the Labor and Management Field, chaired by Senator John McClellan, held hearings on the infiltration of labor and business by organized crime. Senator McClellan later chaired the Special Subcommittee on Criminal Laws and Procedures, which developed the Organized Crime Control Act of 1970.

State Organized Crime Prevention Councils and Study Commission

Some states have established special committees or commissions to study organized crime and to recommend legislation to meet the problems that it identifies. A recent C.O.A.G. report discusses organized crime prevention councils. Twenty states have established such councils, although three states discontinued them. Six additional states were considering such councils at the time of the report.[15] Other states have created legislative study committees for this purpose. This approach permits development of a comprehensive package of proposals, to meet the particular state's problems. It also helps develop the requisite public support.

New Jersey was one of the first states to create such a group. In 1968 the legislature established a special committee, chaired by Senator Edwin B. Forsythe, to study crime. Its recommendations included legislation to authorize evesdropping, provide general witness immunity, increase penalties for large-scale gambling, attack loansharking, and authorize state-wide investigatory grand juries.[16] Many of these became law.

The Pennsylvania Crime Commission was created by Executive Order in 1967 and given a statutory basis in 1969. Its report was issued in 1970, with recommendations for legislation, because:

> The penal code of Pennsylvania, which has undergone no major revision in over a hundred years, fails in many ways to cope with present conditions. Emphasizing individual crimes, it does not adequately deal with the ongoing corporate or organized crime. Crime syndicates cannot be outlawed or punished per se, since they cannot be defined with sufficient exactness, but the substantive prohibitions of our penal law can be better molded to encompass their schemes and activities.[17]

The Commission recommended new substantive laws to: outlaw the infiltration of legitimate business by organized crime; prohibit loansharking; prohibit major gambling business; set mandatory minimum sentences; and provide for appellate review of sentencing. It recommended procedural reforms to provide for: investigative grand juries; "use" immunity for witnesses; more simple proof of perjury; and electronic surveillance.

The 1971 Colorado legislature created a Committee on Criminal Justice to study organized crime and other subjects. The Committee concluded that two major thrusts were necessary to combat such crime: first, an effort to increase public awareness of the problem; second, legislation to assist law enforcement agencies in combating it. The Committee submitted bill drafts to broaden wiretapping authority, provide felony penalties for loansharking, and provide special sentences for organized criminals.[18]

Virginia's General Assembly created a State Crime Commission in 1966 to study matters relating to crime and its prevention. The 1970 legislature instructed it to report on organized crime activities in the state and a Task Force was created. Fourteen of the Task Force's recommendations required legislation. These included: authority for electronic surveillance; allowing the Attorney General to initiate criminal prosecutions concerning official corruption; appropriating funds to pay informers and purchase contraband; making professional gambling a felony; broadening the conspiracy law; enacting general witness immunity; and providing joinder of actions involving multiple defendants or offenses.[19] The Crime Commission itself supported these recommendations.[20] Witness immunity and wiretapping bills were introduced in the 1972 legislature but were not enacted; the wiretapping bill, however, was enacted in 1973. In 1973, New

Mexico created by statute a Governor's Organized Crime Prevention Commission, to evaluate organized crime activities. The Commission was empowered to petition a district court to subpoena witnesses, to require the production of records, and to grant immunity to witnesses.[21]

Other states have had similar study groups. In general, this has proved an effective method of preparing legislative proposals and informing the public of the need for their enactment.

Approaches to Legislation

Some states have enacted a single statute, such as authority for electronic surveillance, to combat organized crime. In others, a "package" of legislation has been developed to provide a broader array of tools. Former Attorney General Richard J. Israel of Rhode Island has suggested an essential package of tools for investigating organized crime cases. At a NAAG seminar he said that:

> Many investigative tools are essential to [an organized crime investigation] unit. Most important are: witness immunity; plea bargaining; wiretap and bugging; statewide investigative jurisdiction; and the statewide grand jury.[22]

The 1970 federal Organized Crime Control Act is an example of the comprehensive approach. The New York Times termed it "a nuts-and-bolts operation, in which Congress had toughened up obscure corners of the law over sincere but dramatic objections."[23] The American Bar Association's Board of Governors approved the bill's provisions "in principle", but recommended amendments, many of which were adopted.[24] The Act contains provisions which: authorize special grand juries; limit the immunity of witnesses; allow the court to imprison a recalcitrant witness for up to eighteen months; revise perjury laws; provide protected facilities for witnesses in organized crime cases; prohibit syndicated gambling; proscribe the investment of organized crime profits in business; provide extended sentences for "dangerous special offenders"; and make bombing a federal offense. Most provisions of the federal Organized Crime Control Act are discussed in this report. Others are not, although the states might wish to consider comparable legislation. The section providing imprisonment for recalcitrant witnesses has been used widely, as has that providing for appeal by the prosecution.[25]

The Congress had previously enacted an electronic surveillance law as Title III of the 1968 Omnibus Crime Control and Safe Streets Act. Numerous other statutes, of course, have been used in the prosecution of organized crime figures.

During 1975, Congress will be considering the Criminal Justice Codification, Revision, and Reform Act.[26] This Act essentially establishes a federal criminal code. The existing substantive and procedural statutes available for prosecuting organized criminal activities will be carried over into the new Act with some modification. A new law will be added which makes "operating a racketeering syndicate" a crime. The statute

will apply to any group of five or more persons who engage on a continuing basis in any of the enumerated racketeering activities other than illegal gambling or prostitution. This is similar to the new Ohio statute.[27]

Few states have been equally successful in securing a broad array of legislative tools in a single session. Most states that have all or most of the organized crime control statutes described in this report have enacted them over a period of years. The then-Attorney General of New Jersey reported to a 1969 NAAG Conference that New Jersey had a uniform crime reporting system, a weapons control law, mandatory police training, a witness immunity statute, a statewide investigative grand jury, and an electronic surveillance law. He noted, however, that "ours has been a long and difficult struggle to put together the semblance of a workable and effective program".[28] It was not until a new administration, with a strong legislative majority, took office in 1970 that laws were passed giving the Attorney General some authority over local prosecutors and creating a criminal justice division.

An Attorney General may be able to obtain passage of an organized crime legislative package in a single session. In 1969, Wisconsin enacted an omnibus crime control bill. It authorized the Department of Justice to investigate crime "which is state-wide in nature, importance or influence"[29] and to enforce specific statutes. Operators of coin-operated machines and cigarette distributors were required to obtain permits, which were restricted to persons of good character. Loansharking was prohibited and commercial gambling made a felony. The bill contained various other provisions concerning crime.

This experience, however, is not typical. Usually, only a few of the proposed bills are passed, and the rest are defeated or die in committee. They may be resubmitted in subsequent sessions and finally be enacted, or they may continue to fail. For example, the Attorney General of Maine backed legislation concerning witness immunity, full-time prosecutors and electronic surveillance. The 1968 legislature passed the immunity bill, but not the other measures. They were resubmitted, but still have not been enacted. In Georgia, the 1971 and 1972 legislatures passed a law authorizing electronic surveillance, but defeated bills relating to witness immunity, loansharking, and uniform crime reporting. Colorado's Legislative Council Committee on Criminal Justice recommended measures to the 1972 legislature to revise the wiretap law and prohibit loansharking; these were enacted, but a bill relating to special sentencing of dangerous offenders was postponed indefinitely. The 1971 legislature had authorized statewide investigative grand juries and amended laws concerning official corruption.

The 1971 Connecticut legislature authorized electronic surveillance and prohibited the infiltration of legitimate business by organized crime. The 1969 Legislature had enacted laws concerning witness immunity, official corruption and extended sentencing. In Iowa, on the other hand, the 1972 General Assembly considered bills prohibiting the infiltration of legitimate business and authorizing investigative grand juries, but defeated these measures. A previous legislature had passed an electronic surveillance law, but the Governor vetoed it.

Michigan's Organized Crime Division of the Attorney General's Office developed a comprehensive legislative package in 1971. This included measures to: authorize wiretapping; prohibit the infiltration of legitimate business; provide for special sentencing of dangerous offenders; revise the law on perjury; create a permanent state investigatory commission; and amend the corruption laws. None of these proposals have yet become law, although some have been incorporated into the revised criminal code, which is, for the most part, still pending. A new usury statute was passed in 1968, after many years of effort.[30]

Hawaii's 1973 legislature enacted a gambling law, which made certain gambling activities a felony. It defeated two bills relating to witness immunity, one of which was sponsored by the Attorney General.[31]

The Attorney General of Louisiana sponsored a wide-ranging package of legislation relating to organized crime in 1972 legislature. About half of these measures were enacted, including legislation to: give the Attorney General subpoena power; authorize the Attorney General to receive information from the bureau of investigation; give the Attorney General access to grand juries; enact a general witness immunity statute; and to provide certain information about grand jury proceedings to the Attorney General. Measures that failed of enactment included legislation to: control loansharking; give the Attorney General access to Department of Revenue records; control electronic surveillance; and to authorize the convening of special grand juries.[32]

Missouri's 1973 General Assembly enacted a statute which made it a felony for two or more persons to conspire to commit the crime of murder, rape, arson or robbery; previously, all conspiracies were misdemeanor offenses. Efforts by the Attorney Generals office to obtain a use immunity law, make prostitution a state crime, and to establish a state bureau of investigation were unsuccessful.[33]

In Massachusetts, only one of eight bills relating to crime which were sponsored by the Attorney General was enacted. That bill eliminated from certain probation reports any reference to criminal proceedings that were nol-prossed or had been continued for over a year. The other measures would have, among other things, imposed a 50 percent tax on income from certain illegal sources, empowered the Attorney General and district attorneys to subpoena certain corporate records, and made changes in the wiretap laws to conform to federal law.

The experience of most states suggests that continuing effort may be necessary to obtain these legal tools. It also suggests, however, that a state may have an effective organized crime control effort without enacting all of the types of legislation discussed here; no state has a complete "package", comparable to the federal laws, yet many states are making measurable inroads against the problems of organized crime. The lack of legislation need not prevent a state from developing strategies and programs to combat these problems.

Other Legislative Approaches

There are many legislative approaches to organized crime control in addition to those discussed herein. Some involve new legislation, while others involve the application of existing laws to organized crime.

Some states are using antitrust laws to combat organized crime.[34] A 1974 COAG report discussed state antitrust laws and their enforcement. It noted that antitrust laws are substantially similar, because they are a codification of common law principles, and exist in most states. The report noted also that these laws have not been enforced in most states and that only in the past few years has there been any substantial antitrust activity at the state level.

Part of the recent interest in antitrust laws is due to their utility in organized crime control. In Illinois, for example, a new antitrust law was enacted in 1965, and the Attorney General is using it to combat organized crime.[35] Iowa has received an L.E.A.A. grant for organized crime control for the primary purpose of attacking purchasing and related problems.[36] Wisconsin has initiated a similar program.

Minnesota's 1971 antitrust law, while it is not specifically aimed at organized crime, is an example of a statute that could be used for this prupose. It prohibits "a contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce." Among practices declared unlawful are price fixing, production control, allocation of markets, collusive bidding, and concerted refusals to deal. Both civil and criminal penalties are provided. The Attorney General is authorized to investigate any alleged violation of the law, and may institute on behalf of the state, or any of its agencies or subdivisions, a court action seeking appropriate relief.

There is renewed legislative interest in state antitrust laws. New Hampshire enacted a new state antitrust law in 1973, that became effective on August 29. It gives the Attorney General subpoena power in investigations concerning violations of state antitrust laws.[38] At the request of Wisconsin's Attorney General, three bills were introduced in the 1973 session that would have increased penalties in antitrust cases and clarified the treble damage remedy. They would also have created a six-year statute of limitations in antitrust prosecutions.

Another area of great relevance to organized crime control is corruption. COAG published a report in 1974 entitled Legislative Approaches to Campaign Finance, Open Meetings and Conflict of Interest, which discusses legislation in the corruption area. Some Attorneys General's offices report efforts to strengthen such laws.

Legislation was introduced at Rhode Island's 1973 session that would have made bribery of a public servant a felony, rather than a misdemeanor as at present. It would also have made the giving or taking of grant, the criminal threatening of a public servant or state's witness or informer, the abuse of personnel authority, the non-disclosure of a retainer to

influence government action and the engaging in conflicts of interest by public servants all felonies, punishable by substantial prison terms and heavy fines. Under existing laws, these offenses are not crimes. This legislation was not reported out of committee.

Commissions to Review Legislation

Many of the legislative approaches to organized crime control are new and, therefore, may involve uncertainties as to their effect on individuals and as to their efficiency in curbing crime. For this reason, states might consider providing for review of actions under the kinds of laws discussed herein.

Title III of the Organized Crime Control and Safe Streets Act of 1968 authorized electronic surveillance under certain conditions and also established the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance.[39] The Commission was empowered to conduct a comprehensive study and review during the six year period following its enactment to determine the law's effectiveness.

The section establishing this Commission was repealed in 1970 by the Organized Crime Control Act. Title XII of that Act established the National Commission on Individual Rights to review federal laws relating to special grand juries, special offender sentencing, wiretapping and electronic surveillance, bail reform and preventive detention, no-knock search warrants, and the accumulation of data on individuals by federal agencies.[40] The law directed that: "the Commission shall determine which laws and practices are effective, and whether they infringe upon the individual rights of the people of the United States."[41]

In late 1970, Congress was considering amendments to the Omnibus Crime Control and Safe Streets Act of 1968. The Senate version of the amendment carried a provision, not included in the House bill, to re-enact the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance which was repealed in 1970. The Senate amendment also amended the 1968 provision by conferring subpoena power on the Commission and defining it as an "agency" so as to have authority to grant immunity to witnesses pursuant to 18 U.S.C. sec. 6001 (1970).[42] On January 2, 1971, the Congress enacted the Senate amendment re-establishing the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance.[43] The Commission may make such interim reports as it deems advisable and a final report within two years after the formation date of June 19, 1973. Legislation has passed Congress which would extend the life of the Commission, but the President has yet to sign the bill.

The National Commission includes members appointed by the President, the Senate, and the Speaker of the House. On December 7, the President appointed the Chairman and six members. Four Senators and four Representatives were subsequently appointed.[44]

Investigative and Prosecution Capability

Legislation is of little effect unless there is adequate intelligence capability to show when and where it should be used, and adequate prosecutive capability to ensure its effective enforcement. The National Association of Attorneys General has recommended that:

> In states which have an organized crime problem, the Attorney General should establish a special investigative and prosecutorial unit within his office to assist local offices or to act directly depending on conditions in that jurisdiction.[45]

The NAAG points out that successful action to control organized crime requires specialized investigative, legal and accounting skills. These, in turn, require special staff and even special equipment. Funds must be appropriated to make this possible if legislation is to be effective.

It should also be noted that passage of legislation does not always have immediate results. The nature of organized crime, unlike street crime, requires that extensive investigation and planning precede prosecution. Long-range planning is required to select targets and acquire sufficient evidence for successful action. This may require a commitment of personnel and funds, without a showing of results, for a considerable period of time.

A companion COAG report, Organized Crime Control Units, analyzes the organization and function of state units for the investigation and prosecution of organized crime.

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27. Supra, note 12.

28. Attorney General Arthur Sills, "New Jersey's Approach to the Problems of Organized Crime, Remarks to a NAAG Workshop, Woodbridge, New Jersey, November 10, 1969.

29. WISC. STAT. 165.70 (1) (b).

30. Telephone interview with Vincent W. Piersante, Chief, Organized Crime Division, December 12, 1974.

31. Letter from Deputy Attorney General S. Raymond Okuma, State of Hawaii to Patton G. Wheeler, July 16, 1973.

32. Letter from William B. Fause, III, Organized Crime Unit, Louisiana Department of Justice, to Patton G. Wheeler, August 6, 1973.

33. Letter from Assistant Attorney General Mark D. Mittleman, Missouri, to Patton G. Wheeler, August 10, 1973.

34. Committee on the Office of Attorney General, National Association of Attorneys General, STATE ANTITRUST LAWS AND THEIR ENFORCEMENT (1974).

35. Robert Atkins, The Illinois Attorney General's Role in Consumer Protection XV THE ANTITRUST BULLETIN 367 (1970).

36. Interview with Solicitor General Richard E. Haesemeyer, Des Moines, Iowa, May 12, 1972.

37. MINN. STAT. sec. 325.8011 - 8028 (1971).

38. N. H. REV. STAT. ANN. 356:4 - a et seq.

39. Pub. L. 90-351, 82 Stat. 197, 90th Congress, Title III, Sec. 804 (1968).

40. Pub. L. 91-452, 84 Stat. 960, Title XII secs. 1201-1211 (1970).

41. Id. at sec. 1204.

42. 1970 U. S. Code. Cong. and Adm. News. p. 5849.

43. Pub. L. 91-644, 84 Stat. 1892, Title VI sec. 20 (1971).

44. Members appointed to date are: William H. Erickson, Chairman; Richard R. Anderson; G. Robert Blakey; Samuel B. Pierce; Frank J. Remington; Lawrence P. Shientag; Allen F. Westin; Senator John L. McClellan; Senator James Abourezk; Senator Roman L. Hruska; Senator Robert E. Taft, Jr.; Rep. Robert W. Kastenmier; Rep. Don Edwards; Rep. Thomas F. Railsback; and Rep. Sam Steiger.

45. National Association of Attorneys General, supra note 1.

2. POWERS IN PROSECUTION

2. POWERS IN PROSECUTIONS

An Attorney General's ability to combat organized crime is defined not only by statutes directed specifically toward this purpose, but by his general powers in prosecutions. Statutory authority to eavesdrop or to immunize witnesses may facilitate preparation of a case, but is of little value if the Attorney General can't prosecute the case. Organized crime control laws must be considered within the broader context of Attorneys General's authority to initiate or to intervene in prosecutions.

Authority to Initiate or Intervene in Local Prosecutions.

In 1974 COAG published a report concerning The Prosecution Function: Local Prosecutors and the Attorney General. This report contains a detailed analysis of the Attorney General's power to initiate or intervene in local prosecutions. It also contains an analysis of the relationship between prosecutors and Attorneys General.

The accompanying tables are taken from that Report. They have been updated where possible, but there may be some additional changes in laws that are not included. The diversity of powers is illustrated by the difference between Rhode Island, where the Attorney General is responsible for all prosecutions, and the neighboring state of Connecticut, where the Attorney General has no criminal jurisdiction. Under a new constitutional provision in South Carolina, the Attorney General has been designated as the Chief Prosecuting Officer of the state.

Most Attorneys General may initiate local prosecutions in at least some circumstances. Only seven states report that the Attorney General may not initiate prosecutions under any circumstances. In three states and three territories, there are no county or district attorneys, and the Attorney General handles all or most prosecutions. In the remaining states, the Attorney General's authority ranges from power to initiate prosecutions at his discretion, or when he considers it to be in the best interest of the state, to power to so act only on the request or direction of another officer. These powers may be limited to prosecutions under specific statutes.

The Attorneys General's authority to assist, intervene or supersede in cases initiated by the local prosecutor is equally diverse. As Table 2 shows, a dozen states, in addition to the six with no local prosecutors, gives the Attorney General authority to intervene or supersede when he considers it proper. In several states, he may intervene on his own initiative, but it is not settled whether he can supersede. In a substantial number of states he can intervene, or can both intervene and supersede, only at the direction of the Governor, legislature, or the local prosecutor. Other states limit this to cases involving certain statutes.

All available data indicate that Attorneys General initiate or intervene in local prosecutions very infrequently, even when they have the power so to do. This may be due to various factors, including: a reluctance to interfere in local situations; budget and staff limitations; and political considerations.

TABLE 1. MAY THE ATTORNEY GENERAL INITIATE LOCAL PROSECUTIONS?

Alabama	Yes—On own initiative.
Alaska	Yes—(No local prosecutor).
Arizona	Yes—Only on request of Governor.
Arkansas	Yes—Only under certain statutes, on own initiative.
California	Yes—On own initiative.
Colorado	Yes—Only on request of Governor.
Connecticut	No—A.G. has no jurisdiction in criminal matters.
Delaware	Yes—(No local prosecutor).
Florida	No—But A.G. may initiate quo warranto proceedings
Georgia	Yes—On own initiative or at direction of Governor.
Guam	Yes—(No local prosecutor).
Hawaii	Yes—On own initiative or at direction or request of Governor.
Idaho	No.
Illinois	No.
Indiana	No.
Iowa	Yes—On own initiative.
Kansas	Yes—Only under certain statutes.
Kentucky	Yes—Under some statutes for specific crimes.
Louisiana	Yes—In criminal cases, when the interests of the state requires.
Maine	Yes—On own initiative.
Maryland	Yes—On request of Governor or Legislature.
Massachusetts	Yes.
Michigan	Yes—May initiate and conduct criminal proceedings.
Minnesota	Yes—At request of Governor; assists county attorney on request.
Mississippi	Yes—When required by public service or directed by Governor.
Missouri	No—Except in offenses against morals.
Montana	No.
Nebraska	Yes—Has concurrent power with county attorney.
Nevada	Yes—On own initiative; at request of Governor, (but only through grand jury proceedings).
New Hampshire	Yes—On own initiative; direction of Governor, Legislature, or local prosecutors.
New Jersey	Yes—When interest of state requires it.
New Mexico	Yes—Only under certain statutes.
New York	Yes—Under certain statutes on own initiative; at request of Governor, to supersede a district attorney in specified cases; at request of state agency in matters within its jurisdiction.
North Carolina	Yes—Only for violations of monopolies and trust laws.
North Dakota	Yes—On own initiative, or request of County Board, 25 citizens, doctor, judge.
Ohio	Yes—On request of Governor.
Oklahoma	Yes—On request of Governor or either branch of Legislature.
Oregon	Yes—Only on request of Governor, except for concurrent jurisdiction with district attorneys for election law violations.
Pennsylvania	Yes—Under certain circumstances.
Puerto Rico	Yes.
Rhode Island	Yes—(No local prosecutor).
Samoa	Yes—(No local prosecutor).
South Carolina	Yes—On own initiative.
South Dakota	Yes—On own initiative.
Tennessee	No—(but Governor may appoint extra counsel at district attorney's request).
Texas	Yes—For election fraud, labor union crimes, misuse of state funds
Utah	Yes—On default of local prosecutor.
Vermont	Yes.
Virgin Islands	Yes—(No local prosecutor).
Virginia	Yes—Under certain statutes.
Washington	Yes—On lobbying law, or when prosecuting attorney fails to take proper action; also for certain acts of city or state officers in connection with public funds.
West Virginia	No—But Attorney General may replace Prosecuting Attorney if he refuses to prosecute.
Wisconsin	Yes—On request of Governor or local prosecutor, and on own initiative in environmental and consumer protection matters and certain other specified areas.
Wyoming	Yes—If the county and prosecuting attorney refuses to act in any case, the Board of County Commissioners, the District Judge, or any State Agency may request the Attorney General to initiate the local prosecution. Local prosecutions may also be initiated upon the request of the Governor.

TABLE 2. ATTORNEY GENERAL'S POWERS IN PROCEEDINGS INITIATED BY THE LOCAL PROSECUTOR.

Alaska	(No local prosecutors).
Arizona	May assist on request of local prosecutor.
Arkansas	May act jointly with local prosecutor under certain statutes.
California	May intervene, supersede or assist on own initiative.
Colorado	May intervene or request of Governor or legislature. May assist on request of local prosecutor with direction of Governor.
Connecticut	No jurisdiction in criminal matters.
Delaware	(No local prosecutors).
Florida	May intervene upon request of local prosecutor, at direction of Governor or legislature.
Georgia	May intervene or assist at direction of Governor.
Guam	(No local prosecutors).
Hawaii	May intervene or assist on own initiative or at direction or request of Governor.
Idaho	May assist upon request of local prosecutor; may not intervene or supersede; may be appointed as special prosecutor when local prosecutor cannot act.
Illinois	May intervene in any prosecution if state's interest requires it.
Indiana	May assist in criminal cases upon request of local prosecutor.
Iowa	May intervene on own initiative; may supersede on direction of Governor, legislature, or either house thereof. May assist on request of local prosecutor.
Kansas	May intervene on direction of Governor or either branch of the legislature. May institute action, supersede, or intervene on own initiative on behalf of any political subdivision in action for conspiracy, combination or agreement in restraint of trade, or other illegal acts.
Kentucky	May intervene on request of Governor, courts or grand juries, sheriff, mayor, or majority of a city legislative body.
Louisiana	May intervene, may not supersede.
Maine	May intervene, supersede or assist on his own initiative.
Maryland	May assist on request of local prosecutor or at the direction of the Governor.
Massachusetts	May intervene, supersede or assist on his own initiative. May initiate proceedings independent of local prosecutor.
Michigan	May intervene or initiate on own initiative or at direction of Governor or legislature; will assume jurisdiction when requested by prosecuting attorney.
Minnesota	May intervene or assist at direction of Governor or local prosecutor.
Mississippi	May intervene or assist at direction of Governor or when required by the public service.
Missouri	May intervene or supersede at the direction of the Governor; may assist local prosecutor.
Montana	May intervene or supersede on own initiative or at the direction or request of the local prosecutor.
Nebraska	May intervene, assist or supersede.
Nevada	May intervene, supersede or assist on own initiative or on request of Governor or local prosecutor.
New Hampshire	May intervene, supersede or assist on own initiative, or on direction of Governor or legislature. Has full responsibility for criminal cases punishable with death or imprisonment for 25 years or more.
New Jersey	When, in his opinion, the interests of the state will be furthered by so doing.
New Mexico	May intervene or assist on direction of Governor.
New York	May intervene or supersede at direction of Governor.
North Carolina	No statutes or case law in point.
North Dakota	May intervene, supersede or assist on own initiative; on request of majority of board of county commissioners; on petition of twenty-five taxpaying citizens; on written demand of district judges.
Ohio	May appear for state in all cases in which the state is directly or indirectly interested. May appear in any court on direction of Governor or legislature.
Oklahoma	May appear in any case at direction of Governor or legislature and may, at his discretion, supersede. May assist at request of local prosecutor.

TABLE 2. ATTORNEY GENERAL'S POWERS IN PROCEEDINGS INITIATED BY THE LOCAL PROSECUTOR. (cont'd.)

Oregon	May intervene. Attorney General is charged with responsibility of supervising all District Attorneys; however, may only intervene in particular prosecution when directed by Governor or requested by district attorney.
Pennsylvania	May assist. May supersede on own initiative or at request of local judge.
Puerto Rico	May intervene on own initiative.
Rhode Island	(No local prosecutors).
Samoa	(No local prosecutors).
South Carolina	May intervene or supersede in any case where state is a party.
South Dakota	May intervene or assist in any case where the state has an interest on own initiative or on request of Governor or legislature. May not supersede.
Tennessee	May not intervene, supersede or assist, expect that additional counsel may be appointed by the Governor upon request of the District Attorney.
Texas	May assist in or initiate some cases. May not intervene or supersede.
Utah	May intervene when required by the public interest or directed by the Governor.
Vermont	May assist, intervene or supersede on own initiative.
Virgin Islands	Full power, except for felonies, which are handled by U. S. Attorney.
Virginia	May intervene at request of Governor, or on own initiative in cases involving ABC laws, Motor Vehicle Laws and the handling of state funds.
Washington	May intervene on own initiative when the interests of the state require it.
West Virginia	May intervene or supersede on request of Governor. Apparently, assistance is limited to instances where local prosecutor is disqualified.
Wisconsin	May not intervene on own initiative. May assist at request of District Attorney and intervene otherwise at the direction of the Governor.
Wyoming	May intervene or supersede upon failure of local prosecutor to act.

The National Association of Attorneys General has recommended that the state Attorney General should be empowered to intervene or supersede in local prosecutions and to initiate local prosecutions when he considers it in the best interests of the state. It contends that:

> At common law, the Attorney General had full authority over local prosecutions. The office of county or district attorney represented a division of the Attorney General's powers. In those states where the local prosecutor is independently selected, the Attorney General should retain power to initiate prosecutions when, in his opinion, the interests of the state so require. Experience demonstrates that such authority, when granted, is used infrequently.
>
> In those rare instances where local prosecutors are unable or unwilling to prosecute a case properly, the Attorney General should be able to enter the case and to assist or direct the prosecutor. Where such power presently exists, it is rarely exercised, but it should be available to the Attorney General.[1]

Authority Relating to Organized Criminal Activity

Several states have recently conferred upon the Attorney General broad authority to act against organized crime or corruption. This recognizes that organized crime by its nature, must be viewed as a statewide problem and that investigations and prosecutions cannot effectively be limited to a single locality. Some of the new laws are described herein.

Wisconsin, in 1969, enacted an omnibus bill aimed primarily at organized crime. The Division of Criminal Investigation of the Department of Justice was authorized to "investigate crime which is statewide in nature, importance or influence" and to enforce specified statutes. These statutes relate to: dangerous drugs and narcotics; coin machine regulation; gambling; loansharking; battery of witnesses and jurors; extortion, interference with commerce, and influencing witnesses and jurors by threats or use of force; prostitution; vagrancy relating to prostitution and gambling; obstructing justice; liquor and beer laws; liquor, beer and cigarette taxation; arson. This law enables the Department of Justice to coordinate the investigation of the types of criminal activity which are related to organized crime and, in the language of the statute, "...to give the Attorney General responsibility for devising programs to control [such] crime..."[3]

The same law authorized the Attorney General to appoint investigative personnel, who have the powers of a peace officer. Local district attorneys, sheriffs, and chiefs of police were directed to cooperate with and assist these persons, but the law did not relieve local peace officers of any law enforcement duties. The Department of Justice now has an Organized Crime

Unit, with nine special agents and seven attorneys. It operates through a task force approach, holding planning sessions to select subjects for investigation, which may be either particular individuals or particular activities.[4]

A 1970 Ohio law authorized the Attorney General to investigate "any organized criminal activity" in the state, when directed by the Governor or General Assembly. Organized criminal activity was broadly defined as:

> ...any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood, or to violate, or aid, abet, facilitate, conceal, or dispose of the proceeds of the violation of, criminal laws relating to prostitution, gambling, counterfeiting, obscenity, extortion, loansharking, drug abuse, or illegal drug distribution, or corruption of law enforcement officers or other public officers, officials, or employees.[5]

If it appears that there is cause for prosecution, the Attorney General shall refer the evidence to the local prosecutor having jurisdiction, or directly to a regular or special grand jury. If the evidence is referred to a grand jury, the Attorney General or his designees have the exclusive right to appear before it.

California's Legislature mandated an organized crime program in the Department of Justice, effective March, 1972. The Department of Justice was directed "to seek to control and eradicate organized crime" by:

> (a) Gathering, analyzing and storing intelligence pertaining to organized crime.
> (b) Providing this intelligence to local, state and federal law enforcement units.
> (c) Providing training and instruction to assist local and state law enforcement personnel in recognizing and combating organized crime.
> (d) Providing a research resource of specialized equipment and personnel to assist local, state, and federal agencies in combating organized crime.
> (e) Conducting continuing analyses and research of organized crime in order to determine current and projected organized crime activity in California.
> (f) Initiating and participating in the prosecution of individuals and groups involved in organized crime activities.

The statute also directed the Department of Justice to divide its functions concerning organized crime into the following five programs: operations and training; intelligence; long-range intelligence research; investigation; and prosecution. California's Department of Justice has powers of supervision over district attorneys and sheriffs and may require them to report or to meet in conference. When the interests of the public so demand, the Attorney General may direct the activities of a sheriff or chief of police in the investigation of crime.[6]

Legislation introduced in the 1973 Session of the New York Legislature (S.B. 5860) would have set up an Office of Special Prosecutors and established regional and statewide grand juries. The Bill, which did not pass, designated the Attorney General or an assistant as "State Prosecutor", with power to investigate and prosecute any offense committed or alleged to have been committed in two or more counties, or partly in New York and partly in another jurisdiction. The State Prosecutor could also investigate or prosecute for any offense "in any way connected with the enforcement or administration of criminal justice", any offense prosecutable by law by the Attorney General, or any offense upon agreement with the district attorney where the latter was disqualified from investigating and prosecuting the case. The Bill would also provide for impenelling of statewide and regional grand juries, and have given the Attorney General power to appear before these..

The 1973 New York Legislature did not enact proposed amendments to the tax laws that would have given the Organized Crime Task Force access to otherwise confidential tax return data. Other provisions of this Bill would have made certain tax offenses felonies. A bill to give the Attorney General access to Department of Revenue records failed of enactment in Louisiana in 1973.

Subpoena Powers

Table 3 shows the Attorney General's subpoena powers. Of the fifty-four jurisdictions, only eleven give the Attorney General broad powers to issue subpoenas. In twelve jurisdictions, the Attorney General has no power to issue subpoenas. The rest give him limited power in this regard.

In the jurisdictions reporting that Attorneys General's subpoena powers are limited to one or a few specific statutory areas, the most common such areas are consumer protection and antitrust. Other areas include: unauthorized practice of law; alcoholic beverage control; condominiums; syndication; and elections. In seven jurisdictions, the Attorney General has subpoena powers in connection with various investigations which are specifically directed by grand juries, legislatures, or Governors. One state (Washington) reports that the Attorney General can exercise the subpoena powers of state agencies he is required to represent, in addition to subpoena powers specifically granted to him.

A 1968 New Jersey law authorized the Attorney General to call for the impaneling of a statewide grand jury.[7] Such juries have the same powers and duties as county grand juries, so the Attorney General, through the special grand jury, can subpoena witnesses. The chapter of this Report which discusses statewide grand juries notes that other states give statewide grand juries the same power as county grand juries, but the status of the latters' subpoena powers is less clear.

Several jurisdictions have expanded the Attorney General's subpoena powers in recent years. A 1971 law gave the Attorney General of the Virgin Islands subpoena powers. In Maryland, the 1972 legislature gave the Attorney General limited subpoena power, in that he can demand documentary materials in antitrust cases. A 1973 law gave the Attorney General subpoena power in antitrust cases.

TABLE 3. THE ATTORNEY GENERAL'S SUBPOENA POWER

	Broad Power	Limited Power	No Power	
Alabama			X	
Alaska		X		Under consumer protection law.
Arizona		X		Under consumer protection law
Arkansas		X		Under consumer protection law
California	X			
Colorado		X		Under consumer protection law
Connecticut	X			
Delaware	X			
Florida		X		Under antitrust law.
Georgia	X			
Guam		X		Under a number of laws.
Hawaii		X		Under antitrust law.
Idaho		X		
Illinois	X			
Indiana			X	
Iowa		X		Under consumer protection law.
Kansas	X			
Kentucky		X		
Louisiana	X			
Maine		X		In monopoly cases only.
Maryland		X		In antitrust, securities, and unauthorized practice of law matters and under consumer protection law.
Massachusetts			X	
Michigan		X		In administration of charitable trust and removal proceedings.
Minnesota	X			
Mississippi			X	
Missouri		X		Under antitrust law.
Montana		X		
Nebraska		X		In antitrust and related matters.
Nevada		X		Before a grand jury
New Hampshire		X		Under antitrust law.
New Jersey		X		Before statewide grand jury.
New Mexico			X	
New York		X		In antitrust, consumer protection, condominium, syndication, theatre financing, election and stock fraud matters, and investigations.
North Carolina		X		Can apply to courts in investigation of trust.
North Dakota		X		Under alcoholic beverage laws.
Ohio		X		Under consumer protection laws.
Oklahoma	X			
Oregon		X		When directed by Governor to supersede district attorney.
Pennsylvania		X		In criminal matters and under consumer protection law.

TABLE 3. THE ATTORNEY GENERAL'S SUBPOENA POWER (cont'd.)

	Broad Power	Limited Power	No Power	
Puerto Rico		X		In criminal matters and special investigations.
Rhode Island	X			Through the grand jury and with civil investigative demands.
Samoa			X	
South Carolina		X		Under consumer protection and antitrust laws; may examine records of all non-profit corporations.
South Dakota		X		In investigations ordered by Governor and Legislature.
Tennessee			X	
Texas			X	
Utah	X			
Vermont		X		Under consumer protection law.
Virgin Islands	X			
Virginia			X	
Washington		X		Under consumer protection law, or when representing state agencies.
West Virginia			X	
Wisconsin		X		
Wyoming			X	

Utah is among the states which have recently established by legislation the Attorney General's subpoena power. In matters "involving the investigation of a crime, the existence of a crime, or any criminal conspiracy or activity" the Attorney General or a district or county attorney may request the district court's approval, "for good cause shown" to subpoena witnesses to testify under oath and to require the production of books, papers, records and other tangible items "which constitute or may contain evidence which is or may be relevant or material to the investigation".[8] The subpoena need not disclose the names of possible defendants. The statute also provides that, upon application of the Attorney General or county or district attorney:

> the court may order that interrogation of any witness shall be before a closed court; that such proceeding be secret; and that the record of such testimony be kept secret unless and until the court for good cause otherwise orders.

Procedures for compelling testimony and for granting immunity from prosecution to witnesses are also specified.

A recent Pennsylvania case clarified the Attorney General's subpoena powers in that state and examined extensively the use of such powers in investigations.[9] The Attorney General is not granted subpoena power directly. He is, however, chairman of the Pennsylvania Crime Commission, which may issue subpoenas "to require the attendance and testimony of witnesses and the production of documentary evidence relative to any investigation which the commission may conduct in accordance with the powers given it."[10] Subpoenas must be signed by the Chairman, the Executive Director, and two of the four commissioners. Pennsylvania's Commonwealth court held that the legislature's delegation of investigatory power, including the power of subpoena, to the commission was constitutional. The court dealt also with the judicial role in enforcing subpoenas:

> In judicial enforcement proceedings, the person to whom the subpoena is directed has full opportunity to test its validity....The court may consider such questions as authority to conduct the investigation, the power to issue the subpoena, and any constitutional rights and privileges of the witness which he proves will be violated by his appearance at the hearing. Whether a subpoena shall be enforced rests in the judicial discretion of the court. In the absence of a basis or showing that the investigative agency has exceeded its lawful limits, the court has no other alternative but to order the subpoenaed witness to appear at the hearing.[11]

In 1931, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Act to Secure Attendance of Out-of-State Witnesses. This has been adopted by forty-nine states[12] and should be especially useful in organized crime cases, which often involve interstate activities.

Other Powers

There are various other statutes which help determine the Attorney General's powers in prosecution. These include statutes concerning: the right of the prosecution to appeal; perjury; extended sentencing for dangerous offenders; and the corruption of public officials. Some of these are discussed in the COAG Report, The Office of Attorney General. Also to be considered is the application of existing statutes to organized crime problems.

Some specific statutes concerning public corruption are discussed in a COAG report on legislation relating to campaign expenditures, conflict of interest, and open meetings. Consumer protection laws are discussed in another COAG publication, State Programs for Consumer Protection. These are among the laws that may be useful in organized crime control. The effectiveness of any particular approach will depend on the particular state's statutes, and on the particular Attorney General's staff and resources to enforce those statutes.

2. FOOTNOTES

1. National Association of Attorneys General, Committee on the Office of Attorney General, THE OFFICE OF ATTORNEY GENERAL 3 (1971).

2. WIS. STAT. ANN. ch. 252 (1969).

3. WIS. STAT. ANN. sec. 165.170 (1969).

4. Interview with Assistant Attorney General David Mebane, Madison, Wisconsin, May 12, 1972.

5. OHIO REV. CODE sec. 109.83.

6. CAL. GOV'T. CODE sec. 15025 et seq. (1971).

7. N.J. REV. STAT. sec. 2A:73A-1 et seq. (1968).

8. UTAH CODE ANN. sec. 77-45-2 (1971).

9. Pennsylvania's Crime Commission v. Nacrelli et al., 5 Commonwealth Ct. 551-594 (1972).

10. PA. STAT. title 71, sec. 307-7 (9).

11. Supra note 5 at 577.

12. The Council of State Governments, THE BOOK OF THE STATES 1972-73, 101 (1972).

3. ELECTRONIC SURVEILLANCE

3. ELECTRONIC SURVEILLANCE

Wiretapping and electronic surveillance are used by an increasing number of the states. The Preamble to Massachusetts wiretapping law says that:

> ...because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized crime activities.[1]

The 1967 President's Commission on Law Enforcement and Administration of Justice recommended that Congress enact legislation dealing with this issue, although it said that "if authority to employ these techniques is granted it must be granted only with stringent limitations."[2]

The table shows that twenty-one states now authorize court-supervised electronic surveillance. Ten states reported to COAG that such legislation was defeated, vetoed, or introduced but not acted on during their 1973 legislative session. No state passed legislation authorizing electronic surveillance in 1974.

Court-authorized surveillance by law enforcement officers was approved by Congress in enacting Title III of the Omnibus Crime Control and Safe Streets Act. It is incorporated into the American Bar Association's Standards for Criminal Justice, "subject to strict limitations [which]...should be enforced through appropriate administrative and judicial processes."[3] A COAG survey of 294 local prosecutors in states which did not authorize electronic surveillance revealed that 83 percent favored such laws.[4]

Recommendations adopted by the National Association of Attorneys General in 1971 did not take a direct position on wiretapping, but did state that "the Attorney General should assure that any similar state legislation conforms to existing constitutional law and allows his office supervisory authority."[5]

There is controversy about authorizing wiretapping by law enforcement officers, but there is general agreement about prohibiting wiretapping by private citizens. Federal law prohibits the unauthorized interception of wire or oral communications or the disclosure of information so obtained. Most states also prohibit wiretapping or electronic surveillance, and there is general agreement that vigorous enforcement of these laws is essential. There have been few statistics reported on action against illegal wiretapping. Vigorous enforcement is necessary to assure the public of the government's interest in protecting privacy and in proscribing abuse of electronic surveillance.

Constitutional Issues

In two 1967 cases, the Supreme Court clarified the constitutional requirements for electronic surveillance.[6] Berger v. New York[7] concerned a New York statute which allowed surveillance under a court order. The order required a showing of a reasonable belief that a crime had been committed. The Court found that the statute did not meet constitutional requirements, because it failed to: (1) require a sufficiently particular description of the objects of the search; (2) require a sufficiently particular description of the crime that had been or was about to be committed; (3) require a particular description of the type of conversation; (4) limit the search to authorized areas only; (6) require dispatch in executing the order; (7) require that the officer report back to the court which had approved the surveillance; (8) require justification for not giving prior notification to the persons involved.

In the other 1967 case, Katz v. United States, the Court declared that wiretapping without a warrant was prohibited by the Fourth Amendment:

> [W]e have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under...local property law." Silverman v. United States, 365 U.S. 505,511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people--and not simply "areas"--against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.[8]

Although it found the particular wiretap under consideration to be unconstitutional,the Court declared that electronic surveillance could be conducted constitutionally. It said that:

> ...this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the search and seizure.[9]

Osborn v. United States stressed that electronic surveillance may be permitted only "under the most precise and discriminate circumstances, circumstances which fully [meet] the 'requirement of particularity.'"[10]

The courts have upheld surveillance conducted with the consent of one of the parties. A law enforcement officer, acting undercover, may transmit or record conversations with concealed equipment and without a court order. "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police" and it makes no difference whether the informers are transmitting conversations.[11]

A recent review of federal court cases concerning electronic surveillance notes that "The courts dealing with Title III have struggled to reconcile the limitations placed on all searches and seizures by the fourth amendment with Congress's attempt to write a law believed needed to fight the rising increase in organized crime." It points out that decisions reflect conflicting points of view. One is concerned with "the unique intrusive quality of electronic devices and the looming spectre that advancing technology places on the horizon." Others are concerned with "steady and widening encroachment of crime in everyday life and see electronic surveillance as one of the more necessary and effective arrows in the quiver of law enforcement."[12] The prepondenance of case law, however, holds that Title III meets constitutional requirements.

Federal Law

The first federal legislation related to wiretapping was enacted during World War I, 40 stat. 1017 (1918). It was limited to the duration of the war and was clearly enacted to protect government secrets rather than individual privacy.[13] In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress authorized court-ordered wiretapping and electronic surveillance. The Supreme Court, while not ruling directly on the constitutionality of Title III, has said that:

> The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in [Berger and Katz].[14]

The U.S. Court of Appeals for the Seventh Circuit recently joined the Second, Third, Fourth, Eighth, and Tenth Circuits in holding Title III constitutional. The court rejected appellant's argument that the Act was unconstitutional on its face. It stated that:

> We cannot say that the normal application of Title III will crdinarily lead to results condemned by the Fourth Amendment. Moreover, we are conscious that, even if the statute is susceptible of unconstitutional application, it does contain additional protections, not necessarily mandated by the Constitution, which would be forfeited by a holding of facial invalidity.
>
> Accordingly, without further enlarging upon the constitutional discussion in the many other judicial opinions analyzing Title III, we hold that it is not unconstitutional on its face.[15]

The U. S. District Court for the District of Kansas in Cox v. United States, held that:

> We are unable to say that the product fails to satisfy the Constitution. Every effort has been made to comply with the requirements of Berger and Katz... Title III is as precise and discriminate in its approach as are the demands of Berger and Katz.[16]

The U.S. District Court for the Southern District of Florida has analyzed Title III at length in relationship to Berger and Katz and upheld its constitutionality. Specifically, it noted that: Title III allowed a maximum of 30 days of interception, compared with 60 days allowed by the law considered in Berger; Title III requires a particular description of facts showing a continuity of criminal activity; the execution and termination of the order must be prompt; the court may order periodic reports at any intervals it wishes, so "the statute is thus clear in providing a framework of control, crucial to its constitutionality."[17] Other lower court decisions have upheld the law; further, the fact that judges have approved hundreds of applications for surveillance indicates they are willing to cooperate in enforcing the law.[18]

The federal Act, in its own language, is an effort to "define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[19] Interception of communications, except as authorized by the Act, is made a felony. The Act permits the following officials to apply to the appropriate court for authority to intercept: the Attorney General of the United States or an Assistant designated by him; and the principal prosecuting officers of states or political subdivisions, if authorized by state law. The application must include specified information and the judge may require further facts.

A judge of a United States district court or court of appeals, or a judge of a state court if authorized by state law, may authorize intercept if there is probable cause for belief that: offenses enumerated by the Act are involved; particular types of communications concerning them will be obtained; and the facilities involved are or will be used in connection with the offense. It must also be shown that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."[20]

The judge may authorize an interception for up to 30 days and may grant 30-day extensions. Under certain circumstances, a prosecutor may intercept communications without prior approval if he applies for approval within 48 hours. Detailed reports of authorized surveillance must be filed with the Administrative Office of the United States Courts.

Model Laws

In addition to the requirements set by the federal law, some model laws have been developed as a guide for the states.

The Council of State Governments included a model eavesdropping law in its 1970 Suggested State Legislation. The Act corresponds in most respects to the federal statute. It does not, however, authorize use of "emergency" eavesdropping powers, "due to the high risk of unwarranted invasion of privacy inherent in such procedures."[21]

Another model law was set forth in a 1968 article by G. Robert Blakey and James A. Hancock. This proposal, which was accompanied by a detailed commentary, would authorize prosecutors to approve applications to courts to allow interception. It contains some provisions that are more restrictive than those in the 1968 federal law. Other provisions, such as allowing intercepts for forty-eight hours without prior approval, are similar to Title III.[22]

The American Bar Association adopted standards relating to electronic surveillance as part of its comprehensive Standards for Criminal Justice. The Standards correspond with the Omnibus Act. They hold that wiretapping should be limited to law enforcement officers and that authorization for electronic surveillance should be obtained only through appropriate administrative and judicial processes. The Standards also suggest that law enforcement agencies adopt administrative regulations, such as limiting the number of agents authorized to use the techniques, listing the circumstances under which they may be used, and restricting the access to overheard communications.[23]

State Statutes

Table 4 shows the status of electronic surveillance or wiretapping legislation in each state.

Twenty one states authorize electronic surveillance: Arizona; Colorado; Connecticut; Delaware; Florida; Georgia; Kansas; Maryland; Massachusetts; Minnesota; Nebraska; Nevada; New Hampshire; New Jersey; New York; Oregon; Rhode Island; South Dakota; Virginia; Washington; and Wisconsin. Legislation to authorize electronic surveillance has been introduced in several state legislatures in recent sessions, as shown in the Table. A wiretapping bill was passed by the Iowa Legislature, but vetoed by the Governor. The 1973 Indiana Legislature enacted legislation to authorize surveillance; this was also vetoed.

Six states neither authorize nor prohibit wiretapping or eavesdropping: Indiana, Mississippi; Missouri; Texas; Vermont; and West Virginia. The remaining states prohibit wiretapping or eavesdropping or both.

Most state wiretap laws were enacted when the use of the telephone and telegraph became fairly common and were intended primarily to protect the equipment. Later, some jurisdictions amended their "malicious mischief" statutes to include wiretapping. A few outlawed private wiretapping, but authorized its use by law enforcement officers.[24] Violation of most of these early laws is a misdemeanor. Generally, they do not make exceptions for law enforcement officers and do not refer to subsequent use of the communications intercepted.

TABLE 4. ELECTRONIC SURVEILLANCE AND WIRETAPPING LAWS

Alaska	Prohibited by ALASKA STAT., sec. 11.60.280 - 11.60.310 (1966).
Alabama	Prohibited (wiretapping only) by ALA. CODE, tit. 14, sec. 84, tit. 48, sec. 414.
Arizona	Authorized by ARIZ. STAT., sec. 13:1051 - 13:1058 (1968).
Arkansas	Prohibited (wiretapping only) by ARK. STAT. ANN., sec. 73-1810.
California	Prohibited by CAL. PENAL CODE, sec. 630-637.2. Assembly Bill No. 62 would authorize.
Colorado	Authorized by COL. REV. STAT. ANN., sec. 40-4-26 et seq (1963, amend. 1969, 1972).
Connecticut	Authorized by CONN. STAT. ch. 959 a, sec. 54-41a (1971).
Delaware	Authorized by DEL. CODE ANN., tit. 11, sec. 1335 et seq. (1973).
Florida	Authorized by FLA. STAT., sec. 934.07 - 934.10 (1969).
Georgia	Authorized by GA. CODE ANN., ch. 26-30 (amend. 1971, 197
Hawaii	Prohibited by HAWAII REV. LAWS, ch. 275.
Idaho	Prohibited (wiretapping only) by IDAHO CODE ANN., sec. 18-6704, 18-6705.
Illinois	Prohibited by ILL. REV. STAT., ch. 38, sec. 14 (1961); ch. 134, sec. 16.
Indiana	Bill authorizing electronic surveillance was enacted by the 1973 legislature but vetoed by the Governor.
Iowa	Prohibited (wiretapping only) by IOWA CODE, sec. 716.8. (Bill authorizing surveillance was passed by the 63rd Assembly and vetoed by the Governor).
Kansas	Authorized by Senate Bill No. 627 (L. 1974, ch. 150).
Kentucky	Prohibited by KY. REV. STAT., 433.430.
Louisiana	Prohibited (except for law enforcement officers) by LA. REV. STAT., sec. 14:322.
Maine	Prohibited by ME. REV. STAT. ANN., sec. 15- 709 et seq.

TABLE 4. ELECTRONIC SURVEILLANCE AND WIRETAPPING LAWS. cont.

Maryland	Authorized by MD. CODE ANN. Art. 35, sec. 92-99 (1956).
Massachusetts	Authorized by MASS. GEN. LAWS, ch. 272, sec. 99 (1933, amend. 1959, 1968).
Michigan	Prohibited by MICH. COMP. LAWS ANN.,sec. 750, 539 (1967). (Bill authorizing surveillance, H. B. 4747, introduced last session).
Minnesota	Authorized by MINN. STAT., ch. 626A (1969).
Mississippi	No legislation
Missouri	No legislation. (Bill authorizing surveillance, H. B. 337, failed in 1973 session).
Montana	Prohibited by MONT. REV. CODES, sec. 94-8-114. (Bill authorizing surveillance failed in 1971 session).
Nebraska	Authorized by NEB. REV. STAT., 86-701 to 86-707. (1969, amend. 1971).
Nevada	Authorized by NEV. REV. STAT., ch. 179 (S. B. No. 262, 1973).
New Hampshire	Authorized by N. H. REV. STAT. ANN., sec. 570-A:1 to 570-A:11 (1969).
New Jersey	Authorized by N. J. REV. STAT., sec. 2A:156A-1 to 156A-26, (1968).
New Mexico	Prohibited by N. M. STAT. ANN., sec. 40A-12-1 (1963). (Bill authorizing surveillance defeated in 1970 session).
New York	Authorized by N. Y. Crim. Proc. Law, Art. 700 (1942, amend. 1969, 1970, 1971).
North Carolina	Prohibited by N. C. GEN. STAT., sec. 14-155, 14-158.
North Dakota	Prohibited by N. D. CENT. CODE, sec. 8-10-07, sec. 8-10-09, sec. 12-42-05.
Ohio	Prohibited by OHIO REV. CODE, sec. 2933.58 (1970).
Oklahoma	Prohibited (wiretapping only) by OKLA. STAT., tit. 21, sec. 1757.
Oregon	Authorized by ORE. REV. STAT., sec. 133.723, 133.725, 133.727 and 133.992 (1955, amend. 1959).

TABLE 4. ELECTRONIC SURVEILLANCE AND WIRETAPPING LAWS cont.

Pennsylvania	Prohibited by 18 PA. STAT. sec. 5702 (H.B. 1588, adding and grading the crime of eavesdropping, was signed into law in January, 1975).
Puerto Rico	Prohibited by CONST. Art. 11, sec. 10 and L.P.R.A. PENAL CODE, tit. 33, sec. 2158.
Rhode Island	Authorized by R. I. GEN. LAWS ANN., sec. 12-5.1-1 to 12-5.1-16.
South Carolina	Prohibited (eavesdropping only) by S.C. CODE ANN., sec. 16-554, (1937).
South Dakota	Authorized by S.D. COMP. LAWS ANN., sec. 23-13A (1969).
Tennessee	Prohibited (wiretapping only) by TENN. CODE ANN., sec. 39-4533. (Bill authorizing surveillance introduced last session, not passed).
Texas	No legislation. (Bill authorizing surveillance, H. B. 149, introduced in 1971 session, not acted on).
Utah	Prohibited (wiretapping only) by UTAH CODE ANN., sec. 76-48-11. (Bill authorizing surveillance, H. B. 125 introduced in 1971 session, not acted on).
Vermont	No legislation
Virgin Islands	Prohibited (wiretapping only) by VIRGIN IS. CODE ANN., tit. 14, sec. 1134.
Virginia	Authorized by S. B. 367, 1973 Legislature.
Washington	Authorized by WASH. REV. CODE, sec. 9.73.030 to 9.73.080, (1967).
West Virginia	No legislation.
Wisconsin	Authorized by WISC. STAT., sec. 968.27 - 968.33 (1969).
Wyoming	Prohibited (wiretapping only) by WYO. STAT. ANN., sec. 37-259. (Bill authorizing surveillance defeated in 1971 session).

Advances in electronics and development of sophisticated equipment have made eavesdropping a threat to privacy. Although this is thought to be a recent problem, South Carolina included eavesdropping in a 1937 "Peeping Tom" statute. A few states have recently enacted laws to prohibit eavesdropping as well as wiretapping. Illinois, for example, enacted a comprehensive statute in 1961, setting penalties of up to $1,000 and/or 2 years imprisonment for eavesdropping and of up to $2,000 and/or one year for wiretapping.[25]

Ohio had a law prohibiting interfering with telephone or telegraph messages. In 1970, it enacted another law providing one to three years imprisonment for a person who "shall willfully, surreptitiously, and by means of any device listen to, transmit, amplify, or record a private oral communication carried on in circumstances which reasonably indicate that the parties thereto desire it to be confined to them..."[26]

The federal law raises problems of compliance. The California Supreme Court held unanimously that:

> Congress intended to enact comprehensive national legislation, against which all their existing federal and state legislation was to be measured...At the same time, however, Congress left room for the states to supplement the law in certain areas, provided the regulations are not more permissive.[27]

Title III makes several references to an "applicable state statute" and state officers can apply for an intercept order only if "authorized by a statute of that state." The Maryland Court of Appeals held recently that:

> ...while Title III requires an appropriate state act before it can be effectuated, under no circumstances is that law enforceable if it is less restrictive than the federal statute so that it grants the governing power more rights at the expense of its citizens...evidence obtained by the interception of wire or oral communications, in violation of the Crime Bill, cannot be received in evidence in any court, federal or state. Of course, a state act which is more closely circumscribed than the federal law in granting eavesdrop authority is certainly permissible.[28]

The Maryland Court has also said that the procedure required by the federal act must be strictly followed, and that compliance with the state law is not sufficient.[29]

The California Supreme Court has refused to allow evidence obtained by federal agents in an electronic surveillance that complied with the federal law. Because the state statute was more stringent than the federal law the court refused to admit the wiretapping evidence. Although there was no actual conflict between the state and federal statutes the court could not preempt the state statute that provides more protection for criminal defendants.[30]

Some new state laws, like North Dakota's, refer specifically to the federal law and declare the legislature's intent "to conform the requirements of all interceptions of wire and oral communications conducted by investigative or law enforcement officers in this state to the provisions of Ch. 119 of the U.S. Code."[31]

The following sections of this report analyze selected provisions of state and federal law, with emphasis on those which have caused controversy. Most of the state laws were patterned closely on Title III. The New Jersey court upheld that state's statute, saying that it "has been drawn to rectify each essential constitutional vice delineated by the Supreme Court in [Berger]." 32

Authority to Apply for Intercept

Federal and state laws limit the officials who may apply for authority to intercept. State law may, however, allow other officials to apply if their applications are approved by the designated officials.

The federal statute requires that applications for intercept be approved by the Attorney General or an Assistant Attorney General specially designated by him. It also authorizes applications by the principal prosecuting attorney of any state or policital subdivision, if authorized by state law.

A significant number of cases have arisen concerning the proper procedure for wiretap applications. For example, in U.S. v. Giordano,[33] the Court held invalid an electronic surveillance application that was not signed by either the Attorney General of the U.S. nor the designated Assistant Attorney General. It was signed by the Attorney General's Executive Assistant, who purportedly was carrying out Department of Justice policy created by the Attorney General. Thus, since the Executive Assistant was not empowered by the Act to direct the use of wiretapping, the evidence was suppressed. However, identification of an Assistant Attorney General as the authorizing officer when in fact the application was authorized by the Attorney General does not invalidate the interception order granted on application.[34] An original wiretap was upheld by the Court in U. S. v. Aquino,[35] but the extension was suppressed. The original was accepted by the Court because the Attorney General had initialed a memorandum approving the application. The memorandum was accepted as forming part of the request for the wiretap application. However, the extension did not contain any authorization, as only the Executive Assistant to the Attorney General had passed on the application

Almost all state electronic surveillance statutes authorize the Attorney General to apply. Exceptions are Connecticut, where the Attorney General has no criminal jurisdiction, and Oregon, whose statute was enacted in 1955. An Indiana bill that was passed by the 1973 legislature but vetoed by the Governor would have limited such authority to county prosecutors. Almost all authorize the local prosecutor (the district, county, or state's attorney) to apply. The exception is Rhode Island, which has no local prosecutors. New Hampshire allows the county attorney to apply only with written approval of the Attorney General or his deputy. Florida allows applications by those local prosecutors who have jurisdiction to prosecute felonies. Kansas allows the Attorney General, district attorney, or county attorney to apply.

In Virginia, a law enforcement agency which desires a wiretap must consult with the Commonwealth's Attorney in that jurisdiction. If he approves the request, he may present the facts to the Attorney General, who may then petition the circuit court in the area in which the wiretap is to be made. The State Police is the only enforcement agency which may actually conduct the taps.

A few states extend authority to Assistant Attorneys General or prosecutors. New York authorizes applications by the Attorney General or Deputy Attorney General in charge of the organized crime task force, when exercising the respective functions of their offices, or a district attorney, or persons designated to act for them during their actual absence or disability. New Jersey also allows designees to act only during the actual absence of he listed officers. Kansas allows an Assistant Attorney General or assistant district attorney to apply in the absence of the superior officer only if the assistant is specifically authorized in writing to apply.

Other officials are named in a few states. New Jersey and New York allow application by the Chairmen of their State Commissions on Investigation, when authorized by a majority of members. New York law originally allowed any law enforcement officer above the rank of sergeant to apply, but this was deleted in 1969. Wisconsin law says that the Attorney General, together with the district attorney, may approve the request of an investigative or law enforcement officer. In Arizona, sheriffs and any police officers above the rank of sergeant may request authority. Florida allows the Governor to apply.

A model law proposed by G. Robert Blakey and James A. Hancock would restrict authority to apply to the Attorney General, his designated assistants, and district attorneys. This would "avoid the possibility of divergent practices developing, and if abuses should occur, the lines of responsibility will be clear."[36] Restricting the persons who may apply also serves to screen requests. Of 860 applications made to state and federal judges in 1972, all but five were granted. Four were denied by Connecticut state judges and one application to a federal judge was subsequently withdrawn.[37] This indicates that applications were carefully considered before they were submitted. A U.S. Circuit Court, in requiring that a designated official personally sign the application, noted that the intent of Congress was to place authority in a readily identifiable public official.[38]

Offenses for Which Intercept May be Authorized

Although the current interest in electronic surveillance laws results largely from their use in organized crime control, these statutes apply to a wide range of crimes in virtually all states. Only one state (Massachusetts) in any way restricts surveillance to organized crime.

Almost all states do place some limits on the type of offenses for

which interception may be used. The authors of one suggested act did not specify offenses because:

> Since any list must, to a certain extent, be arbitrary, no judgment is reached on what specific crimes should be included. The point remains, however, that a line ought to be drawn...the offenses selected should be either serious in themselves or characteristic of organized crime...A list might, therefore, include, at a minimum: murder, kidnapping, extortion, robbery, bribery, syndicated gambling, narcotics, or any conspiracy involving any of the above offenses.[39]

The preliminary "Findings" to the federal Act state that organized criminals "make extensive use of wire and oral communications" and that interception of such communications is "an indispensable aid" to law enforcement. The law, however, is not restricted to organized crime. Interception may be authorized when it may provide evidence of offenses under various enumerated sections of the U.S. Code. These include offenses related to: espionage; treason; riots; labor union finances; bribery; betting information; obstruction of criminal investigation; theft from interstate shipment; influencing an officer or juror; stolen property; counterfeiting; bankruptcy; extortionate credit transactions; narcotics and dangerous drugs; and any conspiracy to commit any of the foregoing. State officials may apply in connection with the offenses of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotics or marijuana or other dangerous drugs, or "other crime dangerous to life, limb, or property" and punishable for more than a year's imprisonment and designated in the applicable state statute.[40] This was amended in 1970 to add unlawful use of explosives.[41]

Most state statutes are generally in accord. Some add other offenses and some are more restrictive. Massachusetts law says that interceptions may be authorized only when the listed offenses are connected with organized crime, which is defined as "a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services."[42] Legislation sponsored by the Attorney General would have changed this to conform to federal law, but was not enacted. Under New Jersey Law, the court must determine that the person whose communication is to be intercepted is or was engaging in listed offenses "over a period of time as part of a continuing criminal activity" or is about to or has committed a listed offense.[43] Florida includes gambling only when it is of an organized nature or carried on as a criminal conspiracy.

The 1973 Virginia law limits electronic surveillance to three types of violations: drug law offenses, extortion, and bribery.

Some state statutes have broader definitions of the crimes for which surveillance may be authorized. Arizona requires merely that "a crime" be involved. Maryland allows authorization when "there are reasonable grounds to believe that a crime has been committed or is about to be committed".[44] Delaware adds any felony to a list of specific offenses.

Other states add certain offenses to those included in the federal list. Washington, for example allows interceptions where there are reasonable grounds to believe that national security or human life is endangered, or that arson or a riot is about to be committed. Several states include arson, usury and assault. New York's law refers to numerous specific laws, including such offenses as absconding from work release, criminally possessing a hypodermic needle, and illegal eavesdropping. Nevada law refers to the destruction of public property by explosives, while the Indiana legislation dealt with "any other crimes dangerous to life, limb or property and punishable by imprisonment in the state prison."

In practice, interception is used for a wide array of offenses. The great majority, however, concern gambling and narcotics. There is no indication as to whether these offenses involved organized criminal activity. Additional offenses for which interception was authorized included abortion, conspiracy, extortion, and intimidating an official.[45]

Emergency Intercepts

The federal law allows any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting officer of a state or subdivision, acting pursuant to state law, to intercept without court approval if: (a) an emergency exists with respect to "conspiratorial activities threatening the national security interest" or "characteristic of organized crime" that require interception before an order " can with due diligence be obtained;" (b) there are grounds upon which an order could be entered under the law; and (c) an application is made within forty-eight hours after the interception begins or occurs. If the application is denied, the contents of the intercept shall be treated as having been obtained in violation of law.[46]

The forty-eight hour application requirement has made this emergency intercept provision of little use. If fact, the United States Department of Justice has not received an emergency intercept application for review from any field office. Due to the large number of facts which must be gathered and arranged for a normal wiretap application, it takes on the average, twelve to sixteen days to prepare one. The people working in the field simply are not able to prepare an application in the forty-eight hours required by statute, and therefore are not using the provision.[47]

The only states with an emergency intercept provision are Nevada, South Dakota, and New Jersey. New Jersey has a provision which allows a judge to grant verbal approval in emergency situations "with respect to the investiigation of conspiratorial activities of organized crime."[48] None of the three states report that they have used the emergency provision.

A similar provision is found in the model law drafted by Blakey and Hancock, who say that:

> Often in criminal investigations a "meet" between known criminals will be set up and held almost simultaneously. Requiring an advance court order in these situations--where the facts establishing probable

> cause may be the most compelling and the dangers of overbroad or overlong surveillance the least--would be tantamount to failing to authorize surveillance at all. When there is no time to obtain an order, the police have always been thought to have emergency power.[49]

Concerning the scope of the national security surveillance, the U.S. Supreme Court has ruled unanimously that the government may not carry on electronic surveillance in domestic security operations without first obtaining a judicial warrant. The court condemned warrantless electronic surveillance in domestic security cases directed at any domestic organization composed of U.S. citizens and having no significant connection with a foreign power. Although the Supreme Court did not address itself to the question of foreign security, lower courts have held that a judicial warrant is not necessary to obtain foreign intelligence necessary for the protection of national security.[50]

Content of Application

The federal and state statutes specify the factors that must be present either when an application is made or when it is granted. Most also specify information to be included in the request for intercept.

Section 2518(1) of the federal statute says that each application must include the following:

> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
> (d) a statement of the period of time for which the interception is required to be maintianed. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional

> communications of the same type will occur thereafter;
> (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and
> (f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.[51]

These requirements are being strictly enforced, especially since U.S. v. Giordano. The Circuit Court of Appeals for the District of Columbia has recently found a wiretap application to be defective which did not disclose the fact that one of the persons named in the instant wiretap was also the subject of a prior application connected with an earlier, unrelated investigation. The court, in presenting its reasons for finding the application defective and suppressing the evidence, said:

> Section 2518(1)(e), along with other provisions of Section 2518(1), helps to ensure that judges obtain the information they need to determine whether law enforcement authorities are being over-zealous in their efforts to employ wiretapping and electronic surveillance in situations where a lesser intrusion on privacy would serve the investigative need.[52]

In another case, a federal district court suppressed evidence obtained through a wiretap because the application for the tap failed to include an adequate statement as to whether other investigative techniques had failed and whether alternatives to wiretapping were unlikely to succeed or were unduly dangerous. The court stated that the application must present some criteria on which to base the decision as to whether wiretapping is necessary.[53]

Many states statutes are either identical to or patterned after the federal law. Some, like Maryland and Washington, are less specific.

A few states set additional requirements. Connecticut requires an application to state that the communications sought are material to a particular investigation and are not legally privileged. If it is necessary to make a secret entry on private premises to install an intercepting device, the application must state that there is no practical alternative method of executing the order.

The detailed content of the applications represents an attempt to meet Fourth Amendment requirements:

> The danger of an indiscriminate search for damning evidence can be met by imaginative adaptation of the requirement that the object of the search be particularly described. More importantly, application of an expanded concept of probable cause can limit invasion of the individual's privacy to the relatively infrequent situations in which the government's needs to use electronic surveillance is demonstrably superior.[54]

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> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
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Each application must establish probable cause, thus avoiding the "blanket authority to conduct general searches" which was ruled unconstitutional in Berger. The standard for a probable cause determination is the same as that for an ordinary search warrant.[55]

New Jersey has additional requirements if public facilities are used, or are leased by, listed in the name of, or "commonly used by" a physician, attorney, clergyman, or are primarily used for habitation by a husband and wife. In such cases, the court must determine that there is a special need to intercept communication in such places. A similar provision is contained in the A.B.A. Standards.

Number and Type of Intercept

Table 5, derived from figures collected by the Administrative Office of the U.S. Courts, shows the number of state and federal wiretaps per state for a six year period. Part of the increase in wiretaps during the 1971-1973 period is due to the interaction between Title III and the Organized Crime Control Act of 1970.

Every state which authorizes wiretapping shows an increase in taps during the second three year period with the exception of Virginia, Washington, Oregon, and South Dakota, which did not use any wiretaps at all during the six years. Thirteen states did not have any federal wiretap activity within their states during the six year period. Of the remaining states, all but five experienced an increase in federal wiretap activity during the later three years.

Reports on court-approved intercepts must be made to the Director of the Administrative Office of the United States Courts, which must report certain data to Congress. Reports must be filed by a judge within thirty days of the expiration or denial of an order or extension and must include the name of the applicant, offense and duration. Prosecuting officials must file annual reports showing the cost, type, and results of intercepts. These data do not include internal security wiretaps, which are not reported.

Further Administrative Office reports show that 866 applications for intercepts were filed in 1973, 855 in 1972, 816 in 1971, 598 in 1970, 302 in 1969, and 174 from June 20 to December 31, 1968. Of the 1973 applications, 130 were federal, while 736 were state applications. Two of the 1973 applications were denied, four in 1972, none in 1971 and two in 1969. Of the 1973 denials, both were state applications in Connecticut. Part of the increase in applications is due to the increased number of states with laws authorizing surveillance, but most is due to increased applications in most states. Rhode Island, for example did not authorize a wiretap in 1969 and authorized six in 1971. In New York, 183 intercepts were authorized in 1969, compared to 311 in 1971. Similar increases were true in most states which have authorized intercepts for several years.[56]

As noted earlier, not all states which have electronic surveillance laws use them. Six of them (Connecticut, Nebraska, New Hampshire, Oregon, South Dakota and Washington) did not report any requests for intercepts in 1971. The reasons for this are not apparent, since several of these states have acknowledged organized crime problems, and most of the statutes have been in effect long enough for the states to have acquired the necessary equipment and trained personnel in its use.

TABLE 5: TOTAL FEDERAL AND STATE WIRETAP AUTHORIZATIONS, 1968-1973

	1968-1970		1971-1973		Totals		
	Federal	State	Federal	State	Federal	State	Total
Alabama	0	*	2	*	2	*	2
Alaska	0	*	0	*	0	*	0
Arizona	0	17	0	26	0	43	43
Arkansas	1	*	0	*	1	*	1
California	13	*	78	*	91	*	91
Colorado	0	3	1	22	1	25	26
Connecticut	3	0	10	44	13	44	57
Delaware	2	0	7	7	9	7	16
Florida	15	14	27	58	42	72	114
Georgia	1	16	10	46	11	62	73
Hawaii	0	*	4	*	4	*	4
Idaho	0	*	0	*	0	*	0
Illinois	16	*	36	*	52	*	52
Indiana	6	*	4	*	10	*	10
Iowa	0	*	2	*	2	*	2
Kansas	1	0	1	8	2	8	10
Kentucky	0	*	5	*	5	*	5
Louisiana	0	*	8	*	8	*	8
Maine	0	*	0	*	0	*	0
Maryland	4	39	17	81	21	120	141
Massachusetts	2	9	14	27	16	36	52
Michigan	17	*	72	*	89	*	89
Minnesota	0	3	5	5	5	8	13
Mississippi	0	*	0	*	0	*	0
Missouri	4	*	12	*	16	*	16
Montana	0	*	0	*	0	*	0
Nebraska	1	0	2	13	3	13	16
Nevada	1	0	10	6	11	6	17
New Hampshire	0	1	0	4	0	5	5
New Jersey	32	171	62	637	94	808	902
New Mexico	0	0	1	1	1	1	2
New York	36	564	98	882	134	1,446	1,580
North Carolina	0	*	1	*	1	*	1
North Dakota	0	*	0	*	0	*	0
Ohio	10	*	16	*	26	*	26
Oklahoma	1	*	1	*	2	*	2
Oregon	0	0	0	0	0	0	0
Pennsylvania	32	*	66	*	98	*	98
Rhode Island	0	0	1	26	1	26	27
South Carolina	1	*	2	*	3	*	3
South Dakota	0	0	0	0	0	0	0
Tennessee	0	*	2	*	2	*	2
Texas	1	*	6	*	7	*	7
Utah	0	*	0	*	0	*	0
Vermont	0	*	0	*	0	*	0
Virginia	1	0	9	0	10	0	10
Washington	0	0	3	0	3	0	3
West Virginia	1	*	0	*	1	*	1
Wisconsin	1	1	4	17	5	18	23
Wyoming	0	*	0	*	0	*	0
Total	203	838	599	1,910	802	2,748	3,550

* Not authorized by state law.

Type of Intercept. Most applications involve wiretapping. In 1969, 250 interceptions involved telephones, 15 used a listening device such as a microphone, and 6 used both. Of the 792 intercepts which actually occurred in 1971, 753 involved telephones, 17 specified a listening device, 12 used both, 2 used video-tape, and the rest were not specified. In 1972, 779 of the applications installed involved a telephone tap, 20 specified a listening device and 28 used both. In 1973, 731 interceptions involved telephones, 48 microphones, and 32 used both. This continued reliance on telephone wiretaps seems surprising in light of the array of "snooping" devises available.

Most interceptions are of residences or apartments. In 1973, the reported locations included 319 residences, 237 apartments, 61 multiple dwellings, 156 business locations, and 32 business and living quarters combinations. In 59 applications, the place of interception was either not indicated or was another category or location, such as a hotel or automobile.

Cost. In 1973, the average cost of a single intercept installed was $5,632 with a range from $34 to $153.488. This figure includes federal intercepts which alone averaged $12,236 with a range from $358 to $153,488. The average cost of state and local intercepts would be considerably less. In 1972, the average cost of a single intercept installed was $5,435 with a range from $5 to $82,628. Reported costs are supposed to include both manpower and equipment.

Length of Intercept.

Federal law requires that every order contain a provision that the authorization to intercept be executed as soon as practicable. No order may be for any period longer than necessary, but in no event longer than 30 days. Extensions may be granted in the same manner as the original authorization, and no extension may be for more than 30 days.

A 30 day limit, for the original application and for each extension, is found in most of the state laws. Several states, however, (Connecticut, Minnesota, and New Hampshire) set the limit for original authorizations or extensions at ten days. Connecticut also limits to three the number of extensions that may be obtained. Minnesota specifies that authority to intercept shall terminate instantly when anyone named in the warrant has been charged with a crime listed in the warrant. Massachusetts permits 15 days of interception, which must terminate no later than 30 days from installation of the equipment. Oregon authorizes up to 60 days in the original order and in the extensions. Colorado amended its laws in 1972 to provide that no more than one extension may be granted for any order.

Reports to the Administrative Office of the U.S. Courts show the authorized length of each application, including the original period, the number of extensions, the total length, and the actual period in operation. In 1971, a total of 792 intercepts installations were in use a total of 14,583 days

These reports show the total number of days each authorized intercept

was in operation. Of those authorized by state judges for which information was reported, forty-three were under 5 days duration, while eight were over 100 days. One lasted for 300 days. There was considerable variation in the length originally authorized, indicating that the maximum is not automatically granted. There also does not appear to be any relationship between the length of the original period and the number of extensions authorized.

The length of time allowed and the provision for unlimited extensions under the federal law have drawn some criticism. The American Bar Association Standards provide that the order should terminate when the objective has been achieved, or in any event, no later than 15 days. An unlimited number of extensions, of up to 30 days each, are allowed.

The U.S. Court of Appeals for the Eighth Circuit noted that this facet of Title III might be questioned, because the only interceptions the Supreme Court had allowed were those of single conversations. The lower court, however, did not conclude that only "rifle shot" eavesdrops are permissible: "obviously, an electronic search extending over a period of time will encompass overhearing irrelevant conversations, but the search of a building will likewise involve seeing and hearing irrelevant objects and conversations."[57]

Other decisions have found the 30-day limit acceptable, one noting that Title III "requires a particular description of facts showing the continuity of criminality before such continuous interception can occur."[58] New Jersey's high court said that to hold that state's 30-day limit unconstitutional "would enshrine a numerical formula into constitutional dogma and prescribe categorically, as a matter of constitutional stricture, that necessity for a 30-day wiretap could never be shown or justified."[59] New Jersey's court termed the time limits of that law "sufficiently narrow."[60]

The federal statute provides that intercepts "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."[61] Some states have a similar or identical provision. New Jersey's law is more restrictive, requiring that such interception be minimized or eliminated.[62] A New Jersey court construed this to mean that:

> [T]elephone conversations shall not be overheard or recorded if and when it becomes clear in the mind of the executing officer exercising reasonable judgment under all the circumstances that such conversations do not in any way pertain to the objects of the criminal investigation.[63]

This policy of minimization is a critical factor in protecting unwarranted invasions of privacy.

The application of this minimization rule has been the subject of great controversy. Once a court finds that police failed to minimize the interception of conversations, the question arises whether to suppress all communications under the order or only those not applicable. One federal district court found that 60 percent of the surveillance was unauthorized.

By holding that the police had failed to minimize their interceptions, the court suppressed all the interceptions. However, the majority of federal courts have held that the failure of federal agents to minimize telephone conversations does not require suppression of all intercepted conversations.

> I see no reason why a different rule should be applied in the interceptions of telephone conversations under court order than is applied to items seized under search warrants issued by the courts. To do so would not only be unnecessary for the protection of constitutional rights but contrary to the public interest in legitimate and effective law enforcement.[64]

The Maryland Court of Special Appeals has joined the majority of federal courts. In dicta, it has stated that:

> The great weight of authority and, in our judgment, the sounder reasoning requires only the suppression of those conversations which should not have been seized and not the suppression of those conversations which were appropriately seized. Indeed, analogy to general Fourth Amendment experience dictates such a result.[65]

The Maryland court did, however, leave a door open for complete suppression in those cases where "the police utterly...flout a minimization order."

These courts, forming the majority have generally concluded that it is impossible to determine beforehand whether a certain communication will be authorized for seizure. This is especially so when a seemingly innocent conversation may be coded or otherwise obscure.[66]

Use as Evidence

Title III prohibits the use of any intercepted communication as evidence in any proceeding before any court, grand jury, agency, legislative committee or other governmental authority, if such interception was in violation of the law. It provides that contents of communications derived from intercepts authorized by law may be used by the investigative or law enforcement officers "to the extent such use is appropriate to the proper performance of his official duties."[67] Any person, who, in accordance with the law, has received information concerning or derived from an intercept may disclose the contents of that communication or derivative evidence while testifying in any criminal proceeding before any state or federal court and grand jury. An amendment to Title III made such evidence admissible in civil cases.

The A.B.A. Standards likewise limit disclosure to law enforcement officers "in the proper performance of their official duties," and further restrict disclosure to a showing of good cause before a judicial officer. The Blakey-Hancock draft is like the federal law and does not limit evidentiary

use of surveillance techniques to criminal proceedings. A law enforcement officer may use intercepted information relating to offenses not specified in the order of authorization if the intercept was authorized and conducted in accordance with laws.

The new electronic surveillance statute of Nevada, Delaware, and Kansas stipulate that any evidence obtained from an ordinarily privileged communication (attorney-client, husband-wife, priest-penitent) should remain privileged. Recently, in California v. Halpin,[69] the California Supreme Court suppressed the evidence obtained by intercepting a phone conversation between an arrested marijuana defendant and his wife. The court based its decision on the fact that no warrant was authorized for the wiretap. Yet the Court of Appeals for the Seventh Circuit had held that the husband-wife privileged conversations relating to the commission of a crime are not protected against electronic surveillance. However, the court suppressed the phone calls made and received by the wife because the application order specified only the husband and "others as yet unknown." It was the court's belief that the wife should have been specifically included in the order and not merely included as "others as yet unknown."[70]

The use of evidence relating to an offense not specified in the order has caused some controversy. The federal law[71] provides that conversations which are outside the limits of the authorization may be used as evidence if they were intercepted in the course of an authorized investigation. This is analogous to the "open view" doctrine of search and seizure. Proponents of Title III have argued that the plain view doctrine of physical search and seizures allows the seizure of unspecified conversations. Thus, the minimization requirement of Section 2518(5) meets the problem of surveillance for unusually long duration; the plain view doctrine meets the problem of the scope of the electronic searches. One court has described the use of this doctrine to intercept conversations not described in the warrant as "only a restatement of existing case law, adapted to fit the electronic surveillance situation."[72] On the other hand, one commentary says this is "beyond the limits set out by the Supreme Court." and another contends that Fourth Amendment requirements are "illusory" if government agents "are allowed to indiscriminately intercept all conversations made and to continue monitoring calls when it becomes clear that they are not related to the authorized objectives of the wiretap."[73]

A decision by the U.S. Court of Appeals for the Tenth Circuit, upheld the use of such evidence because:

> It would be the heigth of unreasonableness to distinguish between information specifically authorized and that which is unanticipated and develops in the course of an authorized search...the nature and probable consequence of authorized wiretapping is discovery of unanticipated and undescribed communications. The very nature of this form of invasion is conducive to producing unexpected information.[74]

Colorado amended its statute in 1972 to provide that intercepted communications, other than those relating to the offense specified in the order, may

be used only if such communications relate to an offense which constitutes a felony. The new Kansas statute provides that intercepted communications relating to offenses not specified in the order may be used as evidence only when approved or authorized by a judge. In order to authorize such use, the judge must find that the material was intercepted in accordance with the federal or state statute. Application for such review must be submitted to the court "as soon as practicable."

The law requires that intercepted communications or the evidence therefrom may not be used in any proceeding unless each party, not less than 10 days before the proceeding, is given a copy of the application and authorization. The judge may waive this period if he finds that it is not possible to furnish the information and that the party will not be prejudiced by the delay. Any aggrieved person in a proceeding may move to suppress the intercepted communications on the grounds it was unlawfully intercepted, the authorization was insuffucient on its face, or the interception was not made in conformity with the authorization. The prosecution may appeal from an order granting a motion to suppress.

The Blakey-Hancock model also provides for advance notice of intent to use the communications. This is "designed to guarantee that disputes over the legality of intercepted communications will be raised and settled before the trial on the merits" and "to give the person against whom the intercepted communication is to be introduced an adequate opportunity to defend himself in this obviously technical area of the law."[75]

Inventory

Not later than ninety days after the filing of an application, the judge must cause an inventory to be served on the persons named in the order. If the judge determines that it would be "in the interest of justice" to serve other parties to the intercepted communication, he has the discretionary power to do so. The inventory must include: the fact of the order; the date of the order and period authorized; the fact that the communications were or were not intercepted. The judge may make available to the person or his counsel such portions of the order, application or communications as he also determines to be in the interest of justice."

The Ninth Cirucit has expanded this notice requirement somewhat. In U.S. v. Chun, the court increased the number of people who must receive inventory notice when it said:

> We believe that when the government intends to use the contents of an interception, or evidence derived therefrom, to obtain an indictment against an unnamed but overheard individual, such individual must be given notice promptly after the decision to obtain an indictment has been made. At a minimum, this notice must include all the information which is contained in a subparagraph 2518(8)(d) inventory notice.[76]

A Rhode Island case held that the state's law giving a defendant the right to examine tangible evidence does not apply to recordings or transcripts of intercepted communications.[77] On an ex parte showing of good cause, the serving of the inventory may be postponed. In U.S. v. Iannelli, the Court held that the federal statute does not require that a notice be served upon each person whose calls have been intercepted. "It is sufficient if an inventory is served upon the individual named in the application and such persons as the judge may determine in his discretion."[78] One U.S. District Court was of the opinion that, while the subject of the order does have an absolute right of notice, "It need be neither prompt nor adequate."[79]

The A.B.A. Standards are substantially similar to this federal provision for inventory, so that..."when an individual receives the inventory he will, moreover, then be in a position to take whatever action is available to him to suppress, if possible, the evidence obtained or to recover, where appropriate, civil damages."[80] The U.S. Court of Appeals for the Third Circuit upheld the suppression of evidence after non-compliance with this, citing the A.B.A. Standards and noting that this is not a mere ministerial act.[81]

Penalties for Illegal Surveillance

Penalties for illegal surveillance serve both as a deterrent to unlawful conduct and as the basis for restitution for persons whose conversations were unlawfully recorded. The older wiretapping statutes generally include only criminal sanctions, which were usually a misdemeanor. New statutes are generallly more severe.

Title III provides that any person whose communication is intercepted or used in violation of the law shall have a civil cause of action against the person who intercepts or uses it, and may recover: (a) actual damages of not less than the liquidated damages computed at $100 for each day of violation, or $1,000, whichever is higher; (b) punitive damages; and (c) costs and attorneys' fees. The A.B.A. Standards specify only that there should be a civil cause of action. The law defines "person" to include government employees.

Most of the new state electronic surveillance statutes contain a provision identical or similar to the federal one. The model state law proposed by Hancock and Blakey would also prohibit the state or political subdivisions from asserting governmental immunity. The A.B.A. also takes the position that sovereign immunity should be appropriately set aside in cases involving illegal surveillance.

Criminal penalties are also provided by the federal law and state laws. Connecticut's 1971 law set penalties similar to those in the federal law. The 1973 legislature, however, made the illegal possession, sale, or distribution of electronic surveillance equipment a class D felony. The federal law sets fines of not more than $10,000 or five years imprisonment, or both. State penalties vary widely. New Jersey's and New Hampshire's penalties, for example, are the same as the federal law. Maryland, on the other hand, sets the maximum penalty at $1,000 and 90 days. New York makes

it a Class E felony to eavesdrop illegally and a Class A misdemeanor to divulge information from an eavesdropping warrant.

The penalties assessed for illegal surveillance are of little use unless such illegal surveillance can be discovered. Because of the secret nature of surveillance activities, detection is often a matter of luck. One author has suggested that a statute be drawn which imposes "an affirmative obligation upon all persons having or obtaining knowledge of the existence of surveillance to disclose that knowledge to specified prosecutional or investigative officials."[82] Criminal and/or civil sanctions would be applied to any violator. The author concedes that this statute would only be one more tool with which to break the "conspiracy of silence" often connected with illegal surveillance.

Information is generallly not available on the number of actions that have been brought for unauthorized wiretapping or electronic surveillance, but there is no indication that enforcement has been vigorous. Some states are bringing such actions. Wisconsin has reported one conviction for illegal eavesdropping in 1973. New York reports seven convictions for the period from September 1, 1973 to September 30, 1974. New Jersey has issued one multi-defendant indictment for illegal eavesdropping. California reports that while such cases are not common, they do occur.

Results of Intercepts

Prosecutors are required to report police and court action resulting from intercepted communications. These show that intercepts are effective. In 1973, there were 2,306 arrests and 409 convictions reported as a result of intercepts. The total figure for the six years the Act has been effec is 3,211 convictions.

More detailed information on selected states show results obtained. The chief of Wisconsin's unit reported that their electronic surveillance law was used only once between its effective date in 1969 and June of 1971, but has been used eight times since then. Intercepts have concerned narcotics, gambling, kidnapping, and murder, and all have resulted in indictments.[83] Colorado's Organized Crime Stirke Force gives great credit for success in prosecutions to wiretaps. Of the seventeen wiretaps authorized in the state over the past four years, the Strike Force has conducted thirteen. Convictions resulting from wiretaps include two for gambling, five for burglary, and nine for possession of narcotics and dangerous drugs.[84] Of the eighteen states reporting to COAG on the use of electronic surveillance, thirteen report that intercepted conversations have been introduced as evidence.

The New Jersey Attorney General reports the following information for a four and one-half year period. The figures on the following page represent only those court orders obtained by the Attorney General. Locally obtained order are not included.

	1970	1971	1972	1973	Total
Total Installations Authorized	82	87	68	47	284
Total Conducted					
Gambling	65	69	38	29	201
Property	7	0	8	2	17
Narcotics	2	7	16	9	34
Loansharking	2	0	0	7	9
Bribery	0	1	0	0	1
Miscellaneous	0	4	4	0	8
	76	81	66	47	270
Total Arrests					
Gambling	270	206	68	57	601
Property	27	0	0	5	32
Narcotics	8	24	31	55	118
Loansharking	3	0	0	8	11
Bribery	0	2	0	0	2
	308	202	99	125	764
Total Convictions					
Gambling	156	142	21	13	332
Property	17	0	0	0	17
Narcotics	0	14	15	3	32
Loansharking	7	0	0	0	7
Official Misconduct	0	2	5	0	7
	180	158	41	16	395

Most organized crime control units consider wiretapping an essential tool. The statistics show increasing reliance on it. The New Jersey Attorney General issued a report on the state's wiretap law which said in part that:

> Electronic surveillance has enabled law enforcement to prosecute and to convict many high echelon organized crime figures in situations where all other investigative techniques had previously proved unsuccessful. In addition, the wiretap procedure has provided evidence not only vital to conviction, but to continuing investigations. Evidence so obtained has aided in the discovery of several criminal combinations once undetectable.[85]

Not all states, however, consider it necessary. Four of the states which have authorized electronic surveillance did not use it at all during the six years between 1968 and 1973. In an interview with COAG staff members, the chief of the organized crime control unit in a state which does not authorize wiretapping indicated he did not consider such a law necessary, because a small unit couldn't engage in long-term surveillance. The organized crime control chief of another state, which does authorize wiretapping, felt that it took too much time, compared to more traditional methods.

Congress recognized the lack of a firm factual basis for evaluating court-authorized surveillance by establishing a National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance to conduct a comprehensive study of the law's effect. Under the original timetable, the Commission was to file its report by June 19, 1975. Both Houses of Congress unanimously passed legislation in 1974 which would extend the deadline to January 31, 1976. As of January 1, 1975, however, the bill has yet to be signed by the President.[86] This Commission's report will help states in evaluating the need for and use of electronic surveillance.

On the state level, the Attorney General can take the initiative in ensuring proper use of electronic surveillance if his state has or is considering enabling legislation. He can draft legislation that embodies the necessary safeguards and work with the legislature to secure its enactment in proper form. The preceding discussion has shown that some variation is possible within the framework of federal law and constitutional requirements. The Attorney General can work for legislation that requires his approval of all applications for intercepts. He can assure that periodic public reports are made of surveillance activities. He can help police and prosecutors understand the legal requirements for authorized surveillance. He can make personnel and equipment available to help local officers in surveillance activities. Finally, he can provide for periodic review of his state's law and its effect.

3. FOOTNOTES

1. MASS. GEN. LAWS ch. 272, sec. 99A

2. President's Commission on Law Enforcement and the Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967).

3. American Bar Association Project on Standards for Criminal Justice, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 11, Approved Draft. (1971).

4. National Association of Attorneys General, Committee on the Office of Attorney General, SURVEY OF LOCAL PROSECUTORS, 80 (1972),

5. National Association of Attorneys General, Committee on the Office of Attorney General, THE OFFICE OF ATTORNEY GENERAL 9 (1971).

6. Olmstead v. United States, 227 U.S. 438 (1928) upheld a conviction secured by wiretap evidence.

7. Berger v. New York, 388 U.S. 41 (1967).

8. Katz v. United States, 389 U.S. 353 (1967).

9. Id. at 354.

10. Osborn v. United States, 385 U.S. 323 (1966).

11. United States v. White, 401 U.S. 745 (1971).

12. Note, Federal Decisions on the Constitutionality of Electronic Surveillance Legislation, 11 AM.CRIM.L.REV. 694 (Spring, 1973).

13. American Law Division, Congressional Research Service, Library of Congress, Update of American Law Division Study on Wiretapping and Electronic Surveillance 1 (1974).

14. U.S. v. U.S. District Court, E.D. Mich., 11 CrL 3131 U.S. Supreme Court, (June 19, 1972).

15. U.S. v. Ramsey, ___ F.2d ___ (7th Cir., August, 1974).

16. U.S. v. Cox, 449 F.2d 679 (10th Cir., 1971), cert. denied, 406 U.S. 934 (1971).

17. U.S. v. Escandar, 319 F.Supp. 296 (1970).

18. The statute has been held constitutional in other lower court cases: U.S. v. Cox, 462 F.2d 1293 (8th Cir. June 5, 1972); U.S. v. Focarile, 340 F.Supp.1033 (D.Md. Feb. 2, 1972); U.S. v. LaGorga, 336 F. Supp. 190 (W.D.Pa. 1971); U.S. v. King, 335 F.Supp. 523 (S.D.Cal. 1971); U.S. v. Lawson,334 F.Supp. 612 (E.D.Pa. 1971); U.S.v.Becker, 334 F. Supp. 546 (S.D.N.Y. 1971); U.S. v. Perillo, 333 F.Supp. 914 (D.Del. 1971); U.S. v. Scott, 331 F.Supp. 233 (D.D.C. 1971); U.S.v. Cantor, 328 F.Supp. 561 (E.D.Pa. 1971); U.S.v. Sklaroff, 323 F.Supp. 296 (S.D.Fla. 1971).

3. FOOTNOTES

19. Pub.L. 90-351, 82 Stat. 112, Title III, sec. 801 (1968).

20. Id.

21. Committee on Suggested State Legislation of the Council of State Governments, 1970 SUGGESTED STATE LEGISLATION, 44-22-00, 197 (1969).

22. G. Robert Blakey and James A. Hancock, A Proposed Electronic Surveillance Control Act, 43 NOTRE DAME LAWYER 657 (1967-68).

23. A.B.A. Project, supra note 3.

24. Charles Doyle, WIRETAPPING AND EAVESDROPPING: A BRIEF DISCUSSION OF PERTINENT SUPREME COURT CASES, A SUMMARY AND COMPILATION OF FEDERAL AND STATE STATUTES AND A SELECT LEGAL BIBLIOGRAPHY, Library of Congress (1970).

25. ILL.REV.STAT. ch. 38, sec. 14 (1961); ch. 134, sec. 16.

26. OHIO REV. CODE sec. 2933.58 (1970).

27. Halpin v. Superior Court, 495 P.2d 1295 (Calif. S.Ct. 1972).

28. Maryland v. Siegel, ___Md. ___, 292 A.2d 86 (July 12, 1972), affirming State v. Siegel, 13 Md.App. 444, 285 A.2d 671.

29. State v. Lee et al., ___Md.App.___ (Court of Special Appeals, Oct. 25, 1972).

30. California v. Halpin, 495 P.2d 1295 (1973).

31. N.D. CENT. CODE sec. 23-13-2.

32. State v. Cristy, 112 N.J. Super. 48, 270 A.2d 306 (1970).

33. U.S. v. Giordano, 473 F.2d 906 (4th Cir. 1973).

34. U.S. v. Brick, 502 F.2d 219 (8th Cir., August 15, 1974).

35. U.S. v. Aquino, 338 F.Supp. 1080 (1972).

36. Blakey &. Hancock, supra note 22 at 657.

37. Administrative Office of the United States Courts, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS FOR THE PERIOD JANUARY 1, 1970, TO DECEMBER 31, 1971, 10, (1972).

38. U.S. v. Robinson, 468 F.2d 189 (5th Cir. 1972).

39. Blakey & Hancock, supra note 22 at 671.

40. 18 U.S.C. sec. 2516 (1968).

41. 18 U.S.C. sec. 841 (1970).

3. FOOTNOTES, cont'd.

42. MASS. GEN. LAWS ch. 272 99A.

43. N.J. REV. STAT. sec. 2A:156A-1 et seq. (1968).

44. MD. ANN. CODE sec.35-92 et seq. (1956).

45. Administrative Office of the U.S. Courts, supra note 42.

46. 18 U.S.C. sec. 2510 et seq. (1968).

47. Interview with Alfred King, Special Attorney, Organized Crime and Racketeering Section, Criminal Division, U.S. Department of Justice, November 7, 1974.

48. N.J. REV. STAT. sec. 2A:156A-1 et seq.

49. Blakey and Hancock, supra note 22 at 671.

50. U.S. v. Keith, 407 U.S. 297 (1972); U.S. v. Clay, 430 F.2d 165 (1970); U.S. v. Smith, 321 F.Supp 424 (1971); Zweibon v. Mitchell, 42 U.S.L. Week, 2054 (1973).

51. 18 U.S.C. sec. 2510 et seq. (1968).

52. U.S. v. Bellosi, 501 F.2d 833 USCA - DC Cir., June 28, 1974).

53. U.S. v. Currevi, ___ F.Supp. ___, 16 CrL 2288 (USDC - Md., December 3, 1974)

54. Eavesdropping Orders and the Fourth Amendment, 66 COL. L. REV. 353 (1966).

55. U.S. v. Falcone, ___F.2d __ (3rd. Cir., September 30, 1974).

56. Administrative Office of the U.S. Courts, supra note 37.

57. U.S. v. Cox, 462 F.2d 1293 (1972).

58. U.S. v. Escandar, 319 F.Supp. 295 (1970).

59. State v. Christy, 112 N.J. Super. 48, 270 A.2d 306 (1970).

60. State v. Sidoti, 116 N.J. Super. 70, 280 A.2d 864 (1971).

61. 18 U.S.C. 2518 (5).

62. N.J. STAT. ANN. sec. 2A:156A.

63. State v. Molinaro, 117 N.J.Super. 292, 284 A.2d 385 (1971); See: The Right to Privacy - Minimization of Non-Pertinent Communications Required by New Jersey Statute, 3 SEXTON HALL L. REV. 543 (1972).

64. U.S. v. Scott, 331 F.Supp. 233 (1971); U.S. v. Sisca, 13 CrL 2379 (USDC -SNY, 6/25/73).

65. Spease v. State, __Md.App. ___ (May 21, 1974).

66. See Also AM. CRIM. L. REV., supra note 12 at 639; 26 RUTGERS L. REV.

67. 18 U.S.C. sec. 2510 et seq. (1970).

68. California v. Halpin, 495 P.2d 1295, 8 Cal. 3rd 301 (1973).

69. U.S. v. Kahn, 471 F.2d 191 (1973).

70. 18 U.S.C. sec. 2517 (5) (1968).

71. U.S. v. Skaroff, 323 F.Supp. 296, 300 (1971).

72. Note, Eavesdropping Provisions of the Omnibus Crime Control and Safe Streets Act of 1968: How Do They Stand in Light of Recent Supreme Court Decisions? 3 VALPARAISO L. REV. 97 (1969); Note: Electronic Surveillance - The Problem of Subsequent Justification, 23 MERCER L. REV. 993 (1972).

73. U.S. v. Cox, 449 F.2d 679 (10th Cir., 1971), cert. denied 406 U.S. 934 (1971).

74. Blakey and Hancock, supra note 22 at 651.

75. U.S. v. Chun, ____ F.2d ___ (9th Cir., August 30, 1974).

76. State v. Ricci, 106 R.I. 829, 268 A.2d 696 (1970.

77. U.S. v. Iannelli, 339 F.Supp. 171, 173 (1973).

78. U.S. v. Whitaker, supra note 17.

79. American Bar Association, supra note 3 at 162.

80. U.S. v. Eastman, 465 F.2d 1057 (3rd Cir., 8/8/72).

81. Alan Meisel, Political Surveillance and the Fourth Amendment, 35 U. PITT. L. REV. 53 (1973).

82. Interview with Assistant Attorney General David C. Mebane, Madison, Wisconsin, May 12, 1972.

83. Telephone interview with Assistant Attotney General Thomas N. Alfrey, Chief, Organized Crime Strike Force, Denver, Colorado, January 6, 1975.

84. Office of the Attorney General of New Jersey, REPORT ON THE NEW JERSEY WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT 13 (September 16, 1974).

85. Telephone interview with General Kenneth J. Hodson, Executive Director, National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, January 7, 1975.

4. INFILTRATION OF LEGITIMATE BUSINESS

Organized crime activities are not confined to traditional criminal areas. Organized criminals are penetrating legitimate business activities and are using them to"cleanse" their ill-gotten gains. The federal government and several states have developed legislation to meet this problem. Constitutional problems have arisen in framing such laws.

Nature of the Problem

The U.S. Chamber of Commerce said in a recent publication that:

> Practically every type of business and industry in the United States is currently being exploited or penetrated by an awesome, powerful, and no-holds barred competitor--a conglomerate of crime. This criminal conglomerate employs thousands, nets billions annually, operates nationwide and internationally, possesses an efficient and disciplined organizational structure, wields a depressingly effective lobbying apparatus, insulates itself against legal action, hurts billion-dollar corporations and cripples smaller companies, and according to many, rates as the most serious long-term danger to the security and principles of this nation.[1]

Business can supply invaluable assets to racketeers. Business enterprises can provide profits to feed into illegal activities, such as loansharking. They can provide a source of reportable income to cover a criminal's provable expenditures, thus making it possible for him to evade paying taxes on the rest. They give a racketeer respectability and social standing. They can provide a cover for illegal activities: employees, for example, can be carried on a company payroll but actually be involved in illegal activities. They can provide a way of "cleaning up" illegal income; the legitimate business, for example, can absorb illegal money, and show more profits than it actually has earned. They can provide a "front" for dealing with public officials.

There has been enough documentation to indicate that the problem is serious. The organized crime strike force in the Wisconsin Department of Justice, for example, reported three years ago that it had uncovered evidence showing that first-line organized crime figures in one part of the state had a financial interest or had participated in the operations of at least twenty-three business firms in the preceding 16 years.[2] The Pennsylvania Crime Commission compiled a roster of over 375 legitimate businesses which were wholly or partially owned by criminal syndicates, or were used by them for some illicit purposes.[3] The Commission recommended a Corrupt Organizations Act (which was subsequently enacted) because:

> It would destroy the fronts that many racketeers use to buy respectability or invest and cleanse their illegal profits, and would thereby increase their exposure to tax liability. It would also reduce those crimes such as bankruptcy shams, hijacking, embezzlement, and internal theft that are best accomplished through the trust or the contacts employed in business or union relationships.[4]

A recent study of the penetration of legitimate business by organized crime also found the problem to be widespread. It concluded that the problem was "manageable" because:

> it is not the intrinsic difficulty of collecting vital information about the extent and character of business penetrations that has been the effective bottleneck but, rather, the lack of manpower and other resources required for adequate collection of this intelligence, its pooling, and its analysis for use in mounting counter measures.[5]

This analysis did not examine legislative approaches.

Status of Legislation

Available information indicates that five states have enacted laws intended primarily to prohibit the infiltration of legitimate business by organized crime.

All of these authorize civil proceedings to forfeit corporate charters or to enjoin the operation of businesses which are criminally-operated. These are:

Connecticut - CONN. GEN. STAT. ANN. secs. 3-129a, 3-129b (1971).

Florida - FLA. STAT. sec. 932.62 (1969), declared unconstitutional by the Florida Supreme Court in Aztec Motel v. Faircloth, 251 So. 2d 849 (1971).

Hawaii - HAWAII REV. STAT. ch. 742 (Act 71, 1972).

Pennsylvania - PA. STAT. tit. 18, sec. 3921 et seq.

Rhode Island - R. I. GEN. LAWS ANN. sec. 7-14-1 (1970).

There are numerous differences between these statutes, which will be discussed subsequently. Several are similar to a Model Law included in the Council of State Governments Suggested State Legislation.[6] Others are modeled on Title IX of the federal Organized Crime Control Act of 1970, which concerns Racketeer Influenced and Corrupt Organizations.[7]

The State of Florida brought twenty-two actions under Florida's Corporate Charter Act before it was ruled unconstitutional. The Attorney General's office conducted all the investigations and developed all the background materials on which the cases were based.[8] No litigation has yet been initiated under the Connecticut, Hawaii, Pennsylvania or Rhode Island statutes.[9] The Attorney General of Hawaii reported, however, that the Organized Crime Unit of his office is presently investigating several potential cases which may result in prosecution under the statute.[10]

As of December 31, 1974, twenty indictments have been brought under the federal law, involving one-hundred and fourteen defendants. Fifteen of these defendants were convicted in four cases. A separate strike force in the U. S. Department of Justice, Strike Force 18, is devoting full-time to the statute. This strike force presently handles the larger and more difficult infiltration cases. It also devotes time to educating other personnel on the applicaton of the statute. The Chief of Strike Force 18 believes that the statute will be used more frequently as prosecutors become more aware of it and recognize its utility.[11]

Four states (Iowa, Massachusetts, North Carolina and Wyoming) reported to C.O.A.G. that legislation concerning infiltration of legitimate business was defeated in recent legislative sessions. Several other Attorneys Generals' offices have indicated that they plan to introduce such legislation next session.

Other states reported that they have laws relating indirectly to this problem. California, for example, reported that the Attorney General has statutory authority to prosecute violations of certain crimes involving business. Minnesota cited an antitrust law, which can be used against criminally-operated businesses. Presumably, all Attorneys General have some statutory powers concerning business which could be used against criminally-operated enterprises. For example, a Kansas law, discussed subsequently, prohibits business racketeering.

The Attorney General of Ohio has statutory authority to investigate and prosecute any organized criminal activity, when directed by the Governor or the General Assembly. Such activity includes concealing or disposing of the proceeds of the violation of certain criminal laws.[12] This law probably would permit investigation of businesses owned by organized crime figures. Ohio also has a law permitting dissolution of corporations which are organized for criminal purposes.[13]

Definition of Organized Crime

A basic matter of policy in statutes controlling the infiltration of organized crime elements into legitimate business is the definition of what constitutes organized crime. This may be phrased in terms of individual activities, types of activities, or violation of certain statutes. It should be noted that other types of legislation considered in this report, such as gambling and electronic surveillance, may include definitions of organized crime. While none of these definitions have been reviewed by the Supreme Court, they might be helpful in drafting the kind of laws considered here.

It is difficult to formulate a sufficiently precise definition for these purposes. Florida's statute was declared unconstitutional for this reason. It authorized action, under certain circumstances, against corporations whose officers or employees:

> purposely engaged in a persistent course of violent revolutionary or unlawful activity aimed at the overthrow of the government of the state or any of its political subdivisions, institutions or agencies, homosexuality, crimes against nature, intimidation and coercion, bribery, prostitution, gambling, extortion, embezzlement, unlawful sale of narcotics or other such illegal conduct...with the intent to compel or induce other persons, firms or corporations to engage in any such illegal conduct...[14]

Florida's Supreme Court held the statute unconstitutional because:

> The infirmity in the statutes is that they are too vague, indefinite and uncertain to constitute notice of the acts which may result in the forfeiture of a charter of a corporation or the enjoining of the operation of a business. The statutes contain no standard by which the proscribed acts may be determined...
>
> The effort to correct a purported evil as recommended by a crime commission is commendable, but when the means employed clash with our Constitution, this court is compelled to follow organic law. The protective wall safeguarding the constitutional rights of all our citizens should not be pierced, or even cracked by public opinion.[15]

The Florida law also listed activities which were not necessarily criminal. A person could, for example, "purposely engage in a persistent course" of gambling if he worked for a state lottery, although such employment was legal.

While the Council of State Government's Model Law was based on the Florida statute, the definition is significantly different and would not necessarily fail the court's tests of constitutionality. Organized crime is defined as:

> any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood, or to violate, aid or abet the violation of criminal laws relating to prostitution, gambling, loansharking, drug abuse, illegal drug distribution, counterfeiting, extortion, corruption of law enforcement officers or other public officers or employers. [Pornography and crimes against nature.][16]

The bracketed words are optional. The rest of this definition is taken from an Ohio statute[17] which gives the Attorney General broad investigative powers. The Hawaii law also uses this definition.

The Rhode Island and Connecticut laws are even more specific. They authorize the Attorney General to take action against a corporation when any person controlling its operation, under certain circumstances is:

> engaged in organized gambling, organized traffic in narcotics, organized extortion, organized bribery, organized embezzlement or organized prostitution, or who is connected directly or indirectly with organizations, syndicates or criminal societies engaging in such.[18]

Action against the corporation is also authorized if any of its officers, employees or stockholders have, under certain circumstances, engaged in "a persistent course" of the above-listed activities, with the intent to induce other persons or firms to deal with the corporation or engage in such conduct. Thus, definitions of proscribed activity for persons controlling a corporation are different from persons who are merely officers, employees, or stockholders. It is sufficient for the former to have engaged in specified organized criminal activity without following "a persistent course."

The federal law concerning racketeer influenced organizations defines racketeering activity by listing the following offenses: any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is punishable by imprisonment for more than a year under state law; any act which is indictable under specified provisions of the U.S. Code relating to bribery, sports bribery, counterfeiting, felonious theft from interstate shipment, embezzlement from pension or welfare funds, extortionate credit transactions, transmission of gambling information, mail fraud, wire fraud, obstruction of justice or of criminal investigators or of state or local law enforcement, interference with commerce, robbery or extortion, racketeering, interstate transportation of gambling equipment, unlawful welfare fund payments, illegal gambling, interstate transportation of stolen property, white slave traffic, or dealing with restrictions or payments to or embezzlement from union funds; any offense involving bankruptcy or security fraud, or the felonious manufacture, sale or receiving narcotics or dangerous drugs.[19]

This corresponds closely to the list of offenses for which electronic surveillance may be authorized under Title III of the Safe Streets Act.

The law does not apply to persons who have committed a single offense, but requires a "pattern of racketeering activity." This requires at least two such acts, one of which occurred after the effective date

of the law and the last of which occurred within ten years (excluding any period of imprisonment) after commission of a prior act. The ten-year limit between crimes was included on recommendation of the Council of the A.B.A. Section of Criminal Law, which pointed out that otherwise the acts could have been separated by any number of years.[20]

This definition has been criticized as including offenses which are often committed by persons not involved in organized crime, and as applying to a person who might commit two widely separated criminal offenses.[21] Senator McClellan argues, however, that "it is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well."[22] He notes further that an individual does not come under this definition unless he "not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate activity."[23] The U. S. Department of Justice has pointed out that "[i]t should be carefully noted that there must be affirmative proof of a nexus or relationship between the acts of racketeering charged in order to establish a pattern as required in each section of the statute."[24] Furthermore, the definition of pattern says that it "requires" at least two acts; this implies that two acts do not necessarily constitute a pattern.

Proscribed Activities

These laws take different approaches. They may make it illegal for a racketeer to invest in an enterprise or for anyone to conduct the affairs of the enterprise through racketeering activity.

The federal law in title 18, section 1962, creates four new crimes. It is unlawful:

(a) for "any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt...to use or invest any part of such income...in the acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." (The purchase of securities for purposes of investment are excluded under stated circumstances.);

(b) for any such person through a pattern of racketeering activity or through collection of an unlawful debt "to acquire or maintain, directly or indirectly, any interest in or control of" any enterprise in interstate commerce;

(c) for any person "employed by or associated with any enterprise" to conduct or participate in the conduct of its affairs "through a pattern of racketeering activity or collection of unlawful debt";

(d) for any person to conspire to violate any of these provisions.

The Pennsylvania statute is similar to this, and Hawaii's law includes these provisions.

The term "enterprise" as used in the federal statute is defined, in part, as meaning "a group of individuals associated in fact."[25] In commenting upon this definition, the U. S. Department of Justice has said:

> The term...is a new concept designed to reach illegitimate enterprises engaged in illegal activities. Our experience has been that this concept can be put to excellent use in the enforcement of Section 1962(c). Cases have arisen where organized criminals have banded together to commit illegal acts which affect economic activity. The group is only associated in fact and does not have any commonly known legal appearance.[26]

Such a criminal group can be prosecuted under the statute and thereby become subject to the tough criminal penalties and civil remedies of the Act.

This statute provides a new method of attacking illegal gambling businesses where a debt was incurred and collected and also loansharking activities where there is an absence of proof of violence in the collection of the debt. These prosecutions are possible because the statute applies to people who obtain funds, obtain control, or conduct an enterprise through the "collection of an unlawful debt." When this aspect of the statute is used in conjunction with the new criminal remedies of the Act, the legitimate front of a gambling business becomes subject to forfeiture.[27]

One of the indictments brought to date under the federal law charged that the defendants conspired to conduct and participate in the conduct of a meat loading company through a pattern of racketeering activity: "it was part of the said conspiracy that the defendants would, through harassments and threats of economic loss, intimidate various meat packers" for purposes of extorting money. All of the defendants in the case were convicted.[28] In another, the seven defendants were associated with a labor union, the Furriers Joint Council. They were charged with compelling named individuals:

> to abstain from engaging in conduct in which they had a legal right to engage, that is, the right to solicit business and operate, and conduct their non-union fur manufacturing shops, by instilling in them a fear that the defendants or others would cause physical injury to some persons in the future and cause damage to their property.[29]

Another federal case named sixteen defendants, who were associated with a vending machine business. The six-count indictment charged numerous specific offenses, which aimed at inducing personnel of other vending machine businesses to restrict the conduct of such businesses. Such consent was induced "by the wrongful use of force, violence, and fear," including threats and acts of violence. These defendants were all acquitted, however.[30]

The Council of State Governments Model Law takes a somewhat different approach, prohibiting control of an enterprise by persons connected with organized crime, and prohibiting organized crime activities by anyone acting for the corporation. Action may be brought against a corporation when:

(a) any officers or persons controlling the management or operation of the corporation, with the knowledge of the president and a majority of the board of directors or under circumstances wherein they should know, are engaged in organized crime or "connected directly or indirectly with organizations or criminal societies engaging in organized crime"; or

(b) a director, officer, employee, agent or stockholder "acting for, through or on behalf of a corporation in conducting the corporation's affairs, purposely engages in a persistent course of organized crime", with the knowledge of the board or under circumstances wherein they should know, "with the intent to compel or induce" other persons or firms to deal with the corporation or to engage in organized crime.

(c) In addition, the public interest must require action against the corporation "for the prevention of future illegal conduct of the same character."

Rhode Island's, Connecticut's and Hawaii's laws incorporate these provisions; Hawaii's also includes activities proscribed by the federal law. Florida's law was similar although, as noted previously, the definition of illegal conduct was much broader.

Ohio law specifies the conditions under which "a corporation may be dissolved judicially and its affairs wound up." One is by a court order in the county in which a corporation, whether non-profit or otherwise, has its office,

> ...when it is found that the corporation was organized or systematically used to further criminal purposes, or as a subterfuge to engage in prostitution, gambling, loansharking, drug abuse, illegal drug distribution, counterfeiting, obscenity, extortion, corruption of law enforcement officers or other public officers, officials, or employees, or other criminal activity.[31]

Actions are brought by the county prosecutor, rather than the Attorney General. This section of the statute was added in 1971.

A Kansas statute makes "racketeering" a felony and defines it as:

> demanding, soliciting, or receiving anything of value from the owner, proprietor, or other person having a financial interest in a business, by means of either a threat, express or implied, or a promise...that the person...will:
> (a) Cause the competition of the person from whom the payment is demanded, solicited or received to be diminished or eliminated; or
> (b) Cause the price of goods or services purchased or sold in the business to be increased, decreased or maintained at a stated level; or
> (c) Protect the property used in the business or the person or family of the owner, proprietor or other interested person from injury by violence or other unlawful means.[32]

This is not limited to businesses controlled by organized crime personnel. An annotation to this statute points out that racketeering is not a parallel offense to extortion, because it includes only the obtaining of business tribute, and extends to cases where special benefits are obtained, as well as to cases involving threats. This law apparently has not been used.

These statutes rest on the state's power to charter corporations, which assumes that such a charter is a privilege and not a right and on the state's consequent power to regulate corporate activity. The proscribed actions range from using income derived indirectly from a pattern of racketeering activity to acquire an interest in a business, to direct racketeering activity to acquire an interest in a business, to direct racketeering activity by a business. With the exception of the previously-cited Florida case, no decision concerning the constitutionality of these laws have been identified. The courts will probably decide whether some of these laws involve problems of vagueness and proof.

While the Florida law was declared unconstitutional primarily because of a defective definition, some other questions were raised. The defendants had noted that a corporation which was operating lawfully was subject to having its charter forfeited for an officer's activities which were not connected with any corporate business. The Supreme Court of Florida noted that its laws

> ...are not aimed at a corporation used as a mere device to accomplish an ulterior purpose, fraud, or illegal act. They are directed toward one or more individuals engaged in or associated with illegal activities who represent, control or manage a corporation engaged in a lawful business.[33]

Senator McClellan believes that:

> These equitable devices can prove effective in cleaning up organizations corrupted by the forces of organized crime. The first step in cleaning up an organization will be to require the mob to divest itself of its holdings in legitimate endeavors, where its members have abused that right by the condemned practices. In some cases, the organization will no doubt be so corrupt that it will have to be dissolved.[34]

This is a new approach to organized crime control. Its success would, of course, depend in large part on the quality of the investigative work that preceded court action.

Disclosure of Ownership

Another approach is to require disclosure of ownership, so that racketeers cannot use a corporation as a respectable front for their operations.

The Massachusetts Attorney General sponsored, unsuccessfully, a bill in the 1972 legislature which would have authorized him to request any corporation or real estate trust doing business in the Commonwealth to produce "a certified statement containing the names and addresses of all persons or business enterprises having a direct or indirect beneficial interest in the ownership or control of said corporation or trust." The list would have been required to be produced within three days and to include the names and addresses of those holding stock certificates in their own names or in a representative capacity for another. If the corporation or trust did not comply, the Attorney General could have brought court action. The court, after a hearing, could issue orders including, but not limited to: (1) quashing the request; (2) ordering the officers to divest themselves of any interest; (3) imposing reasonable restrictions on their future activities or investments; (4) order the corporation dissolved, after making due provision for the rights of innocent parties; and (5) prohibiting the corporation from engaging in similar activities. The legislature was unwilling to confer such broad investigatory power.

In 1970, New Hampshire enacted a Land Sales Full Disclosure Act, which imposed an ownership disclosure requirement upon anyone wishing to sell subdivided land within the state.[35] A subdivider must file an application for registration for subdivided lands before offering them for sale. The application must contain the name, address, and principal occupation of the subdivider. If the subdivider is a corporation, the statute directs which officers and stockholders must disclose their identity. The agency within the Attorney General's office responsible for enforcing the Act is authorized to initiate an examination to determine whether any subdivider, or any officer, director, or principal thereof, has been convicted "of a crime involving land dispositions or any aspect of the land sales business or any other felony in this state, the United States, or any other state or foreign country within the past ten years." Any violator of the Act or any person who willfully falsifies an application is guilty of a felony. The Attorney General has said that, according to the available intelligence, this statute has kept organized crime out of New Hampshire.[36]

In interviews with COAG staff members, organized crime control personnel in several states said that legislation was needed to allow the Attorney General to examine corporate holdings, merger lists and similar documents. It was noted that a racketeer-controlled enterprise might operate legitimately, so there was no way to bring an action against it, but the state needed to learn whether it was actually part of organized crime's operations.

Penalties

These laws invoke either civil or criminal remedies, or both. Civil sanctions include revocation of charters or licenses, divestive orders and injunctive relief. Criminal sanctions include fines, imprisonment and forfeiture of property.

The federal law provides both civil and criminal remedies. Criminal penalties include a fine of not more than $25,000 or 20 years imprisonment,

or both. They also include forfeiture of any interest acquired or maintained in a business contrary to the law. The forfeiture proceeding would be against a property declared unlawful, as in other federal law. The Department of Justice noted that this would be the first federal law to provide forfeiture as punishment for violation of a criminal statute, but believed that:

> ...this revival of the concept of forfeiture as a criminal penalty, limited as it is...to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom rather than of Constitutional power.[37]

In relation to forfeiture, the federal law also provides that the court shall have "jurisdiction to enter such restraining orders or prohibitions... in connection with any property or other interest subject to forfeiture."[38] This provision has been successfully used in a case concerned with the acquisition of stock in a corporation which operated a Caribbean resort hotel and casino, through a pattern of racketeering activity including fraud and the interstate transportation of stolen money and securities. In that case, the government obtained a restraining order to prevent the defendant from disposing of any part of his interest in the corporation, pending final disposition of the criminal charges against him. The government's plans for forfeiture were frustrated, however, since the creditor banks foreclosed on the defendant's interests. This case is presently pending on petition for certiorari to the United States Supreme Court.[39]

Several state laws include criminal sanctions. Pennsylvania's law sets penalties of up to $10,000 and/or 20 years imprisonment for persons who invest income derived from a pattern of racketeering activity in an enterprise. Hawaii sets a maximum penalty of $10,000 and 10 years imprisonment, plus forfeiture of property, for ownership or operation of business by persons who receive income from racketeering activity.

All of the statutes prohibiting criminal infiltration of business include civil sanctions. The Model Act authorizes the Attorney General to institute civil proceedings to forfeit the charter of a corporation, or enjoin the operations of another business. Rhode Island, Hawaii, Connecticut, and Florida have similar provisions.

Civil Remedies

The federal law authorizes district courts to issue appropriate orders, including:

> ...ordering any person to divest himself of any interest, direct or indirect, in any enterprise, imposing reasonable restrictions on the future activities or investments

> of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in...; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.[40]

An action brought against some persons associated with the Furriers Joint Council in New York sought to: (1) enjoin defendants from engaging in labor union activities; (2) divest them from any interests in the Council; (3) divest them from "all interests of any kind" in any union; and (4) direct each defendant to file a written quarterly report with the U. S. Attorney, describing their sources and amounts of income.[41]

In U.S. v. Cappetto[42] the federal government successfully invoked for the first time the civil injunction proceedings cited above when it obtained a temporary restraining order against various defendants involved in a wagering operation, which was found to be a violation of section 1962. The Department of Justice sought divestiture and reporting in addition to the restraining order but the court found consideration of those remedies to be premature at that particular stage of the case. A complaint was filed, however, which sought to permanently enjoin the defendants from engaging further in the gambling business.

The federal law provides that actions shall be expedited upon request of the Attorney General. Proceedings under the law may be open or closed to the public at the court's discretion "after consideration of the rights of affected persons."

Those persons injured in their business or property by reason of a violation of section 1962 are provided a cause of action for treble damages and the cost of suit by the federal statute.[43] This section is presently being used by a plaintiff in a thirteen and one-half million dollar suit involving the Caribbean casino case.

The federal law and the Hawaii and Pennsylvania laws provide for civil investigative demands. These are similar to those used in antitrust statutes and allow the Attorney General to require that relevant documents be produced for investigation. When the Attorney General has reason to believe that a person or enterprise under investigation has relevant documentary material he may, prior to the institution of a criminal or civil proceeding, issue a civil investigative demand to produce the material for examination. The statutes also provide for custody and return of the material, and for court action to enforce the demand.

The Department of Justice, in a statement submitted by Richard G. Kleindienst, who was then Deputy Attorney General, said that:

> These time tested remedies, particularly when used in conjunction with the civil investigative demands...should enable the Government to intervene in many situations

> which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure under which Section 1964 actions are governed, with its lesser standard of proof, non-jury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity.[44]

The civil investigative demand provision of the federal infiltration statute has not been used by the U.S. Department of Justice. Problems may arise in obtaining documents, because the type of persons involved may not be record-oriented, or may lose the documents. Furthermore, a grand jury investigation will usually uncover all those things available through the investigative demand.[45]

The defendants in the Florida case argued that the statute was in fact criminal in nature, because it was placed in the statutes dealing with criminal procedure and were "complete with references to suppressing of criminal activities and organized crime."[46] They argued that they should have the constitutional rights offered defendants in a criminal case. The Florida Attorney General's brief had argued that the United States Supreme Court "has consistently refused to apply the high standard used in criminal cases to actions involving civil sanctions," so the "void for vagueness" doctrine did not apply. The Florida court did not directly rule on the civil or criminal nature of the sanctions, but commented that "the statutes involved clearly impose a forfeiture or penalty" and quoted a Florida case holding that statutes authorizing forfeitures will not be enforced if they are ambiguous.

The United States Court of Appeals for the Seventh Circuit spoke directly to the issue of the civil remedies section of the federal statute in light of the general criminal nature of the statutory scheme. The defendants argued that the civil remedies of section 1964 were being used in an action which was essentially criminal and that, therefore, they were entitled to the traditional rights of a criminal defendant. In holding for the government the court said:

> Defendants unsuccessfully attempt to distinguish what they refer to as "the federal antitrust, pure food, and similar statutes." They argue that the civil proceedings provided for in those statutes, unlike those under Section 1964, are not designed as alternatives to criminal prosecution to serve when the requisite proofs are lacking. Neither, necessarily, is a proceeding under Section 1964, but the standard of proof is lower in a civil proceeding than it is in a criminal proceeding under any of the statutes we are considering.

> Defendants argue that the other statutes were designed to serve values "totally different from the purely criminal thrust of the Organized Crime Control Act." We see no basis in this distinction, if it is one, for circumscribing Congress' power to regulate activities affecting interstate commerce which is of a kind that is traditionally proscribed under criminal statutes, state or federal, does not enjoy a special immunity from regulation through civil proceedings, as the Supreme Court pointed out in the Debs case.[47]

The few existing laws that have been enacted to counteract the infiltration of business by organized crime have not been subject to either adequate tests of constitutionality in the courts or effectiveness in practical application to evaluate their merit. Further experience with these laws is necessary to judge their utility and their validity.

Action against businesses infiltrated by organized criminal elements is often possible without special legislation. The Oregon Attorney General's office has had particular success in attacking infiltrated businesses by using the powers existing under the state's regulatory laws. In one case, the Criminal Justice and Special Investigation Division of the Attorney General's office obtained the revocation of nine liquor licenses held by Sportservice Corporation at a Portland race track. Sportservice Corporation is a subsidiary of Emprise Corporation. Emprise controls at least 162 other corporate enterprises.[48] The Chief of the Division has said that:

> The use of regulatory agencies in the fight against organized crime provides an important tool not available through the traditional criminal justice system. While in most cases criminal statutes are adequate, there are various problems in getting judges to apply them to their full effectiveness. They are not adequate deterrents as used. Administrative rulings have the benefit of putting an orgainzed crime figure entirely out of business.[49]

Except for the Florida statute, which was declared unconstitutional, existing state laws concerning the infiltration of legitimate business by organized crime have not been tested either by the courts or by experience. This makes an evaluation of their constitutionality and practicality difficult. These laws do, however, embody a growing awareness of the importance of civil remedies in organized crime control.

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6. Committee on Suggested State Legislation of the Council of State Governments, 1971 SUGGESTED STATE LEGISLATION XXX (1970) 43-30-000.
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15. Aztec Motel, Inc. v. State ex rel. Faircloth, 251 So. 2d. 849 (1971).
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33. Aztec Motel v. Faircloth, supra note 13, at 853.

34. McClellan, supra note 20, at 142.

35. NEW HAMPSHIRE REV. STAT. ANN. ch. 356-A (1970).

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39. U. S. v. Parness (U.S.D.C.-S. Dr. N.Y., 73 Cr. 157).

4. FOOTNOTES

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48., Letter to Richard Kucharski from Clark E. Mears, Chief Investigator, Criminal Justice and Special Investigator Division, State of Oregon, October 4, 1974.

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5. LOANSHARKING

5. LOANSHARKING

The President's Commission on Law Enforcement and Administration of Justice in its 1967 report estimated that loansharking was organized crime's second largest source of revenue.[1] This chapter will consider the nature of the loansharking industry and the legislative response to its existence.

Nature of the Problem

The following definition of criminal loansharking was given in a thorough 1969 economic analysis of that activity:

> Criminal loan-sharking comprises three major elements. The first is the lending of cash at very high interest rates by individuals reported to be connected with underworld operations. With few exceptions, interest rates are much higher than those available at legitimate lending institutions. The second element is a borrower-lender agreement which rests on the borrower's willingness to pledge his family's physical well-being as collateral against a loan. The corollary of the borrowers' willingness is the lender's willingness to accept such collateral with its obvious collection implications. The third element is a belief by the borrower that the lender has connections with ruthless criminal organizations. The borrower is induced to repay his loans based on this reputation and his expected needs for future loans. If loan-shark reputations and future loans are inadequate repayment incentives, however, the lender is willing to resort to criminal means to secure repayment.[2]

The impact of loansharking is felt both by the individual victim and by society in general. The victim faces the prospect of financial ruin, emotional strain, and physical danger. He may be called upon to surrender the collateral on the loan - his life. Society feels the effects of criminal loansharking because it encourages further criminal activity. Revenue from loansharking provides organized crime with resources for corruption of officials and other criminal activities. The demands of payment have forced otherwise innocent victims to commit crimes such as robbery, embezzlement, and prostitution.[3] The greatest impact of loansharking was held by the Knapp Commission to be in urban ghettos, where it milks the poor, encourages criminal activities to raise money for repayment, and gains respect of young people, because it sucessfully flouts authority.[4]

Loansharking is attractive to organized crime because of the low risks involved and the enormous profits possible. The profits are attributable to exorbitant rates of interest. The low risks are attributable to the effectiveness of collection practices and the ineffectiveness of traditional statutory controls and law enforcement practices. It is a market that can be easily monopolized and it is less risky than other

forms of reinvestment, such as narcotics: "...like gambling, it sustains little risk vis-a-vis the police and courts, and is viewed with tolerance by society."[5] Since neither loansharks nor their victims pursue their claims or complaints in court, usury laws have little effect.[6]

The existence of a growing market for criminal loansharking may be explained in large part by the unavailability of high-risk credit through legitimate means. Usury laws and traditional lending practices limit the risk-taking ability of legitimate lending institutions. Persons who need high-risk credit and are willing to pay the price must turn to the loanshark. Legitimate credit institutions cannot compete with the loanshark's quick informal, convenient, and secretive extensions of credit. By relying on force and violence in the collection process the criminal lender is able to accept risks not feasible for legitimate agents.[7] Because written records are often not kept and nothing is illegally possessed, police enforcement is very difficult. The insulated organized crime pyramid is more difficult to expose than in other cases, since the victims are already in fear of physical harm. The silencing effect of fear is demonstrated by a 1971 survey conducted by the Michigan Attorney General's office. This survey established that, as of 1971, the Michigan criminal usury statute had not been used because, for the most part, there was a complete lack of complaints and/or complainants. Rather than assume that there was no loansharking going on in their state the Attorney General's office stated that:

> We are very much aware that it is the fear of physical retaliation, sometimes resulting in death, from loansharks that is the one prime reason for the lack of complaints and/or complainants in criminal usury cases.[8]

The preceding discussion seems to suggest a two-fold legislative approach to loansharking: first, to reduce the attractiveness of this enterprise to organized crime by severe criminal sanctions; second, to increase the availability of legitimate high-risk credit. Either approach should take into account the total scope of the problem.

Recent statutory efforts to curtail loansharking generally take the first form and extend the criminal sanction to two aspects of loansharking. (1) usurious rates of interest; and (2) extortionate collection practices. State criminal usury laws enacted in the middle 1960's concentrate on the first aspect, a 1968 federal statute on the latter, and several recent state enactments incorporate both approaches.

Federal Legislation

Congress enacted a modern loansharking statute in Title II of the Consumer Credit Protection Act of 1968.[9] The statute is not a federal usury law and "...does not preempt any field of law with respect to what state legislation would be permissible in the absence of this chapter."[10] Entitled "Extortionate Extensions of Credit," Title II concentrates on the use of force or violence in the extension of credit.

The Act defines an "extortionate extension of credit" as:

> ...any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.[11]

Penalties for making such an extension of credit are set at up to $10,000 and 20 years imprisonment.[12]

Recognizing possible difficulties of proof, the act provides that if four factors are present there is prima facie evidence that the extension of credit was extortionate. These are: (1) the unenforceability of the obligation in the jurisdiction of the debtor's residence; (2) a rate of interest in excess of 45 percent a year; (3) a reasonable belief on the part of the debtor at the time of the transaction that either the creditor had used extortionate collection means in the past or that he had a reputation for the use of such means; and (4) a total debt between the debtor and the creditor exceeding $100.[13]

The Act also prohibits the "financing" of extortionate extensions of credit[14] and the actual collection of extensions of credit by "extortionate means."[15] The same penalties are provided for these offenses.

Congress advanced two constitutional bases for the regulation of loansharking: (1) regulation of interstate commerce and (2) establishment of uniform laws on the subject of bankruptcy.[16] In Perez v. U.S.,[17] the Court upheld the constitutionality of the statute. It held that Congressional findings were adequate to support the conclusion that loansharks who use extortionate means of collection are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce.[18]

A recent Tenth Circuit opinion may have expanded the scope of future prosecutions under Title II. In U.S. v. Briola,[19] the court interpreted the statute as prohibiting the use of extortionate means in the collection of a gambling debt. While noting that the Act is aimed primarily at traditional loan transactions the court found that:

> ...the real thrust of the legislation is directed to the use of extortionate means in order to collect monies which creditors maintain are owing them, regardless of whether the loan arose from a traditional type of loan or resulted from the assumption of responsibility as a result of force or threats.[20]

This decision seems to follow the express desire of Congress that the measure be used "with vigor and imagination against every activity of organized crime that falls within its terms."[21]

The Briola decision was cited on a similar issue in U.S. v. Annerino.[22] In that case the extortion victim became indebted to his business partner through the unauthorized use of his partner's credit cards and the misappropriation of partnership funds. When he left the partnership he owed his partner

$3,500. Various threats and other extortionate means were used in attempting to collect the debt. The Court quoted Briola and held that the nature of the debt was not important to the case; what matters is the extortionate means used to collect the debt. The debt owed by the victim was found to be an extension of credit to him within the meaning of the statute because there was no doubt that a debt was owed, and there did exist an agreement whereby payment would be deferred. An extension of credit is defined, in part, as entering "into any agreement...whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid , and however arising, may or will be deferred."[23]

Other decisions have upheld the law. In U.S. v. Webb[24] the Fifth Circuit Court of Appeals held that the power of Congress to legislate by means of the Commerce Clause extends to intrastate activities which affect interstate commerce. The court quoted from a 1942 case, Wickard v. Filburn:[25]

> ...even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantive economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect...In legislating for a legitimate end under the Commerce Clause, Congress is not restricted to merely an economic definition of commerce but it may also legislate against matters considered to be deemed a moral and social wrong.

State Legislation

The lack of effective state statutory prohibitions is generally cited as a major incentive for organized crime's move into loansharking. In most states, loansharking operations violate two statutory provisions: small loans laws and usury laws. Neither of these laws effectively control loansharking. Alternate means of prosecution such as extortion and conspiracy also have limited application. In the late 1960's, state legislatures began to respond to the obvious lack of statutory proscriptions against loansharking. Six states enacted criminal usury statutes which made it a felony to knowingly charge above the legal interest rate. Five states followed the language of 1968 Federal Consumer Credit Act and prohibited "extortionate extension of credit".

A 1969 study in the Columbia Journal of Law and Social Problems[26] examined statutes applicable to loansharking operations in the seventeen states which were identified by the President's Commission as having the most severe organized crime problem. The authors found that all seventeen states had small loan laws prescribing penalties for operation of a small loan business. These laws were found to be an ineffective means of controlling loansharking for two reasons. The maximum transactions covered ranged only from $300 to $3,000 and many loanshark transactions exceed these limits. The penalties provided were too light to be effective deterrents, with fines commonly ranging from $25 to $1,000 and prison sentences from none to one year.

The article also found usury laws to have inadequate penalties. Usury laws are not effective against organized crime because they provide insufficient remedies to the borrower and inadequate sanctions for the lender, who may merely have to forfeit interest in excess of the legal maximum. Some states provide solely for civil actions. The article finds that "these laws are primarily designed to provide a defense in a suit by a creditor to enforce a debt obligation, an unlikely course of action for a loanshark.[27]

In addition to these statutory controls, most states have other available means of prosecuting loansharks. One approach is to indict organized crime figures for conspiracy to violate the small loan and usury laws. Another approach is to bring charges for extortion or other crimes committed in the collection process. For example, it is sometimes possible to convict a loanshark under telephonic threat laws. The procedure involves having the victim tell the loanshark over the telephone, if such is possible, that he will not pay the debt or a portion thereof. The ensuing conversation will usually involve a series of threats over the telephone which provide direct evidence of a violation of the statute. A consensual wiretap can be used to preserve the evidence.[28] Proof of these crimes is not always possible in a loansharking operation and even if a case can be made, it will normally only reach lower members of the syndicated operation.

New York, Michigan, Illinois, Massachusetts, Kentucky, and California have enacted criminal usury statutes which aim at one illegal aspect of loansharking by making it a felony knowingly to charge excessive rates of interest.[29] The New York and Michigan statutes are identical:

> A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes, or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five percentum per annum the equivalent rate for a longer or shorter period.[30]

The Massachusetts and Illinois laws apply to one engaged in transactions involving an interest rate greater than 20 percent per year while the Kentucky and California laws apply to any loan involving an interest rate in excess of the legal maximum.

The Michigan Attorney General's office has successfully conducted two investigations under the statute. One case resulted in the conviction and sentencing of three "well-known and documented" organized crime figures. The second case resulted in the conviction of two persons who were sentenced to prison and fined heavily.[31]

These statutes are clearly more effective controls of the criminal loansharking industry than traditional small loan and usury laws. There are no limitations on the amount of the loan covered or no corporate exemptions from prosecution. The maximum penalties provided, if applied, are strict enough to have a deterrent effect.

However, the authors of the Columbia Journal article note that these statutes also present problems:

> Ignorance and fear seem to discourage victims from coming forward as much under the new law as under the old statutes. In addition, in theory the testimony of the victim alone should be sufficient for a successful prosecution. But as a practical matter, corrobarative evidence (such as records, checks, tape recordings, and other witnesses) will probably be required, and this may be difficult to acquire.[32]

Perhaps the main shortcoming of these laws is that they extend to only one illegal aspect of loansharking, charging an excessive rate of interest. The other, the use of force or violence in the lending process, is not touched upon. Massachusetts attempts to remedy this by providing severe penalties for an assault and battery in the collection of a loan.[33] Another approach is to enact a single statutory framework applicable to both aspects of loansharking.

The Columbia Journal article sets forth a model act which attempts to incorporate the best features of both the 1968 federal consumer credit act and the New York criminal usury statute. The definition of "extortionate means "is like that in the federal law,"and "criminal usury" is defined as interest exceeding 25 percent, per annum.

Where direct evidence of the understanding is available, the offense of extortionate extensions of credit may be proved without regard to the sums involved. Where it is not, or where the debtor does not testify, the existence of three factors creates a rebuttable presumption of guilt. These factors are: (1) a rate in excess of that established for criminal usury; (2) the debtor's reasonable belief that extortionate means would be used, or the creditor's reputation for using such means; and (3) the total credit outstanding, including interest, exceeded $100. A conspiracy provision is included and penalties are set for financing either criminal usury or extortionate credit, and for possessing relevant records. Other provisions of the model contain witness immunity and protection of witnesses.

Five states have followed the federal statute and the Model Act by penalizing extortionate extensions of credit. These states are Colorado, Florida, New Jersey, Pennsylvania, and Wisconsin.[34]

The 1969 Wisconsin law, using language similar to the federal Act, prohibits lending or giving money "for the purpose of making extortionate extensions of credit." The prohibited credit is that "with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment...could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person."[35]

The 1968 New Jersey statute comes conceptually closer to the Model Act by prohibiting both excessive rates of interest and the use of force and fear in connection with the loan. The Act prohibits charging or receiving interest on a loan in excess of 50 percent per annum, engaging in the business of making such loans, using fear or force in connection with a loan with interest in excess of 50 percent, and possession or control of records of such transactions.[36]

The 1969 Florida statute makes extensions of credit at a rate of more than 25 percent but less than 45 percent and possession of records of loansharking transactions misdemeanors. Loans at a rate greater than 45 percent are extortionate extensions of credit are designated felonies.[37]

The 1972 Pennsylvania statute punishes any extortionate extension of credit where the rate of interest exceeds 36 percent per annun "when not otherwise authorized by law." The statute uses factors similar to those in the federal law to establish prima facie evidence that the extension of credit was extortionate.[38]

The 1972 Colorado law is the closest in form to the Model Act. It utilizes both the Model's definitional structure and the presumption that an extension of credit, satisfying three factors, is extortionate. The Act prohibits extortionate extensions of credit, criminal usury (in excess of 45 percent), and the financing of either activity.[39]

Maximum penalties for violations of criminal usury statutes range from fines of $1,000 in Illinois to $15,000 in Colorado and from imprisonment of four years in New York to ten years in Massachusetts. Penalties for extortionate extensions of credit range from up to $10,000 and ten years in Florida and $10,000 and twenty years in Pennsylvania to $30,000 and ten years in Colorado. The Federal Act and the Model Act both set penalties for extortionate extensions of credit and up to $10,000 and twenty years imprisonment.

5. FOOTNOTES

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3. Comment, Loansharking: The Untouched Domain of Organized Crime, 5:91, COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS, 102 (1969).

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6. New York State Commission of Investigation, THE LOANSHARK RACKET (1965).

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11. 18 U.S.C. sec. 891 (6) (1968).

12. 18 U.S.C. sec. 892 (a) (1968).

13. 18 U.S.C. sec. 892 (b) (1968).

14. 18 U.S.C. sec. 893 (1968).

15. 18 U.S.C. sec. 894 (1968).

16. Pub. Law 90-321 sec. 201, 18 USCA sec. 891 (1968).

17. Perez v. U.S., 402 U.S. 146 (1971).

18. See also, U.S. v. Antonelli, 439 F.2d 1068 (1971); U.S. v. Keresty, 323 F.Supp. 230 (1971); U.S. v. Calegro Delutro, 309 F.Supp. 462 (1970); U.S. v. Cuncio, 310 F.Supp. 351 (1970); U.S. v. Bonanna, 467 F.2d 14 (1972); U.S. v. Bowdash, 474 F.2d 812 (1973); U.S. v. Annoveno, 460 F.2d 1303 (1972); U.S. v. Pizzi, 470 F. 2d 681 (1972); U.S. v. Manarite, 434 F. 2d 1069 (1970); U.S. v. DeCarlo, 458 F.2d 358 (1972).

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20. Id. at 2031.

21. Conference Report 1357, quoted in COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS, supra note 3, at 113.

22. U.S. v. Annerino, 495 F. 2d 1159 (USCA - 7th Cir., 1974).

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25. Wickard v. Filburn, 317 U.S. 111 (1942).

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27. Supra note 3.

28. Interview with Alfred King, Special Attorney, Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice, Washington, D. C., November 7, 1974.

29. N. Y. PENAL LAW sec. 190.40 (McKinney 1967); MICH. COMP. LAWS ANN. sec. 438.41 (1968); ILL. ANN. STAT. ch. 38 sec. 39-1 (1967); MASS. GEN. LAWS ch. 271 sec. 49 (1970).

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31. Supra, note 8.

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33. MASS. GEN. LAWS ch. 265 sec. 13B (1967).

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35. WISC. STAT. ANN. sec. 943.28 (Supp. 1970).

36. N. J. REV. STAT. sec. 2A 119A-1 et seq. (1968).

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6. PROFESSIONAL GAMBLING

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Gambling is generally considered the chief source of income for organized crime. Most states, however, still have gambling laws that were enacted in the 19th century, and aim at individuals rather than syndicated operations. These laws seldom differentiate between casual and professional gambling, and involve only a misdemeanor.

In the last few years, states have begun to revise their gambling laws to set severe sanctions for professional gambling. The federal government and twenty states now have such statutes.

At common law, gambling was not a crime. It became a crime only under certain conditions that involved special statutes concerning some particular game or type of gaming. By the late nineteenth century, almost every type of gambling had become illegal. These laws were primarily a result of the efforts of religious and reform groups, whose policy toward gambling was to protect the public as set out in Marvin v. Trout:

> It is well settled that the police power of the state may be exerted to preserve and protect the public morals. It may regulate or prohibit any practice or business, the tendency of which as shown by experience, is to weaken or corrupt the habits of those who follow it, or to encourage idleness instead of habits of industry. Whether or not gambling is demoralizing in its tendencies is no longer an open question. Gambling is injurious to the morals and welfare of the people and it is not only within the scope of the state's police power to suppress gambling in all its forms, but it is its duty to do so.[1]

Gambling and Organized Crime

In 1951, the Kefauver Commission found that gambling was the principal source of income for organized crime.[2] In 1967, the President's Commission on Law Enforcement and Administration of Justice said that "law enforcement officials agree almost unanimously that gambling is the greatest source of revenue for organized crime," and that "most large-city gambling is established or controlled by organized crime members through elaborate hierarchies."[3] Estimates from responsible sources place the gross annual revenue from gambling (primarily from races, athletic contests, and numbers games) at from $20 billion to $50 billion, with the net proceeds estimated at about one-third of the gross. It is estimated that half of all television footballs fans make bets of some kind, and that up to 90 percent of the business of bookmakers comes from team sports.[4]

Of the twenty-six states which felt they had sufficient information on the issue, twenty-two reported to COAG that they considered that interstate organized criminal groups were involved in some gambling activities within their borders. Another sign of the connection between organized crime and gambling is that state organized crime control units are probably

more concerned with gambling than with any other single crime. One indication of this is that of 855 electronic surveillance intercepts authorized by courts in 1972, gambling was the major offense in 497.[5]

Some gambling laws recognize this relationship to organized crime, although none restrict their application to organized crime members. The new federal gambling law was enacted as part of the Organized Crime Control Act of 1970. The Model Anti-Gambling Act promulgated by the Commissioners on Uniform State Laws, in the declaration of policy section, recognized "the close relationship between professional gambling and other organized crime."[6] The Illinois Statute uses this same language.

Illegal gambling may be relatively inoffensive, but it supplies organized crime with the economic base to carry out more socially-harmful activities. It often involves the corruption of public officials. The President's Commission said that the organization of gambling activities "not only creates greater efficiency and enlarges markets, it also provides a systemized method of corrupting the law enforcement process by centralizing procedures for the payment of graft."[7] The Knapp Commission Report on Police Corruption stated that New York City policemen, especially those in plainclothes units, shook down gambling operations throughout the City on a regular, systematic basis. The money collected by the police from gamblers has been well organized and has existed for years in spite of scandals, reorganization of departments, and the closing of some gambling operations.[8] One authority believes "that crime leaders run illegal gambling with the full knowledge and sometimes active participation of local authorities, and that they have strong connections among powerful people at every level in American life."[9]

Gambling takes many forms, including card games; dice and roulette; bookmaking and poolselling; coin-operated devices; lotteries; policy; and numbers. All of these benefit from affiliation with an organization. A bookie, for example, needs someone to supply fast race results from out-of-state tracks. He must be able to "lay-off" some bets with other gamblers. He must be able to collect illegal gambling debts. He must be able to channel his illegal winnings into reportable profits. He must have protection from arrest and prosecution. Organized crime renders these services to him.

The structure of organized crime insulates its leaders, making it very difficult to curb their activities. The Missouri Task Force on Organized Crime found that:

> In every instance, members of organized crime's hierarchy are insulated from the street operations by three of four levels, making arrests and prosecution of syndicate members virtually impossible... Arrests and prosecution invariably are brought against the local bookie or policy writer but the key operators of the gambling rackets are seldom, if ever, discovered. Hence, the operation is never dealt a mortal blow.[10]

The neighborhood bookie or policy writer may be part of a syndicated operation, but he knows little about the structure of the organization. He

may be arrested, but it is difficult to prove a connection between him and organized crime bosses. This characteristic of most gambling activities is important when considering anti-gambling legislation as a method of organized crime control.

Gambling may be, as one writer says, "an activity which is universally indulged in, which is not generally very injurious directly to those who participate, and which implies no direct threat to the social structure".[11] But as Pennsylvania's Crime Commission reported, "The end result of the entrenchment of gambling syndicates is an intricate web of conspiratorial and individual crimes." Gambling usually involves other crimes: extortion, to drive out competition and collect debts; loansharking, to provide players with funds; bribery, to immunize from police raids; and tax evasion.[12] It is this relationship to organized crime that is responsible for the recent interest in revising gambling laws.

Federal Law

Title VIII of the Organized Crime Control Act of 1970[13] finds that "illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof." It then makes certain syndicated gambling activities federal crimes. The U.S. Court of Appeals for the Third Circuit has upheld Congress's power thus to regulate gambling:

> Congress has chosen to protect commerce and the instrumentalities of commerce not from all illegal gambling activities but from those it deems of major proportions. We may not substitute our judgement as to where the line might have been drawn. Nor may we sit in judicial review of congressional legislative findings.[14]

The law penalizes persons who conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business. Illegal gambling is defined as a gambling business which: involves five or more persons who conduct, finance, or supervise such operations, which violates state or local law; has been or remains in "substantially continuous operation" for over thirty days; or has a gross revenue of $2,000 in any single day. The statute exempts bingo and similar games of chance which are conducted by non-profit organizations. The Act also makes it a crime for two or more persons to conspire to obstruct state or local criminal laws in order to facilitate illegal gambling, if one or more of the persons: does any act to effect this purpose; is an officer or employee of the state or local government involved; and finances or conducts the illegal gambling. Thus, the federal government has become directly involved in enforcing gambling laws, whether those are federal, state or local. Particular provisions of this federal law are discussed throughout this chapter.

Federal courts have sustained convictions for operating an illegal gambling business in violation of section 1955 without a showing in each individual case that the defendants' activities affected interstate commerce. In U. S. v. Harris, the court rejected appellants' argument that Congress' right to regulate gambling is reserved to the states by the Tenth Amendment, or that the Commerce Clause can be used to regulate intrastate gambling.

Noting the legislative history behind the Organized Crime Control Act of 1970, the court sustained the government's authority to resort to any means for the permitted end of controlling illegal gambling. "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." In denying the argument of the purely intrastate nature of the gambling activities, the court pointed out the interstate ramifications of the gambling operations:

> It is no answer to suggest, as does respondent, that the federal power to regulate intrastate transactions is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitious circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce... It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power.[15]

A dispute exists regarding the application of the general conspiracy statute to a 18 U.S.C. sec. 1955 case. The dispute centers around the application of Wharton's Rule to the conspiracy prosecution. Wharton's Rule states that an agreement by two persons to commit a crime cannot be prosecuted as a conspiracy when the crime is of a nature as to require the participation of two persons for its commission. Since a substantive violation of 18 U.S.C. sec. 1955 requires the participation of five or more persons, it is argued that Wharton's Rule prohibits a conspiracy conviction. This rule of criminal law has long been recognized by the federal courts, but has generally been applied to crimes such as adultery, bribery, incest, and dueling. In each case, the crime cannot be effectuated without the concerted activity of two people.

The federal courts which have considered the question, have reached different conclusions. Three federal courts have held that the Rule forbids the prosecution for conspiracy to violate sec. 1955. One district court has denied a pretrial motion by defendants to dismiss the conspiracy charges on the basis of Wharton's Rule holding that the Rule does not apply when more than the requisite five people are arrested for a sec. 1955 violation. The Fifth Circuit has held that Wharton's Rule is not applicable to a sec. 1955 case. It stated that:

> Wharton's Rule is applicable only when more than one party is necessary to perform the basic crime. It prevents prosecution for conspiracy only when the proscribed type of conduct cannot take place without such concert of action. The basic conduct prohibited by sec. 1955, however--the operation of

> an illegal gambling business--does not require concert of action. It is not, therefore, a proper subject for the application of Wharton's Rule.[16]

Six U. S. Circuit Courts have held that 18 U.S.C. sec. 1955 is within the constitutional powers of Congress under the Commerce Clause. The Ninth Circuit Court of Appeals was the most recent to hold that sec. 1955 does not exceed Congress' power to regulate commerce, is not unconstitutionally vague, and does not deny equal protection or due process by virtue of the fact that its application may vary from state to state, depending upon the laws of each state.[17]

Prior to enactment of Title VIII of the Organized Crime Control Act:

> ...The exercise of Federal jurisdiction [over gambling] has been neither consistent nor completely successful. In part this has been due to the fact that such legislation has been largely the result of haphazard historical development in response to Congressional concern with particular aspects of the gambling problem, rather than a rational analysis as to what extent and upon what basis the Federal government should regulate gambling.[18]

Previous federal gambling laws have been of three types: those using tax provisions to regulate gambling activities; those dealing with the interstate transmission of gambling information or shipment of gambling devices; and those prohibiting interstate lotteries or similar schemes. This indirect approach has resulted from an assumption that regulation of gambling is a police power reserved to the states; "not suprisingly, these statutes have failed to achieve their purpose since they must purport to be a proper exercise of other federal powers and employ indirect methods of control over gambling."[19]

Some of the federal laws will be noted here, although a complete listing is not attempted. Federal law proscribes interstate transmission of wagering information by individuals engaged in the business of wagering.[20]

Some courts have interpreted "transmission" to mean sending, but not receiving, which has hindered the law's effectiveness. Another law makes it a crime to travel in interstate commerce with intent to carry out certain activities relating to gambling.[21] A third statute prohibits interstate transportation of wagering equipment into a state where betting is illegal.[22] Other federal laws proscribe lotteries and prevent use of the mails for this purpose.[23] These statutes antedate the legalization of lotteries by several states. These laws were enacted after the Kefauver Committee findings and carry strong penalties. Their constitutionality has been upheld in numerous decisions.

One approach has encountered constitutional problems. Title 26 of the U.S. Code levied a $50 tax on anyone engaged in the business of receiving bets. The bookmaker had to register with the Internal Revenue Service and maintain records for inspection. The Supreme Court held that no one may be

prosecuted for violating this law if they claim their constitutional privilege against self-incrimination, so the law is no longer enforced.[24]

Gambling laws have been heavily utilized by the Organized Crime and Racketeering Section of the U. S. Department of Justice. About 20 percent of the cases result in jail sentences, with terms of from 6 months to a year, and some up to 5 years.[25]

State Gambling Legislation

The accompanying table shows each state's approach to control of gambling. Some states have also attempted to meet the problem by legalizing lotteries or other forms of gambling, under state regulation. Legalized gambling is beyond the scope of this chapter and is not considered here.

The most prevalent approach to gambling control is still a series of statutes which have been enacted piecemeal to prohibit different specific activities. Usually, these do not involve a felony, and penalize both the player and the promoter.

Individual statutes have been enacted as new forms of gambling developed. A 1969 study, for example, found that thirty-one sections of the chapter of the Kentucky statutes which dealt with offenses against morality dealt with gambling. Eight penalized the citizen who bets, while the rest restricted the promotional aspects of various types of gambling. Kentucky gambling laws, which had remained basically the same since the 1890's, were probably typical. Not only are such laws ineffective, they are difficult to enforce because:

> The fact that each phase and type of gambling is dealt with separately limits the efficacy of the statutes to their own specifically defined terms. Each charge must be individually tailored to the explicit section and clause of the statute, a process which often produces mistakes and results in fewer convictions.[26]

Kentucky modernized its gambling laws in 1974.

These kinds of laws, even if enforced, may have little long-term effect. The chief of one state's organized crime prosecution unit commented in an interview with the C.O.A.G. staff that gambling raids get publicity, but have little long-term effect; you can embarrass people, but the public and judiciary are very tolerant of gamblers.

In addition to gambling statutes, there are other laws that may be used. Some states have statutes providing that certain licenses, such as alcoholic beverage licenses, may be revoked if the owner is found guilty of gambling offenses. Gambling was not a common law offense, although gambling debts were not enforceable, but gambling premises may be common law nuisances and subject to abatement. Some states recognize this by statute.[27]

TABLE 6. PROFESSIONAL GAMBLING LAWS

Alabama	ALA. CODE tit. 14 ch. 46 (various dates) - General prohibition. ALA. CODE tit. 14 secs. 294, 296, and 297 (1909) - Felony to use electric bells, signals, or barricades in conjunction with gambling devices.
Alaska	ALASKA STAT. secs. 11.60.140 et seq. (1949) - General prohibition, no felony provision. ALASKA STAT. sec. 11.60.170 (1949) - "Common Nuisance".
Arizona	ARIZ. REV. STAT. ANN. sec. 13-440 (1970) - Business of accepting bets is felony.
Arkansas	ARK. STAT. ANN. secs. 41-2001 et seq. (1913) - General prohibition. ARK. STAT. ANN. sec. 41-2001 (1913) - Felony to keep gambling house.
California	CAL. PENAL CODE secs. 330-337s (various dates) - General prohibition. CAL. PENAL CODE sec. 337a (1909, amended 1968) - Felony provision for bookmaking and pool selling.
Colorado	COLO. REV. STAT. ANN., secs. 40-10-101 et seq. (1963, amended 1971) - New gambling article, "Professional Gambling".
Connecticut	CONN. GEN. STAT. REV. secs. 53-271 et seq. (1949) - General prohibition, no felony provisions.
Delaware	DEL. CODE ANN. tit. 11 secs. 661 et seq. (1962) - General prohibition. DEL. CODE ANN. tit. 11 sec. 670A (1962) - Progressive penalties for repeaters.
Florida	FLA. STAT. ch. 849 (1971) - General prohibition. FLA. STAT. sec. 849.01 (1971) - Felony to keep gaming house.
Georgia	GA. CODE ANN. ch. 26-27 (1968) - General prohibition. GA. CODE ANN. sec. 26-2703 (1968) - "Commercial Gambling" misdemeanor of high and aggravated nature.
Guam	GUAM PENAL CODE secs. 330-337 (various dates) - General prohibition, no felony provision.
Hawaii	HAWAII REV. LAWS ch. 12, sec. 1220.
Idaho	IDAHO CODE ANN. sec. 18-2013 (1971) - New gambling law, no felony provision.

TABLE 6. PROFESSIONAL GAMBLING LAWS

Illinois	ILL. REV. STAT. ch. 38 secs. 28-1 et seq. (1961)- "Syndicated Gambling" - felony.
Indiana	IND. ANN. STAT. secs. 10-2301 et. seq. (1905)-General prohibition. IND. ANN. STAT. secs. 10-2329 et. seq. (1955)-"Professional Gambling"- felony.
Iowa	IOWA CODE ANN. ch. 99A-Gambling devices IOWA CODE ANN. ch. 99B (1973)-Regulates games of chance and skill.
Kansas	KAN. STAT. ANN. secs. 21-4302 et seq. (1969)- "Commercial Gambling"-felony.
Kentucky	KY.REV. STAT. secs. 528.010 et seq. New gambling law, felony provision.
Louisiana	LA. REV. STAT. ANN.sec. 14:90 (1942)-General prohibition no felony provision
Maine	ME. REV. STAT. ANN. sec. 17-1301 et seq. (1974)-Beano or bingo regulated. ME. REV. STAT. ANN. sec. 17-330 et seq. (1974)-Games of chance regulated. ME. REV. STAT. ANN. sec. 17-1801 et seq. (1954)-General prohibition, felony provision for pool selling, bookmaking and numbers. ME. REV. STAT. ANN. sec. 17-2301 et seq. (1954)-Lotteries regulated.
Maryland	MD. ANN. CODE Art. 27, secs. 237 et seq. (various dates) - General prohibition, no felony provision.
Massachusetts	MASS. GEN. LAWS ch. 271 (various dates) - General prohibition. MASS. GEN. LAWS ch. 271 sec. 16A (1970) - "Gambling Syndicates" - felony.
Michigan	MICH. COMP. LAWS. sec. 750.301 et seq. (1931) - General prohibition, no felony provision.
Minnesota	MINN. STAT. secs. 609.75, 609.755, 609.756 (1963) - no felony provision; higher penalty for bookmaking than placing bets.
Mississippi	MISS. CODE ANN. secs. 2190 et seq. (various dates) - General prohibition; no felony provision, but higher penalties for "game keepers" than bettors.
Missouri	MO. REV. STAT. secs. 563.350 et seq. (1969) - General prohibition; Felony for bookmaking, gaming device, establish lottery, etc.; Misdemeanor to place a bet.

TABLE 6. PROFESSIONAL GAMBLING LAWS

Montana	MONT. REV. CODES ANN. secs. 94-2401 et seq. (1947) - General prohibition. MONT. REV. CODES ANN. sec. 94-2406 (1947) - Dealing, using, or winning by certain card games up to five years prison.
Nebraska	NEB. REV. STAT. secs. 28-941 et seq. (various dates) - General prohibition. NEB. REV. STAT. secs. 28-947 (1923) - "Common Gambler".
Nevada	NEV. REV. STAT. ch. 463 - Gambling and licenses.
New Hampshire	N.H. REV. STAT. ANN. ch. 477 (various dates) - General prohibition, no felony provision. N.H. REV. STAT. ANN. sec. 577:12 - "Common Nuisance".
New Jersey	N.J. REV. STAT. sec. 2A:40 et seq. - Civil liabilities and penalties. N.J. REV. STAT. secs. 2A:121-1 et seq. - Criminal liability, no felony provision. N.J. REV. STAT. secs. 2A:152-6 et seq. - Destruction of seized gaming apparatus and forfeiture of money seized.
New Mexico	N.M. STAT. ANN. secs. 40A-19-1 et seq. (1963) - Generally. N.M. STAT. ANN. sec. 40A-19-3 - "Commercial gambling" - felony.
New York	N.Y. PENAL LAW Art. 225 (1967).
North Carolina	N.C. GEN. STAT. secs. 14-292 et seq. (various dates) - General prohibition, no felony provision.
Ohio	OHIO REV. CODE ANN. ch. 2915 (1974) - General prohibition.
Oklahoma	OKLA. STAT. tit. 21 secs. 941 et seq. (1961) - General prohibition. OKLA. STAT. tit. 21 sec. 941 (1961) - Opening and carrying on a gambling game - felony. OKLA. STAT. tit. 21 sec. 946 (1961) - Gambling house is public nuisance and felony.
Oregon	ORE. REV. STAT. secs. 167.117 et seq. (1971).
Pennsylvania	PA. STAT. ANN. title 18, secs. 5512-5514 (1972) - General prohibition, misdemeanor first degree.
Rhode Island	R.I. GEN. LAWS ANN. tit. 11, ch. 19 (various dates) - General prohibition. (1973 legislation, not enacted, would have set higher penalties for organized criminal gambling business.
South Carolina	S.C. CODE ANN. sec. 16-515 (1962) - General prohibition of betting, pool selling, and bookmaking.

TABLE 6. PROFESSIONAL GAMBLING LAWS

South Dakota	S.D. COMPILED LAWS ANN. ch. 22 - 25 (1967) - General prohibition, no felony provision.
Tennessee	TENN. CODE ANN. tit. 39 ch. 20 (1955) - General prohibition. TENN. CODE ANN. sec. 39-2032 (1955) - "Professional Gambling" - felony. 1971 amendments to sec. 39-2017 included pyramid and chain letter clubs in the definition of lottery.
Texas	TEX. PEN. CODE Art. 615-659 (enacted 1902) - General probition.
Utah	UTAH CODE ANN. ch. 76-27 (1953) - General prohibition.
Vermont	VT. STAT. ANN. tit. 13 secs. 2151 et seq. (1961) - General prohibition, progressively more severe penalties for subsequent offenses of bookmaking.
Virginia	VA. CODE ANN. secs. 18.1-316 et seq. (various dates) - General prohibition. VA. CODE ANN. sec. 18.1-318.1 (1972) - Participating in the operation of an "illegal gambling business".
Washington	WASH. REV. CODE ANN. ch. 9.47 (1972) - General prohibition; "professional gambling" - felony.
West Virginia	W. VA. CODE ANN. secs. 61-10-1 et seq. General prohibition, no felony provision.
Wisconsin	WIS. STAT. sec. 945.01 et seq. (1969) - "Commercial Gambling".
Wyoming	WYO. STAT. ANN. secs. 6-203 et seq. (various dates) - General prohibition, no felony provision.

Recent Legislative Trends

The Kefauver Committee studied the gambling problem. While proposing several new federal measures, it stressed that the problem would have to be dealt with primarily by state and local governments. The American Bar Association's Committion on Organized Crime and Law Enforcement, which was formed as a result of the Kefauver Committee's work, was directed to review state gambling laws and to propose model legislation. Its study revealed many inconsistencies and inadequacies in state legislation and led it to make the following observation:

> It must also be borne in mind that a poor statute vigorously enforced is more effective than the best of laws administered by corrupt police, indifferent prosecutors, or an unreasonably lenient judiciary... it can be generalized that nearly every one of the

> forty-seven states under study could break up organized gambling by full reliance on existing provisions in its laws, coupled with truly deterrent sentences and penalties.[28]

The underlying problems were the same in all areas of gambling. Therefore, the Commission suggested treating gambling as a generic offense rather than enumerating specific offenses, such as lotteries, bookmaking, draw poker or casinos. The second major change suggested by the A.B.A. study was to delineate clearly the different kinds of gambling activity and apply criminal sanctions differently to each. Offenders were divided into three classes: the professional racketeer-type gambler; the patron of the professional whose activities are detrimental to society because they support the professional; and the casual or social gambler whose modest wagers with his friends do no significant damage to society.

On the basis of this study, a Model Anti-Gambling Act was drafted by the American Bar Association and promulgated in 1952 by the National Conference of Commissioners on Uniform State Laws.[29] This Model has been adopted in full or in part by Indiana, Montana, Tennessee, Washington, and Colorado.

The Model Anti-Gambling Act carries the following declaration of legislative policy:

> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and other organized crime, to restrain all persons from seeking profit from gambling activities in this state; to restrain all persons from patronizing such activities when conducted for profit of any person; to safeguard the public against the evils induced by common gamblers and common gambling houses; and at the same time to preserve the freedom of the press [and to avoid restricting participation by individuals in sport and social pasttimes which are not for profit, do not affect the public, and do not breach the peace].[30]

The bracketed language is optional, but shows the intent to differentiate between casual and commercial gambling. Twenty states have enacted more modern laws, which specifically and severely prohibit professional, commercial, or syndicated gambling. These states, and the dates their statutes were enacted are:

Arizona (1970)	Massachusetts (1970).
Colorado (1971)	New Mexico (1963)
Florida (1971)	New York (1967)
Georgia (1968)	Ohio (1974)
Hawaii (1973)	Oklahoma (1961)
Illinois (1961)	Oregon (1971)
Indiana (1955)	Tennessee (1955)
Iowa (1973)	Virginia (1972)
Kansas (1969)	Washington (1972)
Kentucky (1974)	Wisconsin (1969)

These statutes are analyzed in the following sections of this report.

Definition of Professional Gambling

There are various approaches to defining professional or commercial gambling. All may face problems of vagueness or uncertainty. An example is a 1934 New Jersey statute making it a criminal offense to be a "gangster", defined as anyone not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has previously been convicted of any crime. In a 1939 decision, Lanzetta v. N.J.,[31] the U.S. Supreme Court invalidated this statute on due process grounds of vagueness and uncertainty. It was held that the definitional scheme lacked the necessary specificity to inform those subject to it as to what conduct on their part would subject them to criminal liability.

The Model Act's definition treats gambling as a generic offense, and is very broad:

> "Professional Gambling" means accepting or offering to accept for personal gain or profit, money credits, deposits or other things of value risked in gambling, or any claims thereon or interest therein. Without limiting the generality of this definition, the following shall be included: pool-selling and bookmaking; maintaining slot machines, [one-ball machines or variants thereof, pinball machines which award anything other than an immediate and unrecorded right of replay,] roulette wheels, dice tables, or money, merchandise push-cards, punchboards, jars or spindles, in any place accessible to the public; and conducting lotteries, gift enterprises, or policy or number games, or selling chances therein; and the following shall be presumed to be included: conducting any banking or percentage game played with cards, dice or counters, or accepting any fixed share of the stakes therein.[32]

Tennessee and Indiana use the Model Act's definition, although Tennessee omits the bracketed language, which is optional.

Other states have different approaches to the problem of separating the professional from the casual gambler. A somewhat unique approach was taken by Colorado when it defined professional gambling as:

> (a) aiding or inducing another to engage in gambling with the intent to derive a profit therefrom, or
>
> (b) Participating in gambling and having, other than by virtue of skill or luck, a lesser chance of losing or a greater chance of winning than one or more of the other participants.[33]

Washington defines a professional gambler as one, other than a player, who materially aids any gambling activity, participates in the proceeds from gambling, or engages in bookmaking.[34]

Wisconsin's statute says a person is engaged in commercial gambling if he participates in the earnings of, or for gain operates, or permits the operation of a gambling place, or receives or forwards bets, and intentionally performs certain other acts. The words "for gain" were added in 1969.[35] Georgia, Kansas and New Mexico also use the term "commercial gambling." The wording of the Kansas statute is typical of these states. It defines "commercial gambling" as:

> (a) Operating or receiving all or part of the earnings of a gambling place; or
> (b) Receiving, recording or forwarding bets or offers to bet or with intent to receive, record, or forward bets or offers to bet, possessing facilities to do so; or
> (c) For gain, becoming a custodian of anything of value bet or offered to be bet; or
> (d) Conducting a lottery, or with intent to conduct a lottery possessing facilities to do so; or
> (e) Setting up for use or collecting the proceeds of any gambling device.[36]

Ohio has developed a two-pronged attack against the professional gambler. In its new criminal code, numerous gambling statutes were combined and revised into a six statute gambling section.[37] All forms of gambling and related activities are made illegal if they are carried on as a business, for personal profit, or as a significant source of income or livelihood. For example, a person is guilty of gambling if he engages in bookmaking which is defined as "the business of receiving or paying off bets." These gambling statutes are augmented by another new provision which makes it a felony to engage in organized crime. One definition of engaging in organized crime is to provide material aid, managerial service, or supervision to a criminal syndicate. A criminal syndicate is defined, in part, as "five or more persons collaborating to promote or engage in...any gambling offense as defined in...the Revised Code."[38] Under the new code, any gambling operation of five or more people is therefore subject to the felony organized crime provision. A gambling business with less than five participants is subject only to the regular gambling provisions.

The revised codes of New York and Oregon and a proposed Michigan code penalize the advancing or profiting from unlawful gambling. Gambling is defined as staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the control of the player. A person "advances gambling activity" when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. "Profiting from gambling activity" occurs when a person, other

than as a player, accepts or receives money or other property as proceeds of a gambling activity. [39]

The New York statute also used the criterion of volume to help differentiate the professional gambler from the mere participant. Gambling in the first degree requires that a person receive in one day more than five bets totalling more than $5,000, or receive more than $500 in one day of money played in a lottery or policy scheme.

The 1973 Hawaii gambling statute declares that a person commits the offense of promoting gambling in the first degree if he knowingly advances or profits from unlawful gambling activity by:

> (a) engaging in bookmaking to the extent that he receives or accepts in any one day more than five bets totalling more than $500, or
> (b) receiving in connection with a lottery, or mutual scheme or enterprise money or written records from a person other than a player whose chances or plays are represented by such money or records, or
> (c) receiving in connection with a lottery, mutual, or other gambling scheme or enterprises, more than $1,000 in any one day of money played in the scheme or enterprise. [40]

The new code section of Kentucky is similar to Hawaii's. There are some exceptions, however, The bookmaking activity, section(a), requires that three or more people be employed or utilized before the statute applies. There is no requirement relating to the number of bets. The dollar limit for a mutual scheme or lottery is only $500. Setting up and operating a gambling device is included in the offense. [41]

Legislation proposed, but not enacted, in the 1973 Rhode Island legislative session would have defined "organized criminal gambling business" as involving five or more persons, whose gross revenue exceeds $1,000 and which handles more than one hundred illegal transactions in any single day or part of a substantially continuous operation.

The federal law uses as standards the size of the enterprise and volume of proceedings, plus the fact that a state or local law is broken. The term "gambling" is defined as including, but not limited to, pool-selling, bookmaking, slot machines, roulette wheels or dice, lotteries, policy, bolita or numbers. "Illegal gambling business" means a gambling business which:

> (i) is a violation of the law of a State or political subdivision in which it is conducted;
> (ii) involves five or more persons who conduct; finance, manage, supervise, direct, or own all or part of such business; and

> (iii) has been or remains in substantially continous operation for a period in excess of thirty days or has a gross revenue of $2,000 in a single day. [42]

This language had been critized as unconstitutionally vague, but the U.S. Court of Appeals for the Third Circuit said the meaning was "perfectly clear":

> Before the gambling enterprise may be deemed of sufficient magnitude to warrant federal proscription, it must be carried on by at least five people, including its street level employees, its managers and its owners. Its customers are excluded from the numerical count. All other participants are included. [43]

Probable cause that the business receives over $2,000 per day is established if five or more persons are involved as in (ii) and it has been in operation for two or more successive days.

The National Commission on Reform of Federal Criminal Laws had proposed somewhat different standards. It would have considered a person engaged in the business of gambling if he:

> (a) conducts a wagering pool or lottery;
> (b) receives wagers for or on behalf of another person;
> (c) alone or with others, owns, controls, manages or finances a gambling business;
> (d) knowingly leases or otherwise permits a place to be regularly used to carry on a gambling business;
> (e) maintains for use on any place or premises occupied by him a coin-operated gaming device, as defined in 26 U.S.C. Sec. 4462; or
> (f) is a public servant who shares in the proceeds of a gambling business whether by way of a bribe or otherwise. [44]

Higher penalties were proposed for persons who: accepted wagers of over $2,000 per day; employed three or more persons in the gambling business; "provided reinsurance or wholesaling functions" for persons engaged in a gambling business; or bribed a public servant.

A few states have followed the quantative definitional approach. Virginia uses the federal criteria of five persons, thirty days, or $2,000 per day receipts. [45] Massachusetts penalizes anyone who "knowingly organizes, supervises, manages, or finances" at least four persons so that they may provide services or facilities for illegal betting. This does not include customers. [46]

Proscribed Activities

States differ as to the kind of gambling activities they prohibit. Gambling is not a common law crime, although gambling contracts are not enforceable. Therefore, each state has declared through legislation what activities are unlawful.

Engaging in Gambling. Most states prohibit both the placing and the taking of bets. There are a few exceptions, either where some or all forms of gambling are legalized, or where social gambling is legalized. The Model Act penalizes "whoever engages in gambling"; however, it has an optional section exempting "any game, wager or transaction which is incidential to a bonafide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling."[47] Colorado's law contains this provision. The revised criminal codes of Oregon and New York, and the proposed Michigan code, have abolished criminal penalties for the player, while making the penalties for promoting gambling more severe. The 1970 federal law applies only to a gambling business.

The commentary to the Model Act states that:

> The Commission recognizes that it is unrealistic to promulgate a law literally aimed at making a criminal offense of the friendly election bet, the private, social card game among friends, etc. Nevertheless, it is imperative to confront the professional gambler with a statutory facade that is wholly devoid of loopholes...The optional subsection comes as close as possible to throwing the positive burden of proving compliance with its terms upon a defendant who claims exemptions.[48]

Professional Gambling. As previously noted, a substantial number of states now expressly prohibit professional gambling. The Model Act penalizes "whoever engages in professional gambling".[49] The federal law penalizes "whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business". 50 The different approaches to defining professional or commercial gambling were discussed in the preceding section.

A few states limit professional gambling to certain activities. New York and Virginia are among the states which use the amount of money involved to define professional gambling. Illinois prohibits syndicated gambling and defines this as operating a policy game or engaging in the business of bookmaking. A person operates a policy game when he knowingly uses any premises or property for the purpose of receiving or knowingly does either money or written policy game records from a person other than the bettor whose bet is represented by the money or record. A person engages in bookmaking when he receives or accepts more than five wagers or bets on a

single event which total more than $2,000.[51] Legislation pending in Pennsylvania defines a gambling operation as one operating continually for 15 days with gross revenues of over $1,000 on a single day. Similar legislation died in Committee in the 1973 Rhode Island legislature.

A number of states have sought to exempt activities of certain organizations from gambling laws. A 1971 Tennessee law, for example, made gambling law inapplicable to bingo games, lotteries, a similar games of chance conducted by tax-exempt religious or charitable organizations.[52]

The 1973 Iowa Legislature has passed a statute relating to games of skill and chance. It punishes as a misdemeanor violation any person who "conducts, manages, operates, plays or participates in a game of chance or raffle in a manner which causes the winner to be determined other than by chance." The statute also permits "natural persons" to participate in games of skill, games of chance, card games played for money with ordinary playing cards, wagers, bets, pools, or raffles as long as the game is conducted in a fair and honest manner. This approach can involve problems of definition. Games and raffles are permitted "provided a bona fide social or employment relationship exists between the sponsors and the participants", but this relationship may be hard to prove.

Common Gambler Laws. Three states utilize the "common gambler" classification, a concept akin to vagrancy, to distinguish the person who is without any visible means of support or lawful occupation and who supports himself primarily by gambling.[53]

These statutes, like the vagrancy laws from which they were derived, may rest on questionable constitutional grounds. Papachristou v. Jacksonville,[54] a 1972 case, is the latest in a line of Supreme Court decisions holding vagrancy statutes unconstitutionally vague. Papachristou holds a Jacksonville, Florida, vagrancy ordinance void because it "failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,[55] and because it encourages arbitrary and erratic arrests and convictions.

Gambling Premises and Equipment. Many states make the keeping of a gaming house, table or device a crime. These laws frequently provide for forfeiture of any equipment used in connection with gambling. The Model Act declares that all gambling devices are common nuisances, subject to seizure by any peace officer, and that no property right in any gambling device or equipment shall exist. Unless good cause to the contrary is shown by the owner, they shall be forfeited to the state.[56] Under this provision, it is not necessary to convict the owner in order to seize the gambling equipment.

Several states expressly penalize concealed gambling premises. California law makes it a felony to conduct even misdemeanor-level gambling offenses "in a room barred or barricaded or protected in any manner to make it difficult of access or ingress to police officers.[57] Alabama prohibits the installation of warning devices.[58]

Gambling Records. Some states prohibit keeping gambling records. Kentucky, New York, and Oregon make unlawful the posssession of gambling records of a kind commonly used in the operation or motion of a bookmaking scheme or numbers. If the records reflect or represent more than five bets totaling $500 in a bookmaking operation, or more than 500 plays in a numbers or lottery scheme, then the person is guilty of possession of gambling records in the first degree, a Class E Felony.[59] New York allows as an affirmative defense in prosecution under this subsection that the records, possessed by the defendant represented plays or chances of the defendant himself as a player in a number not exceeding ten.[60]

Official Corruption. The federal law recognizes the common relationship between gambling and official corruption. It is made unlawful for two or more persons to conspire to obstruct state or local laws with the intent to facilitate an illegal gambling business if one or more of such persons: (1) does any act to effect the object of such a conspirary; (2) is an official or employee of the state or political subdivision; (3) conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business. Such business must involve five or more persons and be in operation for over 30 days or have a gross revenue of $2,000 in one day.[61] The word "facilitate" should be noted. The U.S. Court of Appeals for the Third Circuit said in upholding the law, "it seems clear that one may conspire to facilitate such a business and thereby violate Sec. 1511, and at the same time be so removed from its operation as to fall outside the reach of Sec. 1955 [which prohibits carrying on such a business]."[62] The court found in this case however, that there was no proof of the requisite number of persons conducting the business.

There have been several indictments under this section, including a mayor and police chief in a Pennsylvania city, and a district attorney in Louisiana.

Actions brought

Statistics on the number of indictments and convictions for gambling offenses are usually not kept by states. The following figures were reported, however, in response to a COAG questionnaire. Unless otherwise noted, the questionnarie responses did not distinguish as to whether the actions enumerated represented cases brought by the state, by local offices, or by both groups.

Louisiana reported that during 1973, 615 charges were issued for gambling offenses and 512 convictions were obtained. Rhode Island obtained 63 convictions during 1973 for conspiracy to violate the gambling laws. During the same period, the state also obtained 15 convictions related to gambling and lotteries. The only statistics available from New York show that from September 1, 1973 to September 30, 1974, there were 233 convictions for felony-grade offenses. Wisconsin reported that during the twenty-four months preceeding September, 1974, strike force agents and attorneys were responsible for the conviction of 48 sports and horse bookmakers and their runners of 165 felonies and 36 misdemeanors. Fines of $129,500 were assessed. Approximately 27 other individuals were convicted of other forms of gambling. The only statistics available from California were for superior court convictions. In 1972, there were 14 convictions in the superior court for violation of the gambling statute and 328 convictions for violation of the bookmaking statute. Maine reports that there have been

no local prosecutions for gambling offenses during the past five years. During this same period, there were only two convictions at the state level. These two were concerned with bookmaking.

Penalties

One study of gambling laws found that "perhaps the greatest disparities and inadequacies are to be found in existing penalty statutes."[63] Under most of the older statutes, gambling crimes were misdemeanors, although certain crimes might be designated as felonies. The newer laws show a greater range in penalties, although most involve felonies.

Of the states which use the older approach to control of gambling, fifteen apparently do not differentiate between betting and accepting a bet for profit. In Connecticut, for example, owners, keepers or operators of a gambling house are subject to a $100 fine or 6 months in jail or both; frequenters of gambling houses are subject to the same penalties.[64]

Several states differentiate between placing bets and taking them for profit by classifying the former as a misdemeanor and the latter as a felony. Arizona provides that placing a bet constitutes a misdemeanor, however, the business of accepting or registering any bet is a felony.[65] Missouri makes bookmaking and poolselling and keeping a gambling device felonies, while betting on a game of chance is merely a misdemeanor.[66] Florida and Arkansas provide that the keeping of a gaming house, table or device is a felony and that betting is a misdemeanor.[67] Similarly, Oklahoma and Utah make it a felony to deal or conduct any game played with cards, die, or any other device for money.[68] Alabama designates as a felony the installation of electric bells, and other devices for the purpose of warning the proprietors of a police intrustion.[69]

"Commercial gambling" is a felony in Kansas, New Mexico, and Wisconsin, and a high misdemeanor in Georgia, while making a bet is merely a misdemeanor in these states.[70] Hawaii's new statute makes it a felony to promote gambling. The statute also defines a "social gambler" cand establishes such status as an affirmative defense for misdemeanor gambling offenses, as well as for one possession of gambling records.[71]

Other states impose progressively more severe penalties for subsequent violations of the gambling laws. Delaware, for example, provides a fine of up to $500 and/or imprisonment for up to six months, for a first gambling offense; a fine of not more than $3,000 and/or imprisonment for not more than one year for a second offense; and for a third and all subsequent offenses, a fine of not more than $5,000 and/or imprisonment for not more than three years.[72] Vermont follows a similar pattern, with not more than $250 fine nor six months imprisonment or both for a subsequent offense.[73] Vermont also specifies that a felony conviction in another state for gambling shall be an offense for this purpose. The revised Ohio Code makes the first violation of the gambling statute a misdemeanor of the first degree while all subsequent violations are felonies of the fourth degree.[74] This approach should increase the professional gambler's risk capital. However, these laws would punish the professional gambler more severely than the casual better only if the professional were arrested and convicted more frequently.

The new laws provide maximum penalties for professional gambling that range from fines of $1,000 in Tennessee to $100,000 in Washington. Maximum imprisonment ranges from 6 months in Vermont for a first offense to 15 years in Massachusetts. Illinois, Indiana and Wisconsin authorize maximum fines of $5,000 and/or imprisonment ranging from one year in Wisconsin to one to 5 years in Illinois and Indiana. In Massachusetts, the penalty may be up to 15 years and $10,000. The Model Act authorizes penalties for professional gambling of up to $1,000 and one year. The federal law allows a fine of up to $20,000 and/or 5 years imprisonment.

The effectiveness of a penalty statute is in part a function of the sentence imposed by the judiciary. Statutes which impose heavy fines or lengthy imprisonment as a maximum penalty will not serve whatever purpose they were meant to unless they are applied strictly. Of the Attorneys General's offices with sufficient information to respond, over 80 percent reported that the penalty provision of their professional gambling statutes was applied toward the minimum sanction authorized. All of the responding Attorneys General's offices reported that the penalty provision of their social gambling statutes was applied in the same manner.

Legalized Gambling

This chapter has been concerned with legislative efforts to attack the problem of professional gambling through the use of criminal sanctions. Some observers feel the answer to the problem lies in legalizing gambling. Seventeen states reported that legislation was introduced in their 1974 legislature to legalize some form of gambling. Proponents of legalized gambling argue that the primary function of the criminal laws concerned with private morality. They note that gambling is the primary source of income for organized crime, and the primary reason for corruption of officials. Legalization would presumably divert this revenue and remove the motive for corruption.

Opponents contend that the state should not conduct operations that are of no social value and that may be harmful to the participants. Under any system, most bettors will lose money. They also point to the difficulties of keeping legalized gambling free from corruption. It is also argued that legalized gambling could never entirely replace illegal gambling; for example, some gambling involves the extension of credit, which presumably would be prohibited in a legalized operation.

The Organized Crime Control Act of 1970 created a Commission on the Review of the National Policy toward Gambling, composed of eight members of Congress and seven citizens named by the President. It is directed to: "review the effectiveness of existing practices in law enforcement, judicial administration, and corrections in the United States and in foreign legal jurisdictions for the enforcement of the prohibition and taxation of gambling activities and consider possible alternatives to such practices."[75] It can be inferred that alternatives to the present general prohibition will be considered.

6. FOOTNOTES

1. Martin v. Trout, 199 U. S. 212, 215 (1965).

2. Special Committee to Investigate Organized Crime in Interstate Commerce, Third Interim Report, Sen. Rep. No. 307, 82nd Congress, 1st. Sess. 2 (1951).

3. Task Force on Organized Crime. The President's Commission on Law Enforcement and Administration of Justice. TASK FORCE REPORT: ORGANIZED CRIME 2 (1967).

4. Committee for Economic Development, REDUCING CRIME AND ASSURING JUSTICE 50 (1972).

5. Administrative Office of the United States Courts, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS FOR THE PERIOD JANUARY 1, 1972 to DECEMBER 31, 1972, 8.

6. MODEL ANTI-GAMBLING ACT, sec. 1, 9 U.L.A. 19 (1967 pocket supp.).

7. The President's Commission on Law Enforcement and Administration of Justice. THE CHALLENGE OF CRIME IN A FREE SOCIETY 189 (1967).

8. The Knapp Commission Report on Police Corruption, 71 (1972).

9. Rufus King, GAMBLING AND ORGANIZED CRIME 3 (1969).

10. Missouri Task Force on Organized Crime. TASK FORCE REPORT: ORGANIZED CRIME 27 (n.d.).

11. King, supra note 9 at 16.

12. Pennsylvania Crime Commission, REPORT ON ORGANIZED CRIME 39 (1970).

13. 18 U.S.C. sec 1955 (1970).

14. U. S. v. Riehl, 460 F. 2d 454 (1972).

15. U. S. v. Harris, 460 F. 2d 1041 (1972).

16. U.S. v. Pacheco, 489 F.2d. 554, 559 (USCA - 5th Cir., 1974)

17. U.S. v. Sacco, 491 F.2d 995 (USCA - 9th Cir., 1974) The other courts to find the statute constitutional are:
U.S. v. Ceroso, 467 F.2d 563 (USCA - 2nd Cir., 1972);
U.S. v. Becker, 461 F.2d 230 (USCA - 5th Cir., 1972);
U.S. v. Hanis, 460 F.2d 1041 (USCA - 5th Cir., 1972);
U.S. v. Smaldone, 484 F.2d 311 (USCA - 10th Cir., 1973);
Schneider v. U.S., 459 F.2d 540 (USCA - 8th Cir., 1972).

18. Consultants Report on GAmbling, National Commission on Reform of Federal Criminal Laws, Working Papers 1172 (1970).

19. Note, Gambling and the Law, 42 J.CRIM.L.C.S.P.S. 205 (1971).

20. 18 U.S.C. sec. 1084.

21. 18 U.S.C. sec. 1952; in Erlenbaugh v. U.S. 409 U.S. 239 (1972), the U.S. Supreme Court has upheld this section of the law.

22. 18 U.S.C. sec. 1953.

23. 18 U.S.C. sec. 1301-1306.

24. Marchetti v. U.S., 390 U.S. 39 (1968); Grosso v. U.S. , 390 U.S. 62, (1968).

25. Interview with William S. Lynch, Chief, Organized Crime and Racketeering Section, U.S. Department of Justice, December 27, 1973.

26. Note, Gambling - the Need for Legislative Reform, 57 KY.L.J. 564 (1969).

27. See: WASH. REV. CODE sec. 9.47.350.

28. American Bar Association Commission on Organized Crime and Law Enforcement, A Critical Analysis of the Gambling Laws, 73-112 (1952).

29. MODEL ANTI-GAMBLING ACT, supra note 6.

30. MODEL ANTI-GAMBLING ACT, sec. 1, supra note 6 at 23.

31. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

32. MODEL ANTI-GAMBLING ACT sec. 2(3), supra note 6 at 24.

33. COL. REV. STAT. ANN. sec. 40-10-102 (1971).

34. WASH. REV. CODE ANN. ch. 9.47 (1971).

35. WIS. STAT. sec. 945.03 (1969).

36. KAN. STAT. ANN. sec. 21-4304 (1969).

37. OHIO REV. CODE ANN. ch. 2915 (1974).

38. OHIO REV. CODE ANN. sec. 2923.04 (1974).

39. N.Y. PENAL LAW sec. 225.00 (McKinney, 1967); ORE. REV. STAT. sec. 167 117 (1971).

40. HAWAII REV. L. ch. 12, Sec. 1220.

41. KY REV. STAT. sec. 528.020 (1974).

42. 18 U.S.C. sec. 1955 (1970).

43. Riehl, supra note 16 at 457.

44. National Commission on Reform of Federal Criminal Laws, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE 251 (1970).

45. VA. CODE ANN. sec. 18.1 - 318.1 (1972).

46. MASS. GEN. LAWS ch. 271 sec. 16A (1970).

47. MODEL ANTI-GAMBLING ACT sec. 3(2), supra note 5 at 29.

48. Id. at 30.

49. Id.

50. 18 U.S.C. sec. 1955 (1970).

51. ILL. REV. STAT. ch. 38, sec. 28-1.1 (1961).

52. Tennessee Public Acts 1971, Ch. 216.

53. LA. REV. STAT. sec. 14.107 (1952); NEV. REV. STAT. sec. 28-947 (1913); R.I. GEN. LAWS ANN. sec. 11-19-18 (1896);

54. Papachristou v.Jacksonville, 405 U.S. 156 (1972).

55. Id. at 162, quoting from U.S. v. Harriss, 347 U.S. 612, 617.

56. MODEL ANTI-GAMBLING ACT sec 4, supra note 5 at 31.

57. Quoted in King, supra note 9.

58. ALA. CODE tit. 14 secs. 294, 296 and 297 (1909).

59. N.Y. PENAL LAW sec. 225.20 (1967).

60. N.Y. PENAL LAW sec. 225.10 (1967).

61. 18 U.S.C. sec. 1511.

62. Riehl, supra note 16.

63. King, supra note 9 at 185.

64. CONN. GEN. STAT. REV. sec. 53-247 (1949).

65. ARIZ. REV. STAT. ANN. sec. 13-440 (1971).

66. MO. REV. STAT. secs. 563.350, 563.360, 563.370 (1929).

67. FLA. STAT. ses. 849.01, 849.08 (1971); ARK. STAT. ANN.sec. 41-2001, 41-2005, 41-2011, 41-2102 (1913).

68. OKLA. STAT. tit. 21, sec. 941 (1961); UTAH CODE ANN. ch. 76-27 (1953).

69. ALA. CODE tit. 14, sec 294 (1909).

70. GA. CODE ANN. sec. 26-2703 (1968); KAN. STAT. ANN. sec. 21-4304 (1969); N.M. STAT. ANN. sec. 40A-19-3 (1963); WIS. STAT. sec. 945.01 (1969).

71. HAWAII REV. LAWS, ch. 12, sec. 1220.

72. DEL. CODE ANN., tit. II, sec. 670A (1962).

73. VT. STAT. ANN., tit. 13, sec. 2152 (1961).

74. OHIO REV. CODE ANN. sec. 2915.02(d) (1974).

75. Pub. L. 91-452, 84 Stat. 938, Title VIII, sec. 805(a)(1) (1970).

7. PROTECTION OF WITNESSES

7. PROTECTION OF WITNESSES

Special problems may arise concerning protection of witnesses in organized crime cases. Such cases often rely on informants, who are granted immunity in return for testimony, and involve other persons who are vulnerable to retaliation on the part of organized crime figures. It may be necessary to protect these witnesses, both to get them to agree to testify and to assure that they are not prevented from testifying.

Problems in Protecting Witnesses

The President's Commission on Law Enforcement and Administration of Justice recommended that "The Federal Government should establish residential facilities for the protection of witnesses desiring such assistance during the pendency of organized crime litigation."[1] It said also that:

> After trial, the witness should be permitted to remain at the facility so long as he needs to be protected. The Federal Government should establish regular procedures to help Federal and local witnesses who fear organized crime reprisal, to find jobs and to preserve their anonymity from organized crime groups.[2]

The then-Attorney General had testified that, between 1961 and 1965, the organized crime program, despite its efforts to offer protection, lost twenty-five informants.[3]

Some of the questions that should be considered in protecting a witness are set forth below. This list is based on comments by state and federal officials who are concerned with the problem.

1. How important is the case, and how important is the witness to the case? Is his testimony important enough to assume the burdens of protection or of relocation?
2. Is it assured that he will testify, or that his cooperation will otherwise be disclosed?
3. How much danger is there to the witness?
4. What type of assistance is needed--subsistence, protection or relocation?
5. How long will it be necessary to protect the witness?
6. Can the witness support himself and his family? What are his job skills? Are other members of the family employable?

The alternative types of protection all pose problems. Physical protection of the witness, by furnishing guards for him and his family, involves a tremendous expenditure of manpower. Placing the witness in a "safe house", or special facility, requires confining his activities and it is very difficult to keep the location of such facilities confidential. Relocation of the witness and his family involves numerous problems of accomplishing the move in secret and of establishing him in the new location. There are problems of re-employment. Documentation must be created to

substitute for actual records that might reveal his true identity. Records must be changed or replaced without violating laws or requiring the person to perjure himself. The people being protected usually have criminal histories, so pose problems of employability and adaptability.

Federal Law

Title V of the Organized Crime Control Act of 1970 authorizes the Attorney General to provide for the security of government witnesses and potential witnesses and their families involved in legal proceedings against a person alleged to have participated in an organized criminal activity. The Attorney General is authorized to:

> provide for the health, safety and welfare of witnesses and persons...and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.[4]

For these purposes "government" includes any state, territory, or political subdivision, as well as the United States. The Attorney General may condition the protection of witnesses upon the state or subdivision's agreeing to pay for their maintenance. As of December, 1973, the federal government has provided such service for nine states. In the vast majority of witness protection cases, the state has paid the full cost of such protection. To obtain this assistance, the state officials concerned should contact an Assistant United States Attorney General. If it is determined that protection should be provided, the U.S. Marshals Service makes further arrangements.[5]

Protection of a witness cannot safely end with the trial, because he may be subject to later jeopardy. The statute recognizes this by not setting a time limit on use of facilities. Few people, however, would want to remain indefinitely in protected facilities. To help solve this problem, a program exists in which businesses are helping the federal government relocate both federal and state witnesses. Over eight hundred witnesses have been relocated through the program. The U.S. Chamber of Commerce has set up meetings of business leaders in different localities with officials of the U.S. Department of Justice. The response by business leaders has been very good and most of those contacted have volunteered to help provide jobs when the problem is properly presented. It is necessary to maintain maximum confidentiality about the program to

protect the persons involved, and the Chamber of Commerce is not involved in the actual arrangements.

A witness relocation under the program costs a great deal in terms of money and manpower. The Justice Department has a relatively small staff working on witness relocation. They are, however, willing to share expertise with the states when appropriate. Should a state wish to use the program, it can obtain an estimate of expenses for the relocation. These will include all out-of-pocket expenses, but will usually not include the salaries of federal employees working on the case.[6]

An article in Nation's Business about the program said that over one hundred and fifty firms have offered to hire persons under this program, and that the firm's chief executive is usually the only person who is aware of the employee's true identity.[7] The article describes the steps involved in moving witnesses to new locations, establishing new identities for them, and maintaining confidentiality. It notes that "Unless there is a complete breakdown in the system it is impossible to trace the witness to his new home. Even the prosecuting attorney handling the case does not know where his witness will be located."[8]

Any request for relocation should be submitted to Assistant Attorney General Gerald Shur of the U.S. Department of Justice. He will make the initial determination as to whether the Department of Justice can be of help in the relocation. It must be noted that the decision to relocate a witness is essentially left up to the local prosecutor. The Justice Department will only provide advice, suggest alternatives, and/or render aid when appropriate.[9]

State Legislation

As noted earlier, the federal facilities and relocation program may be used by states and localities. Some states may prefer to rely primarily on this means of protection. Others, however, may want to have their own facilities or programs which may or may not require enabling legislation. It may be necessary to authorize by law the expenditure of funds to protect witnesses, whether protection is furnished by the state or by the federal government.

COAG staff members interviewed directors of eight state organized crime units; none of these considered state legislation necessary. although several mentioned the problem of financing protection. Several had provided protection for witnesses in organized crime cases or had used the federal law. New Jersey's Organized Crime and Special Prosecutions Section has been involved in relocation of witnesses on a number of occasions, and reports that the process is terribly complex and hard to do well.

Despite the complexities of relocation, one of the reasons advanced for the low level of state participation in the federal witness relocation program is that the states may be doing the relocation themselves. There are numerous pitfalls to a successful relocation. Since the great majority of witnesses are criminals, it is sometimes difficult to get the

witness to adjust to a law-abiding life style once he is relocated. In some cases the witness will attempt to exploit the relocation program by using his testimony for bargaining leverage. It must be remembered that relocation exists to keep people alive, and not to buy testimony. Some witnesses are unwilling to take the decrease in income which often follows a relocation. The witness as a criminal was often making much more than the position offered through relocation provides. Some witnesses are often unwilling to cooperate fully with the security measures involved in relocation, and may thereby endanger not only their own lives but also the lives of any agents accompanying them. A state should insist on total cooperation from a witness before relocating him.[10]

Protection of witnesses is one of the few areas of organized crime control law that does not appear to involve constitutional issues. If legislation is needed to assure that persons who testify in organized crime cases are not jeopardized as a result, it is not likely that it would meet strong opposition. Such legislation, like the federal law, should probably state: the agency or official responsible for providing protection; the definition of witness; the types of proceedings involved; limits, if any, placed on the period before and after the trial during which protection may be afforded, and, if necessary, what funds are appropriated.

Interstate agreements might be very helpful in facilitating relocation, either temporary or permanent, to another state. A small state might find it difficult to protect a witness in a non-institutional setting, because of the difficulty of keeping his whereabouts confidential, and might wish to locate him in another state.

COAG asked the states to cite their laws concerning protection of witnesses. Twenty-five states reported that they had no such legislation. Several cited statutes relating to protecting witnesses from physical harm. These are summarized below to show different existing approaches. No state had legislation comparable to the federal law discussed above.

Texas now protects witnesses by making it a felony, punishable by imprisonment for two to six years, to tamper with a witness. Many other states presumably have similar laws. although they were not reported. Texas law defines tampering as offering benefits to a witness to falsify or withhold testimony, or conversely, as coercing a witness. "Coerce" is defined as: to threaten, to commit any offense; to accuse a person of any offense; to expose them to hatred, contempt, or ridicule; to harm their credit or business repute; or to take or withhold action as a public servant.[11]

The revised Kentucky Penal Code, effective January 1, 1975, makes "intimidating a witness" punishable by one to five years imprisonment. Intimidation is defined as the "use of a threat directed to a witness or a person he believes may be called as a witness in any official proceeding" to influence testimony, induce avoidance of process, or induce absence from the proceeding.[12]

The 1973 North Carolina Legislature passed a law which allows a judge

to order protective custody for a witness upon the witness' request and a determination that he is a material witness. The order may provide for protective custody in a penal institution, in a place other than a penal institution, or the release of the witness to a law enforcement officer. The person having custody of the witness may not release him without his consent or an order from the court. The protective order may be vacated upon request of the witness or upon the courts own motion.[13]

A new California law helps protect policemen from reprisals by exempting them from furnishing their home address in affidavits, depositions and testimony.[14]

A Massachusetts statute concerning intimidation of witnesses was enacted in 1969 and amended in 1970. It provides a penalty of up to five years and $5,000 fine for anyone who, directly or indirectly, willfully endeavors "to influence, impede, obstruct, delay or otherwise interfere with" any witness, juror, or any person furnishing information to a criminal investigator concerning violation of a state criminal law. The 1970 amendment made this law apply also to anyone who injures any person or damages his property on account of giving such information or testimony. A definition of "criminal investigator" was also added, and includes an individual or group who is legally authorized by the state or a political subdivision to conduct an investigation or prosecution of state laws.[15]

Wisconsin, in a 1969 law, set maximum penalties of $10,000 or 5 years imprisonment, or both, for anyone who causes bodily harm to a witness or juror because of any testimony, verdict or indictments.[16] A bill introduced in the 1973 Rhode Island Legislature, but not enacted, would have made it a felony to criminally threaten a state's witness or an informer.

Availability of Funds

Information is not available as to whether any states budget funds specifically to provide protection for witnesses. A number of state organized crime control units, however, have confidential funds. While such funds are always subject to controls and meet standards of accountability, they are not subject to public scrutiny. For this reason, they are sometimes used for such purposes, according to information furnished the COAG staff.

The Department of Justice raised some objections to the federal act when it was pending, noting that "The question of protecting Government witnesses is not one of law but of practicality."[17] It thought that funds should not be limited to the acquisition of facilities, but should be allowed for such items as the salaries and expenses of U.S. Marshals. Further, appropriations should be authorized to protect witnesses "in whatever manner is deemed most useful under the special circumstances of each case. Such a provision would provide the necessary flexibility to adequately deal with this problem."[18]

7. FOOTNOTES

1. President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 204 (1967).

2. Id.

3. Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st sess. pt. 3, at 1158 (1965); quoted in Senator John L. McClellan, The Organized Crime Act or its Critics: Which Threatens Civil Liberties?, 46 NOTRE DAME L. 99 (1970).

4. Pub. L. 91-452, 84 Stat. 922, Title V, sec. 502 (1970).

5. Interview with Gerald Shur, Attorney-in-Charge, Intelligence and Special Services Unit, U.S. Department of Justice, Washington, D. C., December 27, 1973.

6. Interview with Gerald Shur, Attorney-in-Charge, Intelligence and Special Services Unit, U.S. Department of Justice, Washington, D. C., November 7, 1974.

7. Telephone interview with Wayne Hopkins, Senior Associate for Crime Prevention and Control, Chamer of Commerce of the United States, January 28, 1973.

8. How Business Shelters Witnesses from the Mob, NATION'S BUSINESS, 20-26, (August, 1973).

9. Supra note 6.

10. Id.

11. TEX. PEN. CODE. art 428 (1971).

12. KY REV. STAT. sec. 524.040 (1974).

13. N.C. GEN. STAT. sec. 15A-804 (1973).

14. CAL. PENAL CODE sec. 806, 869 (1971)

15. MASS. GEN. LAWS ch. 268, sec. 13B (1969 a. 1970).

16. WIS. STAT., sec. 940.206 (1969).

17. 115 CONG. REC. 137 (August 12, 1969).

18. Id.

8. STATE INVESTIGATIVE GRAND JURIES

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The ancient institution of the grand jury is being viewed in a new light, as an investigative tool to combat organized crime. The federal government, as a result of the Organized Crime Control Act, has placed new reliance on the investigative grand jury. Several states have authorized grand juries which are not restricted in jurisdiction to a single county, and many others are considering such legislation. This report describes existing laws and delineates some possible questions of policy.

Role of the Investigative Grand Jury

The Chief of the Organized Crime and Racketeering Section of the U.S. Department of Justice described the advantages of "what has been our most effective tool: the investigatory grand jury:"

> ...[A] grand jury is awesome. The right of subpoena vests it with power that no detective or agent can legitimately wield. The threat of perjury prosecutions can cajole timid witnesses into giving information which would otherwise remain hidden. When a witness is immunized, under a proper statute, he can be coerced into telling all he knows with the threat of contempt proceedings. Perhaps most importantly, the psychological effect of being called before the grand jury, of being summoned to answer questions in solemn surroundings before ordinary citizens--this can unnerve the most hardened capo in La Costa Nostra.1

The grand jury has been subject to criticism and it is sometimes suggested that it be abolished.[2] Others have suggested that its powers be limited. A resolution before the House Judiciary Committee would amend the Constitution to provide that no grand jury could present, indict, or otherwise hold any person to answer for any federal offense.[3] Two other resolutions would allow for periodic changes in what is now constitutionally mandated grand jury procedure.[4] On the other hand, there are those who contend that the grand jury has several distinctly valuable features. It can act as a safeguard for those accused of a crime, since it is not dependent on the judgment of one individual, as is a prosecutor system. Through its investigations, the grand jury can secure evidence for law enforcement officials. It can investigate derelictions of duty by office holders. The system of holding regularly scheduled grand jury proceedings tends to involve many different citizens in the criminal law processes of the community.[5]

While the composition and practices of the grand jury vary from state to state, a few generalities can be made. The size of the grand jury ranges from fifteen to twenty-three members. The grand jury investigates criminal matters presented to it by a court, a district attorney or other prosecutor, or its members. It usually meets behind closed doors and proceedings

are somewhat less formal than those of a court, in that strict rules of evidence are not observed. The grand jury may usually subpoena witnesses and compel anyone but a prospective defendant to testify. Witnesses may plead the Fifth Amendment privilege against self-incrimination and be granted immunity.[6] According to a 1970 article, grand jury report powers exist in about half the states, on the basis of statute or common law.[7]

A New York court, in examining the grand jury's authority, concluded that "A grand jury must meticulously observe those provisions of law which define and limit its powers and duties and the procedures it must follow."[8] Statute and case law concerning grand juries vary from state to state. Examination of such law is beyond the scope of this report, which is limited to recent laws which authorize the Attorney General to petition for a statewide grand jury or to appear before a county investigating grand jury.

The Task Force on Organized Crime of the President's Commission recognized the importance of the grand jury in organized crime investigations by recommending that, in jurisdictions with major organized crime problems, at least one investigative grand jury be impaneled annually, and that its sessions should allow reasonable time to build an organized crime case, so that the grand jury would not be dismissed before successful completion of an investigation. The Commission recommended that courts allow reasonable time extensions and that the prosecutor should be able to appeal judicial dismissal of the grand jury, with a provision made for suspension of the dismissal during appeal.

The Commission pointed out that the automatic convening of grand juries tends to force less diligent investigators and prosecutors to explain their lack of action. It also said that the grand jury should be able to replace local investigators and prosecutors with special counsel by appealing to an appropriate executive official, such as the Attorney General or Governor.[9]

The National Association of Attorneys General adopted the following recommendation at its 1971 winter meeting:

> The Attorney General should have power to call a statewide investigatory grand jury.
>
> Statewide problems cannot be met solely on the local level. The Attorney General should have authority to call a statewide grand jury to investigate organized crime and other matters of general importance.[10]

The current reemphasis on the grand jury's role in investigations has resulted in new laws at both the federal and state level.

Federal Law

Title I of the Organized Crime Control Act of 1970 establishes special federal grand juries in judicial districts having over four million population. In addition, the Attorney General, his Deputy, or any designated Assistant Attorney General may certify to the chief judge of the district that such a jury is necessary "because of criminal activity in the district." In such districts, a special grand jury shall be summoned at least once each

18 months unless another special grand jury is serving.[11] The jury must meet at least once each 18 month period. It shall serve until it determines by majority vote that its business has been completed, but not more than eighteen months, unless the court orders a 6 month extension. No term so extended shall exceed 36 months, unless the grand jury is taking testimony concerning noncriminal misconduct of a public official on direction of a court.

The court may order an additional special grand jury impaneled when the court determines that the volume of business exceeds the grand jury's capacity to discharge its obligations.

The constitutionality of this law has been upheld in at least one court decision. A U.S. district court has upheld the contempt conviction of two defendants before a special grand jury called in Illinois. The court held that their contempt conviction does not deny them equal protection even though defendants argued that they reside in a district having a special grand jury without the Attorney General's certification. "Assuming arguendo, that the provision for calling special grand juries involves a classification which imposes a heavier burden upon witnesses who live in the three [New York, Chicago, Los Angeles] urban areas, the classification is not unreasonable or arbitrary." The defendants also argued that the life of a special grand jury and consequently the incarceration of witnesses, could be twice as long as that of a normal grand jury. However, the court noted that a special grand jury may be called in any district. Once called, its term and the burden upon unwilling witnesses is the same in all districts.[12]

At the completion of its term, the grand jury, with the concurrence of a majority of its members, may submit a report:

> (1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the bases for a recommendation of removal or disciplinary action; or
>
> (2) regarding organized crime conditions in the district.[13]

The official or employee may be federal, state, or territorial.

The court is required to examine the report and file it as a public record only if the court is satisfied that it concerns a subject authorized by law and "is supported by the preponderance of the evidence". Each person named therein and a reasonable number of witnesses designated by him must have been afforded an opportunity to testify before the grand jury prior to filing of its report. A copy of the report must be given to the person named and he has at least twenty days to respond. His response becomes an appendix to the report, except for any parts which the court considers have been inserted "scandalously, prejudiciously, or unnecessarily." Subject to certain other conditions, the report is then given to the officer or body who has jurisdiction over the person concerned.

This provision for grand jury reports on noncriminal conduct has been subject to controversy. It is based on a 1964 New York statute, the constitutionality of which was upheld by that state's courts.[14] The New York law, however, has some significant differences, including a requirement that the report be supported by a "preponderance of the credible and legally admissible evidence."

The New York City Bar Committee, the American Civil Liberties Union, and the American Bar Association Section of Criminal Law opposed this provision of Title I. The latter group was:

> ...strongly opposed to giving the special grand jury a power so inconsistent with our constitutional system of procedural due process which provides an opportunity for an accused person to confront his accusers and defend himself in a court of law and before a jury if he so chooses. [this provision]...would deprive a public official or employee of these rights and would substitute instead weak remedies allowing the accused person to testify before the grand jury, call witnesses before the grand jury and to file an answer to the grand jury report. This is no substitute for the constitutional safeguards outlined in the Sixth Amendment.[15]

Senator McClellan, author of the Act, argued that:

> ample means are provided for evaluation of a grand jury report, which is not a "charge" of crime but a set of findings regarding noncriminal conduct... the court supervising the grand jury studies both the evidence against the subject of the report and the evidence which he adduced before the grand jury, to see whether the report is supported by the evidence. The court's determination on that question is subject to appellate review....Thus, a great deal of "evaluation" of the report is done before it even reaches the public.[16]

The Senator notes that, prior to this law, "the report writing functions of federal grand juries have been substantially curtailed by district court level decisions, although grand juries continue to issue and district courts continue to accept reports."[17] The Supreme Court has never ruled directly on the reporting power of federal grand juries.

Legislation which was pending before Congress in 1974 would have changed the grand jury system. The bill, H.R. 9008, was in the Judiciary Subcommittee last year. Hearings were scheduled but were not held. The bill seeks to "restore to the grand jury its traditional role of protecting individuals from harassment and unwarranted prosecutions." The maximum

period of imprisonment for refusal to testify would be reduced from 18 to 6 months. Bail would be required on appeal of contempt orders, unless the court finds that the appeal is frivolous. Appointed counsel would be required in contempt proceedings, if the witnesses were unable to afford his own counsel. The legislation would prohibit the use of compelled testimony against a witness in all cases except perjury before the grand jury. The bill will be resubmitted to Congress in 1975.

To date, no reports on non-criminal conduct have been issued by federal grand juries.

State Grand Jury Legislation

Five states authorize statewide investigative grand juries. New Jersey's law was passed in 1968[18] and Colorado's in 1971.[19] Florida[20] and Wyoming[21] enacted such legislation in 1973. Rhode Island passed such legislation in 1974 which became effective January 1, 1975.[22] The New Jersey law was extensively amended in 1973.

These laws are substantially similar. The New Jersey statute provides that whenever the Attorney General, or the Director of the Division of Criminal Justice, deems it to be in the public interest to convene a grand jury which shall have jurisdiction extending beyond the boundaries of any single county, he may petition an assignment judge of the Superior Court. The assignment judge "may, for good cause shown, order the impaneling of a state grand jury in which event said grand jury shall have state-wide jurisdiction". At least one jury serves at all times. Prior to the 1973 amendments, the judge was required to consider whether the matter could effectively be handled by a county grand jury. The amendments also provided that the Division of Criminal Justice paid the expenses incurred by a county from prosecution of the grand jury's indictment. In Rhode Island, a regular statewide grand jury sits on a quarterly basis throughout the year. The Attorney General may apply for the impaneling of as many additional statewide grand juries as he deems necessary. This additional jury may not sit for longer than eighteen months.

Colorado's and Wyoming's laws are similar, except that the chief judge of any district court may issue the order, and the judge must, in making his determination, require a showing that the matter cannot be effectively handled by a county grand jury. Wyoming's law gives the Governor, as well as the Attorney General, the power to petition for a grand jury. In Florida, the matters which a grand jury may consider are enumerated in the statute.

The administrative director of the courts in New Jersey, or the state court administrator in Colorado, prepares a list of prospective jurors drawn from existing jury lists of the counties. In New Jersey, the composition is the same as a county grand jury. In Colorado, the administrator need not include jurors from every county in the state, but may select jurors from counties near where the judge presides. Both states provide that not more than one-fourth of the jurors shall be from any one county. In Wyoming, the clerk, upon receipt of an order by the district judge of the

court granting a petition to impanel a statewide grand jury, shall prepare a list drawn from existing jury lists of the county. In all three states the judge selects the jury; in Colorado, he does so with the advice of the Attorney General. In Rhode Island, the jurors are selected at random from the names of all prospective grand jurors appearing on current lists compiled pursuant to statutory directive.

Wyoming, New Jersey, Florida and Colorado provide that the judge who issued the order impaneling the grand jury shall maintain judicial supervision of it, and that all formal returns of any kind shall be made to him. He may order the consolidation of an indictment returned by a county grand jury with an indictment returned by a state grand jury to fix venue for trial. In New Jersey, jurors are summoned by the sheriff of the county in which they reside; in Colorado, they are summoned by the clerk of the court in which the petition for impaneling was filed. The expenses of the grand jury are paid by the state under all laws.

These statutes specify that "the presentation of the evidence shall be made to the state grand jury by the Attorney General or his designee".

In 1971, Oklahoma adopted a constitutional amendment providing for multi-county grand juries.[23] However, enabling legislation has not been enacted concerning such matters as jury selection or the Attorney General's authority to prosecute indictments resulting from the grand jury, so no action has been taken under the amendment. Legislation to clarify these matters was introduced in 1974, with the Attorney General's support but failed of passage. It will be proposed again in the 1975 Session.

Legislation to authorize statewide grand juries was introduced in the 1971 Pennsylvania General Assembly and in subsequent sessions. This would allow the district attorney or the Attorney General to apply to a county court for summoning of an investigative grand jury when this was "necessary because of criminal activity within the county". Refusal to grant an application would be appealable to the Chief Justice of the Supreme Court. The Attorney General could also apply to a justice of the Supreme Court for a statewide investigative grand jury when, in his judgment, the matter could not be adequately handled by a county grand jury. The Bill contains detailed provisions concerning investigative grand juries' powers and procedures. As of January 31, 1974, it had passed the Senate and was pending in the House. Like the federal law, the proposed Pennsylvania legislation would authorize issuance of the reports concerning noncriminal misconduct, malfeasance, or misfeasance by a public officer. This portion of the Pennsylvania bill corresponds closely to the federal statute.

The Wyoming statute provides that the statewide grand jury, in addition to its power to indict, may "cause an investigation to be made into the extent of organized criminal activity within the state and return a report thereon", if the Attorney General so requires.

Legislation at one time pending in Iowa would have allowed the Attorney General to petition the Chief Justice of the State Supreme Court to impanel a grand jury. The grand jury would be impaneled in the same manner as a county grand jury, except that challenges could be made only by the Attorney General.

A Bill introduced in the 1973 New York Legislature, but not enacted, would have provided for statewide and regional grand juries, in addition to the county grand juries. A statewide grand jury would be impaneled by a state supreme court and would examine evidence "concerning offenses prosecutable in any criminal court of the state and concerning any misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise". A regional grand jury would examine evidence of offenses prosecutable in the criminal courts of the region. The same bill would have provided for a State Prosecutor in the Attorney General's office.

The Criminal Division of the Louisiana Attorney General's office prepared a feasibility study of a state-wide grand jury. This analysis found that the main practical problem was the cost and financing involved, because of the necessity for jurors coming from distant places. It noted that one solution would be to allow the Attorney General to make greater use of parish grand juries, using a statewide grand jury only for capital cases and those involving statewide public officials.[24]

Other Laws Concerning the Attorney General's Authority

Several other states have legislation which authorizes the Attorney General to present evidence to a grand jury, although these juries are not statewide. In California, grand juries are selected by order of the superior court.[25] The Attorney General may demand that a grand jury be impaneled if one has not been selected.[26] In addition:

> Whenever the Attorney General considers the public interest requires, he may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of such matters of a criminal nature as he desires to submit it. He may take full charge of the presentation of such matters to the grand jury, issue subpoenas, prepare indictments, and do all other things incident thereto to the same extent as the district attorney may do.[27]

The grand jury is furnished with broad investigative powers, including statewide process by subpoena.[28]

A 1970 Ohio law authorized the Attorney General to investigate any organized criminal activity when directed by the Governor or General Assembly.[29] If there appears to be cause for prosecution, the Attorney General shall refer the evidence to the prosecuting attorney or directly to a regular or special grand jury. A few other states give the Attorney General powers in grand jury investigations. In Michigan, he can use the citizen's grand jury as an investigatory tool.[30] In Nevada, he may appear before the grand jury, examine witnesses, and present evidence.[31]

Wisconsin law provides that a grand jury may be convened to investigate crime"which is statewide in nature, importance or influence";[32] if

such activity involves more than one county, the Attorney General may approve charging the costs of the proceeding to the Department of Justice. Using this statute, the Attorney General had "rejuvenated the grand jury concept as an investigative device"[33], initiating four grand juries over the 1969-71 biennium.

A 1973 amendment to the Code of Criminal Procedures imposed a requirement for a preliminary hearing following indictment by a grand jury. Because of this, the grand jury law is no longer used. Extensive use is made in Wisconsin of "John Doe" investigations, under an old statute which provides that:

> If a person complains to a judge that he has reason to believe that a crime has been committed within his jurisdiction, the judge shall examine the complaint under oath and any witness produced by him and may, at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in such examination is within his discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but such counsel shall not be allowed to examine his client, cross-examine other witnesses or argue before the judge. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. Subject to s. 971.23 the record of such proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.[34]

The provision for counsel was added recently. This type proceeding is frequently used by the Attorney General's office, which is authorized by statute[35] to investigate crime which is statewide in nature, importance or influence. The Wisconsin Supreme Court has defined a John Doe proceeding as "primarily an investigative device, out of which can come either an exoneration, by implication at least, or a formal charge of a crime"[36].

Kansas' Revised Code of Criminal Procedure retained provisions for county grand juries.[37] It also provides that the Attorney General, an Assistant Attorney General, or a county attorney who "is informed or has knowledge of any alleged violation of the laws of Kansas" may apply to a district judge to conduct an inquisition. The judge subpoenas the witnesses. The Attorney General, Assistant Attorney General, or county attorney may issue subpoenas if the laws violated pertain to specified crimes. Testimony is under oath and the prosecutor may grant immunity. Witnesses are entitled to counsel. If there is probable cause to believe that a crime has been committed, the Attorney General, an Assistant Attorney General, or a county attorney may file a complaint and testimony and a warrant for arrest shall be issued.

In 1972, Washington enacted a Criminal Investigator Act "to serve law enforcement in combating crime and corruption".[38] It provides for summons of a grand jury whenever a superior court thinks there is sufficient evidence of crime or corruption in the county, or whenever requested by a prosecuting attorney, city attorney or corporation counsel, Attorney General, or special prosecutor appointed by the Governor on request of the grand jury. The grand jury shall inquire into all "indictable offenses within the county which are presented to them by a public attorney or otherwise come to their attention;" thus, its jurisdiction is limited to the county. A superior court judge may be designated by the court as a "special inquiry judge" to hear evidence of crime and corruption.

The Wasington law provides that, upon request of the county prosecutor, the Attorney General shall assist him before the grand jury or special inquiry judge. It also authorizes the court to direct the Attorney General to supersede the local prosecutor, in which event the Attorney General is responsible for prosecuting any indictments which are returned. Finally, the law says that "when the Attorney General is conducting a criminal investigation pursuant to powers otherwise granted him, he shall attend all grand juries or special inquiry judges in relation thereto and shall prosecute any indictments returned by a grand jury."

Composition and Procedures

The Colorado statute authorizes the Attorney General to petition for a state grand jury and authorizes the judge to order such a jury "for good cause shown". The judge could presumably decline to order a jury impaneled. The federal law creates permanent special grand juries in heavily populated areas, and allows the Attorney General or his designated assistants to certify the need for grand juries elsewhere. Neither Colorado nor New Jersey specify how the foreman of the state grand jury is selected, so the same methods apply as for the county grand jury; in both states, he is appointed by the court.[39] Federal grand juries, however, elect their own foreman.

Length of service of these grand juries differs. Members of Colorado's state grand jury serve for one year, unless discharged sooner by the chief judge, although a county grand jury serves for 18 months.[40] In New Jersey, the grand jury law does not specify the term, but a county grand jury continues for twenty weeks and the judge may order an unlimited number of 3-month extensions.[41] The special federal grand jury meets for 18 months, but may, by majority vote, extend its term for additional periods of 6 months, not to exceed a total term of 36 months.[42] The U. S. Department of Justice favored this provision for extensions because:

> It would have the effect of stimulating prosecutors and investigators to take effective and timely action against organized crime in their districts. It would also insure that grand juries would stay in session long enough for the unusually lengthy period of time often required to build an organized crime case. Lastly, it would eliminate the possibility of arbitrary termination of a grand jury by supervisory judges.[43]

The Second Circuit has held that this time extension available to a special federal grand jury is not applicable to a Rule 6 grand jury which happens to be involved in the investigation of organized crime.[44] The court said that "each type of grand jury has its own duration fixed by its own statute". Therefore, the statute under which the grand jury was formed controls its life span and not the nature of its investigation.

There are differences in grand juries' subpoena powers. California specifically authorizes the Attorney General to subpoena witnesses before the grand jury. In Ohio, the Clerk of the Court is to issue subpoenas when required by the grand jury, prosecuting attorney, or judge.[45] Neither the Colorado nor the New Jersey state grand jury laws mention subpoena powers, but they state that these bodies shall have the same powers as a county grand jury.

A grand jury does not normally have the power to subpoena witnesses directly. Usually, however, the court will issue them for the grand jury without question. The court's willingness to issue and enforce subpoenas

> ...may be partially explained by the secrecy of grand jury proceedings which generally protects the individual from any significant harm until an indictment is made or a report issued at the end of the investigation. It is at that time that the court may most intelligently determine whether the grand jury has exceeded its allowed scope of investigation.[46]

Because of the variations in a grand jury's power to call witnesses, this is a point states might wish to clarify when drafting legislation.

Courts traditionally have held that procedural safeguards do not apply to grand jury proceedings, because the grand jury can't determine guilt "The grand jury merely investigates and reports. It does not try."[47] This concept has been criticized because, as one commentator notes:

> In addition to the absence of counsel, the scope of the grand jury's inquiry is generally not limited as it would be at trial; there is frequently no requirement that an indictment be based on evidence which would be admissible at trial; and because of the ex parte proceedings, the witness has neither the right to confront those who might implicate him, nor the right to testify in his own behalf.[48]

Another recent article compares the grand jury to the preliminary hearing. It suggests that the concept of "critical stage of the prosecution" might equally well be applied to grand jury proceedings, thus making it subject to recent Supreme Court decisions on Fifth and Sixth Amendment rights.[49] Another critic points out that 'grand jurors must place enormous trust in the prosecutor's guidance", because it is he "who tells them what the charge is, who selects the facts for them to hear, who shapes the tone and

feel of the entire case." He alone understands the legal principles and procedures involved, and the admissibility of proposed evidence. Finally, when a case is brought into the grand jury room the prevailing feeling is that the prosecutor wouldn't bring it there if he didn't think he could get a conviction".[50] These considerations apply primarily to an indicting grand jury, but have some application to an investigating grand jury.

Washington's Criminal Investigatory Act of 1971 specifically provides for counsel.[51] An individual called to testify before a grand jury is given the right to counsel, and must be told of this right. The attorney may be present during all proceedingsattended by his client, unless immunity has been granted, in which case the individual may leave the room to confer with his attorney. Utah also gives witnesses before the grand jury a right to counsel,[52] but most states do not.

The Supreme Court has said specifically that a witness before a grand jury has no constitutional right to counsel.[53] One reason is that, as Senator McClellan has noted, "the secrecy of grand jury proceedings is designed in part as a means of protecting witnesses and suspects from prejudice through disclosure to the public that their activities are being investigated."[54] This has been considered to lessen or obviate the need for counsel.

Operation of State Grand Juries

Colorado, New Jersey, and Florida have used their state grand jury laws. Their experience indicates that such statutes provide a practical approach to expanding the Attorney General's powers in combating crime.

The 1971 Colorado law has been used every year subsequent to its enactment. The first investigation involved a multicounty drug operation in which there were many potential defendants in each county. Rather than call a special grand jury in each jurisdiction, the statewide jury was impaneled, because the witnesses before the jury were essentially the same in each case. In the second instance, a jury was impaneled to investigate apparent arson in condominium developments in a multi-county metropolitan area. Under the law, the Attorney General may designate someone else to present the cases to the grand jury. In the first case, the local district attorney was designated, but the Attorney General's office is handling the second case. This case is still under investigation by the grand jury. Another major investigation concerned possible corruption in the state prison system. A fourth concerned a multi-county problem of bribery of public officials by a chemical company, and resulted in a number of indictments. In addition to the condominium fires, the grand jury in 1974 investigated a nursing home chain for possible criminal violations and also a series of people for possible tax violations.[55]

The Attorney General of Colorado reported to COAG that "I have encountered no expressed objection to the statewide grand jury concept. Quite the contrary, our law seems well received in this state".[56] A special committee was appointed by the Chief Judge of the State Supreme Court to make recommendations concerning the entire jury system. The committee,

which was composed of judges, district attorneys, the public defender, and private attorneys, recommended that the statewide grand jury be continued. It also recommended that witnesses be allowed to have counsel inside the grand jury room, and that district attorneys be given the power to subpoena witnesses before the grand jury.

The Director of the Division of Criminal Justice of New Jersey's Department of Law and Public Safety believes that: "The State Grand Jury has been a very effective agency in this state. It has not conflicted with the local grand juries or prosecutors, but rather has supplemented them by filling an important gap in our law enforcement structure."[57] The state grand jury is used for many matters brought to the attention of the Attorney General's office by the State Police, and is not limited to organized crime. For example, one case concerned an attempt by a chief of police to fix a traffic ticket, on the assumption that municipal corruption was a matter of statewide interest. Another involved homicide by an interstate motorcycle gang.

From 1969 to December 29, 1973, New Jersey's statewide grand juries have returned 330 indictments, naming 841 defendants. The major offenses involved have been as follows: gambling - 122 indictments; public corruption - 63; major thefts - 43; loansharking - 8; perjury - 12; narcotics - 11; prison riot cases - 43; fraud - 7; murder - 6; labor corruption - 4. Other offenses for which indictments have been brought are contempt, arson, illegal electronic surveillance, criminal antitrust, forgery, and conspiracy. Most cases are multi-county although some corruption cases have been confined to a single county. All investigation and presentation for these grand juries have been handled by the Organized Crime and Special Prosecutors section of the Department of Law and Public Safety, and all cases resulting from the grand juries have been tried by this section or by the Department's Trials Section. In New Jersey, the State Police are under the Attorney General, so work with the Organized Crime Section.

The Florida statewide grand jury law has been used twice. The first investigation was headed by the state's attorney from Hillsborough County and involved an investigation of drug abuse and drug traffic. The second investigation is presently underway.[58]

An investigation brought under Washington's 1971 Criminal Investigatory Act disclosed a widespread "payoff" system operating within the Seattle Police Department which reached to the highest level of city government.[59] Several cases have been brought which relate to the investigation and resulting indictments, although none of these challenged the statute's constitutionality.[60]

Investigations have been carried out under the 1970 Ohio law directing the Attorney General to look into organized criminal activity on direction of the Governor or General Assembly.[61] The first two investigations brought through the statute did not actually deal with organized crime cases. The first one which concerned alleged criminal activity at Lima State Hospital, was headed by the Chief of the Division of Criminal Activities, assisted by investigators from the Highway Patrol. The other concerned the disorders at Kent State University in 1970. Investigations are presently underway under the statute which involve organized criminal activity. Information was not available regarding the nature of the investigations.

The state grand jury which investigated Kent State filed a special report. Some of the individuals named therein filed under the Civil Rights Act, claiming that this report was unlawful and an infringement on their First Amendment freedoms. The court ordered the report destroyed and expunged. It found that "a report of an Ohio grand jury is issued without authority if the report violates the grand jury's secrecy against disclosure of evidence".[62] In rendering specific written findings on offenses, "The Special Grand Jury takes over the duty of a petit jury, acts as a trying body, and determines guilt."[63] This is beyond the scope of its authority.

The federal law has been used extensively, particularly in connection with federal organized crime strike forces. This is a useful tool for the strike forces and they rely heavily on it.

Available information indicates that the few jurisdictions which have statewide or special investigative grand juries have found them very useful.

The Director of Criminal Justice in New Jersey has said that "[o]ne of the most important and necessary tools against public corruption is the statewide grand jury."[64] Other states may wish to consider this approach to strengthen the Attorney General's role in organized crime control.

8. FOOTNOTES

1. Remarks of William S. Lynch to L.E.A.A. Conference, Norman, Oklahoma, March 4, 1970.

2. See, e.g., Melvin Belli, The Useless Coroner and the Redundant Grand Jury, 6 TRIAL 51 (1970); William Campbell, Eliminate the Grand Jury, 64 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 178 (1973).

3. H.J. RES. 774, 93rd Cong., 2nd Sess. (1974).

4. H.J. RES. 752, 93rd Cong., 2nd Sess. (1974); H.J. RES. 885, 93rd Cong., 2nd Sess. (1974).

5. See, e.g., J. Edward Lumbard, The Criminal Justice Revolution and the Grand Jury, 39 N.Y. STATE BAR JOURNAL 397 (1967).

6. Law Student Research Council, Survey of the Grand Jury System, 3 FORTIAE L.J. 70 (1967); See: Bibliography of the Grand Jury 10 AM. CRIM. L. REV. 867 (1972); Note, The Grand Jury - Its Investigatory Powers and Limitations, 37 MINN. L. REV. 586 (1953).

7. Senator John L. McClellan, The Organized Crime Control Act or Its Critics: Which Threatens Civil Liberties? 46 NOTRE DAME L. 64 (1970).

8. In Re Grand Jury, January, 1967, 277 N.Y.S. 2d 105 (1967).

9. The President's Commission on Law Enforcement and Administration of Justice, Task Force on Organized Crime, TASK FORCE REPORT 16 (1967).

10. National Association of Attorneys General, Committee on the Office of Attorney General, THE OFFICE OF ATTORNEY GENERAL 4 (1971).

11. 18 U.S.C. 31-3334.

12. Womack v. U. S. Attorney, 348 F. Supp. 1331 (U.S.D.C. - N.D., Ill. 1972); See also State v. Westerberg, 506 P.2d 746 (Col. 1973).

13. 18 U.S.C. 3333.

14. N.Y. CODE CRIM. PROC. sec. 253(a), upheld in In Re Grand Jury, January 1967, 277 N.Y.S. 2d. 105 (1967).

15. Supplemental Report in Support of Majority Recommendations on S.30, 9 AM. CRIM. LAW QUARTERLY 50 (1970); See contra: Kuk, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 COLUM. L. REV. 1103 (1955); 115 CONG. REC. S17089 (December 18, 1969).

16. Senator John McClellan, Supra, Note 46 at 70.

17. Id. at 65.

18. N. J. REV. STAT., sec. 2a.73-1 to 9 (1968).

19. COL. REV. STAT., sec. 78-8-1, et seq. (amended 1971; S.L. 1971, p. 880).

20. Ch. 906, FLA. STAT. 1973.

8. FOOTNOTES, cont'd.

21. WYO. STAT. ANN. sec. 7-117.1 - 7-117.9.

22. 74 S 2403 ch. 12-11.1 (1974).

23. OKLA. STAT., CONST. ART., ART. II sec. 18 (1974).

24. Louisiana Department of Justice, Feasibility Study of State-Wide Grand Jury, (February, 1972).

25. CAL. PEN. CODE, sec. 895.

26. CAL. PEN. CODE, sec. 913.

27. CAL. PEN. CODE, sec. 923.

28. CAL. PEN. CODE, sec. 939.2.

29. OHIO REV. CODE ANN. sec. 109.83.

30. Letter from Vincent W. Piersante, Chief, Organized Crime Division, Michigan Department of Attorney General to Patton G. Wheeler, January 25, 1971.

31. NEV. REV. STAT. sec 228.120.

32. WISC. STAT. sec. 255.10(8).

33. Attorney General of Wisconsin, Report to the Legislature, 1969-71, 11.

34. WISC. STAT. sec. 968.26.

35. WISC. STAT. ANN. ch. 252 (1969).

36. State ex rel. Kurkierewicz v. Cannon, 166 N.W. 2d 255.

37. KAN. STAT. ANN 22-3001 through 22-3101.

38. WASH. REV. CODE 10.27.010 et seq.

39. New Jersey Rules Governing Criminal Practice, 3:6-4; COLO. REV. STAT. ANN. sec. 78-6-4.

40. COLO. REV. STAT. ANN. sec. 78-8-3, sec. 78-6-1.

41. New Jersey Rules Governing Criminal Procedure, 3:6-10A, 10B.

42. 18 U.S.C. 3321.

43. 115 CONGRESSIONAL RECORD, August 12, 1969.

44. U.S. v. Fein, ___F.2d___, 42 LW 2190 (USCA - 2nd Cir., November 8, 1974.)

45. OHIO REV. CODE ANN. sec. 2939.12.

46. The Grand Jury as an Investigatory Body, 74 HARVARD L. REV. 593 (1961).

47. Hannah v. Larche, 363 U.S. 420 (1960).

48. Right to Counsel in Investigative Grand Jury Proceedings: Washington Criminal Investigating Act of 1971, 47 WASH. L. REV. 518 (1972); footnotes omitted.

49. Samuel Dash, The Indicting Grand Jury: A Critical Stage? 10 AM. CRIM. L. REV. 807 (Summer, 1972), See also: Steale, Right to Counsel at the Grand Jury Stage of Criminal Proceedings, 36 MO. L. REV. 193 (1971); Comment, The Rights of a Witness Before a Grand Jury, 1967 DUKE L.J. 97 (1967).

50. Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965).

51. WASH. REV. CODE. sec. 10.27.120-.140.

52. UTAH CODE ANN. sec. 77-19.3 (1969).

53. In Re Groban, 352 U.S. 330 (1957).

54. Senator John McClelland, supra Note 5 at 70.

55. Telephone interview with Assistant Attorney General Thomas N. Alfrey, Chief, Organized Crime Strike Force, Colorado, December 6, 1974.

56. Letter from Attorney General John P. Moore to Patton Wheeler, September, 13, 1972.

57. Letter from Evan William Jahos, Director, Division of Criminal Justice, to Patton Wheeler, September 25, 1972. Telephone interview with Charles Intriago, Special Counsel to the Governor, January 31, 1974.

58. Telephone interview with James T. Flack, Assistant Attorney General, State of Florida, December 6, 1974.

59. Letter from Assistant Attorney General Donald Foss, Jr., to Patton G. Wheeler, October 27, 1972.

60. State v. Anderson, 81 Wn. 2d 234; State v. Carroll, 81 Wn. 2d 97; Deskins v. Waldt, 81 Wn. 2d 1.

61. Interview with First Assistant Attorney General George Jenkins, Columbus, Ohio, September 28, 1972; Telephone interview with Assistant Attorney General James Reuth, January, 1974; Telephone interview with Assistant Attorney General Bennie Espy, December 6, 1974.

62. Hammond v. Brown, 323 F. Supp. at 345, (N.D. OHIO 1971), aff'd , 450 F.2d 480 (USCA - 6th Cir., 1971).

63. Id. at 342.

64. Evan Jahos in National Association of Attorneys General, PROSECUTING ORGANIZED CRIME, SUMMARIES OF SPEECHES TO 1974 NAAG SEMINARS 15 (1974).

9. WITNESS IMMUNITY

9. WITNESS IMMUNITY

Witness immunity legislation has long been recognized as an effective tool in law enforcement. This chapter will review the fundamental constitutional issues involved and report the current status of legislation. Informal, non-statutory immunity is beyond the scope of this chapter.[1]

Intruduction

In Kastigar v. United States, Mr. Justice Powell noted that:

> The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence. The power with respect to courts was established by statute in England as early as 1562, and Lord Bacon observed in 1612 that all subjects owed the King their "knowledge and discovery"...[T]he general common law principles that "the public has a right to every man's evidence" was considered an "indubitable certainty" which "cannot be denied" by 1742. The power to compel testimony and the corresponding duty to testify, are recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him and have compulsory process for obtaining witnesses in his favor.[2]

This essential power of government to compel testimony is not unqualified, however. A fundamental exception to the duty to testify is the Fifth Amendment privilege against compulsory self-incrimination. This privilege, standing alone, effectively bars proof of certain criminal activities when the only parties who could give useful testimony are themselves implicated in the offense. But, as Dean Wigmore notes: "The privilege protects only against legal consequences of conduct; hence, the legal consequences lacking, the privilege does not exist for such conduct."[3] The practice of granting immunity from prosecution to witnesses for the state was begun in early 18th Century England. The practice was carried to the American Colonies where the colonial legislatures of Pennsylvania and New York enacted early immunity statutes.[4] Today, the federal government, all states, the District of Columbia and Puerto Rico have witness immunity legislation.

Professor Henry Ruth at a National Association of Attorneys General Conference, stressed the critical need for testimony by cooperating witnesses in the fight against organized crime:

> I recall a remark made here in Massachusetts a couple of years ago when a bill was pending that 'We do not want our cases made by finks.' Well, most of the organized crime cases are made by finks, and you are going to want to subpoena them to these investigative grand juries and maybe give them immunity. At least, you will want the authority available; if not general

> immunity, certainly immunity for those crimes in which organized crime enforcement will most likely come up with indictments.[5]

In a recent article, Attorney General Lee Johnson of Oregon noted that "an immunity statute is particularly useful in prosecuting organized criminal activity. In crimes such as gambling or sale of narcotics, the victim is as guilty as the perpetrator. Unless the state can immunize one, it is very difficult to prosecute the other."[6] Another article notes that, until recently, immunity legislation has applied only to specific offenses. This reflects a view that "the immunity device is justified only where, because of the nature of the crime under investigation, the acquisition of evidence from untainted sources is especially difficult."[7]

Constitutional Issues

The most prominent constitutional issue related to witness immunity has been whether the Fifth Amendment requires transactional or use immunity in order to compel incriminating testimony. The Pennsylvania Attorney General's brief in Pennsylvania ex rel Specter v. Mario Riccobene gave the following definitions of "transactional" and "use" immunity:

> This distinction may be illustrated as follows: if an individual receives 'transactional immunity' in a grand jury investigation of narcotics in which he also is compelled to discuss his participation in a murder, prosecution for murder could not subsequently be undertaken. Thus, the witness may not be prosecuted for any crime about which he is compelled to testify before the grand jury. In contrast, 'use immunity' is much narrower. The grant of immunity is limited to the actual testimony which the witness is compelled to give. Thus, in the hypothetical [case] outlined above, although the actual testimony concerning the murder could not be used, the witness would still be subject to prosecution for the murder to which he referred if other independent evidence could be obtained.
>
> [U]nlike a 'use' immunity statute where independent evidence derived from compelled testimony could be used, the 'transaction' immunity statute is an absolute bar.[8]

Counselman v. Hitchcock[9] was the first case in which the constitutionality of a witness immunity statute was considered by the U.S. Supreme Court. In that case, a unanimous Court held that a federal statute which provided immunity solely from the use of compelled testimony was not coextensive with the privilege it replaced. The Court stated that the statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him."[10] Therefore the witness was justified in refusing to testify after the grant of immunity. In dictum at the end of the opinion, the Court stated that an immunity statute, in order to be constitutional, "must afford absolute immunity against future prosecution for the offense to which the question relates."[11]

Soon after the Counselman decision, a new immunity statute applicable to proceedings before the Interstate Commerce Commission was enacted by the Congress. This legislation, The Compulsory Testimony Act of 1893, was drafted to satisfy the broad language of Counselman and provided that:

> No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise..."[12]

In Brown v. Walker[13] the Supreme Court held that the immunity provided by this section was co-extensive with the Fifth Amendment privilege and therefore constitutional. Subsequent state and federal statutes followed this basic form, providing transactional immunity. Not until 1964 was there any doubt that these statutes met the minimum constitutional requirement.

In a 1964 decision, Murphy v.Waterfront Commission,[14] the Court seemed to suggest that legislation providing immunity for the "use and derivative use" of compelled testimony would withstand a constitutional challenge. The question before the Court in that case was whether a state, by a grant of transactional immunity under state law, could compel a witness to testify to facts that tended to incriminate him under federal law.

The court held that such testimony could be compelled but that the "compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."[15] In a footnote, the Court stated that the federal government would have the burden of proving that a subsequent federal prosecution against the witness was not derived from the fruits of the previously compelled testimony in state court.[16] Presumably, the decision would cover a reverse situation by protecting the recipient of federal immunity from state prosecution and by protecting the recipient of immunity in one state from prosecution in a sister state based upon evidence derived from the fruits of the compelled testimony.

Based upon the language in the Murphy opinion and re-examination of Counselman, the new federal general immunity statute[17] and a New Jersey immunity statute for investigations of the State Commission of Investigation[18] provide immunity from the use of compelled testimony and evidence derived therefrom. The question of whether use and derivative use immunity is constitutionally sufficient was brought directly before the Court in recent challenges to the constitutionality of both statutes. In the companion cases of Kastigar et al v. United States,[19] and Zicarelli v. N.J. State Commission of Investigation[20] decided May 22, 1972, the Court upheld the constitutionality of these statutes:

> ...the immunity provided by 18 U.S.C. sec. 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity is therefore coextensive with the privilege and suffices to supplant it.[21]

In a subsequent criminal prosecution of a witness compelled to testify by a grant of use and derivative use immunity, the prosecution has the burden of proving affirmatively that its evidence is derived from a legitimate source wholly independent of the compelled testimony.

In another opinion handed down the same day, Sarno v. Investigating Commission,[22] the court rejected a challenge to a Illinois transactional immunity statute. The petitioner claimed that the statute failed to give him full transactional immunity as required by Counselman. Since neither party contended that the scope of immunity provided by the Illinois statute was less than the "use and derivative use" standard of Kastigar and Zicarelli, the writ was dismissed as improvidently granted.

Following the decisions of the Court in Kastigar and Zicarelli, state legislatures may revise their immunity statutes so as to prohibit only the "use and derivative use" of compelled testimony. As Table 7 shows, a number of states are considering or have proposed this change. The usefulness of a "use immunity" statute was pointed out by Professor G. Robert Blakey at a NAAG conference:

> ...If you have immunity statutes that are transactional in character, work to shift them into "use" immunity statutes. The usefulness of the use type of immunity has nothing to do with the legal fact that you can go out later and prosecute a witness, after you immunize him. While the theory says that is what you can do--for any prosecutor to do it is asking for trouble. With transactional immunity, all the witness has to do is mention the transaction; he does not have to fill in the details. So his attorney can tell him to just mention it, and then say, "I don't remember." But with a "use" statute, a smart attorney advises his client to tell all he knows, because the more he tells, the less can be later used against him. So "use" statutes encourage fuller disclosure by witnesses and that is what they are really all about.[23]

Federal Legislation

The National Commission on Reform of Federal Criminal Laws recommended legislation to reform the federal immunity laws both in form and substance. In place of the more than fifty specialized immunity provisions tied to particular substantive statutes, the Commission suggested a single immunity provision applicable to compulsory testimony in three situations: court-grand jury proceedings; formal administrative hearings; and Congressional investigations. Satisfied that a substitution of use and derivative use immunity for transactional immunity would meet constitutional requirements, the Commission proposed a "use" type statute.[24]

The recommendations of the Commission served as the model for Title II of the Organized Crime Control Act of 1970 which provides that:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--
>
> (1) a court or grand jury of the United States,
> (2) an agency of the United States, or
> (3) either House of Congress,a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[25]

This section reveals several important changes in federal immunity law. The act replaces the numerous prior-immunity statutes with one provision for all offenses and procedures. The scope of immunity granted to witnesses compelled to testify over a claim of privilege is limited to the minimum required by the Constitution.[26] The statute was upheld in Kastigar v. United States.

Some prior statutes, such as the frequently copied Interstate Commerce Commission Immunity Provision of 1893, conferred immunity automatically when a subpoenaed witness testified. The 1970 act avoids the possibility of inadvertant and gratuitous grants of immunity by requiring that a witness claim his privilege against self-incrimination as a pre-condition to a grant of immunity.

The President's Commission on Law Enforcement and Administration of Justice in its 1967 report recommended that broad general immunity statutes be enacted at both the state and federal level. The Commission stressed the need for coordination between the governmental units with immunity power.[27] Title II of the 1970 Act recognizes this need by giving the Attorney General a centralized role in federal grants of immunity. In court-grand jury matters, there must be a "public interest" certification by the United States Attorney, approved by the Attorney General, and an application to a United States District Court for an order.[28] In administrative hearing matters, the "public interest" determination and the power to issue a direction to testify are left with the agency, subject to the approval of the Attorney General.[29] In Congressional investigations, the United States District Court may issue an order compelling testimony upon the request of a majority of either House or two-thirds of any committee, and if ten days notice of such application was served on the Attorney General.[30]

Since Kastigar, the challenges to use immunity orders under section

TABLE 7. WITNESS IMMUNITY LAWS

Alabama	No general statute. Specific sections include: ALA. CONST. Art. 8, sec. 189 - Election law violations. ALA. CODE tit. 28, sec. 90 (13)(1951) - Trade practices investigations. ALA. CODE tit. 29, sec. 171 (1915) - Common carrier's liquor violations. ALA. CODE tit. 29, sec. 234 (1909) - Seizure of liquor.
Alaska	No general statute. Specific sections include: ALASKA STAT. sec. 06.05.020 (1951) - Banking and finance. ALASKA STAT. sec. 23.20.070 (1955) - Department of Employment Security.
Arizona	ARIZ. REV. STAT. ANN. sec. 13-1804 (1969, amended 1971) - Transactional immunity for witnesses compelled by court to testify before any judicial or grand jury proceeding.
Arkansas	No general statute. Specific sections include: ARK. STAT. ANN. sec. 73-225 - Proceedings before Commerce Commission. ARK. STAT. ANN. sec. 81-1114 (j) - Employment Security Commission. ARK. STAT. ANN. sec. 66-2122 - Insurance Commission hearings. ARK. STAT. ANN. sec. 66-3014 - Insurance trade practice hearings. ARK. STAT. ANN. sec. 73-225 & 84-105 - Public Service Commission. ARK. STAT. ANN. sec. 41-4120 - Sabotage Prevention Act. ARK. STAT. ANN. sec. 67-1253 - Securities Act. ARK. STAT. ANN. sec. 70-310 - Unfair Practices Act.
California	CAL. PENAL CODE sec. 1324 (1968, amended 1969) - Transactional immunity in felony proceedings and in Attorney General's investigations of organized crime granted by court at the written request of District Attorney or Attorney General. The 1969 amendment, adding provision for immunity in Attorney General's investigations of organized crime, will remain in effect only until the 91st day following adjournment of 1974 legislature unless reenacted. Constitutionality upheld in People v. Williams, 11 Cal. App. 3d 1156, 90 Cal. Rptr. 409 (1970); People v. Boehm, 270 Cal. App. 2d 13, 17 Cal. Rptr. 590 (1969). CAL. PENAL CODE sec. 1324.1 (1968) - Transactional immunity for witnesses compelled to testify in misdemeanor proceedings granted by court at request of District Attorney. CAL. PENAL CODE sec. 1099, 1101 - When two or more defendants are jointly accused, the court may at any time before the defendants begin their defense, on the application of the prosecutor, direct any defendant to be discharged that he may be a witness for the state. Such an

California (cont'd.)	order is an acquittal of the defendant discharged and is a bar to another prosecution for the same offense. CAL. GOV. CODE sec. 9410 - Immunity afforded witnesses before the legislature.
Colorado	COLO. REV. STAT. ANN. sec. 154-1-18 (1963, amended 1969) - Transactional immunity for witnesses compelled to testify in any proceeding involving a violation of the penal law granted by the court upon motion of state's attorney.
Connecticut	CONN. GEN. STAT. ANN. sec. 54-47a (1969) - Transactional immunity for witnesses compelled to testify in criminal proceedings involving narcotics, gambling, or felonious crimes of violence granted by court upon application of state's attorney or chief prosecuting attorney of circuit court.
Delaware	DEL. CODE ANN. tit. 11, sec. 3508 (1967) - Transactional immunity for witnesses compelled to testify in criminal prosecutions and grand jury investigations upon motion of Attorney General and order of court.
Florida	FLA. STAT. sec. 914.04 (formerly sec. 932.29, amended 1969, renumbered and amended 1970) - Transactional immunity for witnesses compelled to testify in all criminal prosecutions before court having felony trial jurisdiction, and in all grand jury investigations.
Georgia	No current general statute. HB 66 would have provided a district attorney authority to grant immunity to witnesses in a felony trial with approval of trial court judge.
Hawaii	HAWAII REV. LAWS sec. 621C 1-3 (1971) - General witness immunity statute. Witness before court or grand jury may be compelled to testify and given transactional immunity by order of courts upon application of state. HAWAII REV. LAWS sec. 746-15 - Witnesses in gambling cases given transactional immunity. HAWAII REV. LAWS sec. 728-8 - Transactional immunity for witnesses in conspiracy trials. A use immunity bill failed to pass the 1973 legislature.
Idaho	IDAHO CODE ANN. sec. 19-1114 (1970) - Provision for agreement by witness in criminal proceeding to testify voluntarily in return for transactional immunity. Prosecuting attorney who attains his agreement submits it to court for approval. IDAHO CODE ANN. sec. 19-1115 (1970) - Transactional immunity in any criminal proceeding. Prosecuting attorney requests order from court and hearing held for witness to show cause why he should not be compelled to testify.

TABLE 7. WITNESS IMMUNITY LAWS.

Illinois	ILL. ANN. STAT.ch.38 sec.106 (Smith-Hurd 1963) - Transactional immunity granted by court at motion of the state in any investigation before a grand jury or trial in any court. ILL. ANN. STAT.ch.63 sec.315 (Smith-Hurd 1971) - Transactional immunity for witnesses compelled to testify before Illinois Crime Investigating Commission. Upheld in Sarno v. Investigating Commission, 32 L. Ed. 2d 243 (1972).
Indiana	IND. ANN. STAT. sec. 9-1601a (1969) - General immunity statute for all criminal prosecutions. Prosecuting attorney requests in writing an order compelling testimony from a witness who is given notice and a hearing. A witness compelled to testify shall "not be prosecuted on account of any answer given or evidence produced."
Iowa	S.F. 568, 1974 Legislature, Transactional immunity for witnesses compelled to testify in any judicial proceeding upon motion of Attorney General or county attorney and order of court.
Kansas	KAN. STAT. ANN. sec. 23-3102 (1970) - Transactional immunity granted to witnesses compelled to testify at inquisitions by Attorney General, Assistant Attorney General, or county attorney. KAN. STAT. ANN. sec. 62-1428 - Transactional immunity may be granted to witnesses in gambling prosecutions.
Kentucky	No general statute. Specific sections include: KY REV. STAT. ANN. sec. 233.070 - Actions to abate houses of prostitution. KY REV. STAT. ANN. sec. 436.510 - Gambling prosecutions. KY REV. STAT. ANN. sec. 437.140 - Conspiracy prosecutions
Louisiana	Act No. 410, 1973 legislature, added article 439.1 to Code of Criminal Procedure, authorizing use immunity. Other specific sections include: LA. REV. STAT. sec 15:468 - Bribery or corruptly influencing officers. LA. REV. STAT. sec. 51:146 - Discovery proceedings under monopoly laws. LA. REV. STAT. sec. 23:1663 - Unemployment compensation proceedings. LA. REV. STAT. sec. 53:204 - Sabotage; Disloyalty.

TABLE 7. WITNESS IMMUNITY LAWS.

Maine	ME. REV. STAT. ANN. sec. 15-1314-A (1968) - Transactional immunity granted to witness who is compelled to testify in any criminal prosecution. The Attorney General must approve the grant of immunity prior to court order compelling testimony.
Maryland	No general statute. SB 541, not enacted by 1972 session, would have provided general use or derivative use immunity to witnesses compelled to testify in criminal proceedings. States attorney, after fifteen days notice to Attorney General, would apply to court for order compelling testimony. Specific immunity sections include: MD. ANN. CODE art. 27, secs. 23 & 24 - Prosecutions for bribing athletic participants and public officials. MD. ANN. CODE art. 27 secs. 39, 262, and 371 - Gambling and lottery prosecutions. MD. ANN. CODE art. 33, sec. 26-16 - Prosecutions for election irregularities. MD. ANN. CODE art. 27, sec. 400 - Minor obtaining liquor. MD. ANN. CODE art. 27, sec. 542 - Sabotage prosecution.
Massachusetts	MASS. GEN. LAWS ch. 233, sec. 20C-20I (1970) - General immunity statute providing transactional immunity to witnesses compelled to testify in criminal proceedings for thirty-eight enumerated offenses. At grand jury proceedings, a Supreme Court Justice may grant immunity upon application of the Attorney General or District Attorney. At trial, a Superior Court Judge may grant immunity, to a witness who had Supreme Court immunity before grand jury.
Michigan	MICH. COMP. LAWS sec. 767.19a & 767.19b (1970) - Transactional immunity for witnesses compelled to testify in any matter before grand jury upon application of prosecutor to Judge who summoned the jury.
Minnesota	MINN. STAT. sec. 609.09 (1963) - Transactional immunity to witnesses compelled to testify in any criminal proceeding. Prosecuting Attorney in writing applies to court for order, granted after notice and hearing if not contrary to public interest.
Mississippi	No general statute. Specific sections include: MISS. CODE ANN. sec. 1101 - Anti-trust proceedings. MISS. CODE ANN. sec. 2049-06 - Champerty and maintenance prosecution. MISS. CODE ANN. sec. 2527 - Dueling. MISS. CODE ANN. sec. 35 - Futures contracts. MISS. CODE ANN. sec. 2529 - Gambling. MISS. CODE ANN. sec. 5861 - Game and Fish violations. MISS. CODE ANN. sec. 3337 - Witnesses before legislature. MISS. CODE ANN. sec. 2630 - Liquor law violations.

TABLE 7. WITNESS IMMUNITY LAWS

Missouri	No general statute, Legislation was introduced but not passed in the 1972, 1973 & 1974 Legislatures that would have allowed use immunity. It would have provided use and derivative use immunity to witnesses compelled to testify in any criminal proceeding upon application of the state's attorney or Attorney General to the court. Specific sanctions include: MO. REV. STAT. sec. 416.230, 416.330, 316,370, 416.400 - Anti-trust proceedings. MO. REV. STAT. sec. 386.470 - Public Service Commission MO. REV. STAT. sec. 73.840 - Public Utilities Commission.
Montana	No general statute. Specific sections include: MONT. REV. CODES ANN. sec. 94-1617 (1947) - Extortion. MONT. REV. CODES ANN. sec. 94-2422 (1947) - Gambling.
Nebraska	No general statute. Specific sections include: NEB. REV. STAT. sec. 28-707 (1929) - Bribery to attain paving contracts. NEB. REV. STAT. sec. 28-960 (1925) - Gambling. NEB. REV. STAT. sec. 45-113 (1929) - Usury.
Nevada	NEV. REV. STAT. sec. 178.572 (1967) - Transactional immunity for witnesses compelled to testify in any grand jury investigations or trial upon motion of state. NEV. REV. STAT. sec. 465.050 (1911) - Gambling prosecutions.
New Hampshire	N.H. REV. STAT. ANN. sec. 516:34 (1967) - Transactional immunity for witnesses compelled to testify in any criminal proceedings upon application of state's attorney with Attorney General's approval.
New Jersey	N.J. REV. STAT. sec. 2A:81-173 (1968) - Use and derivative use immunity for witnesses compelled to testify in any criminal proceeding. If a person refuses to answer a question on the ground that he may be incriminated thereby, the prosecuting attorney with the approval of the Attorney General may apply to the court for an order compelling testimony. N.J. REV. STAT. sec. 52:9M-17 (1968) - Use and derivative use immunity for witnesses compelled to testify in investigations of the N.J. State Commission of Investigation. Twenty-four hours written notice to the Attorney General and county prosecutor. Upheld in Zicarelli v. N.J. State Commission of Investigation (USSCt. - 5/22/72). N.J. REV. STAT. sec. 2A:81 - 17.1 et seq. Use and derivative use immunity for public employees who, under the statute, may be compelled to testify as to matters pertaining to their public offices.
New Mexico	No general statute. Specific sections include: N.M. STAT. ANN. sec. 64-27-40 (1941) - Investigations of Commission regulating motor carriers. N.M. STAT. ANN. sec. 69-7-7 (1941) - Corporation Commission hearings. N.M. STAT. ANN. sec. 53-2-12 (1941) - Violations of hunting and fishing regulations.

New Mexico (cont'd)	N.M. STAT. ANN. sec. 40A-9-15 (1963) - Prostitution and lewdness cases. N.M. STAT. ANN. sec. 40A-19-14 (1963) - Gambling. N.M. STAT. ANN. sec. 58-9-19 - Insurance Hearings. N.M. STAT. ANN. sec. 65-3-8 - Oil and gas regulation hearings. N.M. STAT. ANN. sec. 59-9-11.9 - Unemployment compensation hearings. N.M. STAT. ANN. sec. 58-9-34 - Insurance (1973). N.M. Laws 1973, Ch. 225 - Governor's Organized Crime Prevention Commission hearings.
New York	N.Y. CODE CRIM. PROC. art. 50 (1971) - Transactional immunity for witnesses compelled to testify in any legal proceeding other than grand jury investigation upon motion of state and court order. N.Y. CODE CRIM. PROC. sec. 190.40 - Transactional immunity for witnesses compelled to testify in grand jury investigation. N.Y. EXEC. LAW sec. 70-a(6) (1971) - Deputy Attorney General conducting organized crime investigations may confer immunity in accordance with 50.20 of CRIM. PROC. LAW after notice to the district attorney of the county.
North Carolina	No general statute. Specific sections include: N.C. GEN. STAT. sec. 8-55 - Gambling and illegal sale of liquor. N.C. GEN. STAT. sec. 163-90, 163-277 - Election irregularities. N.C. GEN. STAT. sec. 14-354 (1913) - Prosecution for influencing agents and servants in violating duties owed employers. N.C. GEN. STAT. sec. 75-11 - Attorney General investigations of monopolies. Passed by the 1973 legislature and effective July 1, 1975: N.C. GEN. STAT. sec. 15A-1051 et seq. - Transactional immunity for witnesses compelled to testify before courts and grand juries upon application of district attorney with notification to Attorney General
North Dakota	N.D. CENT. CODE sec. 31-01-09 (1967) - Transactional immunity for witnesses compelled to testify in any criminal proceeding. If a witness refuses to answer questions on the grounds that he might be incriminated thereby, the prosecutor may apply with Attorney General's approval for an order compelling testimony.
Ohio	OHIO REV. CODE sec. 2939.17 - Use immunity in Attorney General's investigations of organized crime before special grand jury. OHIO REV. CODE sec. 2945.15 (amended 1974) - When two or more defendants are tried jointly, before the defense begins the trial court may discharge one or more defendants to be witnesses for the state in return for transactional immunity. Use immunity for witnesses compelled to testify in any criminal proceeding.

TABLE 7. WITNESS IMMUNITY LAWS

Oklahoma	OKLA. CONST. art. 2, sec. 27 - General transactional immunity provision for witnesses compelled to testify in any trial or investigation. Specific sections include: OKLA.STAT. ANN. tit. 26, sec. 446 - Bribery of voters. OKLA. STAT. ANN. tit. 21, sec. 670 - Duels. OKLA. STAT. ANN. tit. 40, sec. 221 - Employment Securities Act. OKLA. STAT. ANN. tit. 21, sec. 951 - Gambling.
Oregon	ORE. REV. STAT. sec. 136.617 & 136.619 (1971) - Transactional immunity for witnesses compelled to testify in any criminal proceedings upon motion of the district attorney and order of the court. Specific sections include: ORE. REV. STAT. sec. 506.625 - Fishing. ORE. REV. STAT. sec. 625-340 - Banking.
Pennsylvania	SB 118 - Pending bill would provide "use and derivative" immunity to witnesses compelled to testify before any court, grand jury, administrative or legislative proceeding (Had passed Senate as of Jan. 31, 1974). PA. STAT. tit. 19, sec. 640.1 et seq. (1968). - Transactional and use immunity for witnesses compelled to testify in organized crime proceedings and investigations upon petition of the Attorney General. Upheld in Petition of Specter, 439 Pa. 404, 268 A.2d 104 (1970).
Puerto Rico	P.R. LAWS ANN. tit. 34, secs. 1476-1479 (1954) - Transactional immunity for witnesses compelled to testify in any criminal proceedings.
Rhode Island	R.I. GEN. LAWS ANN. sec. 12-17-15 (1969) - Transactional immunity for witnesses compelled to testify in any criminal proceeding before the Superior Court or grand jury upon application of the Attorney General.
South Carolina	No general statute. Specific sections include: S.C. CODE ANN. sec. 10-1805 - Public nuisance investigations. S.C. CODE ANN. sec. 62-307 (1961) - Securities investigations. S.C. CODE ANN. sec. 66-54 - Unfair competition investigations. S.C. CODE ANN. sec. 37-1222 - Insurance investigations. S.C. CODE ANN. sec. 66-115 - Fair trade investigations. S.C. CODE ANN. sec. 16-85 - Criminal actions for abortion. S.C. CODE ANN. sec. 16-66 - Dueling.
South Dakota	S.D. COMPILED LAWS ANN. sec. 23-40-12 (1877) - Transactional immunity for witnesses compelled to testify in any investigation or prosecution conducted by the state.

TABLE 7. WITNESS IMMUNITY LAWS

Tennessee	No general statute. Specific sections include: TENN. CODE ANN. sec. 69-107 (1891) - Restraint of trade investigations. TENN. CODE ANN. sec. 2-2239, 2-2240 - Election law violations. TENN. CODE ANN. sec. 3-319 (1931) - Legislative hearings and investigations. TENN. CODE ANN. sec. 8-2709 (1915) - Proceedings to remove state officers. TENN. CODE ANN. sec. 39-4412 (1941) - Treason, disloyalty, sabotage. TENN. CODE ANN. sec. 50-1342 - Employment Security Commission.
Texas	TEX. CODE CRIM. PROC. art. 1.05 (1965) - Outlines the rights of an accused including right to not be compelled to give evidence against himself. Case law under this section establishes procedure for prosecuting attorney to promise immunity to a witness in return for incriminating testimony. If the witness continues to refuse to testify he may be compelled to do so by court order. TEX. CODE CRIM. PROC. art. 32.02 (1965) - Authorizes state's attorney's dismissal of a criminal action with the permission of the court. Such a dismissal may be pursuant to an agreement not to prosecute.
Utah	UTAH CODE ANN. sec. 77-45-21 (enacted 1971) - Transactional immunity for witnesses compelled to testify in any criminal proceeding. The Attorney General, district attorney and county attorney have the power to grant immunity.
Vermont	VT. STAT. ANN. tit. 12, sec. 1664 (1947) - Transactional immunity for witnesses compelled to testify in misdemeanor cases. VT. STAT. ANN. tit. 13, sec. 3436 (1947) - Transactional immunity for witnesses compelled to testify in treason prosecutions.
Virginia	No General statute. Specific sections for: liquor violation, bribery, disorderly houses, fish and game violations, illegal gambling, monopolies, and corruptly influencing agents.
Washington	WASH. REV. CODE ANN. sec. 10.52.090 - Transactional immunity for witnesses compelled to testify in actions for the following offenses: Abortion - sec. 9.02.040; Anarchy-sec. 9.05.050; Bribery - 9.18.080; Dueling - 9.30.050; Gambling - 9.47.130.
West Virginia	W.VA. CODE ANN. sec. 57-5-2 - Transactional immunity for witnesses compelled to testify in any criminal proceeding.

TABLE 7. WITNESS IMMUNITY LAWS

Wisconsin	WIS. STAT. sec. 325.34 - Transactional immunity for witnesses compelled to testify in any criminal proceeding upon motion of the district attorney and order of the court. Use immunity statute failed of enactment in 1973.
Wyoming	WYO. STAT. ANN. sec. 35-347.43 (1971) - Transactional immunity for witnesses compelled to testify in narcotics cases. A use immunity law failed of enactment in 1973.

6002 have come in various situations. In Goldberg v. U.S.,[31] use immunity was granted the petitior : but he refused and was held in contempt. Goldberg argued that despite the breadth of the law, the intention of Congress was to exclude from those witnesses required to testify under an immunity grant any person who is already the subject of a criminal complaint for the same transaction into which the grand jury is inquiring. However, the Second Circuit Court of Appeals refused to accept this argument, as it sustained the contempt conviction and stated that the fact of prosecution isn't enough of a distinction to keep Kastigar from applying. The court did state, however, that it "would be greatly troubled if the government were seeking an indictment of Goldberg from the grand jury before which he is being asked to testify."

The application of use immunity grants in quasi-judicial hearings has been dealt with in a number of cases. In Napolitano v. Ward,[32] the Seventh Circuit Court of Appeals held that a judge, who had been granted immunity for testimony about some of his allegedly illegal activities before a grand jury that had indicted his co-conspirators, had no right to challenge the use of his testimony by the Illinois Courts Commission proceeding that led to his subsequent removal from the bench. The court sustained his removal on the grounds that it was not a penal aspect of the proceedings by the Courts Commission. This same result was reached in disbarment proceedings based upon an attorney's testimony in a criminal proceeding under an immunity grant. In this case, the Illinois Supreme Court held that the immunity order is limited only to criminal prosecutions and punishments.[33]

Courts differ as to the question of compelling testimony at the risk of foreign prosecution. Two circuit court opinions, In re Tierney,[34] and In re Parker,[35] hold that a federal grand jury witness who is granted immunity can be compelled to give testimony which may subsequently facilitate foreign prosecution. Their decisions are based on the rationale that the witness' testimony is given under such strict secrecy that any real danger of foreign prosecution is eliminated since disclosure of the secret testimony cannot be made without court order. If any substantial likelihood of foreign prosecution appeared upon a request for disclosure, the court could simply refuse to make the testimony available. In re Cardassi,[36] however, a district court held that the immunized witness can't be forced to give testimony that might bring about her prosecution by Mexico. The court argued that the strict secrecy rationale did not even remotely provide the degree of protection necessary to remove any particularly incriminating effect.

A judicial conflict also exists as to the application of the perjury exception of section 6002. As noted earlier, the statute prevents the use of immunized testimony in a prosecution against a witness except in a "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." The dispute centers around the issue of whether or not the perjury exception applies to a prosecution based on statements made prior to the immunized testimony. The courts agree that if the section does apply to such a prosecution, the statute is unconstitutional as violative of the Fifth Amendment since it would not provide protection coextensive with that Amendment. However, the courts disagree as to whether or not the statute does apply to such a prosecution.

In In re Baldinger, a California federal district court held that the statute applied retroactively and was therefore unconstitutional. The case involved a grand jury witness who had previously given the FBI false information concerning the same incident to which she was now to give testimony before the grand jury. Baldinger contended that if she were required to testify, her Fifth Amendment rights would be violated, because her testimony before the grand jury could be used against her in a prosecution for having made false statements to the FBI. The court, held the statute has more than a prospective application:

> It is clear that for a grant of immunity under the use immunity statute to provide protection coextensive with the Fifth Amendment privilege against self-incrimination, it must protect the witness from prosecution for acts of perjury of false statements committed prior to the grant of immunity. The proposed immunity order in this case provides no such protection to Miss Baldinger. The court holds that the exception from immunity in section 6002 is not limited to perjury or false statements made in the course of the compelled testimony, but encompasses as well perjury or false statements made prior in time. Therefore, the scope of the immunity that would be conferred upon Miss Baldinger if the court grants the proposed immunity order would not be coextensive with the Fifth Amendment.[37]

A contrary result has been reached by two other District Courts, however. The District Court of the District of Columbia in In re Application of U.S. Senate Select Committee has held that the statute applies only prospectively and is therefore within the boundaries of the Fifth Amendment.[38] Chief Judge John Sirica said that:

> The court cannot acquiesce in the Baldinger construction (infra) of section 6002. The statute's language, its legislative history, and the well-established principle that wherever reasonable, statutes must be read so as to reserve their constitutionality, all combine to affirm prospective application only. The court holds that the statute and proposed immunity order as written, satisfy the witness' concerns, and no amendment is needed. It strains the language of section 6002 to read it as having any other than a prospective application. Not only is the statute susceptible of a constitutional interpretation, the Supreme Court itself has found that it fully satisfies the Fifth Amendment's proscriptions.[39]

State Legislation

The COAG staff has compiled a table of state immunity legislation which accompanies this report. In all but one state, statutory authority must exist in order to compel a witness to testify over a claim of his privilege against self-incrimination by an offer of immunity.[40] The contrary

rule is followed in Texas, where, if a prosecuting attorney's promise of immunity is sanctioned by the court, the witness may be compelled to testify.[41] In order to use this basic prosecutorial tool, every American jurisdiction has enacted at least some form of witness immunity legislation.

The traditional legislative approach to witness immunity has been to provide separate immunity statutes for certain specific offenses and procedures. As an example, Mississippi has sixteen separate immunity statutes including: Miss. Code Ann. sec. 1100, 1101 (Anti-trust proceedings); Miss. Code Ann. sec. 2049-06 (Champerty and Maintenance); Miss. Code Ann. sec. 2527 (Dueling); Miss. Code Ann. sec. 2529 (Gambling); Miss. Code Ann. sec. 35 (Prosecutions related to future contracts); Miss. Code Ann. sec. 5861 (Game and Fish violations); Miss. Code Ann. sec. 3337 (Witnesses before legislature); and Miss. Code Ann. sec. 2630 (liquor law violations). Approximately half of the jurisdictions still provide for witness immunity in this patchwork manner, as the accompanying table shows. The other states have followed the modern trend toward general immunity statutes.

A Model State Witness Immunity Act was developed by the American Bar Association Commission on Organized Crime and approved in 1952 by the Commissioners on Uniform State Laws.[42] The Act provides that a witness in any criminal prosecution or grand jury investigation who has invoked a valid claim of Fifth Amendment protection may be compelled to answer or provide evidence on the motion of the prosecuting attorney "and with the approval of the Attorney General or the court" in return for a grant of immunity from prosecution. A witness would still be vulnerable to a perjury prosecution on the evidence given in accordance with the order. The Model provides for transactional immunity, then thought to be the minimum constitutional requirement.

The American Bar Association Commission report on the Model Act discussed some inherent problems. The Commission felt that some prosecutors' offices were not subject to adequate supervision. It was concerned that the immunity grant should not be too broad, but it should be limited to evidence which would be protected by the privilege against self-incrimination. Where there is no privilege, there is no necessity to grant immunity.[43]

A recent analysis of immunity legislation says that its value to law enforcement has been established, but "it is imperative that steps be taken to reduce the present complication and uncertainty in immunity legislation."[44] The article, in a 1973 issue of the Columbia Journal of Law and Social Problems, proposes a uniform immunity act that is neither a use nor a transactional statute; "It is something more than the first - in that a subsequent prosecution is possible providing the burden is properly met by the prosecution.

Twenty-six jurisdictions have enacted statutes similar to the Model Act, which provide general authority to grant immunity and compel testimony in any criminal proceeding: Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon,

Puerto Rico, South Dakota, Utah, West Virginia, Wisconsin, and Rhode Island. New Jersey provides immunity from the use of evidence compelled over a claim of self-incrimination.[45] Indiana provides that a witness compelled to testify shall "not be prosecuted on account of any answer given or evidence produced".[46]

Four states have general immunity statutes related to specific criminal offenses. Connecticut provides transactional immunity to witnesses compelled to testify in criminal proceedings involving narcotics, gambling, or felonious crimes of violence.[47] Massachusetts in 1970 enacted a general immunity statute providing for the granting of transactional immunity in criminal proceedings for thirty-eight enumerated offenses.[48] Although worded in such a limited way, the offenses listed are so numerous and comprise so much of the Massachusetts Penal Code that the law has the effect of a general immunity statute.[49]

Vermont has a general immunity statute related to misdemeanor proceedings.[50] It has another statute that applies to treason. In 1969, the Vermont Supreme Court, in State v. Reed, in effect, created the authority for a prosecutor to grant immunity from prosecution:

> ...if a prosecutor, in furtherance of justice, makes an agreement to withhold prosecution, the courts may upon proper showing, even in the absence of statute authority, honor the undertaking.[51]

Washington provides transactional immunity for witnesses in criminal proceedings for abortion, anarchy, bribery, dueling, and gambling.[52]

Several states have general statutes allowing the compulsion of incriminating testimony pursuant to a grant of immunity in certain specific criminal proceedings. Kansas gives the Attorney General, Assistant Attorney General, or county attorney authority to conduct "criminal inquisitions" and to compel witnesses in such proceedings to testify over a claim of self-incrimination by a grant of immunity.[53] Michigan's general immunity statute applies to witnesses in proceedings before the grand jury.[54] Ohio authorizes the Governor or General Assembly to direct the Attorney General to conduct investigations and authorizes the courts or the Attorney General to call a special grand jury. In any such proceeding, a judge of the Court of Common Pleas may compel incriminating testimony and grant immunity from its use.[55]

A 1973 Louisiana Act provides that the Attorney General, together with a district attorney, may request an order for immunity when the Attorney General feels "the testimony or other information from such individual may be necessary to the public interest and such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."[56]

Six jurisdictions have enacted immunity statutes that specifically apply to proceedings against organized criminal activity. The 1969 amendment to California's immunity statute for felony proceedings[57] authorized

the Attorney General to apply to the court for transactional immunity for witnesses in his investigations of "criminal organizations or organized crime and its activities." As amended, this statute will remain in effect only until the ninety-first day after the final adjournment of the 1974 Regular Session of the California Legislature, unless reenacted. If not reenacted, the prior statute, which did not specifically provide for immunity in organized crime investigations, will be revived. The constitutionality of this law in both its original and present form has been challenged and sustained.[58]

A 1971 Illinois statute provides transactional immunity to witnesses compelled to give incriminating testimony before the Illinois Crime Investigating Commission.[59] In Sarno v. Illinois Crime Investigating Commission[60] the petitioners claimed that the Illinois statute did not provide full transactional immunity and, therefore, they could not be adjudged in contempt for failing to answer incriminating questions before the Commission. In a per curiam opinion handed down the same day as Kastigar and Zicarelli, supra, the United States Supreme Court dismissed the writ of certiorari as improvidently granted since neither party contended that the statute in question failed to meet the standard set in Kastigar and Zicarelli.

In the Zicarelli case, supra, a 1968 New Jersey statute,[61] providing immunity from the "use and derivitive use" of incriminating testimony compelled before the State Commission of Investigation was upheld. The statute requires the Commission to furnish 24 hours written notice to the Attorney General and county prosecutor prior to a grant of witness immunity.

The Deputy Attorney General of New York conducting organized crime investigations is specifically authorized to grant immunity, after notice to the district attorney of the county.[62] Transactional immunity in criminal proceedings upon motion of the state and order of the court is provided for.[63]

Pennsylvania specifically provides for transactional immunity for witnesses compelled to testify in organized crime investigations and proceedings upon the petition of the Attorney General.[64] The statute was challenged and upheld in Petition of Specter.[65] It is estimated that the Pennsylvania Crime Commission used this statute approximately fifty times during its first year, and that it has been used about one hundred times statewide.[66]

A 1973 New Mexico law established the Governor's Organized Crime Prevention Commission. Persons asked to testify or produce evidence in the Commission's investigations or hearings may be granted immunity. This is limited to transactional immunity.[67]

Attorney General's Role

In the Louisiana, Pennsylvania, New York, New Jersey, Ohio, and California statutes outlined in Table 7, the Attorney General takes

an active role in the granting of immunity in organized crime investigations. Seven other jurisdictions provide that the Attorney General coordinate grants of immunity under statutes pertaining to any criminal proceeding. The Delaware and Rhode Island statutes require a motion of the Attorney General and order of the court for a grant of immunity.[68] The Iowa statute is similar, but also allows for a motion from the county attorney.[69] The Massachusetts statute provides that a Supreme Court Justice may grant transactional immunity to witnesses before the grand jury upon the application of the Attorney General or district attorney, with the approval of the Attorney General.[70] Maine, New Hampshire, New Jersey, and North Dakota provide for immunity upon the application of the prosecuting attorney with the approval of the Attorney General.[71] In Louisiana, the Attorney General "together with the district attorney" may request an immunity order.[72] The effect of such a provision is to eliminate the possibility of one local prosecutor granting immunity unwittingly to a witness against whom another local prosecutor has been building a case. The office of the Attorney General with the power to approve or disapprove grants of immunity can insure that this valuable mechanism is used most effectively.

In New Jersey, the Attorney General polls all prosecuting attorneys, the U.S. attorney, and the New Jersey State Police before granting immunity to see if they have an interest in the witness. For this purpose, the Attorney General has developed a "witness immunity worksheet" listing: the witness' name, address, and aliases; the office requesting immunity; the case number; the reason immunity is desired; and the question or questions to be asked him. The bottom of the form is a list of county prosecutors, the U.S. attorney and N.J. State Police and their phone numbers with a space for indicating whether each office clears the grant of immunity. A second form must be filled out by the prosecuting attorney whose witness has been immunized. The prosecutor indicates the name or nature of the case; name of the witness and the nature of his testimony for which immunity was sought; whether the petition was used following approval by the Attorney General; whether immunity was granted by the court; whether the witness testified under immunity or voluntarily without immunity; the disposition of the case; and whether the testimony of the witness was vital to the prosecution and determinative of the result in the case.

Summary

COAG staff members interviewed personnel in several Attorneys General's offices in reference to witness immunity legislation. Comments on immunity ranged from one office which considered it "moderately helpful" to "absolutely essential." One state said its best cases result from immunization of witnesses.

The New Jersey office reports rather extensive use of their 1968 statute. In 1970, 41 immunity petitions were sought of which 37 were granted. In 1971, 61 immunity petitions were sought of which 58 were granted. On the other hand, some jurisdictions have made very little use of their immunity laws. As of December, 1973, one state's general immunity statute, enacted in 1970, had been used only once. Another jurisdiction had not yet used its 1970 general statute.

The ability of law enforcement officials to compel incriminating testimony is thought to be crucial in any attack on organized crime. The consensual nature of syndicated crime's illegal operations makes proof of these crimes difficult without immunizing guilty parties. Approximately half of America's jurisdictions and the federal government have enacted general immunity statutes applicable to any criminal proceeding. These statutes are an essential part of any package of organized crime legislation.

9. FOOTNOTES

1. For a discussion of informal, non-statutory immunity see Note, Judicial Supervision of Non-Statutory Immunity, 65 Journal of Criminal Law and Criminology 334 (1974), reviewed in the Organized Crime Control Newsletter, December 20, 1974.

2. Kastigar v. United States 406 U.S. 441, 32 L.Ed. 2d 212, (1972).

3. 8 J. Wigmore EVIDENCE, sec. 2281, 491.

4. Id. at 492

5. National Association of Attorneys General, 1968 CONFERENCE, 53.

6. Attorney General Lee Johnson, Oregon's Witness Immunity Law, 51 ORE. L. REV. 577 (1972)

7. COL. J. OF LAW AND SOCIAL PROBLEMS, Immunity Legislation 9:197,212 (1973).

8. Brief of the Attorney General in Petition of Specter, 439 Pa. 404, 268 A 2d 104 (1970).

9. Counselman v. Hitchcock, 142 U.S. 547 (1892).

10. Id. at 560.

11. Id. at 585, 586.

12. Act of Feb. 1893, 27 Stat. 444.

13. Brown v. Walker 161 U.S. 591 (1896): see also Ulman v. U.S.,350 U.S. 442 (1956).

14. Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

15. Id. at 79.

16. Id. at 53.

17. 18 U.S.C. sec. 6002 (1970).

18. N.J. REV. STAT. sec. 52:9M-17 (1968).

19. Kastigar, supra, note 1.

20. Zicarelli v. N.J. State Commission of Investigation, 406. U.S. 472, 32 L.Ed. 2d 234, (1972).

21. Kastigar, supra, note 1 at 3052.

22. Sarno v. Investigating Commission, 406 U.S. 482, 32 L.Ed. 2d 243 (1972).

23. G. Robert Blakey, in National Association of Attorneys General, PROSECUTING

ORGANIZED CRIME, SUMMARIES OF SPEECHES TO 1974 NAAG SEMINARS, 30, (1974).

24. Second Interim Report of the National Commission on Reform of Federal Criminal Laws, March 17, 1969, WORKING PAPERS OF THE COMMISSION, 1405-1448 (1970).

25. U.S.C. sec. 6002, (1970); For a discussion of this section as applied to grand jury witness see: Rief, The Grand Jury Witness and Compulsory Testimony Legislation, AMERICAN CRIMINAL LAW QUARTERLY, Vol. 10, No. 4 p. 829 (1972); Foster, Grand Jury Practice in the 1970's, 32 OHIO S.L. J. 701 (1971).

26. Kastigar, supra, note 1: See also Testimonial Immunity Adopted in Kastigar to Supplant Federal Grants, 4 LOY. L. REV. 193 (1973).

27. President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 140 (1967).

28. 18 USC sec. 6003 (1970).

29. 18 USC sec. 6004 (1970.

30. 18 USC sec. 6005 (1970.

31. Golberge v. U.S. 472 F.2d 513 (2nd Cir. 1973).

32. Napolitano v. Ward, 457 F.2d 279.

33. Napolitano v. Illinois Courts Commission,'12 CrL 4093 (7th Cir. 12/6/72); see also Commission on Legal Ethics v. Graziani, W.Va.S.Ct.App. (1973).

34. In re Tierney, 465 F.2d 806 (5th Cir. 1972).

35. In re Parker, 411 F.2d. 1067 (10th Cir. 1969);(vacated as moot sub nom) Parker v. U.S. 397 U.S. 96 (1970).

36. In re Cardassi, 351 F.Supp. 1080 (USDC - Conn. 1972).

37. In re Baldinger, 356 F.Supp. 153 (C.D. Calif. 1973).

38. Accord U.S. v. Doe, 361 F.Supp. 226 (USDC - E.D.Pa. 1973).

39. In re Application of U.S. Senate Select Committee on Presidential Campaign Activities, 361 F.Supp. 1282 (USDC - DC 1973).

40. Wigmore, supra, note 2 at 490.

41. Ex parte Muncy, 72 Tex. Crim. 541, 163 S.W. 29 (1914); Ex parte Copeland, 91 Tex. Crim., 549 240 S.W. 314 (1922).

42. Model State Witness Immunity Act, 9C U.L.A. 206 (1952).

43. Id. at 186-207.

44. COL. J. OF LAW AND SOCIAL PROBLEMS, supra, note 6 at 239.

45. N.J. REV. STAT. sec. 2A:81-173 (1968).

46. IND. ANN. STAT. sec. 9-1601a (1969).

47. CONN. GEN. STAT. ANN. sec. 54-47a (1969).

48. MASS. GEN. LAWS ch. 233, sec. 20C-201 (1970).

49. COL. J. OF LAW AND SOCIAL PROBLEMS, supra, note 6 at 211.

50. VT. STAT. ANN. title 12, sec. 1664 (1947).

51. COL. J. OF LAW AND SOCIAL PROBLEMS, supra note 6 at 224; State v. Reed, 127 Vt. 532, 253 A2d. 227 (1969).

52. WASH. REV. CODE ANN. sec. 10.52.090.

53. KAN. STAT. ANN. sec. 23-13102 (1970.)

54. MICH. COMP. LAWS sec. 767.19a and 767.19b (1970).

55. OHIO REV. CODE sec. 2939.17. (1974).

56. Louisiana Legislative Act no. 410.

57. CAL. PENAL CODE sec. 1324 (1968, amended 1969, reenactment deadline extended 1971).

58. People v. Williams, 11 Cal. App.3d 1156, 90 Cal. Rptr. 409 (1970); People v. Boehm, 270 Cal. App. 2d 13, 75 Cal. Rptr. 590 (1969).

59. ILL. ANN. STAT. ch. 63 and 315 (Smith and Hund - 1971).

60. Sarno, supra note 19.

61. N.J. REV. STAT. sec. 52:9M-17 (1968).

62. N.Y. EXEC. LAW sec. 70-a(6) (1971).

63. N.Y. CRIM. PROC. LAW sec. 50.20 (1971).

64. PA. STAT. title sec. 640.1 et seq. (1968).

65. Petition of Specter, 439 Pa. 404, 268 A.2d 104 (1970).

66. Telephone interview with Deputy Attorney General Curtis M. Pong, Pennsylvania Crime Commission, January 31, 1974.

67. N.Mex. Laws 1973, ch. 225.

68. DEL. CODE ANN. title 11 sec. 3508 (1967); R.I. GEN. LAWS ANN. sec. 12-17-15 (1969).

69. Iowa, S.F. 568, 1974 Legislature

70. MASS. GEN. LAWS ch. 233 sec. 20C-201 (1970).

71. ME. REV. STAT. ANN. sec. 1314-A (1968); N.H. REV. STAT. ANN. sec. 516:34 (1967); N.J. REV. STAT. sec. 2A:81-173 (1968): N.D. CENT. CODE sec. 31-01-09 (1967).

72. LOUISIANA, Act no. 410, 1973 legislature

END