Federal Drug Abuse Policy: The Evolving Role of the National Government in the Criminal Justice System

Winfield S. Bolinger
Federal Drug Abuse Policy: The Evolving Role of the National Government in the Criminal Justice System

Winfield S. Bollinger
Department of Political Science
Director of the Criminal Justice Program
University of Toledo

Introduction

Congress, in its declared policy to create a Drug Free America by 1995, provided disconcerting statistics as to the extent and impact of drug abuse in the United States in 1988. According to legislative findings:

(1) approximately 37 million Americans used an illegal drug in the past year, including 6 million who used cocaine;
(2) half of all high school seniors have used drugs at least once, 25% monthly;
(3) 25% of all AIDS victims acquired the disease through intravenous drug use;
(4) over 30,000 people were admitted to emergency rooms in 1986 with drug-related problems—over 10,000 because of cocaine;
(5) drug abuse is prevalent in the workplace, with one in ten American workers impaired by substance abuse;
(6) the cost to the economy is estimated at $100,000,000,000 annually;
(7) drug abuse is accountable for the surge in crime, with eight of ten men arrested in New York testing positive for cocaine use;
(8) spending for law enforcement and treatment has increased between 100% and 400%.
(9) seizures of cocaine are up from 1.7 tons in 1981 to 70 tons in 1987;
(10) convictions have doubled and prison terms have dramatically increased to the largest in the nation’s history, yet the system can’t handle it.¹

To amplify the above figures, the National Drug Institute reported a rise in cocaine deaths from 470 in 1984, to 1,582 in 1988, and an increase in illness from 7,155 in 1984 to 39,657 in 1988. The newly-created Office of National Drug Control Policy revealed that as many as 100,000 “cocaine babies” are born each year.²

Against this background, the administration through the office of William Bennett, newly appointed “Drug Czar,” published the National Drug Control Strategy as mandated by the 1988 Drug Abuse Act. The thrust of the document was announced by President Bush in a major policy speech on September 5, in which the drug problem was portrayed as the “nation’s toughest domestic challenge” and the Administration’s plan as “one that will bring us all together” for an assault against drugs “on every front”.³ This newly-minted strategy is the culmination of several years of legislative effort and initiates what promises to be a long, complex, and politically abrasive interaction between the legislature and
executive, on the one hand, and federal, state, and local agencies on the other. Whether or not the nation unites under this plan is more a statement of hope than it is of fact.

The purpose of this paper is to provide a broad historical overview of what could be described as an incremental evolution of federal drug policy, focusing on the key stages of development against the background of changing and accelerating drug abuse patterns. Attention will focus on the coincidence of federal drug initiatives with the expanding national police presence in the overall criminal justice process, historically a state and local matter. The broad analysis will narrow down to an examination of the three most recent comprehensive legislative programs, the 1984 Comprehensive Crime Control Act; the 1986 Drug Abuse Act and the 1988 Drug Abuse Act. The 1989 White House Drug Abuse Strategy recently announced is an outgrowth of these legislative programs. Owing to the scope of this evolution and the magnitude of the legislation involved—each of these bills is over 700 pages in length and covers a myriad of topics—this analysis can at best be cursory, focusing on selected salient features of each period and of each program.

The Early Years

Drug abuse in America is not a new phenomenon. Opium and morphine consumption have been chronicled as far back as the early 1800s. Owing to the absence of state regulation, on the one hand, and constitutional restrictions on the exercise of federal police powers growing out of the 10th Amendment, on the other, drug use was virtually free of any legal restraint. As a result, a variety of drugs were readily available at the corner store, and, as was testified to before a Congressional Committee, “the country reached a level of opium consumption in the mid-1890s which is arguably the highest per capita level in our history.”

Cocaine first appeared on U.S. markets in the 1880s, and if taken in moderation was considered safe, energizing and non-addictive. It was a principal ingredient in several medications, formed the base for coca-cola, and was readily available even through mail order houses. Its addictive and potentially health-threatening effects first became evident among the young in the nation’s largest slums, stimulating opposition and pressure for reform. State regulatory laws were enacted in New York and Illinois in 1912, and in 1914 the federal government, in the Harrison Anti-Narcotic Act, entered the field. Law enforcement was introduced and opiates were banned throughout the United States. Cocaine use tailed off during the thirties and virtually disappeared for two decades. The first cocaine epidemic was history.

With the “receding danger” of drugs, government attention shifted to the problem of alcohol abuse. Under pressure from a variety of organized interests and many states, Congress proposed the 18th Amendment “prohibiting the manufacture, sale, or transportation of intoxicating liquors and its import or export anywhere in the U.S.” The Amendment was ratified into law January 29, 1919, and was immediately followed by the Volstead Act one year later giving the federal government unprecedented police powers throughout the states. The experience of thirteen years of prohibition provides a foretaste of what can occur when enforcement policy and social culture or practice collide: “Bootlegging, corrupt law-enforcement, and general disregard for the amendment impaired respect for the entire Constitution. The noble experiment demonstrated that it is almost impossible to
regulate personal conduct by legal machinery when the law is contrary to the mores of large segments on the country."5 Prohibition was repealed by the 21st Amendment in 1933. Ironically, as the federal government was removing itself from alcohol regulation, in 1937 Congress passed the Marihuana Tax Act bringing regulation back into the drug environment. As prohibition nurtured the first structures of organized crime, drug regulation was to provide a basis for its growth.

Preoccupation with drugs did not re-emerge until after World War II. Heroin was the drug of choice and its use spread so rapidly that in 1954 Congress passed the Narcotics Control Act, thus beginning a legislative response focusing on expanded law enforcement and increasingly severe mandatory sentencing as the principal line of defense against drug traffickers. Drug abuse reached such visible levels that in 1962 the White House convened a major Conference on Narcotic and Drug Abuse, the findings of which presaged the massive entry of the federal government that was to occur in the next decade. Conference findings, then, read like today's urgent headlines: drugs were sapping our national strength; cartels were uncontrollable; interdiction efforts were unsuccessful; the urban underclass were chief victims; profits were enormous and corruption rampant; and finally the criminal justice system was burdened and unequal to the task.

The National Commission and the LEAA Era

The consequence of accelerating drug use and associated crime and the failure of law enforcement to impact it led President Lyndon Johnson in 1965 to establish the National Commission on Law Enforcement and Criminal Justice which over the succeeding years was to produce the most comprehensive examination of crime and the administration of criminal justice in the nation's history. The enormous amount of data generated by Commission studies was to greatly influence public policy, and called for further and massive action by the federal government. Ironically, for all its attention to drug abuse, the Commission had only the following to report on cocaine in particular: "This drug is included as a narcotic under federal law and other laws, but unlike opiates, it is a powerful stimulant and does not create tolerance or physical dependence. It is derived from the leaves of the cocoa plant cultivated extensively in Latin America. At present it is not the major drug of abuse it once was."6

The ramifications of Commission findings moved Congress to pass a major omnibus crime bill, The Safe Streets and Communities Act of 1968, thus propelling the federal government into virtually every aspect of criminal justice at all levels. The Act was augmented in 1970 by the Law Enforcement Administration Act which established LEAA within the Justice Department as the new overseer of federal policy. Between 1970 and 1978, when LEAA was abolished, the federal government would inject over $8 billion into the war on crime. A critical feature of the bill was to encourage state and local governments to establish sophisticated planning mechanisms for the purpose of long-term policy formulation within prescribed federal guidelines. Through these state and local structures the money was to flow. In Ohio, federal grants stimulated a first comprehensive plan for drug abuse leading to the growth of methadone clinics, and the establishment of a variety of treatment centers throughout the state. In law enforcement, federal dollars led to the establishment of interdepartmental task forces—known as metro drug units—which fostered cooperation
at a regional level among law enforcement agencies and encouraged emphasis on targeting mid to upper level drug traffickers.\(^7\)

A significant responsibility of the Administrator of LEAA was to appoint a Commission, drawn from state and local government, industry, and the private sector, to formulate comprehensive justice standards and goals for dealing with crime reduction at all levels of government. In 1973 the National Advisory Commission on Criminal Justice Standards and Goals produced the first of many volumes, *A National Strategy to Reduce Crime*. The commission approach was to serve as a prototype for criminal justice planning for the next decade and is a model for the current drug strategy. Specifically, the Commission was to formulate operational and quantifiable standards across the spectrum of criminal justice and drug abuse agencies to provide a framework within which state and local planning agencies could define their objectives. The standards thus articulated were to be incorporated into regional plans as a basis for funding, and to serve as a model for policy across the nation.

In the drug area, the Commission recognized the need for a comprehensive approach to treatment including crisis intervention, methadone treatment, therapeutic communities, and drug treatment by antagonist agents that block the effects of heroin. The Commission also recognized the need for drug abuse prevention and educational programs in the schools (more extensive than the current “Just Say No” approach). Abuse and prevention, treatment and rehabilitation, were to be coordinated through a central state agency and local agencies which together worked with the Special Action Office of Drug Abuse Prevention, at the national level. Compulsory treatment of addicts through parole, probation, delayed prosecution, and civil commitment was also involved as an integral part of the treatment structure. With the extinction of LEAA in 1978, many of the planning and treatment mechanisms were already in place.\(^8\)

**Developing Federal Policy**

Apart from these major national efforts, Congress through the 1970s provided much additional legislation to confront the growing drug situation. In 1973 Congress created the Drug Enforcement Administration (DEA) under the Attorney General to bring about more comprehensive and coordinated enforcement efforts at the national level. DEA, referred to by skeptics as “Don’t Expect Anything”, was handed the unenviable responsibility of coordinating the many disparate federal agencies that have drug enforcement responsibilities, especially the FBI, AFT, Customs, Coast Guard, and the Border Patrol. In addition, DEA was to interact with state and local task force units. Turf rivalries among law enforcement agencies are legendary and DEA faced a difficult task establishing itself as a central authority in the drug enforcement field.

Some additional statutes of importance are listed below: 1970 Organized Crime Control Act: First established RICO (Racketeer Influenced and Corrupt Organizations Act) which provides the basis for government seizure of proceeds from organized crime and drug trafficking.

1971 Bank Secrecy Act: Established the first reporting requirements for domestic and international currency transactions.

1971 Comprehensive Drug Abuse Prevention and Control Act: Unified under
One title the Controlled Substances Act and the Controlled Substance Import and Export Act.


1982 Controlled Substance Registration Act: Covered pharmacy robbery and brought this field under reporting requirements.


With the arrival of the Reagan Administration, the rhetoric declaring war on drugs became more pronounced and political. In 1983, President Reagan announced creation of 13 regional Organized Crime Drug Enforcement Task Forces, placed under the spiritual direction of then Vice President George Bush. Funded at a level of $127 million dollars, and encompassing some 1200 U.S. attorneys and investigative agents, these units were to deal specifically with drug interdiction and investigation of high level drug trafficking operations. Participating agencies included the U.S. Attorneys Office, DEA, FBI, Customs, AFT, IRS, Coast Guard, and the U.S. Marshall’s Office. Local law enforcement agencies were involved when necessary. The task force groups worked out of 13 regional offices each headed up by a U.S. attorney. At the time, most interdiction activity took place in Miami and along the east coast. Whether this approach was successful was ultimately a political question, but all parties concerned agreed that the amount of drugs seized was but a small percentage of what was entering the country and that a yet more comprehensive strategy was needed to impact the drug trade.9

First Effort at Massive Reform

In 1984, Congress sought to articulate and aggregate past efforts in the criminal justice and drug enforcement environment and so undertook the most massive and comprehensive examination of the federal role in the justice system to date. The first of three critical statutory programs to emerge, the 1984 Comprehensive Crime Control Act, contains the most significant series of changes ever enacted at one time and was to be the forerunner of the two omnibus drug bills to follow.

In terms of the broader criminal justice system, the Act dealt with a redefinition of the balance between the rights of the accused, the focal point of the previous two decades, and the rights of society, clearly a focal point of the newly emerging conservative agenda. Specifically, the Act allows judges for the first time to detain allegedly dangerous defendants before trial to protect the community (a principle known as preventive detention); revised federal sentencing procedures by providing for higher mandatory sentences; abolished federal parole; restricted plea bargaining; and seriously curtailed the use of the insanity defense.

Of immediate concern in the drug enforcement area, several titles of the Act deal specifically with civil and criminal forfeiture; currency transaction reporting; penalty increases for drug trafficking; aviation drug trafficking; and organizational considerations in drug management. The principal element in the forfeiture provision allowed for both civil and criminal forfeiture in all felony drug cases, including real property and tangible and intangible personal property. The government was thus able to seize proceeds, profits,
and property tied to illegal drug trafficking. In addition, the bill continued the process of greatly increasing maximum terms of imprisonment and fines for violations of the Controlled Substances Act, for example raising to 20 years in prison and $250,000 in fines the sentence for convictions involving one kilogram of cocaine, 500 grams of PCP, or five grams of LSD. Penalties were doubled for drug recidivists, and increasing penalties were added for cultivating controlled substances on federal land or violating drug laws in or near schools.

In order to improve government effectiveness to detect and deter the laundering of money associated with organized drug activity, and to prohibit the transporting of monetary instruments in and out of the country, all transactions involving $10,000 or more, whether by banks or other international commerce, were now to be reported to the government for scrutiny. Failure to comply carried civil penalties up to $10,000 and prison terms up to five years. Additionally, Customs agents were provided greater authority to stop and search, without warrants, any vehicle, vessel, or aircraft suspected of transporting monetary instruments illegally. Also, the federal Aviation Act was amended to provide for the revocation of pilots’ licenses and owners’ certificates where aircraft were used to facilitate the commission of a state or federal felony related to controlled substances. Flying without a license or in an uncertified aircraft became a federal offense with considerable penalty and forfeiture sanctions.

One final note, as a prelude to the national debate soon to follow, Chapter XIII of the Bill enacted the National Narcotics Act of 1984, which, among other things, created a new cabinet level board to develop government wide drug enforcement programs and to coordinate the efforts of the various agencies engaged in enforcement. As early as 1983, proposals were put forward to create a “Drug Czar” to coordinate overall policy, but political opposition from the Reagan Administration led instead to the creation of the National Enforcement Policy Board, chaired by the Attorney General and which included the Secretaries of State, Treasury, Defense, Transportation, Health and Human Services, and the Directors of OMB and the CIA. The Board was to be the principal source of strategy, program evaluation, and coordination of drug-related enforcement activity. The Attorney General clearly seemed to emerge as the visible administrative head of drug policy in the nation.10

The 1986 Omnibus Drug Bill

No sooner was the 1984 Bill enacted when the drug picture in America began to change radically. Cocaine use had been gradually increasing throughout the 1970s, but because of cost was largely confined to the more adventurous, upper classes...the so-called “beautiful people.” This was to change. As The Economist described: “In those days it was foolish fashion for bankers and bond-salesmen who sniffed it through $100 bills after dinner while boasting of their good connections. Now it can be sold unadulterated at $10 or less for a cheap ten-minute thrill amid murder and mayhem in America’s slums.” The price for a kilo of cocaine fell from $60,000 in 1980 to as low as $10,000 in 1988 and thus cocaine ceased to be the exclusive drug of choice among “yuppies” and in its more dangerous street form–crack–was available to one and all.11

The issue gained political momentum throughout the summer of 1986 spurred by the
publicity over the cocaine-related deaths of two highly-visible athletes, Len Bias, University of Maryland basketball star, and Cleveland Browns football player Don Rogers. President Reagan stirred public concern with a nationally-televised speech calling for “mobilization” in what was hoped to be the final stage in our national strategy to eradicate drug abuse. Responding to the growth of voter concern over drug abuse, Congress went to the drawing boards and on October 17, cleared the most massive anti-drug measure ever enacted, the 1986 Drug Abuse Bill.

The product of literally a dozen standing committees in the House, including among others, Foreign Affairs, Government Operations, Ways and Means and the Judiciary, the measure took on gigantic political overtones with virtually every law enforcement and treatment agency in Washington seeking its cut of what promised to be massive appropriations. The debate intensified over focus and perspective: supply side v. demand side; law enforcement v. treatment; international eradication and interdiction v. domestic enforcement and education. In a Bill which promised to attack the drug problem for the first time in a comprehensive manner and from all angles, these inherent ideological conflicts would ultimately have to be worked out in the distribution of money. The initial dollar sign placed on the Act was $1.7 billion dollars for FY 1987. To provide some sense of the scope of the act and the intent of Congress to fund all of the bases, the money allocation broke down as follows: $500 million for drug interdiction; $275 million for drug enforcement; $230 million for grants to state and local law enforcement agencies; $241 million for rehabilitation and treatment; and $200 million for drug abuse education and prevention. Truly comprehensive, but, nevertheless, approximately two-thirds of the money was eventually earmarked for supply side activities. The mass public support generated by the crisis of drugs, bolstered the mood to further pursue the conservative agenda articulated in the 1984 Crime Control Bill. The 1986 Bill provided an intensified forum for change that hitherto remained only dormant. The center of dispute was on the following key items: a) centralized control over drug management; b) introduction back into federal law of some version of the death penalty; c) if not total abandonment then at least significant limitation on the application of the exclusionary rule in drug search cases; d) major use of the military, not only for drug interdiction efforts, but also in the search and arrest of drug traffickers; e) and to cap the agenda, wholesale application of drug testing in both the public and private sectors. These issues were fiercely contested right to the final days before passage of the bill, and because of a fundamental lack of consensus between both parties in both chambers, final resolution was postponed for another time in the interest of achieving at least some kind of immediate program for the nation.

Despite postponement and compromise regarding the above-mentioned politically-charged agenda, the 1986 bill nevertheless made sweeping changes in federal policy, beyond the infusion of billions of dollars of appropriations. Use of the military in the formal stages of arrest was deferred, but Congress was generous in providing millions of dollars in direct military grants, equipment, training and maintenance personnel to Latin countries, and pointed to the success of U.S.-Bolivian joint operations, which, among other things, involved U.S. military personnel in eradication efforts in that country. Along the lines of increasing law enforcement involvement in foreign countries, the legislation altered the
“Mansfield Amendment”, which hitherto prohibited U.S. enforcement agents from even being present at narcotics arrests outside the U.S. Under the new provisions, agents would be permitted to be present if they were assisting foreign counterparts in joint arrest operations. In addition, U.S. officers could take “direct action” to protect themselves, other U.S. personnel, and members of the public in foreign countries if they perceived serious threats to life or safety.

Further, in order to encourage those countries with large drug production, such as Bolivia, Peru, and Mexico, to take steps on their own behalf to discourage supply activity, Congress required the withholding of U.S. assistance to any nation determined to be lacking in efforts toward reducing illicit drug trafficking. In addition, the President was required to defer preferential trade to those countries and to develop whatever strategies deemed appropriate to maintain pressure even so far as to withholding our support and that of any allies for third world loans through international banks. The bill provides the President with authority to “certify” those countries which the executive feels made a reasonable though unsuccessful effort to go after suppliers or where vital national interests might override the drug concern. Congress would then review this process within thirty days with the power to “de-certify”. Obviously, as in the case of Mexico, where Congress and the President clashed on the issue of continued aid, the certification process creates the potential for ongoing conflict between the two branches concerning drugs and other international interests.

One final note on the international dimension, Congress established a joint United States-Bahama drug interdiction task force (referred to as Op-Bat) and authorized $15 million for its implementation—$9 million for three pursuit helicopters, $1 million for communications, and $45 million for planning construction of a drug interdiction docking facility in the Bahamas. It is known that a high percentage of drug trafficking occurs by way of air drops from Columbia into the Caribbean Sea, where the cocaine is picked up by boat and distributed from bases in the Bahamas to the Florida coast. Op-Bat involves DEA, Customs and the Coast Guard working with Bahamian authorities, to interdict this activity, but its “jointness” has been strained from time to time by natural interdepartmental rivalries.13

On the domestic side, Congress continued the process of stiffening penalties across the board for violations of the Controlled Substances Act, not only for big dealers but also for mid- to low-level traffickers, and even casual users. Although the death penalty provision was dropped, mandatory life in prison was a certainty for major traffickers in instances where loss of life occurred as a result of drug activity. Illustrative of the harshness of sentencing, first offenders convicted of trafficking with as little as five kilos of cocaine or one kilo of heroin could face minimum mandatory sentences of up to five years, coupled with fines up to $4 million. For second offenders this penalty structure doubles. First convictions involving 500 grams of cocaine or five grams of “crack” could net mandatory five-year terms and up to $2 million in fines. Owners or operators of “crack houses” faced twenty-year terms and $500,000 fines.

To discourage use, a major preoccupation especially with the administration, for the first time even simple possession of small amounts of a controlled substance, the so-called “zero tolerance” concept, could cost an offender as much as $5,000 and the prospect of a
ninety day jail term. Additional provisions of the bill included five-year terms for selling to minors or using minors under 14 years of age in drug transactions; life sentences for principal organizers of major networks; and the triggering of enhanced penalties under the “armed criminal career” provisions of the 1984 Act for serious drug offenses. Specifically going after money launderers, penalties for violation of reporting requirements were raised to 20 years and $500,000 in fines. One last note of interest, while drug testing was reserved for further study, owing to a recent spate of accidents involving common carriers, Congress devoted a large section of the bill to arming the Secretary of Transportation with tools to better regulate vehicles moving in interstate commerce, especially trucks and buses. The statute provides penalties up to five years and $10,000 in fines for operating a common-carrier while under the influence of alcohol or drugs. The Transportation Department was to issue regulations requiring close monitoring and information sharing of safety and drug records of commercial operators. License suspension procedures were tightened, including full revocation, based on this information, both for first offenders and for habitual offenders.

On the “demand reduction” side, Congress authorized $241 million for alcohol and drug abuse treatment and rehabilitation, and $200 million in FY 1987, followed by $250 million in subsequent years, for “drug free schools.” The grant money was to be distributed to operational agencies in the states on the basis of 45% population and 55% need, however that was to be determined. The education money was earmarked for the development of drug abuse awareness programs in the school system from the top down. Seventy percent of these funds were to be distributed by state education agencies, and 30%, as discretionary funds through the governor’s offices, were to go to public and private non-profit organizations to foster development of community-based drug and alcohol abuse prevention programs.

Finally, the bill revitalized the planning and grant distribution structures established and then dismantled during the LEAA era, by authorizing $230 million in funding for three years beginning with FY 1987 to the states for state and local drug enforcement efforts. The states were required to match the federal grant money on the basis of a 25%-75% split: for every state dollar, there would be three federal dollars available. The money was to be distributed on the basis of 80% population, and 20% discretion by the Bureau of Justice Assistance within the Justice Department. BJA assumed many of the functions of the old LEAA. The grants were earmarked for local governments, through the states, to meet the pressing needs caused by increased law enforcement in police, courts, and corrections. Local governments, however, lost their bid to by-pass state bureaucracies while having the money allocated directly to the areas most in need.

As a prologue, between February and December 1987, the Select Committee on Narcotics Abuse and Control (the Rangel Committee) conducted oversight hearings on the implementation of the bill. During the course of these hearings, the Select Committee examined all aspects of the omnibus drug law, including provisions relating to education and grants to the states for law enforcement. It is noteworthy that for all the emphasis placed on enforcement by the administration, within one year the Reagan budget for FY 1988 completely eliminated the $230 million in grant money designated for the states for law enforcement. In addition, despite Nancy Reagan’s activity and commitment to “saying no to drugs”, the education allocation for drug free schools was reduced by 60 percent from
$250 million to $100 million for the next two years. This lack of commitment provoked Congress, Republicans and Democrats alike, to rebuke the President for "not putting the money where his mouth is."14

The 1988 Omnibus Drug Bill

Even after passage of so sweeping a legislative program as the 1986 Drug Abuse Act, almost immediately, both political parties in Congress set out to confront those large policy matters left unresolved in the earlier debate. A Senate Democratic task force under the guidance of Senators Daniel Moynihan and Sam Nunn, and a Republican task force under the direction of Senator Robert Dole, each produced reports in the summer of 1988 that were to precipitate still another massive drug legislation effort. The old divisions once again surfaced. The Democrats called for an additional $3 billion in spending; creation of a national "Drug Czar" to coordinate all aspects of the drug problem not just law enforcement; and a balance of expenditures and emphasis away from enforcement and toward treatment and education. The Republicans continued to encourage stiffer penalties, including once again a death sentence provision; significantly harsher treatment of users; creation of an international drug strike force with increasing use of the U.S. military; more drug testing; and finally additional tightening of the "certification" process to encourage large drug trafficking nations to get more serious about their own efforts.15

After a summer of debate, the 1988 Anti-Drug Abuse Act (PL 100- 690) a ten title, 758 page document, was passed, 346-11 in the House and by voice vote in the Senate. The vote was taken in late October and became law November 18, 1988. The Act continues and expands many of the provisions established by the 1986 Act. As a compromise between the two reports, Congress ultimately provided for additional expenditures of $2.7 billion, raising the total money spent on drug control to approximately $5.5 billion for FY 1989. Of the $2.7 billion of new money, however, Congress was able to appropriate only $991 million owing to Gramm-Rudman restrictions: not a very auspicious start for so promising a commitment. Of the funds thus provided about 56% were earmarked once again for supply side activities and 44% for demand reduction efforts. Because of the scope and length of the Bill, a summary examination of the salient aspects of the ten titles and the policy ramifications is provided below.16

The most significant change brought about by the 1988 Act is contained in Title I, which finally creates the "Office of National Drug Control Policy" whose Director would in effort be the long sought after "drug czar." The Director would be a Cabinet-level officer with authority, through two Deputy Directors, to manage both supply reduction and demand reduction programs. The key initial responsibility of the Director was to be preparation of a national strategy within 180 days of a confirmation, outlining administration policy toward implementing the legislative scheme. William Bennett was appointed Director in March 1989, and given the absence of a clear policy veto, must find ways to influence, cajole, and coordinate the activities of a myriad of federal agencies with wide powers and independent mentalities. The new Office replaces the Drug Enforcement Policy Board, created by the 1984 Act and formally chaired by the Attorney General, and places Bennett in the unenviable position of having to fill Richard Thornburgh's shoes regarding law enforcement policy coordination. In addition, how far the new Office will be able to

25
affect our international policy and the State Department remains problematical.

Perhaps the second most significant change in the Act finally provides for a federal death penalty, long sought after as the cornerstone of the new conservative agenda. Under the statute the death penalty will be available, but not required, for “any person engaging in, or working in furtherance of a continuing criminal enterprise”, or “convicted of distribution of major quantities of drugs under the Controlled Substance Act, who intentionally kills, or counsels, commands, induces or causes the intentional killing of an individual.” The Statute also allows the death penalty for killings of law enforcement officers if the killing was related to the investigation of a drug felony activity. Thus the death penalty is tied to murders committed within the framework of drug trafficking offenses. As a compromise, death penalty opponents were able to extract limits: for the first time, adequate defense services are to be made available to all indigents facing execution, and the penalty would also not be available for those under 18 years of age or those who are mentally retarded.

Considering the long history of ever increasing penalties for trafficking with only limited success, drug negotiators in Congress and in the administration opted for leveraging the up-scale user as a key ingredient in stymieing the drug trade. Title V of the new Act accomplished this in a variety of ways: by obviously increasing the sanctions for even casual possession of small amounts of a controlled substance; under the Drug Free Workplace Act, by requiring employers who are recipients of federal contracts or grants to institute forms of testing and treatment; by easing eviction procedures in public housing projects where it can be shown that tenants or their companions have engaged in drug-related activity; by compelling education authorities to step up drug awareness programs and curriculum development; and finally by denial of a variety of federal benefits to traffickers and users alike. Under the Statute, for example, the Justice Department can assess civil penalties up to $10,000 in fines for “personal use” amounts of drugs aimed squarely at the middle class user. As a hedge, however, a defendant may seek an administrative hearing with "de novo" judicial review to follow, which places the burden of proof on the government. Regarding loss of benefits, these might be grants, contracts, loans or licenses, but do not include retirement, welfare, social security or other like entitlements. The degree of benefit loss would be left to the discretion of the courts after judicial process.

Two remaining observations can be made of the 1988 Bill that are of interest: the statute contains the potential for a far-reaching regulatory scheme, and it addresses the relationship between intravenous drug abuse and AIDS. Specifically, regarding regulation, the statute: a) provides a new structure of procedures to control the production and distribution of a variety of precursor chemicals necessary to manufacture cocaine, placing upon the nation’s chemical companies stringent reporting requirements; b) introduced provisions designed to improve aircraft registration, certification of pilots, and the processing of repair and alteration forms to assist in the interdiction of drug trafficking through the air; c) strengthened requirements on banks to obtain information and identification of large money traders; increased the control over electronic transfers, and moved to establish a system of international money control and information sharing systems; d) it “revised” income tax regulations so as to increase the types of violations that could fall within the “predicate” offenses necessary to trigger RICO statutes.
In the drug treatment area, not only was increased funding made available for treatment and rehabilitation, especially aimed at intravenous drug users, but a triggering mechanism was included that provided emergency money when states reached 90% of their treatment capacity. Special emphasis was placed on programs which gave a priority to treatment of individuals affected with the etiologic agent for AIDS. No funds, however, were to be used for the distribution of sterile needles or the bleach necessary to cleanse needles already in use.

Prologue

Implementation of the legislative programs thus outlined is an immediate function of the Office of Drug Control and is reflected in the 1989 Drug Control Strategy mandated by the 1988 Act. Analysis of this document is not included in this paper, but referring to the President’s September 5 speech, which was essentially a review of the report, and the Democratic response which followed, the traditional divisions remain evident. The administration called for an increase of $2.2 billion of new revenues to bring the total commitment to the drug war to about $8 billion. Despite rhetoric that the war will be conducted on all fronts, approximately 70% of the funding was destined for law enforcement, especially toward financing a greatly accelerated prison construction program. Against the background of the highly visible state of anarchy in Colombia following last summer’s assassinations, the President designated over $70 million in direct military assistance with the promise of increased effort to fight the cartels throughout Latin America.17

The Democrats immediately pointed to the futility of pursuing a law enforcement agenda and argued for a major shift in emphasis to treatment and education, backed by a request for $3 billion more in expenditures over the administration proposal.18 Both sides understand the gap between announced intentions and actual appropriations, and neither side was willing to say where the additional funding was to come from. Given the virtual prohibition against new taxes, the money can only come from reshuffling other domestic programs: robbing Peter to pay Paul. When contrasted to the $350 billion figure bantered about to save the Savings and Loan Associations, $10 billion to attack the drug problem looks more like a skirmish than a war.

Two additional observations can be made regarding the overall impact of federal policy: the role of the national government in law enforcement will continue to expand; and the policies emerging to allow this police role will make this a less than “kinder and gentler nation.” With enhanced federal criminal violations now paralleling state criminal violations, it is not unusual to find city, county, state, and federal agents participating together in routine drug busts. It is also not unusual to find U.S. attorneys and local District Attorneys negotiating optimum prosecution strategies, especially in the light of the lucrative forfeiture spoils available through the new statutes. Traditional Constitutional restraints on federal police powers are increasingly diminishing. At the same time, federal money will continue to flow by way of grants to support local law enforcement needs, but not without strings: the matching formula has been reduced to a 50-50 split, and costly drug testing provisions have been added to facilitate receiving such money, thus significantly increasing the burden of enforcement on the states. According to the New York Times, of the $350 million earmarked for grants, only $149 million will actually be available, thus effectively
allocating only $39 million of the new money among the fifty states. And according to a study soon to be released, the states on the whole figure to receive $95 million less in FY 1990 than they are now scheduled to receive.¹⁹

It follows that with the emphasis on supply reduction and law enforcement, traditional procedural restraints will continue to be relaxed. The death penalty has already reappeared in federal law for drug-related murder and a new bill before Congress proposes to expand the death sentence to other crimes. While Congress avoided legislating a “good faith” exception to the exclusionary rule, this was accomplished, nonetheless, by the Supreme Court. Ease of forfeiture, relaxed search requirements for Customs and Coast Guard agents, flexibility in stopping and searching suspected traffickers at air and bus terminals by means of a drug courier profile test,²⁰ increased drug testing in the workplace, together with the ever-increasing sanction for even casual drug use have led to the highest arrest and sentencing rates in the nation’s history. Unfortunately, with the current national mood, the likelihood of political posturing on the issue of getting tough on drugs will become more evident. John Glenn pointed to this possibility when, after a Senate debate on the issue of allowing U.S. agents to shoot down private aircraft suspected of being in the drug trade, he said: “All you have to do is mention drugs, and we go into a piranha-like frenzy to put out a press release.”²¹

This paper has not addressed the issue of legalization as an alternative to current policy, although it is much discussed publicly and in the media, because there is no evidence either in the Congress or in the Administration, that legalization is a viable political choice. The administration, far from examining any prospect to make drugs available under controlled conditions, has in fact targeted the experimental first-time and casual users as key to effecting a reduction in drug abuse. In 1987, the Rangel Narcotics Abuse Committee in the House held extensive hearings on legalization, drawing together leading authorities on both sides of the issue, but ultimately came out against it.²² Finally, a legislative provision built into Title V of the 1988 Act seems at the moment to have laid the issue to rest: “The Congress finds that legalization of illegal drugs, on the federal or state level, is an unconscionable surrender in a war in which, for the future of our country and the lives of our children, there can be no substitute for total victory.”²³
ENDNOTES

4. The historical account of early drug use in America is drawn from the testimony of David Musto, M.D., before the Select Committee on Narcotics Abuse and Control (SCNAC-100-2-11), September 30, 1988, pp. 115-126.
7. For an analysis of the response of Ohio agencies to LEAA both regarding drug treatment and law enforcement, see Ohio’s 1972 Comprehensive Criminal Justice Plan, Toward a Safer More Just Society, Columbus, Ohio, 1972.


18. For the Democratic response, see the *New York Times*, September 8, 1989.


20. The Supreme Court, in a string of cases going back to 1984, has altered the balance between due process and privacy rights on the one hand, and the interests of law enforcement on the other. Key cases include U.S. v. Leon, 468 U.S. 897 (1984)—“good faith” exception to the exclusionary rule; U.S. v. Peter Monsanto (105 LED 2d 512) 1989—forfeiture seizure case; Skinner v. Railroad Labor Executives (103 LED 2d 639) 1989—drug testing case; and U.S. v. Sokolow (104 LED 2d 1) 1989—drug courier profile case.


23. PL 100-690 (102 STAT 4296).