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Federal Discretion in the Prosecution of Local Political Corruption

Andrew T. Baxter*

Federal prosecutors' awareness of political corruption at the state and local levels has recently increased concomitantly to the incidence of disclosures and prosecutions of similar corruption at the federal level. Because local law enforcement officials have frequently been unable or unwilling to pursue local political corruption, federal prosecutors have increasingly assumed responsibility for the policing of non-federal political criminal activity, even in the absence of definitive statutory grounds.

In this article, the author examines the legal basis upon which federal prosecution of local political corruption is conducted. It is asserted that existing federal judicial and legislative limitations provide an inexact foundation for federal prosecution and, in actuality, promote potentially unconstitutional discretion on the part of federal prosecutors who pursue local corruption. The article identifies several constitutional issues arising from this prosecutorial discretion, especially noting the areas of the separation of powers and other federalism concepts. The article concludes with suggestions for means of limiting the discretion of federal prosecutors in the pursuit of non-federal political corruption.

I. INTRODUCTION

In the early 1970's, federal prosecutors began to target local political corruption¹ as a major federal law enforcement priority.²


¹ This paper focuses on federal prosecution of state and local officials for corrupt conduct such as extortion and bribery. The term "local corruption" will be used to refer to this type of criminal activity.

² In 1973, the Chief of the Criminal Division of the Department of Justice (hereinafter DOJ) revealed that "conscious efforts are presently being exerted by the Department . . . to bring federal investigative and prosecutorial resources to bear in increasing quantity and quality in the area of governmental and institutional integrity." Thornburgh, Preface to the United States Courts of Appeals: 1974-75 Term Criminal Law and Procedure, 64 Geo. L.J. 173 (1975).

In 1977, the Chief of the Public Integrity Section of the DOJ stated that "[f]ederal prosecutors during the last decade [have begun] to assume a much more active . . . role in attempting to use federal statutes to attack corruption at the state and local level." Henderson, The Expanding Role of Federal Prosecutors in Combating State and Local Political Corruption, 8 Cum. L Rev. 385, 386 (1977). See also, e.g., Harrington Target: White Collar Crime, Boston Evening Globe, Oct.
Federal prosecutors believed that "corrupt schemes at the state and local level . . . [were] at least as corrosive of the governmental process as corruption at the federal level." They determined that vigorous federal enforcement efforts were "required to fill a vacuum created by the inability or unwillingness of state and local law enforcement agencies to deal adequately with the task of ferreting out corruption."  

Faced with an inadequate statutory basis for prosecuting corrupt local officials, federal enforcement officials began to apply four federal statutes which traditionally had been applied to other forms of criminal activity: the Hobbs Act, the Mail Fraud Act, the Travel Act, and most significantly, the Racketeer Influenced and Corrupt Organizations Act (RICO). The interpretations of the general language of the four statutes advanced by federal prosecutors have been described by many Justice Department officials as "creative" and by others as inconsistent with the legislative intent. Nonetheless, the federal courts generally validated

3, 1978, at 3 (Boston U.S. Attorney declared governmental corruption a district enforcement priority) [hereinafter cited as Boston Evening Globe].

Charles Ruff, a former DOJ and United States Attorney (hereinafter USA), argues that local USA's, largely independent of the DOJ, provided the impetus for the earliest federal prosecutions of local political corruption. He describes how the DOJ has recently attempted to exert greater control over prosecution of local corruption by USA's. Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L.J. 1171, 1177, 1205-06, 1211-12 (1977). Sections I and II do not attempt to distinguish the allocation of discretionary power between the DOJ in Washington and the USA's. The text refers to these entities together as "federal prosecutors." Section IV(C) makes a greater effort to distinguish the powers and functions of the DOJ from its local prosecuting arms.

3. Henderson, supra note 2, at 386.
4. Thornburgh, supra note 2, at 173.
5. As Thornburgh describes, "federal prosecutors [cast] about for new tools to deal with corrupt activities in . . . the public sector." Id.
10. See, e.g., Henderson, supra note 2, at 386; Thornburgh, supra note 2, at 173-74. The interpretations advanced by the DOJ are described therein as "creative," "innovative," "imaginative," and "expansive."
11. Charles Ruff argues that the application of the "color of right" language of the Hobbs Act to local corruption is inconsistent with the intent of its drafters. Ruff, supra note 2, at 175.

Lee Radek, an attorney in the Public Integrity Section of the DOJ, acknowledged that the Department's interpretations of the Hobbs Act and the Mail Fraud Act probably transcend the intent of the drafters. He also acknowledged that the inclusion of state and local governmental units as "enterprises" under RICO—an interpretation advanced by the DOJ—was probably not intended by the drafters. Radek argued, however, that the Department's interpretations of these statutes are within the broad, general language of the statutes. Interview with Lee Radek.
the application of these statutes to local corruption. Encouraged by continuing judicial acquiescence, federal prosecutors dramatically escalated their efforts to police local corruption in the following decade.

The brief history of federal prosecution of local political corruption indicates that federal prosecutors have enjoyed broad discretion in developing and implementing, unilaterally, federal law enforcement policy. "Discretion" has been defined by James Vorenberg as "the room left for subjective judgment concerning statutes, administrative rules, judicial decision, social patterns and institutional pressures which bear on an official's decision." This article will examine the process whereby federal prosecutors have managed to formulate and execute a policy of vigorous federal prosecution of local corruption which has remained free of substantial legislative and judicial limitations. Section II reviews the insubstantial legislative and judicial limitations on federal prosecutorial discretion in the local corruption context. Section III discusses several concerns based on the constitutional notions of the separation of powers and federalism. Section IV examines various ways in which federal discretion in the prosecution of local corruption should be narrowed. The recent efforts of Congress and the Department of Justice (DOJ) to narrow and guide prosecutorial discretion are evaluated in Section IV.

II. Scope of Federal Prosecutorial Discretion to Develop Policy in the Local Corruption Context

The limits on prosecutorial discretion to make federal law enforcement policy in the local corruption context, consisting of only open-ended statutory language permissively construed by federal courts, are not very confining. Additionally, neither the

Department of Justice, Public Integrity Section, in Washington, D.C. (Aug. 12, 1980) [hereinafter cited as Radek Interview].

12. See infra notes 15-68 and accompanying text for a discussion of prosecutorial discretion under RICO, the Hobbs Act, the Mail Fraud Act, and the Travel Act.

13. The number of federal prosecutions of corrupt local officials increased from 63 in 1970 to 337 in 1976. Ruff, supra note 2, at 1172 n.l. In 1979, 267 state and local officials were indicted by the Public Integrity Section of the DOJ. STAFF OF HOUSE COMM. ON THE JUDICIARY: CRIMINAL CODE REVISION ACT OF 1980, REPORT TO ACCOMPANY H.R. 6915 302 (Comm. Print 1980) [hereinafter cited as HOUSE REPORT].

statutory language nor the legislative history of the four statutes applied to local corruption clearly authorizes such applications. However, these statutes, enacted to deal with complex problems, such as organized crime, have broad language amenable to "creative" interpretation. Federal courts have allowed federal prosecutors to apply such general statutory language to conduct apparently beyond the contemplation of the drafters of the legislation.

A. Prosecutorial Discretion Under RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it a federal crime for a person, through a "pattern of racketeering activity" to "conduct or participate, directly or indirectly," in the affairs of an "enterprise" which is "engaged in" or which "affects" interstate commerce.15 "Racketeering activity" is broadly defined in 18 U.S.C. section 1961(1) and includes "any act or threat involving . . . robbery, bribery, [or] extortion . . . which is chargeable under state law and punishable by imprisonment for more than one year."16 "Enterprise" is defined in general language as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."17

The legislative history of RICO "clearly indicates a congressional intent that the statute be specifically aimed at combatting the infiltration of legitimate business by organized crime."18 However, the structure of the statute facilitates its application to a broad range of criminal conduct normally prosecuted at the state level, including local corruption. The potentially broad application of the statute is due in part to the jurisdictional elements of the statute which are easily established.19 If the defendant has

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According to the Senate Judiciary Committee Report, RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." STAFF OF SENATE JUDICIARY COMM., 91ST CONG., 1ST SESS., REPORT ON ORGANIZED CRIME CONTROL ACT OF 1969 76 (Comm. Print 1969).

19. The jurisdictional requirement of RICO—that the enterprise must be engaged in or its activities must affect interstate commerce—is satisfied without a transactional link between the racketeering activity in a particular case and commerce. See, e.g., United States v. Long, 651 F.2d 239, 241-42 (4th Cir. 1981); United
committed more than one predicate act, thereby satisfying the "pattern" requirement of section 1961(5), the statute is applicable to the broad range of criminal activities incorporated in the definition of racketeering activity.

In the 1970's, federal prosecutors began to argue that RICO was applicable to corrupt state and local government bodies. Under this interpretation, a local official "on the take" would be participating in the conduct of the affairs of an "enterprise" — the government subdivision — through racketeering activity, i.e., bribery or extortion under state law. This article will advance an argument that such an application of RICO is neither supported by its


Under RICO, almost every conceivable local government subdivision has some effect on interstate commerce. For example, in United States v. Altomare, 625 F.2d 5 (4th Cir. 1980), the court found a sufficient nexus between a county prosecutor's office and interstate commerce because interstate telephone calls were regularly placed from the office and certain of the supplies used in the office had their origins outside the state. In United States v. Vignola, the Philadelphia Traffic Court was found to affect interstate commerce because it had a special department to process violations by cars registered out of state which had consulted with a New Jersey computer firm. 464 F. Supp. at 1097 n.18.

20. Federal prosecutors forcefully advocated the inclusion of governmental units in the term "enterprise" so they could take advantage of several features of RICO in their attack on local corruption. Radek Interview, supra note 11; Interview with Alan Rose, Assistant USA (hereinafter AUSA), in Boston, Mass. (Sept. 14, 1979). The Hobbs Act, the Mail Fraud Act, and the Travel Act require that the particular conduct which is the basis for the prosecution be linked to interstate commerce. Cf. RICO, which does not require a transactional link to interstate commerce. See supra note 18. Because of RICO's definition of a "pattern" of racketeering activity, 18 U.S.C. § 1961(5), the statute can be used to prosecute criminal acts occurring ten years before the most recent racketeering act. Prosecutors proceeding under the other statutes used to prosecute local corruption are constrained by a five-year statute of limitation. 18 U.S.C. § 3283 (1976). Prosecutors can often bring in more incriminating evidence—e.g., of prior crimes—to prove RICO's enterprise and pattern elements than would be admissible in prosecutions under the other three statutes. Finally, the twenty year prison term under RICO, 18 U.S.C. § 1963(a), is considerably higher than the criminal penalty of five years found in the Travel Act and the Mail Fraud Act, 18 U.S.C. §§ 1941, 1952.
statutory language nor by its legislative history. Nonetheless, the federal courts have interpreted “enterprise” to include police departments, state legislatures, state and local executive agencies, municipal courts, and local prosecutors’ offices. It is believed that the courts’ permissive interpretation of RICO has left federal prosecutors with too much discretion to develop and execute federal law enforcement policy in the local corruption context.

Courts which have interpreted “enterprise” to include local government units have stressed that the broad definition in section 1961(4) does not support any distinction between commercial and public entities. However, it should be noted that RICO was drafted broadly only because Congress felt that it was necessary to “adequately cover the wide range of activities covered by organized crime.” Moreover:

“In divining legislative intent... a venerable precept of statutory con-

21. See United States v. Brown, 555 F.2d 407 (5th Cir. 1977); United States v. Burnsed, 566 F.2d 882 (4th Cir. 1977); United States v. Ohlson, 552 F.2d 1347 (9th Cir. 1977).
26. Only a single district court in the Fourth Circuit and a vigorous dissent in a court of appeals decision from the Seventh Circuit have argued that “enterprise” was not intended to include state and local government subdivisions. See United States v. Mandel, 415 F. Supp. 997, 1021 (D.C. Md. 1976). See also United States v. Grywacz, 603 F.2d 682 (7th Cir. 1979) (Swygert, J., dissenting).
27. Some commentators share the following opinion: The complex nature of RICO’s essential provisions, the broad statutory language of the Act, and prosecutorial zeal in invoking RICO have unfortunately combined to result in the application of the statute to situations for which it is not primarily intended. Government prosecutors have seized on RICO’s expansive language and judicial willingness to construe the statute in an unreasonably broad manner to distort... the reach of the statute and extend its outermost limits. Comment, The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform, 33 VAND. L. REV. 441, 476-77 (1980) [hereinafter cited as RICO Comment].
29. United States v. Grywacz, 603 F.2d 682, 685 (7th Cir. 1979).

Congress... felt that unless the predicate acts were defined broadly, they would not adequately cover the wide range of activities covered by organized crime. Still, the stated aim of RICO is to prevent the takeover...
struction, the doctrine of *ejusdem generis*, warns against expansively interpreting broad language which immediately follows narrow and specific terms. To the contrary, the maxim of statutory analysis counsels courts to construe the broad in light of the narrow. . . . None of the specific narrow nouns involved in [the] definition of enterprise — individuals, partnership, corporation, association — are public entities. They are rather a listing of the common legal forms in which business entities and labor groups fashion themselves to carry out their private functions. The more general references to "any legal entity" . . . must be construed to be limited to the same type and class of entities which preceded it in the statutory definition.51

The legislative history of RICO does not support the argument that Congress intended to include government bodies as enterprises. "Out of 2097 pages of hearings, two Congressional reports, and Title IX itself, there are no explicit references to governmental units as 'enterprises' within Title IX."32 "Congress heard testimony and reports of [organized crime] infiltration into a startling variety of industries, unions, service organizations, and the like — but nothing was said about governments."33 "The more reasonable interpretation is that Congress did not intend the term 'enterprise' to encompass government organizations."34

Those who argue that Congress intended "enterprises" to embrace state and local governments cite the Statement of Findings and Purpose for the Organized Crime Control Act of 1970.35 Congress found that "the money and power" obtained by illegal vice activities "are increasingly used to infiltrate and corrupt legitimate businesses and labor unions and to subvert and corrupt our democratic processes."36 "Organized crime activities in the U.S. weaken the stability of the nation's economic system, . . . threaten the domestic security, and undermine the general wel-

or use of legitimate businesses by organized crime. There is no indication RICO was designed . . . to forbid infiltration of government agencies . . . .

*Id.* In addition, see statements of Senator McClellan, a prime sponsor of the RICO statute in McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties*, 46 N.D.L. Rev. 55, 142-44 (1970).

31. United States v. Mandel, 415 F. Supp. at 1021 (quoting in part United States v. Inso, 496 F.2d 204, 206 (5th Cir. 1974)).

32. United States v. Grzywacz, 603 F.2d at 690 (Swygert, J., dissenting).


34. *Grzywacz*, 603 F.2d at 690 (Swygert, J., dissenting). "[The] legislative history, completely silent on the classification of public entities as enterprises, is replete with examples of legislators use of the word 'business' synonymously with the statutory concept of 'enterprise.'" RICO Comment, *supra* note 27, at 474.


fare of the nation and its citizens."\textsuperscript{37} The majority in one case argued that:

\begin{quote}
[this] legislative history manifests a serious concern by Congress not merely with a profusion of racketeering activities within private businesses \ldots but with potentially devastating effects of organized crime on the nation's political and economic system as a whole. \ldots The logical inference from these pronouncements is that Congress intended to frame a widely encompassing enactment to protect both the public and private sectors from the pervasive influences of racketeering.\textsuperscript{38}
\end{quote}

It is obvious that Congress was concerned with protecting the public sector from the influence of organized crime; section 1962 (c) of RICO explicitly sanctions attempts by participants in private enterprises to corrupt government officials by bribery. However, it is not obvious that Congress also intended to protect the public sector by punishing a government official conducting the affairs of his office through a pattern of corrupt activity. Congressional oversight of business enterprises conducted by illegal means is clearly justified by its interstate commerce responsibilities. Congressional oversight of corrupt state and local government has a much weaker connection to interstate commerce and represents a significant intrusion on local government autonomy.\textsuperscript{39} Therefore, it is reasonable to posit that Congress intended to punish, under RICO, illegal activity connected with business enterprises, but not with state and local government "enterprises."

The Statement of Findings, cited to support an expansive interpretation of "enterprise," refers to all eleven titles of the Organized Crime Control Act of 1970, but not specifically to Title IX, which includes RICO. In light of the failure of the specific legislative history to discuss government "enterprises," this very general language of the Statement provides little authority for the proposition that "enterprise" was intended to include governments.\textsuperscript{40}

Proponents of a broad interpretation of "enterprise" point out that Congress specifically provided that "provisions of this title shall be liberally construed to effectuate its remedial purpose."\textsuperscript{41}

\textsuperscript{37.} Id.

\textsuperscript{38.} United States v. Grzywacz, 603 F.2d at 687 (citations omitted). The lower court in United States v. Barber, 476 F. Supp. at 185-86, also cites some general comments made during the opening congressional debates on the Organized Crime Control Act to support the application of RICO to government enterprises. The comments point out, with concern, that organized infiltration of the economy often results in the corruption of local officials.

\textsuperscript{39.} See \textit{infra} text accompanying notes 79-82 for a discussion of federalism concerns.

\textsuperscript{40.} United States v. Grzywacz, 603 F.2d at 690-91 (Swygert, J., dissenting); United States v. Mandel, 415 F. Supp. at 1022.

However, the court in *United States v. Mandel* properly argued that RICO, "with its civil and criminal provisions has both punitive and remedial purposes. While Congress may instruct courts to give broad interpretation to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency. . . ."42 The construction clause in RICO does not support broadening the reach of RICO's criminal provision by including government agencies as enterprises.

The remedies provided by Title IX include the criminal sanction of forfeiture of any interest in the "enterprise"43 and the civil sanctions of divestiture, restriction of activities, and dissolution or reorganization of the "enterprise."44 As noted by the court in *Mandel*, "[i]t could hardly be contended that a private citizen of a state, aggrieved by the 'racketeering acts' of an official in conducting the [functions of a state or local government] could bring a treble damage action against that official and require forfeiture of office and dissolution of the state government."45

"The primacy of the remedial provisions of Title IX46 and the total inapplicability of the provisions to governmental entities corroborate what the legislative history demonstrates: Congress had no intention of including governmental units within the ambit of the 'enterprise' provisions of Title IX."47

In sum, the RICO statute was apparently not intended by Congress to apply to state and local government officials. Nonetheless, the federal courts have allowed federal officials to carry out their policy of active prosecution of local corruption by applying RICO. As a result, federal prosecutors have enjoyed a broad de-

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46. Judge Swygert's dissent in *Grzywacz* sets out passages from the legislative history of RICO to document that these remedial provisions were considered to be a crucial element in the statutory scheme to improve the effectiveness of federal criminal law in dealing with organized crime. See 603 F.2d at 691.

47. Id. (Swygert, J., dissenting).
gree of discretion to unilaterally determine the substantive reach of federal criminal law.

B. Prosecutorial Discretion Under Other Statutes Used to Prosecute Local Corruption

In the last decade, federal prosecutors have successfully prosecuted local corruption under the Hobbs Act, the Mail Fraud Act, and the Travel Act.48 This section proposes that the recent applications of these three statutes to local corruption is inconsistent with the intent of the drafters of the legislation. The federal courts have too readily acquiesced in dubious prosecutorial interpretations of these statutes, particularly the Hobbs Act.49 As a result, the discretion of prosecutors to formulate and execute law enforcement policy in the local corruption context has not been adequately limited.

1. The Hobbs Act

The Hobbs Act was passed in the 1950's to deal with the racketeering activities of organized labor.50 The Act punishes individuals who obstruct or "affect" interstate commerce by extortion or robbery.51 Section 1951(b)(2) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."52 Traditionally, to prove extortion, prosecutors had to demonstrate that the defendant obtained property by "coercion." As a result, the Hobbs Act was often inapplicable to official corruption.53

In the late 1960's, however, federal prosecutors began to advance a novel interpretation of the Hobbs Act so as to overcome

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48. See supra notes 6-9.
49. These three statutes, like RICO, prohibit an inclusive group of local offenses when certain, easy-to-prove jurisdictional elements are present. This statutory structure facilitates "creative" statutory interpretation by prosecutors.
50. See Ruff, supra note 2, at 1174-75.
51. 18 U.S.C. § 1951(2) (1976). The Hobbs Act "was held not to be limited to conduct that directly and immediately obstructs a particular movement of goods in interstate commerce; criminal extortion or racketeering that produces only an indirect effect on [commerce is] sufficient to sustain federal jurisdiction over the offense." Brody, The Proposed Federal Criminal Code: An Unwarranted Expansion in Federal Criminal Jurisdiction, 39 Ohio St. L.J. 132, 142 (1978).
53. The courts recognized the inducement of fear of economic loss as "coercion." However, some decisions have held that such fear must relate to the loss of an existing property interest. See, e.g., United States v. Kubacki, 237 F. Supp. 638, 640-42 (E.D. Pa. 1965). Therefore, in the common situation where a corrupt politician tacitly requires bribes from individuals who desire future economic benefits, such as government contracts or employment, the extortion element of the Hobbs Act was not satisfied. Ruff, supra note 2, at 1176-77.
its limited applicability to local corruption. The prosecutors argued that the wrongful taking of money by a public official was illegal extortion "under color of official right," whether or not the taking was accomplished by coercion or use of fear. It must be remembered that the "color of right" language of section 1951(b)(2) had, to this point, been ignored by prosecutors and the courts.54

Additionally, as noted by several commentators, the application of the statute to local corruption was not intended by the drafters. For example, Charles Ruff points out that in the legislative history of the Hobbs Act there is no mention of the "color of right" language or even of the problem of corrupt demands for payments by government officials. "If Congress had intended to reach local corruption by creating a felony requiring no proof either of intent to be influenced in one's official capacity or of intent to obtain property by force or threats, surely the proponents of the bill would have mentioned it."55

Despite the lack of clear legislative support, the courts acquiesced in the novel application of the "color of right" language. As a result, "a statute thought only to be a mildly effective weapon against labor racketeering became a major factor in the federal effort to combat local corruption."56

54. See discussion of the development of the Hobbs Act to reach local corruption in Henderson, supra note 2, at 386-93, and Ruff, supra note 2, at 1174-96.

55. See Ruff, supra note 2, at 1198-99. Ruff argues that, absent a clear expression of legislative intent, the courts should not expansively apply the Hobbs Act to local corruption. Such an application would constitute a serious encroachment on local government autonomy and would be contrary to the doctrine of strict construction of criminal statutes.

In addition, see Comment, Prosecution Under the Hobbs Act and the Expansion of Federal Criminal Jurisdiction, 66 J. CRIM. L. AND CRIMINOLOGY 306, 318-19 (1975) [hereinafter cited as Hobbs Act Prosecution]. Cf. Stern, Prosecution of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3 SETON HALL L. REV. 1, 17 (1971), who argues that the language of the Hobbs Act unambiguously adopts the common law offense of extortion under color of right which does not require a showing of coercion. Presumably, Stern would consider a resort to the legislative history of the Act improper and unnecessary because the statutory language is plain on its face.

56. Henderson, supra note 2, at 392. Two recent Hobbs Act cases seemed to limit the applicability of the Act to local political corruption. See United States v. Culbert, 548 F.2d 1355 (9th Cir. 1977), rev'd, 435 U.S. 371 (1978) (holding that conduct that did not constitute "racketeering" was not punishable under Hobbs Act even though conduct seemed to be within literal reading of Act's language); United States v. Yokley, 542 F.2d 300 (6th Cir. 1976). Neither court attempted to define the term "racketeering" in general terms. Cf. United States v. Harding, 563 F.2d 290 (6th Cir.), cert. denied, 434 U.S. 1062 (1977) (holding that extortion under
2. The Mail Fraud Act

The Mail Fraud Act punishes a person using the mails for "having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises. . . ." Until recently, the statute had been used primarily to reach "classic swindles" and securities fraud schemes. To establish the "fraud" element of the statute, prosecutors traditionally were required to prove that the defendant had developed a "scheme" with the intent to harm a victim. This burden of proof made the statute ineffective against local corruption. "Whereas mail fraud cases [typically involve] fraudulently obtained goods or money, corruption cases [often] do not involve a pecuniary loss to victims. . . . In [many] corruption cases . . . the defendants apparently do not intend to deprive the victims of existing property rights, but simply to obtain a gain for themselves." In the early 1970's, federal prosecutors argued that the Mail Fraud Act should be applied to a corrupt official because his unscrupulous conduct constituted a scheme to defraud the people of his "faithful and loyal services." This novel interpretation, which was accepted by the courts, has vastly expanded the applicability of the Act to local corruption. However:

color of official right did constitute "racketeering" and was thus fully covered by the Hobbs Act).

The Supreme Court, in a unanimous decision, held in United States v. Culbert, 435 U.S. 371 (1978), that the Hobbs Act applies to conduct within its literal terms regardless of whether such conduct constitutes "racketeering," however defined. After the Culbert decision, it seems unlikely that the Hobbs Act's applicability to local corruption will be limited by a narrow construction of its terms.

58. Henderson, supra note 2, at 393-94.
60. Mail Fraud, supra note 59, at 247.

The Seventh Circuit has limited the applicability of the Mail Fraud Act to local corruption. See, e.g., United States v. Stasyczuk, 502 F.2d 875 (7th Cir. 1974), cert. denied, 423 U.S. 837 (1975) (the Act is inapplicable to local government officials when use of mails is incidental to or does not further corrupt scheme).
[a]nalysis of the legislative history of [the Mail Fraud Act] . . . demonstrates that the section's reach should be limited to fraudulent conduct that results in the acquisition of money or property from the victim. . . . [U]se of [the statute] against politically corrupt politicians thus remains contrary to Congress' original intent. Until Congress amends the section, such use should not receive the imprimatur of the courts. 62

Thus, as with the Hobbs Act, the Mail Fraud Act has been expanded through the use of a novel argument of federal prosecutors, although such application is questionable with regard to local government corruption.

3. The Travel Act

The Travel Act punishes the use of travel in interstate commerce or the use of facilities of interstate commerce to promote or carry on “unlawful activity.”63 The term “unlawful activity” incorporates extortion or bribery in violation of state law. 64

Although the statutory language of this Act is admittedly broad in scope, the legislative history is narrowly and specifically focused.65 The Supreme Court, in Rewis v. United States, 66 interpreted the legislative history as indicating that section “1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one state while managing illegal activities located in another.”67 Once again, as with the Hobbs Act and Mail Fraud Act, despite the absence of clear legislative support for the application of the Travel Act to situations involving local corruption, the courts continue to freely apply it in such situations.68


67. Id. at 811.


The Second and Seventh Circuits have at least limited the discretion of federal prosecutors applying the Travel Act to local corruption. Relying on dicta in United States v. Rewis, 401 U.S. 808 (1971), these circuits have overturned convictions of
III. CONCERNS ABOUT BROAD FEDERAL PROSECUTORIAL DISCRETION

A. Separation of Powers Concerns

As noted in the previous section, the federal courts have allowed federal prosecutors to apply four statutes to local corruption in a manner which Congress did not intend. "The court's reluctance to limit the expansion of these criminal statutes suggest that . . . federal prosecutors hold virtually unlimited discretion to define both the meaning of statutes as well as who they should reach." The exercise of such lawmaking powers by prosecutors appears incompatible with the constitutional notion of the separation of powers. The Supreme Court in United States v. Bass stated that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures . . . should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" Felix Frankfurter wrote:

[F]he function in construing a statute is to ascertain the meaning of [the] words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. . . . Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration.

It might be argued that Congress acquiesced in the application of corrupt officials when the use of interstate facilities were only "casually," "incidentally" or "fortuitously" linked to the corrupt conduct involved. See United States v. Isaacs, 493 F.2d 1124, 1149 (7th Cir. 1974); United States v. Archer, 468 F.2d 683 (2d Cir. 1973).


70. For the most part, the federal courts construing the criminal statutes applicable to local political corruption have not explicitly considered issues of separation of powers. Courts which upheld broad interpretations of these statutes argue that such interpretations are consistent with the broad statutory language. See supra text accompanying notes 29 & 30. Other courts advocate a narrow interpretation because the focused legislative histories of these statutes suggest that Congress never intended that they be applied to local corruption; these courts often cite the doctrines of comity and lenity to support a narrow interpretation of general statutory language. A litigator attacking an expansive interpretation of one of these four statutes should probably argue along the lines suggested in the preceding sentences without explicitly invoking notions of separation of powers. However, separation of power notions are implicit in any invocation of the doctrine of leniency. The Supreme Court in Bass recognized that separation of power notions underlie the doctrine of leniency. See infra note 72 and accompanying text.


72. Id. at 349. This statement was offered as one of the two reasons why ambiguities in criminal statutes should be resolved in favor of leniency.

of these four statutes to local corruption by failing to amend them in the face of expansive prosecutorial interpretations which were validated by the courts. However, the acquiescence argument makes the dubious assumption that Congress is continually monitoring the judicial interpretations of its criminal statutes. Moreover, the congressional amendment process is cumbersome and subject to the vagaries of politics. For these reasons, the failure of Congress to amend a criminal statute in the face of a dubious judicial interpretation does not indicate that Congress supports the interpretation. In any event, implicit congressional approval of how federal prosecutors exercise de facto lawmaking powers will not eliminate separation of power concerns.

The four federal statutes used to prosecute local corruption criminalize very general categories of predicate acts when common jurisdictional elements are present. Some legal scholars have found such statutory language to contain implicit delegation of lawmaking authority to federal prosecutors. However, even if Congress had explicitly delegated to federal prosecutors the

74. See Hobbs Acts Prosecution, supra note 55, at 320. “[Moreover,] such monitoring is not done in a public manner; therefore citizens cannot know what is criminal since the statutes change meaning by gradual accretions which are not reflected in the legislative histories or statutory language.” Id.


76. For example, Chief Justice Burger has argued that “when a ‘new’ fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon until particularized legislation can be . . . passed to deal directly with the evil.” United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting).


Section II of this article indicates that the legislative histories of the four statutes used to prosecute local corruption were narrowly focused on specific problems other than corruption. The legislative histories negate a congressional intent to broadly delegate to federal prosecutors the discretionary power to apply these statutes in entirely different factual contexts. When the legislative intent is ambiguous, the courts generally construe statutes to avoid possible constitutional infirmities. See, e.g., discussion of the doctrine of comity, infra, text Section III(B)(1). Given the ambiguity of the legislative intent, the language of these statutes should not be interpreted as broadly delegating law making powers because such delegation may be objectionable on separation of power grounds. See infra note 78 and accompanying text.
power to create new federal felonies, such broad delegation would be objectionable because of separation of power concerns.\textsuperscript{77}

Broad delegations of power are objectionable because they permit responsibility for government to pass out of the hands of Congress. To a certain degree therefore, broad delegation undermines the electoral check on Congressional power. . . . Moreover . . . broad delegations are politically objectionable because, by enabling Congress to pass the buck on hard choices, and to leave such choices to administrative or executive processes less open to inputs from affected groups, such delegations may short-circuit the pluralist processes of interest accommodation usually structuring legislative decision making.\textsuperscript{78}

B. Federalism Concerns

Federal prosecutors enjoy broad discretion to prosecute local corruption — conduct which was policed almost exclusively at the state level until a decade ago. This broad discretion may result in

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\textsuperscript{77} When the validity of a congressional \textit{delegation} of its lawmaking powers is at issue, the courts focus directly at issues of separation of powers. I K. Davis, \textit{Administrative Law Treatise} 157 (2d ed. 1979) [hereinafter cited as Davis]. A litigator attacking an excessive delegation of legislative power to define crimes would stress separation of powers issues. \textit{Cf.}, N. Abrams, \textit{supra} note 75.

\textsuperscript{78} L. Tribe, \textit{American Constitutional Law} 288 (1978). In the administrative law context, explicit delegations of criminal lawmaking authority to administrative agencies is sometimes upheld over separation of power objections. \textit{See} Davis, \textit{supra} note 77, at 150-51. “Since 1911, federal law has been clear that administrators may be delegated power to issue regulations the violation of which a statute makes a crime. United States v. Grimaud, 220 U.S. 506 (1911).” Davis, \textit{supra} note 77, at 190.

The Grimaud doctrine does not significantly weaken the separation of powers objections to congressional delegation of power to federal prosecutors to define new federal felonies. The courts are reluctant to uphold broad delegations of lawmaking power when Congress is, itself, capable of developing more definitive criminal law provisions. W. Geelhoorn & C. Byse, \textit{Administrative Law: Cases and Comments} 71 (6th ed. 1974). Congressional delegations to administrative agencies occur most often in complex, technical areas in which only a specialized administrative agency is practically equipped to develop rational guidelines. For example, the Clean Air Act of 1970 authorizes the Administrator of the E.P.A. to set “emission standards” for hazardous air pollutants, the knowing violation of which is a criminal offense under § 113(c)(1)(C) of the Act. 42 U.S.C. §§ 1857(c), 1858(c)(1)(c) (1976). \textit{See also} Adamo Wrecking Co. v. United States, 434 U.S. 275, 276-77 (1978). Grimaud involved a statute which provided for criminal sanctions for violations of the Secretary of Agriculture’s rules about using forest reservations. By contrast, Congress is qualified to consider the broad social, moral, economic, and political issues relevant to the development of widely applicable standards of social conduct.

The sanctions for regulatory crimes are generally minor compared to sanctions for federal felonies. Conduct that involves severe criminal penalties should be defined by a highly visible and democratic institution, namely, Congress. Finally, administrative agencies which promulgate regulations which will trigger criminal sanctions do so under a significant system of procedural safeguards that provide for public scrutiny and feedback—the Administrative Procedure Act. 5 U.S.C. § 551 (1976). Prosecutorial discretion to define new crimes by broadly interpreting federal statutes is invisible from the public and uncontrolled by formal procedural restrictions, which makes broad delegation of lawmaking powers all the more objectionable.

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a radical alteration of the balance of law enforcement responsibility between the states and the federal government, contrary to constitutional notions of federalism.

There are numerous concerns about the federal government's expanding role in policing local criminal activity. Because of the remoteness of Congress from the local electorate, federal criminal law will be relatively unresponsive to changing social concerns. Centralized law enforcement authority, insulated from local control, may become oppressive. Most importantly, the unrestrained exercise of federal criminal jurisdiction would work "a wholesale destruction of state responsibility and state autonomy in the preservation of public order and the administration of criminal law."  

The state interest in law enforcement autonomy seems especially compelling in the context of local political corruption.

The duty owed the state and its citizens by an elected official is fiduciary in nature, a special duty of honest and faithful service. Insuring the performance of this duty is best left to its beneficiaries — the people and government of the state. Indiscriminate intervention by the federal government may dampen not only internal state efforts at reforms, but also the special rapport necessary between an elected representative and his constituency.


The destruction of state autonomy in local law enforcement directly raises serious federalism problems. Moreover, the assumption of greater state and local law enforcement responsibility by the federal government would also add to the burdens of the vastly overburdened federal judiciary. Hufstedler, Comity and the Constitution: The Changing Role of the Federal Judiciary, 47 N.Y.U. L. Rev. 841, 857-58 (1972). The effect, at least in the short run, will be a reduction in the effectiveness of criminal law enforcement.

81. See Comment, supra note 61, at 73-74. Some have argued that federalism concerns about the increasing assumption of local law enforcement responsibility by the federal government are undercut by the willingness of state and local officials to accept more and more federal intervention. Comment, The Scope of Federal Criminal Jurisdiction Under the Commerce Clause, 1975 U. ILL. L.F. 805, 822-23 (1972); Interview with Philip Heymann, Assistant Attorney General and Chief of the Criminal Division, Department of Justice, in Cambridge, Mass. (Oct. 29, 1979) (seminar Discussion) [hereinafter cited as Heymann Interview]. However, the testimony of state Attorneys General at the hearings on the proposed federal criminal code suggests that the states are not happy with the growing federal role in policing local crime, especially local corruption. The Attorneys General strongly criticized the expansion of federal criminal jurisdiction under the proposed code and recommended that enforcement of local corruption should be left entirely to the states. Subcomm. Hearings, supra note 80; see also STAFF OF SEN-
"The primary responsibility for feretting out . . . the political corruption of [local officials] must rest, until Congress directs otherwise, with the state, the political unit most directly involved."

Concerns about significant changes in the allocation of law enforcement responsibility between the states and the federal government are embodied in two doctrines: the doctrine of comity and the doctrine that the federal government should not exercise criminal jurisdiction absent a strong federal interest. The broad federal discretion to prosecute local corruption, discussed in Section II, is in conflict with both doctrines.

1. Comity

The Supreme Court in United States v. Bass described the principle of comity as follows: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relations between federal and state criminal jurisdiction." The doctrine, the Court continued, is based on Congress' traditional reluctance "to define as a federal crime conduct readily denounced as criminal by the states" and is "rooted in the . . . concepts of American federalism." The legislative histories of RICO and the other statutes applied to local corruption do not indicate a clear congressional intent to reach such conduct. Additionally, given the ambiguity of the legislative intent, the discretion of federal prosecutors to broadly interpret the statutory language to reach conduct traditionally policed by the states seems inconsistent with the doctrine of comity.

2. Substantial Federal Interest

The second doctrine rooted in federalism seeks to limit the exercise of an unambiguous legislative grant of federal criminal jurisdiction. "The federal prosecutor should recognize that the existence of jurisdiction is not a mandate to federalize all forms of state crime but is, rather, intended to be auxilliary to state en-
The presence of a particular jurisdictional element under a federal criminal statute "only very crudely marks off an area in which . . . a substantial national interest exists." 

"While sections of the Constitution can be stretched to justify federal control over nearly every phase of human conduct, the spirit of the document still demands that there be true need for federal action — a true federal interest — before the federal government may act."

Assuming that Congress had clearly granted federal jurisdiction over local corruption, there are admittedly instances in which a substantial federal interest in the exercise of that jurisdiction does exist. However, federal discretion under RICO and the other federal statutes is so broad that prosecutions which fail to serve a substantial federal interest can and do result.

If state and local corruption causes the breakdown of local law enforcement, the case for federal intervention is strong. Corruption in enforcement of state laws often encourages offenses that are also federal crimes. "Also, to the extent that corruption discourages the exchange of information and other forms of cooperation between federal agencies and local [enforcement officials], it will have still broader ramifications for the effectiveness of federal law enforcement. . . ." A great number of reported RICO cases involve prosecutions of local police officials or prosecutors who have accepted bribes to "protect" local vice activity. It is debatable whether there is a strong federal interest in combating corrupt non-enforcement of state law against, for example, purely

86. Ruff, supra note 2, at 1213-14.
89. Any conclusion stated in this section that federal prosecution seems justified is based on the assumption that Congress evinced a clear intention to reach local political corruption. It is argued above that it is doubtful that Congress ever intended that RICO and the other three statutes be applied to local corruption. Under the doctrine of comity, the statutes should not be so applied.
91. Ruff, supra note 2, at 1217.
92. See, e.g., cases cited supra note 21.
local gambling and prostitution.\textsuperscript{94} However, in many cases, federal prosecution of corrupt local law enforcement officials seems justified.

Federal prosecutions of corrupt local officials who are not involved in law enforcement are often justified by the argument that local enforcement officials are unwilling to prosecute such defendants themselves.\textsuperscript{95} When local officials request federal intervention or when there is evidence of systematic or improper failure to prosecute at the local level, federal intervention is, as noted above, perhaps justified. However, “an inquiry into the willingness . . . of state prosecutors to attack local political corruption is often, in reality, an examination of the [state] prosecutor’s discretion. . . . Federal prosecutors . . . [should not] override state discretion on an unsupported assumption that the state prosecutor will not do his job.”\textsuperscript{96} For example, \textit{United States v. Fineman}\textsuperscript{97} involved a RICO prosecution of the Speaker of the Pennsylvania House of Representatives, who allegedly wrote letters of recommendation to state medical schools in return for indirect bribes from in-state applicants. Federal prosecutors brought the case even though it was under investigation by a special state prosecutor, who had apparently decided not to indict. The federal jury found the evidence, which was based on the self-serving testimony of an informant, inadequate to support the RICO counts in a multi-count indictment.\textsuperscript{98} However, the RICO indictment in \textit{Fineman} may have been improperly based on an unsupported assumption that state enforcement officials declined prosecution for reasons constituting an abuse of discretion.

Federal prosecution of local offenses such as political corruption is justified in cases where local enforcement officials are incapable of successfully prosecuting serious offenses. For example, federal intervention may be necessary to police complex multi-state criminal ventures that involve corruption of state and local government units. It is inefficient and impractical for local authorities to investigate multistate crime because they are limited to prosecution of the local aspects of the criminal activity. Moreover, the states lack the legal mechanisms possessed by federal officials to bring scattered defendants to a single trial and compel

\textsuperscript{94} See Ruff, \textit{supra} note 2, at 1217-18; \textit{see also} United States v. Burnsed, 566 F.2d 882 (4th Cir. 1977).

\textsuperscript{95} \textit{Abrams, supra} note 75, at 54. “Federal investigation and prosecution may be desirable because local law enforcement may find it difficult or awkward to proceed since local officials are involved.” \textit{Id.}

\textsuperscript{96} Comment, \textit{supra} note 61, at 74.


\textsuperscript{98} Fineman was convicted only on a related obstruction of justice charge. \textit{Id.}
the appearance of distant witnesses. Finally, it seems inequitable to saddle one jurisdiction with the entire cost of investigation and prosecution of criminal conduct that transcends that jurisdiction.99

Federal exercise of criminal jurisdiction in political corruption cases may also be appropriate when organized crime is involved, since the adverse social consequences of allowing such activity to escape enforcement are substantial.100 "Corruption of public officials is one of the standard techniques of organized crime."101 A study by the Senate indicated that attorneys general in many states lack the authority to prosecute, successfully, complex organized crime activities.102

Efficient prosecution of local corruption frequently requires the use of highly specialized investigatory techniques103 which the Federal Bureau of Investigation and United States Attorneys (USA's) are better equipped to employ.104 "Federal agents begin to handle some types of crimes just because they do the job better and local police begin to defer and abdicate their function for this same reason."105 However, "if efficiency were the sole criterion for federal participation, many traditional state functions might be usurped by a more efficient federal bureaucracy. . . . Federalism, rather than efficient administration, is the issue."106 Given a "state's special interest in policing its own political process,"107 a federal interest greater than relative efficiency seems necessary to justify federal intervention. "Administrative diseconomies can be rectified by federal-state cooperation during the course of the investigation” and/or federal aid to local enforcement.108

Prosecution may serve a substantial federal interest when the

99. See Abrams, infra note 75, at 52-53.
100. See Brown Comm'n Proposal, infranote 90, at 17.
102. See Subcomm. Hearings, supra note 80, at 943.
103. For example, skilled analysis of government agency records by professional auditors to uncover patterns of illegal diversions of agency funds may be required.
104. See generally Radek Interview, infra note 11; Boston Evening Globe, supra note 2.
105. Abrams, supra note 75, at 53.
106. Comment, infra note 61, at 77.
107. Id.
108. Id.
applicable state or local charges are less serious than the applicable federal charges.109 If the federal offense covering particular conduct is more grave than the relevant state offense, local prosecution will not vindicate those federal interests that Congress contemplated in enacting the provision.

A sufficient federal interest in intervention may also exist where the jurisdictional base is closely related to the offense involved.110 For example, an offense which substantially threatens the integrity of the United States mails or imposes a direct burden on interstate commerce would seem appropriate for federal prosecution.111 A substantial federal interest in the prosecution of local political corruption may also arise from resulting interference with federal programs or the improper use of federal funds.112

There are many examples, however, of federal prosecutions lacking any of the federal interests discussed above. The increasing occurrence of federal prosecutions of local corruption, when there is no substantial federal interest, indicates that prosecutorial discretion is too broad and that its exercise is inconsistent with constitutional notions of federalism.

There are many examples of RICO prosecutions of local corruption where a significant federal interest was not demonstrated. For example, in United States v. Vignola,113 the President Judge of the Philadelphia Traffic Court was convicted for collecting bribes from employees to guarantee their continued tenure and to “fix” traffic tickets. No transactional link to interstate commerce was apparent, and there was no indication that state enforcement officials were unable or unwilling to deal with such isolated cor-

109. In determining whether a federal statute is “applicable” to a state law offense, it is important to establish whether Congress clearly intended the statute to apply to that type of conduct. Congress did not intend for the RICO statute to be applied to local officials who accept bribes to influence their official actions. See text Section II(A). Therefore, a substantial federal interest would not be served by a RICO prosecution of a corrupt official for accepting bribes even though the RICO offense is much more grave than the applicable state law offense. See infra note 119.

110. See Schwartz, supra note 87.

111. See Comment, supra note 61, at 75-76. Several recent RICO prosecutions seem justifiable because the official conduct involved had a substantial impact on interstate commerce. See, e.g., United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977). In Frumento, the defendants were employees of a state liquor and cigarette tax commission. They smuggled liquor into the state and resold it after attaching phony state tax stamps so as to avoid incurring state liquor taxes. The scheme directly involved interstate smuggling, and prosecution seemed to serve the federal interest in protecting interstate commerce. See also United States v. Barber, 668 F.2d 778 (1982).

112. See Ruff, supra note 2, at 1215.

ruption in a minor part of the city judicial system. The justification for federal prosecution was unclear at best.

In *United States v. Salvitti*, the Executive Director of the Philadelphia Redevelopment Authority was prosecuted under RICO for taking an indirect kickback in return for a favorable settlement with an individual who had a disputed claim to a local parcel controlled by the Authority. No transactional link to interstate commerce was involved, and there was no evidence of corruption or politically motivated enforcement inertia. In fact, the Mayor's office publicly repudiated the settlement negotiated by the defendant. A federal interest, if any, seems remote at best.

Studies of federal statutes in addition to RICO also indicate that the courts are allowing federal prosecution of local corruption despite the absence of a significant federal interest. One study of the Mail Fraud Act concluded that "the vast majority of federal mail fraud prosecutions of elected state officials have been conducted with insufficient consideration as to either the special interest of a state in policing its own political processes or the existence of a special federal interest to justify such prosecutions." An analysis of the Hobbs Act found that "it is apparent . . . from the present Hobbs Act prosecutions that many of [the crimes prosecuted] had only remote and tangential effects upon the national policy." Prosecutions in these instances fail to serve a substantial federal interest.

**C. Concerns About the Fairness of the Criminal Justice System**

For many years there has been concern about the role of discretion in criminal administration—the extent to which the subjective judgment of an official determines what will be done with a suspect, defendant or convict. The basis for this concern has been the fear that people's lives, liberty and well-being depend on arbitrary, discriminatory or corrupt decisions.

This section will assess the impact of the broad discretion of federal prosecutors to prosecute local corruption on the fairness of the criminal justice process.

Broad federal discretion in prosecuting local corruption may result in horizontal inequity—dissimilar treatment of similar offenders. A local official who has solicited a bribe faces state bribery

sanctions as well as federal law sanctions if one of the common federal jurisdictional elements is present. Because federal offenses have distinct jurisdictional elements, the courts have found that double state/federal prosecutions do not violate the double jeopardy clause. The penalties under state and federal law for identical political offenses are substantially different.

Since several of the jurisdictional elements of the four statutes used to prosecute local corruption are commonly present, federal prosecutors frequently enjoy the discretion to indict corrupt government officials under more than one federal statute. The discretion of the prosecutor to charge under more than one of these statutes gives him significant control over the possible penalty imposed on a defendant since the penalties range from five to twenty years' imprisonment and from $1000 to $25,000 in fines.

Clearly, the federal prosecutor, because of his power to prosecute under one or more of several federal statutes or to defer to state prosecution, has enormous discretion to treat identical offenders differently. "There is no clear statutory evidence to prove substantial inter- or intra-district disparity in the procedures of federal prosecutors. The lack of proof belies only the primitive state of methodology and does not demonstrate that [this enormous prosecutorial discretion does not require close control]."

The discretion of federal prosecutors to punish conduct not clearly covered by federal statutes makes the criminal justice system less fair by denying offenders clear advance notice of what

118. Double prosecutions are upheld even when the defendant has been acquitted in state court for an offense that constituted the predicate act in a subsequent federal prosecution. See, e.g., United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977).

119. For example, the maximum penalty for state common law bribery is typically one year of imprisonment. See Ruff, supra note 2, at 1196. A local official can be prosecuted under the Hobbs Act or RICO and face imprisonment for up to twenty years for the solicitation of a bribe, regardless of the amount involved. Atkinson, supra note 15, at 2, 18.

120. In United States v. Gillock, 587 F.2d 284 (6th Cir. 1978), rev'd, 445 U.S. 360 (1980), a Tennessee state senator was indicted under the Hobbs Act, the Travel Act, and RICO. The case reached the U.S. Supreme Court on a legislative privilege issue; the Court did not reach any substantive RICO issue.

In United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), the Governor of Maryland was indicted under both the Mail Fraud Act and RICO for the same corrupt transaction.

121. 18 U.S.C. §§ 1963(a), 1341, 1951, 1952 (1976). The discretion of the prosecutor to determine the punishment for an offense by selecting the charges is, of course, limited by the judicial determination of a sentence. An analysis of the impact of the prosecutor's charging decision on the sentence actually imposed is beyond the scope of this article. For a discussion of this subject, see Bubany & Skillern, Taming the Dragon: An Administrative Law for Prosecutorial Decision Making, 13 AM. CRIM. L. REV. 473, 480-81 (1976).

conduct is punishable under federal law. Some scholars argue that this notice argument is substantially weakened because the predicate acts under statutes like the Hobbs Act and RICO are clearly criminal at the state level. However, given that federal law penalties are often substantially greater than state law penalties, notice of possible incremental punishment under federal law seems required on fairness grounds.

Broad official discretion can also make the criminal justice system less fair by facilitating the exercise of official discretion for improper reasons. While corruption among federal prosecutors is not a significant problem, the political nature of the office of the USA may promote the unfair exercise of prosecutorial charging discretion. Excessively vigorous prosecution of local corruption may be politically expedient for a prosecutor who covets a higher political office.

IV. NARROWING FEDERAL DISCRETION IN THE PROSECUTION OF LOCAL POLITICAL CORRUPTION

Section III discussed several concerns about broad federal discretion in the prosecution of local political corruption. This Section will examine alternative ways of narrowing that discretion through judicial, legislative, and administrative action and evaluates recent efforts by Congress and the Justice Department to limit prosecutorial discretion in this area.

A. Judicial Action to Narrow Federal Prosecutorial Discretion

1. Judicial Interpretation of Federal Criminal Statutes

Federal prosecutors have carried out their policy of vigorous

123. Vorenberg, supra note 14, at 665. Notions of "fair notice" underlie the practice of voiding ambiguous criminal statutes for vagueness under the due process clause. See LeFAVE & SCOTT, HANDBOOK ON CRIMINAL LAW 83-89 (1972). The courts have uniformly rejected constitutional challenges to RICO and the other statutes on constitutional vagueness grounds. See, e.g., United States v. White, 386 F. Supp. 882 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973). The notice argument made here is a policy argument that has significance independent of the constitutional doctrine. As the Supreme Court has stated: "A fair warning should be given to the world in the language that the common world will understand, of what law intends to do if a certain line is passed. To make the warning fair, so [far] as possible the line should be clear." United States v. Bass, 404 U.S. at 348. The Court stated that this notion of fair warning is at the base of the doctrine of lenity.

124. Heymann Interview, supra note 81.
125. Comment, supra note 61, at 78-79.
prosecution of local corruption by successfully advocating "creative" interpretations of four federal statutes. Narrower judicial interpretations of these statutes would be consistent with the apparent legislative intent and the principles of comity, separation of powers, and federalism. If the courts were less inclined to validate broad interpretations of such statutes, prosecutorial discretion to develop and implement broad law enforcement policy in the local corruption area could be greatly narrowed. Such a judicial policy may impair the ability of federal officials to prosecute some offenses which are not being effectively policed at the state level. However, "[while] the temptation to extend the legislation is great in cases where evil men otherwise would go free . . . both the judges and the prosecutors have a responsibility to put aside private attitudes and avoid rewriting legislation."  

It should be noted that the reach of the Mail Fraud and Travel Acts to local corruption has been narrowed in some jurisdictions. However, recent federal courts continue to accept expansive interpretations of the RICO statute and the Hobbs Act in local corruption prosecutions. Overall, then, there is little hope that federal prosecutorial discretion in this area will be significantly narrowed by future changes in federal court interpretations of the relevant statutes.

2. Limited Judicial Review

Kenneth Culp Davis advocates limited judicial review of the prosecutor's charging discretion, similar in scope to review of decisions of administrative agencies. He argues that review limited to remedying abuses of prosecutorial discretion would not result in the courts "taking over" basic prosecutorial functions.

The federal courts have held that even limited judicial review of prosecutorial discretion is unconstitutional or at least unwise. The Second Circuit, in 1973, stated:

[T]he manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision. On balance, we believe that substitution of a

127. See generally Comment, supra note 61.
129. Traditionally, federal courts have argued that judicial review of prosecutorial discretion violates the principle of separation of powers. See, e.g., United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied sub nom., Cox v. Hauberg, 381 U.S. 95 (1965). But, as Davis properly points out, the courts constantly allow limited judicial review of delegated executive discretion in the administrative law area. Davis, supra note 128 at 209-12. The discussion in the text will focus on the wisdom of limited judicial review of prosecutorial discretion, not its constitutionality.
130. The Second Circuit continued:
court's decision to compel prosecution for the U.S. Attorney's decision not to prosecute, even upon an abuse of discretion standard of review and even if limited to directing that a prosecution be undertaken in good faith . . . would be unwise.\textsuperscript{131}

Increasing reliance on judicial review to control prosecutorial charging discretion would raise several serious problems. Judicial review of the prosecutor's charging decision may "judicialize" this level of decision-making by causing it to be more formal and trial-like. "As a trend toward judicialization grows, the criminal process as a whole becomes enormously more complex, expensive and time consuming."\textsuperscript{132} Moreover, "ready availability of judicial review could interfere with the rapid development of the desired types of internal controls."\textsuperscript{133} As Professor Vorenberg has pointed out, "[t]he process of narrowing discretion will be promoted if courts, in protecting the individuals against abuse, find ways to encourage rather than preempt the assumption of responsibility by legislatures and criminal justice officials."\textsuperscript{134} Finally, administrative review, limited to a judicial determination of whether an official has abused his discretion, may not be adequate to deal with the problems of prosecutorial charging discretion, as noted in the following passage:

Judicial review is best adapted to correcting real, particularly extreme, problems of prosecutorial charging discretion. Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380-81 (2d Cir. 1973) (citations omitted). See also Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.).

\textsuperscript{131} Inmates of Attica, 477 F.2d at 380-81. The courts do review prosecutorial charging discretion if it is exercised on the basis of a constitutionally forbidden factor such as race. See, e.g., Oyler v. Boles, 368 U.S. 448, 456 (1962).


\textsuperscript{133} Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. REV. 1, 51-52. See infra text accompanying notes 264-70 for a discussion of DOJ Guidelines.

\textsuperscript{134} Vorenberg, supra note 14, at 697.
abuses in administrative action. Although such abuses may occur, real arbitrariness is not necessarily the major problem of prosecutorial decision-making today. The unevenness of application inherent in a multiple decision-maker system operating without articulated criteria is also of great concern. And judicial review is not well adapted to correcting such unevenness.135

In light of these problems and judicial reluctance to review prosecutorial discretion, expanding judicial review does not seem a very promising alternative for control of federal prosecutorial discretion.136

B. Legislative Action to Narrow Federal Prosecutorial Discretion

1. Legislative Pronouncements on Major Policy Issues

Neither the statutory language nor the legislative histories of the four federal statutes used to prosecute political corruption indicate that Congress intended to sanction such conduct. The constitutional concept of separation of powers requires that Congress definitively answer broad substantive questions such as whether local corruption is to be a federal offense.137 Moreover, as a matter of policy, “legislatures should take responsibility for major issues of policy which they believe are ripe for the relatively long-term resolution involved in legislation.”138

The most recent versions of the proposed criminal code in both the House139 and the Senate140 explicitly criminalize local corruption to roughly the same extent as does the current case law. Both proposed codes have provisions, similar to 18 U.S.C. § 1962(c) of RICO,141 which expressly include government bodies as “enterprises.”142 The Judiciary Committee Reports of both

135. Abrams, supra note 133, at 51-52.
136. Other aspects of judicial review are discussed in text infra at Section IV(C)(6).
137. See supra notes 69-78 and accompanying text, especially note 78.
140. S. 1722, 96th Cong., 1st Sess. (1979). Through the 96th Congress, no version of the code had passed both houses.

There have been three major versions of the criminal code in the Senate — S. 1, 93d Cong., 2d Sess. (1975); S. 1437, 95th Cong. 1st Sess. (1977), which was passed by the Senate in January, 1978; and S. 1722, 96th Cong. 1st Sess. (1980). H.R. 6915, 96th Cong., 1st Sess. (1979) was the first major version of the Code to originate in the House.

141. Specifically, these corresponding sections are: H.R. 6915, 96th Cong., 1st Sess. § 2701 (1979) and S. 1722, 96th Cong., 1st Sess. § 1802 (1980). Unlike § 2701 of the House Resolution, § 1802 of Senate Bill 1722 relaxes the jurisdictional requirements of RICO by not requiring that the enterprise be engaged in commerce. Since virtually every government agency has some effect on interstate commerce under current law, this change will have a minimal impact. See supra note 19.
142. “Enterprise” is defined in S. 1722, 96th Cong., 1st Sess. § 111 (1980) and

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houses explicitly state that the statutory provisions carry forward the current applicability of RICO to corrupt state and local officials. Senate Bill 1722 and House Resolution 6915 have bribery provisions expressly applicable to state and local government officials. Both bills have extortion provisions which are clearly intended to apply to local corruption to the same extent as the Hobbs Act, as currently interpreted by the courts. Finally, both versions of the code have fraud provisions which duplicate the current coverage of local corruption by the Mail Fraud Act.
In carrying forward the broad coverage of local corruption by current case law, the drafters were not unmindful of federalism-based objections to broad federal concurrent jurisdiction. For example, the Senate Judiciary Committee, in explicitly extending the bribery provision of Senate Bill 1722 to local officials, noted such objections and responded:

The true interests of Federalism are often better served by occasional Federal intervention . . . acting as an impetus to local vigilance than by a legislatively-mandated hands-off policy leaving exclusive authority for enforcement of the bribery laws to the very officials who are most apt to be the subject of bribery attempts.147

The Senate Report did not indicate that the Committee rejected more extensive or plenary jurisdiction over local bribery (section 1351) because of concerns about federalism.148

The provisions of the proposed code, discussed above, indicate that Congress is capable of articulating at least the broad contours of a federal criminal law policy on local corruption. All major versions of the code concur on the broad policy issue of whether local corruption should constitute a federal offense under some circumstances. The current House and Senate versions define the specific substantive offenses applicable to local officials in similar terms. Although the House and Senate differ on the jurisdictional requirements for some offenses, both seem willing to establish jurisdiction over corruption that is at least as broad as that under current statutory and case law.149 In sum, the broad policy issues in the local corruption area seem ripe for legislative determination. Congress can and should enact legislation that speci-

96th Cong., 1st Sess. § 1734 (1980) tracks the general language of the Mail Fraud Act — “scheme or artifice to defraud.” The Judiciary Committee Report makes clear that § 1734 was intended to apply to conduct prohibited by the Mail Fraud Act as currently interpreted. JUDICIARY COMM. REPORT, supra note 143, at 707, 709-10.

The jurisdictional requirements of § 2534(d) of House Resolution 6915 and § 1734(e) of Senate Bill 1722 are similar. There is a federal jurisdiction over a fraudulent scheme when, in the commission of the offense, the actor uses or causes the use of the mails, interstate or foreign communication facilities, or travels, or causes any other person to travel in interstate or foreign commerce.

147. JUDICIARY COMM. REPORT, supra note 143, at 406. See also HOUSE REPORT, supra note 13, at 300-04.

148. JUDICIARY COMM. REPORT, supra note 143, at 406 n.47. See supra note 144. Cf. the extortion provision of S. 1722, 96th Cong., 1st Sess. § 1722 (1980), which provides for broad “affecting commerce” jurisdiction.

149. Senate Bill 1722 and House Resolution 6915 differ significantly on the jurisdictional elements of the bribery and extortion offenses. See supra notes 143-44. They also differ slightly on the jurisdictional requirements of the racketeering provision. See supra note 141. Senate Bill 1722, with the slight variation for the racketeering provision noted supra at note 141, carries forward the jurisdictional coverage of current law. While the jurisdiction over extortion under House Resolution 6915 is slightly narrower than current law, the plenary jurisdiction over bribery is substantially broader. See supra notes 144-45.
ifies the substantive conduct and the jurisdictional circumstances that may trigger federal prosecution of local corruption.

Congressional determination of the broad policy issues in this area would assuage some, but not all, of the concerns about federal prosecutorial discretion discussed in Section III. Clear legislative articulation of policy reduces the discretion of federal prosecutors to develop their own legislative policy by creative application of general statutory language.150

Under both versions of the proposed code, most instances of local corruption could be prosecuted under several substantive provisions. This overlap in coverage results in considerable prosecutorial discretion to vary the charges and the possible punishment of similar conduct makes the criminal justice system less fair.151 This article will later discuss how Congress might act to reduce the potential for such unfairness.

All versions of the proposed code have expressly provided for broad federal jurisdiction over local corruption. Plenary exercise of that jurisdiction would result in federal prosecution of most existing local corruption. To the extent Congress specifies the jurisdictional prerequisite for prosecution of local corruption, it reduces concerns based on notions of comity. Exercise of jurisdiction in a way that alters the balance of powers between the states and the federal government is less objectionable if Congress has explicitly granted jurisdiction.152 However, exercise of

150. Congress, especially the Senate, seemed deferential to judicial interpretations of prior law in drafting the proposed code. For example, the Senate Judiciary Committee uncritically adopted the “affecting commerce” language as the jurisdictional base in its “color of right” extortion provision (§ 1722) because the current Hobbs Act has the same base. The Committee Report did not mention possible federalism objections to the “affecting commerce” jurisdiction in § 1722. JUDICIARY COMM. REPORT, supra note 143, at 652. However, in rejecting “affecting commerce” jurisdiction for the bribery provisions of § 1351, the same report expressed concern that that “provision alone would probably reach every case of local corruption in the country.” Id. at 406 n.7. Under current law, federal jurisdiction over state bribery law is under the Travel Act or RICO, neither of which has “affecting commerce” jurisdiction.

Efforts by both bodies to limit the breadth of statutory coverage of local corruption prompted a concerted lobbying effort by the DOJ. In all instances, Congress yielded and reincorporated provisions with the scope of current law. See supra note 142 and accompanying text. To the extent Congress uncritically adopted criminal law policy advanced by the DOJ and adopted by the courts, separation of power concerns about prosecutorial law-making persist. See supra notes 68-77 and accompanying text.

151. See supra notes 116-24 and accompanying text.

152. See supra notes 82-84 and accompanying text.
federal jurisdiction when it does not serve a substantial federal interest is in tension with other notions of federalism. Subdivision three of this section will examine how Congress might act to limit the exercise of federal jurisdiction over local corruption in instances where such exercise serves a substantial federal interest.


Under the proposed codes, a federal prosecutor enjoys significant discretion to vary the range of possible punishment applicable to particular misconduct by choosing the provision(s) under which he will indict. For example, a common instance of local corruption could be prosecuted under any or all of the bribery, fraud, extortion, and racketeering provisions of either version of the code. The maximum sanctions under the four applicable provisions vary from five to twenty years imprisonment in the

153. See supra notes 85-115 and accompanying text.

154. Consider a local official who accepts several bribes from the same person in return for favorable official actions. This conduct would support a prosecution of the official under § 1351 of Senate Bill 1722 (bribery) if interstate travel or use of the mails or a facility in interstate commerce was involved in the promotion, execution, or concealment of the offense. Section 1751 of House Resolution 6915 would apply without these jurisdictional elements, but a federal prosecutor would have to satisfy the procedural requirements of § 1751(b) before indicting a local official.

Accepting the bribes would be indictable as conduct executing an "artifice to defraud" under § 1734 of Senate Bill 1722, given the jurisdictional elements required by § 1351 of that bill. The Senate Judiciary Committee acknowledged that § 1734 was intended to encompass schemes to defraud citizens of the faithful services of local officials. See supra note 146 and accompanying text. H.R. 6915, 96th Cong., 1st Sess. § 2534(a)(1)(C) (1980) explicitly covers the same type of scheme.

This conduct would constitute extortion under color of right, under § 1722(a)(2) of Senate Bill 1722, since this offense does not require proof of actual or threatened force or violence or fear. JUDICIARY COMM. REPORT, supra note 143, at 650. This conduct would also constitute extortion under § 2522(b) of House Resolution 6915, but there are procedural prerequisites to the indictment of local officials in § 2522(c). Interstate travel or use of the mails or an interstate facility would not be required to establish jurisdiction under § 1722 of Senate Bill 1722 if the offense "affected" interstate commerce. S. 1722, 96th Cong., 1st Sess. §§ 1722(d)(1), 1721(c)(5) (1980). See also supra note 145. Similar "affecting commerce" jurisdiction exists in the House version. H.R. 6915, 96th Cong., 1st Sess. § 2522(d)(1)(E) (1980). This jurisdictional base is very broad. See supra note 150.

The series of bribes, if they are interrelated, would support a prosecution under § 1802 of Senate Bill 1722, which is similar to RICO. The local official would be guilty of conducting an enterprise—his local government office—through a "pattern," defined in § 1807(e) of Senate Bill 1722, of racketeering activity which is defined in § 1807(f) of the same bill to include state law bribery. Section 2701 of House Resolution 6915 would similarly apply. See supra note 141.
Senate Bill, and from 40 to 160 months in the House Resolution.\textsuperscript{155}

Earlier versions of the proposed code provided for less overlap in the substantive provisions applicable to local corruption. However, Congress restored the broad coverage of current case law, apparently in response to Justice Department statements that such coverage was necessary to adequately police local corruption.\textsuperscript{156} The most recent versions of the proposed code indicate that Congress is more concerned with eliminating gaps in the federal criminal law coverage of local corruption than it is with creating an overlap in substantive provisions. However, neither version attempts to limit or guide the resulting discretion of federal prosecutors in charging defendants under overlapping provi-

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<tr>
<th>Offense</th>
<th>S. 1722</th>
<th>Felony Grade</th>
<th>H.R. 6915</th>
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<tr>
<td>Bribery</td>
<td>§ 1351(b)</td>
<td>C</td>
<td>§ 1751</td>
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<tr>
<td>Extortion under color of right</td>
<td>§ 1722(c)</td>
<td>D</td>
<td>§ 2522</td>
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<td>§ 2534</td>
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<td>Racketeering</td>
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<th>Felony Grade</th>
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<td>20 yrs.</td>
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<td>C</td>
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<td>5 yrs.</td>
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\textsuperscript{155} An early draft of the House version of the proposed code omitted several of the provisions added by House Resolution 6915 to reach local corruption. Originally, the bribery provision of § 1751 of the resolution was limited to elected “public servants.” The extortion provision of § 2522 did not include an “under color of right” provision. The fraud provision was drafted so as to require the imposition of economic loss and apparently did not reach schemes to deprive citizens of the faithful services of public servants. The provisions were restored after Assistant Attorney General Philip Heymann explained to the House Judiciary Committee how their version was “inadequate” to effectively prosecute certain types of corrupt activity by certain officials. Senate Hearings, supra note 144, at 9925-26 (statement of Philip Heymann before House Subcommittee). The draft of the House Resolution was introduced to the Senate by Senator Kennedy as Senate Bill 1723 on Sept. 7, 1979. See Senate Hearings, supra note 144, at 11495.

The first draft of the Senate Bill (S. 1) omitted the “color of right” \textsuperscript{1722} extortion provision. The Senate Judiciary Committee believed that the corrupt receipt of property by a government official would be adequately covered by the bribery provisions or the traditional extortion provisions. In defending the restoration of the “color of right” provision in Senate Bill 1722, the Senate Report cited a concerned letter from the DOJ which argued that the omission in S. 1 would render “far more difficult” the prosecution of certain corrupt activity. Reform of Criminal Laws: Hearings Before the Senate Comm. on the Judiciary on S. 1437, 95th Cong., 1st Sess. 9240 (1977) (letter from Ass't A.G. Richard Thornburgh to Senator McClellan, Feb. 19, 1976, reprinted). See also Judiciary Comm. Report, supra note 143, at 650 n.64.
The prosecutor seems to be the appropriate party to ultimately determine which of several applicable provisions should be applied to particular misconduct. Nonetheless, it would be desirable for Congress to enact general guidelines of prosecutorial charging discretion where federal substantive provisions overlap substantially. Omissions in the proposed codes indicate that Congress does not think it appropriate to articulate even general guidelines at this time. However, the DOJ has developed new guidelines for selecting charges under a single indictment where more than one substantive provision is applicable. After the Department develops some experience with the new guidelines, Congress should consider enacting similar general provisions to guide prosecutorial charging discretion.

3. Narrowing Prosecutorial Discretion to Exercise Concurrent Federal Criminal Jurisdiction

Under current law, federal officials enjoy broad discretion to prosecute local corruption even when no significant federal interest would be served by prosecution. The proposed federal criminal codes create federal jurisdiction over local corruption

157. An early draft of the House version contained provisions barring multiple or successive federal prosecutions based on the same specific instance of conduct or criminal episode. These provisions were dropped from House Resolution 6915, perhaps in response to the strong criticism of the proposed provision by Assistant Attorney General Heymann. Senate Hearings, supra note 144, at 9939 (Addendum to Statement of Heymann Before House Subcommittee). Otherwise, neither house considered any provision to limit successive or multiple prosecutions or multiple charging under a single indictment for the same conduct.

The discussion here will focus on prosecutorial discretion to vary charges under a single indictment. The discretion of the prosecutor to vary the legal consequences of similar misconduct is most clearly raised in this context. The related problems of successive or multiple prosecutions based on the same conduct raises numerous other issues not directly relevant to this discussion, e.g., resource constraints on the federal prosecutors and courts, double jeopardy, and related ideas.

158. See supra notes 129-30 and accompanying text.

159. See Vorenberg, supra note 14, at 694. See infra analogous argument made, in more detail, at text accompanying notes 162-247. That section discusses the desirability of general legislative guidelines for federal discretion in prosecuting conduct that is punishable under both state and federal law.


161. A stronger argument can be made for immediate legislative enactment of DOJ standards on successive prosecution. The Department has had internal guidelines—the "Petite Policy"—on successive federal prosecutions since 1959.

162. See supra notes 79-82 and accompanying text for a discussion of federalism concerns.
that is at least as broad as under current law.\textsuperscript{163} Therefore, the need to control the discretion of prosecutors to exercise federal criminal jurisdiction over corrupt local officials is likely to survive any contemplated federal law reform.\textsuperscript{164}

The exercise of concurrent or “auxiliary” federal criminal jurisdiction “involves serious questions of policy concerning the administration of the federal courts, the role of federal law enforcement, and the possibility of usurping the state’s enforcement of their own criminal statutes.”\textsuperscript{165} Consequently, “the choice between an incursive or refrained enforcement policy in the exercise of federal jurisdiction [should be considered] a legislative function, and . . . should not be abandoned so lightly as it has been in the past.”\textsuperscript{166}

Congress could curtail federal prosecutorial discretion to exercise concurrent jurisdiction by narrowing criminal jurisdiction over local offenses. However, as Louis Schwartz argues:

[T]he use of a particular jurisdictional circumstance in the definition of a federal crime only very crudely marks off an area in which either (1) a substantial national interest exists or (2) the states are incapable of effective action. . . . Rather than limiting the jurisdictional bases, the better approach would be to delimit the bases and examine the nature and extent of the federal interest to be served by intervening in a given case.\textsuperscript{167}

The drafters of the recent versions of the proposed code apparently agree, in large part, with Schwartz’s view. In a few instances, the proposed codes limit the jurisdictional bases for provisions applicable to local corruption because of federalism concerns.\textsuperscript{168} However, Congress clearly felt that broad grants of concurrent jurisdiction\textsuperscript{169} were necessary to insure that federal  

\textsuperscript{163} See supra note 149 and accompanying text.

\textsuperscript{164} The proposed codes, unlike the Travel Act, enact federal definitions of extortion and bribery rather than incorporating a state law definition. Therefore, under the proposed code, there may not be a complete overlap of state and federal substantive provisions applicable to local corruption. However, the proposed federal definitions of bribery and extortion seem likely to reach most conduct prohibited by state law. In addition, the proposed code sections carrying forward RICO, —S. 1722, 96th Cong., 1st Sess. § 1802 (1980), and H.R. 6915, 96th Cong., 1st Sess. § 2701 (1980)—incorporate state law bribery and extortion.

\textsuperscript{165} See Continuing Debate, supra note 65, at 1415.

\textsuperscript{166} See Comment, supra note 2, at 1228; see also Frankfurter, supra note 73.

\textsuperscript{167} Schwartz, supra note 87, at 79.

\textsuperscript{168} See supra note 148 and accompanying text.

\textsuperscript{169} See, e.g., the examples of plenary jurisdiction contained in H.R. 6915, 96th Cong., 1st Sess. § 1751 (1980) (bribery); see also supra notes 144, 145 & 150 and the “affecting commerce jurisdiction” for extortion provisions in both versions of the code.
jurisdiction was available “in the event state or local jurisdiction cannot effectively be asserted.” The drafters of both versions also recognized that federal jurisdiction will exist in numerous instances where prosecution does not serve a substantial federal interest. Section 115(a) of House Resolution 6915 and section 205(a) of Senate Bill 1722 both explicitly state that a grant of concurrent federal jurisdiction does not require that it be exercised in every case. Both provisions require federal law enforcement officials to consider whether a particular exercise of concurrent jurisdiction serves an important federal interest before it is exercised.

The National Commission for the Reform of Federal Criminal Laws (Brown Commission) considered the feasibility of legislative rules specifying when an exercise of concurrent jurisdiction was justified by the presence of a substantial federal interest. The Commission concluded that “the factors involved are too complex and too diverse” to permit the development of detailed statutory standards for the exercise of federal criminal jurisdiction. “The best that can be hoped for probably is to articulate criteria in a more generalized form that will function as guidelines for, and not limits on, the exercise of federal jurisdiction.” The Brown Commission proposed general guidelines in section 207 of its proposed federal criminal code.

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170. JUDICIARY COMM. REPORT, supra note 143, at 51. See Senate Hearings, supra note 144, at 9921-22 (statement of Philip Heymann before House Subcommittee).

171. HOUSE REPORT, supra note 13, at 26-27.

172. H.R. 6915, 96th Cong., 1st Sess. § 115(b)(c) (1980); S. 1722, 96th Cong., 1st Sess. § 205(b) (1980). JUDICIARY COMM. REPORT, supra note 143, at 51, describes the benefits of such a provision as follows:

A statutory command that federal prosecutors satisfy themselves as to the existence of a substantial federal interest before instituting a federal prosecution with respect to a concurrent jurisdiction crime could act to inhibit the bringing of marginal federal cases and to guard against the excessive use of the some necessarily broad jurisdictional grants. . . .”

Id.

173. BROWN COMM’N PROPOSAL, supra note 90.

174. Abrams, supra note 75, at 57. Professor Vorenberg argues that in determining whether a legislative rule is the appropriate vehicle for narrowing executive discretion, one should consider:

[w]hether there is an adequate empirical basis for a decision and whether there is sufficient acceptance of the advantages of a clear-cut pre-announced rule to justify the kind of long term arbitrary line drawing and lumping of somewhat diverse cases that is involved in legislative action. If an issue is not yet ripe for such clear-cut legislative determination, one possible alternative is the use of legislative guidelines which identify the factors to be taken into account or which indicate a preferential order among possible actions to be taken.

Vorenberg, supra note 14, at 676.

175. Section 207 of BROWN COMM’N PROPOSAL, supra note 90 reads as follows:

§ 207. Discretionary Restraint in Exercise of Concurrent Jurisdiction

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Rather than set forth detailed rules, both Senate Bill 1722 and House Resolution 6915 follow the lead of the Brown Commission and establish general guidelines for the exercise of concurrent jurisdiction. Section 205(b) of Senate Bill 1722 lists six factors that federal law enforcement officials should consider in determining whether to exercise jurisdiction:

1. the relative gravity of the federal offense and the state or local offense;
2. the relative interest in federal investigation or prosecution;
3. the resources available to the federal authorities and the state and local authorities with respect to the offense;
4. the traditional role of federal authorities and the state and local authorities with respect to the offense;
5. the interests of federalism; and
6. any other relevant factors.

The factors listed in section 205 cover most of the general issues a federal prosecutor should consider in deciding whether to exercise concurrent jurisdiction. However, there are other more detailed factors that are clearly relevant to the existence of a federal interest in exercising concurrent jurisdiction. One factor, for example, is whether the effectiveness of state and local law enforcement has been substantially undermined by corruption.

Senate Bill 1722 does not preclude federal prosecutors from con-

Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies are authorized to decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial Federal interest in further prosecution or that the offense primarily affects state, local or foreign interests. A substantial federal interest exists in the following circumstances, among others:

(a) the offense is serious and state or local law enforcement is impeded by interstate aspects of the case; (b) federal enforcement is believed to be necessary to vindicate federally-protected civil rights; (c) if federal jurisdiction exists under section 201(b), the offense is closely related to the underlying offense, as to which there is a substantial federal interest; (d) an offense apparently limited in its impact is believed to be associated with organized criminal activities extending beyond state lines; (e) state or local law enforcement has been so corrupted as to undermine its effectiveness substantially.

176. H.R. 6915, 96th Cong., 1st Sess. § 115(b) (1980) requires the Attorney General to prescribe guidelines that federal law enforcement officers should consider in determining whether to exercise concurrent jurisdiction. Section 115(c) of House Resolution 6915 provides that the Attorney General's guidelines should take into account three factors, which correspond to factors (1) - (3) in Senate Bill 1722.

177. See supra notes 90-93 and accompanying text for evidence indicating that this factor is relevant to the existence of a substantial interest in federal prosecution. The Brown Commission's proposed § 207 listed law enforcement corruption as a relevant factor in these terms.
considering these factors; rather, it abdicates the task of specifying when a federal interest in prosecution exists. However, since these factors seem ripe for enactment as factors to be considered in determining when concurrent jurisdiction should be exercised, they should be specified in section 205. Section 115 of House Resolutions 6915 and section 205(b) of Senate Bill 1722 are hortatory; they do not direct federal enforcement officials to decline concurrent jurisdiction under any circumstances. Henry Friendly argues that Congress should direct federal prosecutors to decline to exercise concurrent jurisdiction according to the criteria specified in the Brown Commission's proposed section 207. The following modified version of section 207 seems worthy of legislative enactment:

Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies shall decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by non-federal agencies and it appears that there is no substantial federal interest in further prosecution or that the offense primarily affects state, local or foreign interests. A substantial federal interest exists in the following circumstances:

(a) when the federal charges applicable to the offense are substantially more serious than the applicable state, local or foreign charges;

(b) when federal enforcement is believed necessary to vindicate federally-protected civil rights;

(c) when an offense, apparently limited in its impact is believed to be associated with organized crime activities extending beyond state

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178. S. 1722, 96th Cong., 1st Sess. § 205(b)(6) (1980) and the JUDICIARY COMM. REPORT, supra note 143 at 53 n.112 make clear that prosecutors may consider other factors—including corruption of state law enforcement—which are relevant. It is unclear from the statutory language of H.R. 6915, 96th Cong., 1st Sess. § 115 (1980) or the HOUSE REPORT, supra note 13, at 27 whether the Attorney General may consider only those factors specified in § 115(c) of that resolution in developing his guidelines.

179. See supra text of note 174.

180. H.R. 6915, 96th Cong., 1st Sess. § 115(b) (1980) directs the Attorney General to prescribe guidelines which provide for the declination of concurrent jurisdiction absent a demonstrable, substantial federal interest. However, § 115(d) provides that federal enforcement officials deciding whether to exercise concurrent jurisdiction need only "consider" the Attorney General's guidelines. Section 115, therefore, is hortatory as regards federal prosecutors considering whether to exercise federal jurisdiction.

181. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW, 61 (1973). Other scholars have made similar proposals: see, e.g., Dobbyn, supra note 88, at 207; Ruff, supra note 2, at 1226.

The Brown Commission proposal states that a federal prosecutor was authorized, not compelled, to decline jurisdiction under the circumstances specified. See BROWN COMM'N PROPOSAL, supra note 90.

182. This subsection is based on S. 1722, 96th Cong., 1st Sess. § 205(b)(1) (1980). See supra note 109 and accompanying text for discussion of the relevance of this factor to a federal interest in the exercise of concurrent jurisdiction.

183. BROWN COMM'N PROPOSAL § 207(b), supra note 90.
(d) when the offense is serious and state or local law enforcement is impeded by interstate aspects of the case;

(e) when the offense is serious and impediments to state and local enforcement, due to inadequacies in local resources or expertise, cannot be rectified by the cooperation of federal law enforcement officials;

(f) when state or local law enforcement has been so corrupted as to undermine its effectiveness substantially;

(g) other appropriate circumstances which the Attorney General may publicly specify.

This proposal seems ripe for enactment for several reasons. First, the criteria it incorporates are the result of a thoughtful discussion in the academic literature that started with Louis Schwartz's seminal article in 1948. After vigorous debate over the last several years, Congress has recognized the need for guidelines for the exercise of concurrent jurisdiction. Purely

184. BROWN COMM’N PROPOSAL § 207(d) supra note 90; see also supra notes 100-02 and accompanying text.

185. BROWN COMM’N PROPOSAL § 207(a) supra note 90; see also supra note 99 and accompanying text.

186. This subsection was based on S.1722, 96th Cong., 1st Sess. § 205(b)(3) (1980), but modified in response to concerns expressed supra at notes 103-08 and accompanying text.

187. BROWN COMM’N PROPOSAL § 207(e), supra note 90. See also supra note 177.

188. The role of the Attorney General is discussed in more detail below. The proposal omits the factors set out in S. 1722, 96th Cong., 1st Sess. § 205(b)(2), (b)(4) (1980); these factors are incorporated in the basic Brown Commission standard, supra note 90, which requires consideration of state, local and federal interests in the offense. The § 205(b)(5) clause, “the interests of federalism,” was omitted because this factor merely restates the basic issue in its broadest terms.

189. Schwartz, supra note 87; see also NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970); ABRAMS, supra note 75; BROWN COMM’N PROPOSAL, supra note 90; FRIENDLY, supra note 181; Ruff, supra note 2; Pauley, supra note 76.


191. JUDICIARY COMM. REPORT, supra note 143 at 51-53; HOUSE REPORT, supra note 13 at 28-27.

Earlier versions of the Senate bill had consciously omitted any provision like the Brown Commission’s § 207. S. 1, 94th Cong., 1st Sess. (1974) had, instead, a provision that required the Attorney General to make annual reports setting out the number of prosecutions under each category of jurisdiction to facilitate congressional monitoring of the exercise of auxiliary jurisdiction by federal prosecutors. Academicians argued that this provision would be totally ineffective in limiting the exercise of concurrent jurisdiction. Ruff, supra note 2 at 1227. How-
hortatory guidelines, as one ranking staff attorney for the Senate Judiciary Committee candidly admitted, would be largely "cosmetic." 192

Also, legislative specification of any binding criteria may discourage the exercise of concurrent jurisdiction in some cases where a federal interest, not anticipated by Congress, exists. However, the relevant consideration is whether "the gross sum of the deviation from the assumed legislative norm resulting from individual judgments will exceed the deviation resulting from the inability to make fine calibration under a non-discretionary system." 193 In any event, the proposal authorizes the Attorney General to develop supplementary criteria and thus provides a mechanism for correcting congressional oversight. 194

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193. Vorenberg, supra note 14 at 664.

194. It may be appropriate for Congress to specify additional guidelines for federal prosecution of defendants who had been previously prosecuted at the state and local level for substantially the same conduct. The statutory standard could draw on the Department of Justice’s “Petite Policy,” a policy involving dual and successive prosecution. Manual, supra note 161. Senate Hearings, supra note 144, at 9939 (statement of Philip Heymann to House Subcommittee). The Department’s policy “precludes the initiation or continuation of a federal prosecution following a state prosecution based on substantially the same act or acts . . . unless the state proceeding left substantial federal interests demonstrably unvindicated.” Manual, supra note 161, at § 9-2.142. “The policy applies . . . whenever there has been a prior state proceeding (including a plea bargain) resulting in . . . termination of the case on the merits.” Id. The policy applies to dual prosecutions which are not already barred by the double jeopardy clause. For a complete discussion see Note, The Petite Policy, An Example of Enlightened Prosecutorial Discretion, 66 Geo. L. J. 1137, 1138 (1978) [hereinafter cited as Petite Policy].

The Department policy requires authorization by the appropriate Assistant Attorney General of any dual prosecution covered by the guidelines. Manual, supra note 161 at 20. The Manual lists several factors which the Assistant Attorney General should consider in determining whether a dual prosecution is necessary to vindicate a substantial federal interest. A dual prosecution is not warranted unless: 1) the defendant was acquitted in the prior state trial and a federal conviction is expected or 2) the defendant was convicted, but a federal conviction with an enhanced sentence is anticipated (perhaps because the maximum penalty under the state charge is substantially less than the maximum penalty for the federal charge). Id. at 20c. In addition, a subsequent federal prosecution may be warranted:

where there is a substantial basis for believing that the choice by either the prosecutor or the grand jury of the state charges which were filed or
The criteria in the statutory proposal are general. Justice Department experience in applying the general statutory guidelines should facilitate the development of a more specific standard which may eventually gain sufficient acceptance to justify statutory enactment. Congress should authorize the Attorney General to promulgate supplementary guidelines after consultation with representatives of state and local government. For reasons discussed later in this article, I would suggest that these guidelines be published.

the state determination regarding guilt or severity of sentence was affected by any of the following: (1) Infection of the state proceeding by incompetence, corruption, intimidation, or undue influence; (2) court or jury nullification involving an important federal interest, in blatant disregard of the evidence; (3) the failure of the state to prove an element of the state offense which is not an element of the federal offense; or (4) the unavailability of significant evidence in the state proceeding either because it was not timely discussed or because it was suppressed on state law grounds or on an erroneous view of the federal law. "Id. at § 9-2.142 (emphasis added)."

Given the successful experience of the DOJ with the Petite Policy, the policy seems ripe for legislative enactment. Assistant Attorney General Heymann opposed a legislative provision on dual prosecutions in an early draft of H.R. 6915, 96th Cong., 1st Sess. (1980) on the grounds that legislation was unnecessary in light of the existence of comprehensive DOJ policy. (The proposal, S. 1723, 96th Cong., 1st Sess. § 704 (1980), was substantially different from the Petite Policy and was justly criticized by Heymann on several grounds. The proposal was dropped from House Resolution 6915). Senate Hearings, supra note 144, at 9939 (statement of Philip Heymann before House Subcommittee). However, the question of when federal officials should prosecute activity already prosecuted at the state level involves important issues of federalism and fairness of the criminal justice system. Congress should address such important issues when they are ripe for legislative action. See supra text of note 174.

195. BROWN COMMISSION PROPOSAL § 207 authorized the Attorney General to issue additional guidelines. H.R. 6915, 96th Cong., 1st Sess. § 115(e) (2) (1980) and S. 1722, 96th Cong., 1st Sess. § 205(c)(2) (1980) provide, more generally, that the Attorney General shall "provide general direction to Federal law enforcement officers concerning the appropriate exercise of such federal jurisdiction . . . . The purpose of this requirement . . . is to bring about a more uniform and comprehensive set of national guidelines to Federal . . . prosecutors concerning the appropriate exercise of concurrent jurisdiction crimes." JUDICIARY COMM. REPORT, supra note 143, at 53.

Both § 205 of Senate Bill 1722 and § 115 of House Resolution 6915 provide that the Attorney General should consult with state and local government representatives concerning the exercise of concurrent jurisdiction. The requirement "is designed to assure that the federal government takes into account State and local views in setting its prosecutive priorities." Id.

196. The Senate Judiciary Committee intended that the Attorney General would be able to meet his statutory obligation of providing "general direction" by issuing informal guidelines or memoranda, as well as published regulations or formal guidelines.
If the mandatory guidelines proposed are to have any impact, an effective enforcement mechanism must be established. Congress is clearly unwilling to authorize even limited judicial review of the official application of statutory guidelines for the exercise of jurisdiction. 197 Section 205(c)(2) of Senate Bill 1722, and section 115(e)(2) of House Resolution 6915, require the Attorney General to “provide general direction to federal law enforcement officers concerning the appropriate exercise” of concurrent jurisdiction. 198 Section 205(c)(3) of Senate Bill 1722, and section 115(e) of House Resolution 6915, require the Attorney General to report annually to Congress “concerning the extent of the exercise of such federal jurisdiction during the preceding fiscal year.” 199 These enforcement mechanisms are completely inadequate. 200 Congress should require that a high official, such as a USA, certify that the statutory criteria are satisfied in each case in which concurrent jurisdiction is exercised. 201 In addition, the Attorney General should be required to set up a pre-prosecution screening procedure within the Justice Department to insure local compliance with both the statutory standards and supplementary guidelines. 202

The bribery and extortion provisions of House Resolution 6915, sections 1351, and 2522 respectively, impose certain procedural

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197. S. 1722, 96th Cong., 1st Sess. § 205(e) (1980) expressly provides that no issues relating to the propriety of an exercise of concurrent jurisdiction may be litigated “except as may be necessary in granting leave to file a dismissal of an indictment.” JUDICIARY COMM. REPORT, supra note 143, at 54.

H.R. 6915, 96th Cong., 1st Sess. § 115(d) (1980) and the HOUSE REPORT, supra note 13, at 27 makes it clear that the House version was intended to preclude any litigation under § 115. The Brown Commission’s proposed § 207 similarly precluded litigation relating to the exercise of concurrent jurisdiction by federal prosecutors. See BROWN COMM’N PROPOSAL, supra note 90.

The problems with judicial review of prosecutorial discretion are discussed supra, notes 127-35 and infra notes 263-69 and accompanying text.

199. See supra notes 195-96 for a discussion of the purpose of this provision.

198. The reporting requirement was “designed to provide Congress with information that will flag any material increase or decrease in federal prosecution in particular areas, thereby permitting inquiry to be made into the reasons for such increase or decrease and prompting periodic evaluation of the proper scope of Federal jurisdiction in such areas.” JUDICIARY COMM. REPORT, supra note 143, at 53.

200. One scholar argued that a reporting requirement like that in S. 1722, 96th Cong., 1st Sess. § 205(c)(3) (1980) would be ineffective in controlling the exercise of concurrent jurisdiction:

Congress has not had a particularly good record as a post hoc supervisor of law enforcement activities . . . . Even if the Senate or House Judiciary Committee were to undertake an active review, they could not make any sort of intelligent judgment about the exercise of discretion by the [DOJ] based on the number of cases brought under various jurisdictional headings.

Ruff, supra note 2, at 1227.

201. N. ABRAMS, supra note 75, at 60-61.

202. FRIENDLY, supra note 181, at 61.
prerequisites to a federal prosecution of a state or local official. These sections provide that no state or local public servant shall be prosecuted:

unless within 30 days of the return of the indictment . . . but in no event later than the attachment of jeopardy—

(A) the Attorney General or an Assistant Attorney General designated by the Attorney General certifies that —

(i) before the return of the indictment, the appropriate State or local prosecuting agency was informed of the proposed Federal prosecution and such agency acquiesced in the Federal prosecution; or

(ii) at the time of the indictment there was no pending State prosecution against the actor involving the conduct constituting a violation of this section, and, in the judgment of the Attorney General or Assistant Attorney General, the State was not about to undertake such a prosecution; or

(B) the Attorney General certifies that the Federal prosecution is required by the interests of justice. The certification function under this subsection shall not be delegated.203

The notion that the statutory limits on the exercise of concurrent jurisdiction should be more stringent for particularly sensitive offenses is a sound one; but the procedural requirements should be reformulated in the following manner. The certification should be in terms of “a substantial federal interest,” a meaningful standard in the modified Brown Commission proposal, rather than an undefined, vague standard like “the interests of justice.” The certification function might be more appropriately handled by the Chief of the Criminal Division or even the Chief of the Public Integrity Section. Certification by such an official would be adequate to meet federalism concerns about the exercise of federal jurisdiction. However, certification by a ranking Justice Department official, rather than by local USA’s, would be advisable in light of the extreme sensitivity of the federalism issue in the local corruption context.204

Certification of a substantial federal interest need not be required if the appropriate state or local enforcement officials con-


204. See supra note 81 and accompanying text. HOUSE REPORT, supra note 13, at 300-03 indicates that the procedural requirements of House Resolution 6915 were imposed in recognition of the special importance of federalism issues in this context. Certification, especially at the level of the Chief of the Public Integrity Section, would not impose an unwieldy burden on the DOJ. Every prosecution of a state or local official is already reviewed by the section as a matter of Department policy. The number of local corruption cases prosecuted annually by the DOJ is less than 300. Id. at 302.
sent to federal prosecution. However, the mere fact that a state or local prosecution does not seem imminent is an insufficient justification for a federal prosecution.

The procedural prerequisites are not imposed by House Resolution 6915 for two other provisions that are freely applicable to local corruption: section 2534 (corresponding to the Mail Fraud Act) and section 2701 (corresponding to RICO). Federalism concerns about prosecution of corrupt officials under these provisions are no less poignant than under the bribery and extortion provisions. The procedural requirements, as modified, should be applicable to all prosecutions of local officials for corruption.

C. Department of Justice Action to Narrow Prosecutorial Discretion

The prospects for passage of a new federal criminal code are uncertain at best. Therefore, broad prosecutorial discretion to develop and execute law enforcement policy is likely to persist. If this broad executive discretion must exist, it should be exercised, to the extent practicable, by the DOJ, not by local USA's and their assistants. To the extent possible, the DOJ should control prosecutorial discretion with public rules and guidelines.

The DOJ is better suited than local federal prosecutors to develop judicious national law enforcement policy. "Individual U.S. Attorneys cannot develop policy that will be effective outside their own districts and, as products of a local political appointment process, they are ill-suited to making major national policy decisions." Local USA's have substantial "front line" law enforcement responsibilities which preclude the allocation of substantial resources to thoughtful development of comprehensive policy. The DOJ, by contrast, can and does devote substantial resources to policy analysis and development. Moreover, an executive agency in Washington is likely to be more responsible to Congress in developing policy than geographically scattered USA's. Under our system of separation of powers, it is desirable for those officials of the executive exercising delegated "lawmak-

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205. Consent by state or local officials indicates that federal prosecution would not constitute an unwarranted infringement on state law enforcement powers. See supra note 95 and accompanying text.
206. See supra notes 96-98, 179-87 and accompanying text.
207. Vorenberg, supra note 14, at 655.
208. Beck, supra note 122, at 374-75.
209. The DOJ has a separate Office of Policy and Management Analysis. Moreover, the Criminal Division allocates substantial resources to policy analysis. See, e.g., U.S. DEPARTMENT OF JUSTICE, NATIONAL PRIORITIES FOR THE INVESTIGATION AND ENFORCEMENT OF WHITE COLLAR CRIME (1980) [hereinafter cited as WHITE COLLAR PRIORITIES].

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ing" powers to be accountable to Congress.210

If the Justice Department can effectively secure local compliance with national policy, greater uniformity in the exercise of prosecutorial discretion should result. Consistency in the exercise of discretion enhances the fairness of the criminal justice system.211 Effective implementation of DOJ policy should also result in improved allocation of limited federal enforcement resources and better coordination of federal, state, and local law enforcement activities.212

1. DOJ Development of Broad Policy-Enforcement Priorities

It was earlier proposed in this article that Congress, not executive officials, should develop broad federal law enforcement policy. However, it seems clear that Congress has implicitly delegated to federal prosecutors the power "to formulate rules of enforcement that are effectively less proscriptive of conduct than are parallel criminal statutes."213 The courts have implicitly recognized the power of prosecutors to selectively enforce all-encompassing criminal prohibitions by refusing to review the exercise of prosecutorial charging discretion.214 If individual federal prosecutors enjoy de facto discretion to develop enforcement priorities, the DOJ should take steps to guide and limit that discretion.215

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210. See supra notes 68-77 and accompanying text.
211. See supra notes 117-25 and accompanying text.
212. Id. at 43. See Principles of Federal Prosecution, supra note 160 at i-ii; see also White Collar Priorities, supra note 209, at 43.
214. See supra notes 128-36 and accompanying text.
215. See supra notes 208-09 and accompanying text. The historical development of local political corruption as a federal law enforcement priority highlights the problems inherent in independent policy making by local USA's. The early federal prosecutions of local corruption were independently initiated by a few local USA's. The local USA's made no effort to articulate, in writing, the policies they were implementing at the time. The policies therefore were immune from public and legislative scrutiny and vulnerable to ad hoc application. Local practice with respect to local corruption varied across federal districts. Many of the early local corrup-
The DOJ recently completed a study which sought to determine which white-collar offenses should be most vigorously prosecuted by its component agencies.216 The methodology of the study was systematic217 and, on the whole, sound.218 The result evidenced by the DOJ's publication, *National Priorities for the Investigation and Prosecution of White Collar Crime*, represents effective development and articulation of broad national law enforcement policy.

"The process of developing . . . policy within the Department may have some limiting effect on prosecutorial discretion, and the very existence of such policy in writing may serve to inhibit abuses of discretion."219 However, for at least two reasons, the White Collar Priorities study is likely to fall short of its professed

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216. See *White Collar Priorities*, supra note 209, at 5.

217. The study began with extensive data collection from DOJ personnel across the country who were involved in the enforcement of white collar offenses. Respondents identified five to ten white collar crimes as enforcement priorities on the basis of specified criteria and provided detailed information about those crimes. *Id.* at 2-4. The DOJ analyzed the data and developed national priorities on the basis of the designation of offenses as priorities by local residents and other criteria, including: 1) the pervasiveness of the illegal activity; 2) the nature of the victims and the nature and extent of their losses, especially the impact of the offense on the integrity of public institutions; 3) the status of perpetrators, e.g., whether they occupy special positions of trust; 4) the need for federal law enforcement involvement, determined by the level and effectiveness of state and local law enforcement activity; and 5) the benefits and costs resulting from increased federal emphasis. *Id.* at 7-8.

The report stated that the DOJ would annually update its data base and reevaluate the priorities to insure that policy stays current with legal and social trends. *Id.* at 46.

218. The DOJ study relied primarily on objective and subjective data collected from federal enforcement officials. One general danger of the limited data base is that the DOJ will uncritically perpetuate deficiencies in regional federal enforcement policies. For example, the DOJ guidelines might perpetuate the poor judgment of local federal officials who vigorously prosecute local political corruption without adequately considering the special interests of states and localities in local enforcement. *See supra* notes 81, 215 and accompanying text. The DOJ recognized the potential dangers of its limited data base and "supplemented" the information gathered with the independent judgments of the Criminal Division and other DOJ personnel in Washington. The DOJ also elicited the view of nonfederal sources such as the National District Attorneys Association, albeit less systematically. *White Collar Priorities*, *supra* note 209, at 4.

The results of the DOJ's analysis seems acceptable, at least in the local corruption area. In targeting corruption of major state and local officials as a federal enforcement priority, *see infra* note 221, the DOJ study seemed sufficiently deferential to state and local interests. The report strongly implied that policing of local corruption should be left to local agencies when they can do so effectively, and provide the assistance of federal investigators and prosecutors only if necessary. *White Collar Priorities*, *supra* note 209, at 4.

goals of improved coordination of federal enforcement resources, and increased consistency and equal justice in federal law enforcement. First, the categories of offenses designated as national priorities are often so broad as to leave substantial discretion to local prosecutors. For example, the study designates "corruption of major state and local officials" as a national priority, but leaves to USA's the power to develop priorities among the numerous types of misconduct which comprise the broader category. Second, the national priorities are not mandatory and responsibility for local implementation is left largely to USA's.

The DOJ should continue to systematically develop broad law enforcement policy in important areas of federal concern. However, the DOJ must articulate its policy in more detail so that it can be effectively enforced, and it must design more effective mechanisms for local implementation of that policy. This article

220. WHITE COLLAR PRIORITIES, supra note 209, at 43.
221. Id. at 16. The study designated six national priorities in this area including:

5. Corruption involving major state government officials, elected, appointed or civil service, including but not limited to governors, legislators, department or agency heads, court officials, law enforcement officials at policymaking or managerial levels, and their staffs, or corruption of their state employees, including regulatory commission or board members, where such corruption is systemic.

6. Corruption involving major local government officials, elected, appointed or civil service, including but not limited to mayors, city council members or equivalents, city managers or equivalents, department or agency heads, court officials, law enforcement officials at policymakers or managerial level, and their staffs, or corruption of other local employees where such corruption is systemic.

Id. at 16. But cf. the more specific guidelines for federal prosecution of local corruption proposed infra note 244, and accompanying text.

222. WHITE COLLAR PRIORITIES, supra note 209, at 15.
223. The priorities are to be viewed by federal prosecutors "as guideposts and indicators of the types of white collar crime that deserve special emphasis." Id. at 48.

224. The report notes Attorney General Order No. 817-79 which calls for the development, by each USA, "of specific priorities within the national policy that are peculiar to their federal district, with the concurrence of the [Chief] of the Criminal Division." WHITE COLLAR PRIORITIES, supra note 209, at 43. The DOJ will ask a limited number of USA's to develop district priorities initially but will ask every USA to do so over the next two years. Id. at 43-44, 46. "[These] district priorities should be used as a means of coordinating and focusing federal law enforcement resources devoted to white collar crime" in each federal district. Id. at 44. The success of local USA's in complying with district and national priorities will be monitored, by collection and analysis of data on the number of priority cases handled in each district. Id.
will later consider how the DOJ might accomplish these objectives in the area of local corruption.

2. DOJ Guidelines to Narrow Discretion Resulting from Overlap of Federal Criminal Statutes

It has been illustrated that the substantive overlap of statutory provisions applicable to local corruption gives federal prosecutors significant discretion to vary the criminal charges applied to particular criminal conduct. Because it is unlikely that Congress will take steps to limit this type of discretion, the DOJ must establish guidelines for the exercise of discretion in charging defendants in local corruption cases.

The DOJ's 1980 publication, *Principles of Federal Prosecution*, provides general standards for the exercise of prosecutorial charging discretion. Part C of that publication provides that, in general, a prosecutor should charge “the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.” The prosecutor should also charge other offenses only when additional charges: “(a) are necessary to ensure that the . . . indictment (i) adequately reflects the nature and extent of criminal conduct involved; and (ii) provides the basis for an appropriate sentence under all the circumstances of the case; or (b) will significantly enhance the strength of the government's case . . . .”

The charging guidelines exhibit the general flaws of the *Principles of Federal Prosecution* publication. The standards are general and therefore subject to inconsistent application, and not amenable to effective review. The guidelines are hortatory and not backed up with an effective internal enforcement mechanism. More specific, mandatory DOJ standards are necessary to promote uniform charging of criminal defendants who commit similar wrongs.

3. DOJ Guidelines for the Exercise of Concurrent Jurisdiction

The need for general statutory guidelines for the exercise of concurrent federal jurisdiction and more detailed, supplementary
DOJ guidelines was discussed earlier in this article.\textsuperscript{229} If Congress fails to pass such guidelines, DOJ efforts to control local discretion in the exercise of concurrent jurisdiction will be of critical importance.

In the August, 1980 publication of \textit{Principles of Federal Prosecution}, the DOJ published general guidelines for declining prosecution.\textsuperscript{230} Those guidelines provide that a DOJ attorney should not initiate a prosecution if “in his judgment, prosecution should be declined because . . . (a) no substantial federal interest would be served by prosecution; [or] (b) the person is subject to effective prosecution in another jurisdiction. . . .”\textsuperscript{231} These guidelines contain a list of factors which the prosecutor should weigh in determining when a substantial interest in federal prosecution exists. Some of the factors\textsuperscript{232} listed include: “(a) federal law enforcement priorities,\textsuperscript{233} (b) the nature and seriousness of the offense; . . . (d) the person’s culpability in connection with the offense;\textsuperscript{234} (and] (g) the probable sentence or other consequences if the person is convicted.”

The guidelines also list factors which the federal prosecutor should consider in deciding whether to decline prosecution because the suspect is subject to effective state or local prosecution:\textsuperscript{235} “(a) the strength of the other jurisdiction’s interest in prosecution;\textsuperscript{236} (b) the other jurisdiction’s ability and willingness to prosecute effectively,\textsuperscript{237} and (c) the probable sentence or other consequences if the person is convicted in the other

\textsuperscript{229} \textit{See supra} notes 163-66, 195 and accompanying text.
\textsuperscript{230} \textit{Principles of Federal Prosecution, supra} note 160.
\textsuperscript{231} \textit{Id.} at 6.
\textsuperscript{232} \textit{Id.} at 7.
\textsuperscript{233} \textit{Id.} at 6.
\textsuperscript{234} \textit{Id.} at 7.
\textsuperscript{235} \textit{Id.} at 6.
\textsuperscript{236} \textit{Id.} at 7.
\textsuperscript{237} \textit{Id.} at 11.

The comments state that the federal interest in prosecution is less substantial when the offense is of particular interest to state or local authorities, \textit{e.g.}, because of the nature of the offense or the identity of the offender or the victim. \textit{Id.} at 10, comment (g).

\textsuperscript{237} In assessing the ability of localities to prosecute effectively, the comments suggest that the prosecutor consider the adequacy of local law enforcement resources and “any local conditions, attitudes, relationships . . . that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.” \textit{Id.} at 12, comment (b).
jurisdiction."238

The guidelines are subject to two fundamental criticisms. First, *Principles of Federal Prosecution* does not itself provide for effective enforcement of its guidelines. The preface states that the principles were designed "with a view to providing guidance rather than mandating results."239 For reasons analogous to those offered in the discussion of legislative guidelines for the exercise of concurrent jurisdiction, DOJ guidelines should be mandatory.240 A related criticism is that the guidelines are unnecessarily general in articulating the factors a federal official should consider in declining prosecution. Factors at least as detailed as those proposed for legislative enactment earlier in this article241 seem ripe for promulgation as published DOJ guidelines.242

The DOJ should have sufficient knowledge of the relative enforcement capabilities of the states and the federal government in order to develop guidelines specifying when federal intervention will be justified because of inadequate state enforcement capacity. The DOJ should also be able to articulate more specific guidelines indicating when there is a federal interest in the prosecution of particular types of offenses such as local corruption. Charles Ruff, an experienced DOJ attorney, has proposed workable, specific guidelines for the prosecution of official corruption at the different levels of state and local government. He proposes, for

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238. Id.
239. Id. at i-ii. The Principles of Prosecution provide for enforcement of the guidelines to some extent. It is stated that:

   [e]ach United States Attorney and responsible Assistant Attorney General should establish internal office procedures to insure (a) that prosecutorial decisions . . . are made consistent with these provisions; and (b) that serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions when warranted, as are deemed appropriate.

Id., Part A, pt. 3.

But many of the specific guidelines are discretionary or hortatory and thus not subject to effective enforcement. The declination standard, for example, does not mandate declination of prosecution when no substantial federal interest would be served by prosecution.

240. See supra notes 189-91 and accompanying text.
241. See supra notes 182-88 and accompanying text.
242. To determine the feasibility of more detailed agency guidelines, one must consider whether:

   the policies and practices of the official or agency relating to the issue for decision [are] clear enough so that it makes sense that they be promulgated subject to future change? There will be different degrees of confidence in the detailed elaboration of such policies and practices and in their ripeness for disclosure as guides to agency action, and the determination of whether formal rule-making, publication of operating manuals or directives, or informal guidelines should be used might depend on these differences.

Vorenberg, supra note 14, at 676 (citation omitted).
example, that federal officials should decline prosecution of corruption at the mayoral level if such corruption "does not subvert federal funds or [interfere] with federal programs." Ruff argues that there is no substantial federal interest in the prosecution of a corrupt state judge unless "his acts had some direct impact on federal enforcement." The DOJ has established few specific guidelines for federal prosecutors in the local corruption context. The United States Attorney's Manual does provide for review of every federal prosecution of a corrupt local official by the Public Integrity Section of the DOJ. However, the Public Integrity Section has not formally promulgated criteria for review of proposed local corruption prosecutions. An attorney in the section admitted that many USA's may not fully understand the criteria used in evaluating prosecution requests. The DOJ should be able to articulate guidelines for the exercise of concurrent jurisdiction over corrupt officials that are as specific as Ruff's proposals.

4. Internal Enforcement of DOJ Guidelines

It has been proposed that the DOJ should be able to develop

243. Ruff, supra note 2, at 1215.
244. Id. at 1214-18.
245. Principles of Federal Prosecution, supra note 160, does not attempt to develop specific guidelines for particular substantive areas. White Collar Priorities, supra note 209, does not attempt to specify the relative federal interest in prosecution of different types of local corruption. The DOJ left to local USA's the power to differentiate between particular types of local corruption. See supra notes 222, 224 and accompanying text. A recent DOJ report to Congress revealed that none of the USA's surveyed had local declination policies for local corruption offenses that considered the federal interest in prosecution. U.S. Department of Justice, U.S. Attorneys' Written Guidelines for the Declination of Alleged Violations of Federal Criminal Law: A Report to the U.S. Congress (1979).

The United States Attorneys' Manual, with one exception, does not have special substantive guidelines for the prosecution of local political corruption. Manual, supra note 161, at § 9-131.180. It contains a few guidelines for "color of right" prosecutions under the Hobbs Act. Id. For example, USA's should prosecute officials only when significant amounts of money and reasonably high levels of office are involved, and only where there is a relatively clear effect of the corrupt conduct on legitimate interstate commerce. Id. at 23. The expressed purpose of these guidelines was to avoid a weak case reaching the Supreme Court as the first "color of right" prosecution to be reviewed. Id.
247. Radek Interview, supra note 11. Radek did say that the Public Integrity Section holds seminars two times a year to explain to local federal prosecutors its screening procedures. The Section will explain to the relevant prosecutor the grounds for the denial of a particular prosecution request. Id.
specific guidelines for the exercise of federal jurisdiction over local political corruption. If the standards are to have a substantial impact, they should be made mandatory, not merely advisory. Lee Radek, of the DOJ's Public Integrity Section, argues that mandatory national guidelines are undesirable because they limit the flexibility of USA's in responding to local variations.248 However, DOJ guidelines may permit USA's to supplement or even vary national guidelines if written local variations are approved by the appropriate AUSA.249

Current DOJ policy provides for review of each proposed prosecution of a corrupt local official by the Public Integrity Section.250 If the Department develops specific, mandatory written guidelines for prosecution of local corruption,251 this enforcement procedure seems adequate.

5. Publication of DOJ Guidelines

Policy guidelines developed by the DOJ should, as a general rule, be published.252 Publication will promote public confidence that the official discretion of federal prosecutors is exercised, not on an ad hoc basis, but according to objective standards. The public has a right to notification of changes in the substantive law effected by agency guidelines.253 When guidelines are not publicly available, the benefit of knowledge of substantive policy is limited to those with inside information, for example, former DOJ attorneys now members of the defense bar.254

Publication is likely to substantially improve the guidelines developed. Agencies are apt to exercise greater care in drafting guidelines that are to be made public.255 Publication facilitates critical public feedback on DOJ policy, which may induce im-

248. Id.
249. White Collar Priorities, supra note 209, provides a similar mechanism for giving flexibility to local USA's within the framework of national policy standards. Id. at 43-44. See supra note 224 and accompanying text.
250. The Public Integrity Section generally reviews a prosecution memorandum and a draft indictment before approving the indictment of a corrupt local official. If the Section denies a prosecution request, the local USA may appeal to the Deputy Assistant, Assistant, and Deputy Attorney Generals, in succession. Radek Interview, supra note 11.
251. Currently the Public Integrity Section has not formally promulgated criteria for screening local corruption prosecutions. Id.
252. There may be issues on which DOJ "policies and practices are simply too incoherent to provide a basis for any advance statement of how decisions will be made." Vorenberg, supra note 14, at 676-77. When such issues are decided in a particular case, the DOJ should at least announce and explain the decision after the fact. Id.
253. Beck, supra note 122, at 335.
254. Abrams, supra note 133, at 27.
255. N. Abrams, supra note 75, at 58-60.
Moreover, publication undoubtedly will promote more conscientious compliance by local prosecutors by facilitating public scrutiny of their compliance.

The frequently raised objections to the publication of DOJ guidelines do not seem compelling. For several reasons, the argument that publication of selective enforcement policy will reduce deterrence is flawed. Guidelines will generally not be so clear and rigid as to induce confident reliance on the part of the few potential offenders who seek to modify their conduct to exploit the standards. For guidelines under federal statutes that incorporate state offenses, the clear threat of state prosecution may mitigate any reduction in deterrence attributable to publication of federal selective enforcement policy. Because so few violators are actually detected, a change in the percentage of offenders prosecuted after apprehension may have a minor impact on the deterrent effect of the criminal law. Finally, "[d]isclosure [of prosecutorial policy] may help reduce criminality by making punishment seem more certain for those offenses for which an Assistant United States Attorney's discretion is restricted. It may also encourage public commitment to and trust in the criminal adjudication system where secrecy currently creates suspicion, resentment and pessimism."258

It seems unlikely that publication of DOJ policy will result in "freezing" agency policy or in substantially deterring the development of agency policy. If DOJ policy is made prospective only, public reliance will not present a substantial impediment to policy change. Nor is the DOJ likely to stop developing guidelines; it is too strongly interested in controlling local enforcement policy in controversial areas.260

Some have argued that publication of enforcement policy will provide the defense bar with new, unjustified leverage and will spawn litigation challenging the execution of enforcement policy. However, even now, many members of the defense bar manage to learn of enforcement policy through inside information. Publica-

259. Beck, supra note 122, at 357.
tion merely assures that such information will be equally accessible to all. Furthermore, the judiciary has shown a reluctance to consider challenges to discretionary prosecutorial conduct.261

Recently, the DOJ has published several documents articulating general departmental policy.262 More specific guidelines, such as those in the United States Attorneys’ Manual and various Departmental memorandum, have not been published, but may be procured, in most cases, under the Freedom of Information Act.263 Procurement under that Act is, however, inconvenient and expensive. Publication remains desirable to ensure that DOJ policy standards become readily accessible to all, on equal terms.

6. Judicial Review of DOJ Guidelines

The courts are apparently unwilling to review the substance or the application of written prosecutorial policy. “There is an almost total absence of case law in the United States on the subject of whether a particular prosecutorial policy was beyond the power of the prosecutor to formulate.”264 Also:

[...] despite a general rule that federal courts will review and penalize a federal agency for its failure to comply with its own ... announced policies, no federal court has allowed review of a claim against the Department of Justice for non-compliance with one of its published policies relating to the exercise of prosecutorial discretion.265

An immediate expansion of judicial review of prosecutorial policy which is performed at the behest of the defendant, does not seem desirable.

The extent to which an administrator’s violations of his own guidelines provides a basis for judicial relief may affect not only the punctiliousness of his own compliance, but also his willingness to issue the guidelines, since permitting such challenges would open up a new major level of litigation, with more resulting delay and a need for greater resources.266

261. See infra notes 264-70 and accompanying text.
262. See, e.g., PRINCIPLES OF FEDERAL PROSECUTION, supra note 161; WHITE COLLAR PRIORITIES, supra note 209.
263. Beck, supra note 133, at 353. “Congress and the courts have required disclosure of policies analogous to prosecutorial policy . . . except when the sole effect would be circumvention of a valid agency regulation.” Id.
264. Abrams, supra note 133, at 42. Beck, supra note 122, at 322-37, has concluded that prosecutorial guidelines are not reviewable under the Administrative Procedure Act, as are certain administrative rules and regulations.
265. Pauley, supra note 76, at 497-98. The Supreme Court will remand a federal criminal case for dismissal on the grounds that the DOJ did not follow its own policy guidelines, if the Solicitor General confesses the error and calls for the Court to vacate the conviction. See, e.g., Watts v. United States, 422 U.S. 1032 (1975). However, Rinaldi, 434 U.S. at 28-29, 31 “implies that the Departmental policy would not be enforced over the government’s objection and this implication is consistent with the unanimous decisions of the courts of appeals.” Pauley, supra note 76, at 498 n.137. See also United States v. Snell, 592 F.2d 1083 (9th Cir. 1979); United States v. Howard, 590 F.2d 564 (4th Cir. 1979).
266. Vorenberg, supra note 14, at 682-83. The DOJ strongly opposes judicial re-
“Allowing review of DOJ guidelines or their application . . . would prompt a rash of litigation; it would become routine for a defendant in a criminal case to file a motion challenging the exercise of discretion underlying the determination to seek an indictment . . . against him.”

Moreover, the courts are ill-suited to review, for example, a determination by a prosecutor that a particular exercise of concurrent jurisdiction serves a substantial federal interest. Overall:

it would not be unreasonable for a legislature to see the process of limiting discretion as one proceeding in stages over a long period and to conclude that it would not allocate resources to . . . challenges [by the defendant, of prosecutorial policy] unless a system of public reporting revealed that the regulations themselves or the degree of agency compliance with them were unsatisfactory.

DOJ guidelines, such as those proposed in this article to control the exercise of concurrent jurisdiction, are designed primarily to deal with those federalism-based concerns identified in Part III of this article. Therefore, it may be advisable to allow state Attorneys General to challenge, in court, DOJ policy that is perceived as an unwarranted or legislatively unauthorized infringement on state law enforcement power. This procedure would create an external check on the discretion of federal officials while avoiding many of the disadvantages of judicial review initiated by the criminal defendant.

view of a federal prosecutor’s application of DOJ guidelines. For example, Principles of Federal Prosecution, supra note 161, Part A, pt. 5 states that “the principles set forth herein and internal office procedures adopted pursuant to them . . . are not intended to, and do not, . . . create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the U.S.”

Judiciary Comm. Report, supra note 143, at 54. The Senate Judiciary Committee made this point in supporting its denial of judicial review of prosecutorial applications of S. 1722 § 205 — guidelines for the exercise of concurrent federal jurisdiction. See supra note 197.

See supra notes 129-30 and accompanying text. It should be noted, however, that as DOJ guidelines become more specific, they will provide courts with clearer standards for review of prosecutorial application. Vorenberg, Charging, Bargaining, and Control of Criminal Justice: The Growth of Prosecutorial Power 65-67 (Feb. 3, 1981) (draft).

Vorenberg, supra note 14, at 682-83.

Abrams, supra note 75, at 61-62. Abrams points out that “outside the context of a criminal case, judicial review that challenges prosecutorial policy . . . does not pose a serious danger [of clogging the federal courts].” Abrams, supra note 133, at 52.
V. Conclusion

The broad discretion of federal prosecutors to develop law enforcement policy in the local corruption context is inconsistent with fundamental notions of federalism and separation of powers. The uncontrolled exercise of such discretion undermines the fairness of the criminal justice system. The federal courts must limit prosecutorial discretion by refusing to validate expansive interpretation of federal statutes that promote policies that Congress may not endorse. Congress must not shirk its legislative responsibility to define the proper role of the federal government in criminal law enforcement. If Congress concludes that broad federal concurrent jurisdiction over local corruption is required, it must provide guidelines for the exercise of that jurisdiction. The Department of Justice must control the residual discretion of local federal prosecutors with specific public guidelines to be implemented within a rational administrative structure.

The intervention of federal law enforcement officials to protect the integrity of state and local government appears to be desirable in some situations. However, the decision to intervene must not be committed, de facto, to the uncontrolled discretion of federal prosecutors.