**The Executive Branches**



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**Introduction**

The federal, state, and local executives have the basic responsibility of ensuring that the laws of the legislatures are carried out. The president, governors, and mayors do this by organizing the bureaucracy and making legislative proposals to the legislature as well as making budgetary proposals. The executive can use his or her position to advocate a particular policy or propose changes in the budget to reflect his or her policy initiatives. However, once the legislature has passed a law, it becomes the executive branch’s role to honor and fulfill that law unless they choose to override it with a veto. They fulfill the law by directing the bureaucracy to adhere to and enforce the law. Each of these executives plays an important role in the policy process and can have a major impact on how the law is implemented and enforced.

**U.S. Presidents and Crime Control Policy**

For most of American history, the issue of crime, its control, and thus crime policy have been the direct responsibility largely of local governments and to some degree state governments. Many point to the Kennedy administration (1961–1963) as being the first presidential administration to become actively involved in the issue of crime control policy, although the Hoover administration was quite active in the area of “law observance.” 1 Presidents, when dealing with the issue of crime, have two different types of power: those that are constitutional powers and those that are essentially institutional powers. Another way of explaining the division is simply that some of the powers of the president are “enumerated powers,” those provided for by the U.S. Constitution, and others “implied powers,” powers necessary for the president to perform his various roles. 2

**Constitutional Powers**

The first category is deemed the constitutional powers, as they are in fact the enumerated powers derived directly from the Constitution. These consist of the power to appoint members of his cabinet and key administrators, grant pardons, deliver a message to the U.S. Congress “from time to time” on the “State of the Union,” propose legislation to Congress, share with Congress the power to create and administer the federal bureaucracy, veto legislation, and respond to formal requests for assistance in cases of domestic disturbances. All these enumerated powers have been utilized by presidents to address the issue of crime at one time or another, and, as presidents’ attention to crime has increased over time, so has their frequency.

The Constitution, in article II, sets forth that the “executive power shall be vested in a president of the United States of America.” There are only four sections to article II, of which section 1 details how the president is to be elected, section 2 details his powers, section 3 speaks to his duties, and section 4 articulates the requirements for removal from office. While the president is granted a number of powers, such as his designation as commander in chief of the armed forces, and is given a number of duties, such as receiving ambassadors and other public ministers, there are only a few select powers and duties that are germane to the discussion at hand. In regard to the president’s ability to deal with issues of crime, section 2 gives the president the power to appoint and the power to grant reprieves and pardons. Section 3 states that the president has the duty to “from time to time give to Congress information of the State of the Union,” that he shall recommend to Congress “such measures as he shall judge necessary and expedient,” and that “he shall take care that the laws be faithfully executed.” In addition, article I, section 7, gives the president the power to veto congressional legislation, and article IV, section 4, gives the president the power to, on application by the states, intervene in cases of domestic violence.

**Appointments**

One of the powers of the president, which has long been considered one of his greatest resources, found in article II, section 2, is the power to appoint key officials in the national government. These officials range from cabinet secretaries and undersecretaries to bureau and agency heads as well as the justices of the U.S. Supreme Court. As the Constitution stipulates, he

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. 3

As a result, the president has the power to appoint many of the key leaders in the national government who stand in a position to exercise the will of the president or potentially either their own will or that of the agency they oversee. In terms of crime policy, the president has the power to appoint such people as the attorney general, who runs the U.S. Department of Justice; the director of the Federal Bureau of Investigation; and the solicitor general, who is the government’s advocate before the Supreme Court.

One final aspect of the power to appoint comes in the form of judicial appointments by the president. 4 The president has the ability to appoint, with approval of the Senate, the nine Supreme Court justices as well as all federal judges. One only has to look to the era of the Warren court in order to understand the impact that these appointments can have on issues of crime. Under the Warren court, such cases as *Mapp* v. *Ohio* (1961), 5 *Miranda* v. *Arizona* (1966), 6 and *Gideon* v. *Wainwright* (1963) 7 greatly impacted the criminal justice system and continue to have such an impact today. Therefore, presidential appointment of federal judges, although not a direct influence on crime policy, can have a significant impact in this policy area.

**Pardons**

The second constitutional power granted to the president under article II, section 2, is the power to grant pardons. The president is assisted in this area by the attorney general and through the Office of the Pardon Attorney within the Department of Justice, which handles “all requests for executive clemency” and “prepares the Department’s recommendation to the President for final disposition of each application.” 8 The pardons may be granted in several forms, “including both conditional and unconditional pardons, commutation, remission of fine, and reprieves.” 9 What is perhaps the most famous presidential pardon was the one granted to former President Nixon by President Gerald Ford for his role in the Watergate scandal. 10 Ford issued the pardon on September 8, 1974, a mere month after taking office and prior to any conviction or indictment of Nixon for his role in the scandal. In the pardon, he stated, “I, Gerald Ford, President of the United States, pursuant to the pardon power conferred upon me by article II, section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.” 11 As a result, on Nixon’s acceptance of the presidential pardon, the president had exercised his constitutional powers, and although he was accused of subverting the legal process, his power of the pardon was never disputed. 12

It can be safely stated that the majority of presidential pardons never arise to such levels as the pardon of former President Nixon, but all presidents have granted pardons during their tenure in office. President Ford granted a number of executive warrants for clemency to citizens who evaded the draft during the Vietnam War, 13 and President Carter would pardon all “draft resisters and asked the Defense Department to consider the cases of military deserters during that war on an individual basis.” 14 President Eisenhower granted the commutation of an inmate’s death sentence, provided that he never be paroled, and President Nixon granted executive clemency to former labor leader James Hoffa with the strict condition that he no longer engage in union activities. 15 Perhaps the most controversial pardons came in the last few days of President Clinton’s tenure in office when he pardoned 140 individuals, many for political reasons. 16 It is evident, then, that presidents are granted the constitutional power of the pardon, that they use it, and that it is generally undisputed.

**State of the Union**

In article II, section 3, the Constitution states that the president “shall from time to time give to the Congress Information of the State of the Union.” Although throughout most of the nineteenth century the delivery of a “State of the Union Speech” was given from “time to time,” the speech would ultimately become a permanent yearly institution by the twentieth century. According to Light, the State of the Union has become a means by which presidents transmit their agenda for the following year. 17 In a sense, it has become the “must list” and a means for setting priorities. 18 As Light explains, “at least since Theodore Roosevelt, Presidents have used the message as a statement of both foreign and domestic priorities,” 19 and, as Ragsdale further comments, “since Truman, presidents have used State of the Union messages to capture congressional and national attention for their legislative programs.” 20 As a result, Kessel explains that

Cabinet members, White House aides, and others are quite aware of the significance of getting material included in the State of the Union message. Favorable mentions of a policy gives visibility to it and confers presidential backing to the enterprise at one and the same time. Since there are obvious limits to the number of policies that can be thus favored, very real contests take place over control of this scarce resource. 21

In sum, the State of the Union message has become an important constitutional power granted to the president of the United States, and when specific policy proposals or mentions are found within its pages, one can be assured that presidents and their cabinet and staff desire to make that policy issue part of the president’s agenda.

**Legislative Proposals**

The second power granted to the president under article II, section 3, is that the president may make recommendations to Congress “such measures as he shall judge necessary and expedient.” This power affords the presidents another means by which they can affect crime control, and that is through legislation on crime. Although presidents do not have direct legislative authority, they do have several means to influence the passage or nonpassage of a bill. 22 In some cases, presidents may utilize their constitutional powers to sign a bill into law or to veto the legislation. In other cases, they utilize many of their institutional powers to influence legislation through such means as the administration, the Office of Congressional Relations, or their power of speech. Although the president’s relationship with Congress and his ability to influence Congress are far more complex than this, it is quite evident that the president plays a significant role in the legislative process.

**Execution of the Law**

The third power granted to the president of the United States that is related to the issue of crime and is derived from article II, section 3, is found in the clause that the president “shall take Care that the Law be faithfully executed.” This clause essentially provides an imperative that it should be the president who controls the bureaucracy in order to assist him in “executing” the law. Yet it is well established that both the president and Congress share this role and that because the president is often seen as an outsider to the bureaucracy, he wields even less control despite being hierarchically superior to the bureaucracy. 23 As a result, “to a large extent, the president’s influence over the bureaucracy is tied to the ability to persuade—to convince others of the rightness or political expediency of actions the president desires.” 24 Presidents do in fact have multiple means by which they can influence the bureaucracy, such as those previously discussed, the power to appoint, and the power to remove key officials within the bureaucracy. Presidents have also developed a number of institutional means, such as expansion and reorganization of the bureaucracy, executive orders, and the White House staff, all of which are detailed in the next section. Suffice it to say at this point that presidents can exercise their constitutional powers of faithfully executing the laws by a “general support for law enforcement” and through the creation of, with the approval of Congress, new bureaucracies intent on dealing with crime-related issues. 25 As was seen in Chapter 1, presidents have increasingly demonstrated a strong support for law enforcement over time, and as detailed earlier in this chapter, they do have multiple bureaucratic mechanisms to address the issues of crime, primarily in the Departments of Justice and Treasury.

The president is also granted two additional constitutional powers, both of which lie outside of article II, namely, the power to veto congressional bills and the power to intervene in domestic disturbances when called on by the state legislatures or executives.

**Veto**

The power to veto is granted in article I, section 7, which states,

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Woodrow Wilson, in his classic book *Congressional Government*, wrote of the importance of the presidential veto when he explained that “in the exercise of his power to veto, which is, of course, beyond all comparison, his most formidable prerogative, the President acts not as the executive but as a third branch of the legislature.” 26 The power of the veto is a formidable one, and its use has been studied by many scholars. 27 It has been utilized for various crime legislation passed by Congress, and examples include President Ford’s veto of legislation to reclassify and upgrade deputy U.S. marshals because he felt it was discriminatory against other federal law enforcement agencies, 28 President Reagan’s veto of a bill concerning contract services for drug-dependent federal offenders primarily because it would have created a cabinet-level drug czar, 29 and President Clinton’s veto of a Department of Justice appropriations bill because of the lack of funds to implement the president’s crime-related initiatives. 30

**Intervention in Domestic Disturbances**

Finally, the last presidential power related to crime that is drawn from the president’s constitutional powers comes from article IV, section 4, which, as previously explained, details that “the United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” Presidents since Washington have employed the use of this constitutional power. In most instances, these domestic disturbances are in fact state and local crimes but arise to such a level that the state is no longer effectively able to deal with the crime. As a result, governors, as has typically been the case, have applied to the president for assistance in domestic disturbances. More modern examples include President Franklin D. Roosevelt’s use of federal troops to quell the Detroit race riots on June 21, 1943, 31 and what appeared to be a complete repeat on July 24, 1967, when President Johnson would send federal troops into Detroit during the race riots that summer. 32

**Institutional Powers**

The other powers that presidents have in order to exert some influence over crime control policy are those that fall into the category of institutional powers. The institutional powers can be defined as the implied or informal powers that presidents obtain through broad interpretations of the Constitution, through the many roles they play in national governance, and through the requirement to ensure that the laws are “faithfully executed.” According to Warshaw, “The existence of an institutional process for domestic policy is one that has been evolving for over seventy years, even before Franklin Delano Roosevelt aggressively sought to control the national agenda through the creation of the Executive Office of the President.” 33 This same statement could be made regarding presidents and their domestic crime policy, for it too has greatly evolved over the past seventy years.

The institutional powers related to crime that presidents managed to build during the twentieth century are plentiful. While in many cases they resemble the same institutional powers and means by which presidents address issues other than crime, these powers have been used definitively to address the specific issue of crime. In addition, these methods of engaging in crime control policy are not relegated to only one president but demonstrate evidence of having been utilized by the office of the presidency across time. Although certain presidents may favor one means over another and some presidents may not have utilized the powers available, none of the institutional powers are relegated to only one president. Finally, it is important to also note that while presidents and their staffs often think in terms of how they can address a specific issue, in most instances the choices are not relegated to one specific response; rather, they incorporate multiple means of addressing the crime issue in crafting their administrations’ response.

Although the use of executive orders, legislation, budgets, and administrative (internal) policies are most certainly key powers at the president’s disposal to address the issue of crime, they are not the only means available. In fact, it would appear that presidents have at least six key methods at their disposal. 34 They can utilize the office of the presidency in a number of ways to promote crime policy, from key advisers to the White House staff and special counsels to the bureaucracy. Presidents can utilize various types of crime commissions and task forces to address crimes, executive orders, and host White House conferences. Moreover, as previously indicated, presidents have used the budget to address crime policy. Finally, presidents have used one of their primary tools to address the issue of crime, the institutional power that is granted to the office of the presidency for making speeches. It is to these six institutional powers that we now turn.

**Office of the Presidency**

The first institutional power that presidents have to implement crime control policy comes from the office of the presidency. Although this power contains various components of the executive office, all these either have been or have come to be central to the institutional powers that presidents have to affect policy. As it relates to crime control policy, this consists of specific aides who deal with crime or crime-related issues or those components of the executive office that oversee aspects of crime policy (e.g., the Domestic Policy Council and the Office of National Drug Control Policy) and, through the president’s ability, not only create a cabinet and the bureaucracy, as was noted under the constitutional powers, but also expand and reorganize the bureaucracy. Both of these are perhaps best understood by looking at how President Bush created the Department of Homeland Security and how a number of federal agencies were reorganized under this newly created department. It is through these entities within the executive office that presidents have come to affect crime control policy in the United States.

**Crime Commissions**

The second institutional power of the president to affect crime control policy comes from his ability to create commissions to advise him on specific issues, such as crime. Smith, Leyden, and Borrelli have pointed out that “presidential commissions, known variously as ‘advisory commissions,’ ‘blue-ribbon panels,’ ‘task forces,’ or ‘expert commissions,’ have been frequent, although always temporary, additions to the office of the modern presidency.” 35 They go on to explain that “officially, nearly all of these commissions carry the same presidential mandate: to study and propose alternatives in response to particularly new and/or particularly difficult problems.” 36 However, they and other researchers have pointed out that commissions’ reports are often ignored and that they become a political issue *because* presidents often do not follow the advice. 37 And, although these commissions are “often appointed to defuse highly sensitive issues,” they “often blur critical issues,” or the “commissions may make findings and suggestions that embarrass the president.” 38 Despite these drawbacks, presidents still create commissions to study various issues, and crime has been no different. (See Box 4.1.)

There have been a number of crime commissions throughout the twentieth century, with the first, officially known as the President’s Commission on Law Observance and Enforcement, commencing in 1929 under President Herbert Hoover. 39 Hoover would appoint George Wickersham, the former attorney general in the Taft administration, as the chairman, along with eight other members of notable reputation in various areas of criminal justice. By 1931, the so-called Wickersham Commission would publish fourteen volumes dealing with a variety of administrative and social issues, calling for a number of reforms within the criminal justice system. 40 Although both Truman and Kennedy would have commissions dealing with issues related to crime and Johnson would create the President’s Commission on Crime in the District of Columbia, primarily for political purposes, it was the creation of the President’s Commission on Law Enforcement and Administration of Justice by President Johnson in 1965 that would have a profound impact on the criminal justice system. 41 The attorney general, Nicholas deB Katzenbach, was appointed chairman, and the commission set out in similar fashion to the Wickersham Commission. 42 By 1967, the commission would publish its report titled *The Challenge of Crime in a Free Society*, 43 which included over 200 recommendations for changes in the criminal justice system as well as a number of additional suggestions. The recommendations themselves were not prioritized; rather, they were laid out in terms of topics, such as the police, organized crime, and research. In the end, many of the recommendations would find their way into the Omnibus Crime Control and Safe Streets Act of 1968, often in a watered-down version, and would see aspects of implementation through the Law Enforcement Assistance Administration. Although there are a variety of perspectives on the success and failure of the Katzenbach Commission, the one fact that seems to be well agreed on is that the report did have a significant impact on the criminal justice system. 44 It should also be noted that the report, like many others, encouraged a more active role for the federal government in dealing with the issue of crime. 45

**Box 4.1:** **Presidential Commissions on Crime (or Related)**

| Administration  | Years  | Commission Title  |
| --- | --- | --- |
| Hoover | 1929–1931 | President’s Commission on Law Observance and Enforcement |
| Truman | 1951–1952 | President’s Commission on Civil Rights (Lynchings) |
| Kennedy | 1962–1963 | President’s Commission on Narcotics and Drug Abuse |
| Johnson | 1965–1966 | President’s Commission on Crime in the District of Columbia |
| Johnson | 1967–1970 | Commission on Obscenity and Pornography |
| Johnson | 1965–1967 | President’s Commission on Law Enforcement and Administration of Justice |
| Johnson | 1966–1967 | President’s Task Force on Crime |
| Johnson | 1967–1968 | National Advisory Commission on Civil Disorders |
| Johnson | 1968–1969 | National Commission on the Causes and Prevention of Violence |
| Nixon | 1970–1972 | President’s Commission on Campus Unrest |
| Nixon | 1971–1972 | National Commission on Marihuana [*sic*] and Drug Abuse |
| Nixon | 1971–1973 | National Advisory Commission on Criminal Justice Standards and Goals |
| Reagan | 1983–1987 | President’s Commission on Organized Crime |
| Clinton | 1996–1997 | Presidential Commission on Aviation Safety and Security |
| Bush, G.W. | 2002–2004 | National Commission on Terrorist Attacks Upon the United States (9-11 Commission) |

**Executive Orders**

The third institutional power of the president is the use of executive orders. Although presidents were not given any direct legislative authority by the Constitution, many have exercised this power under article II to “take care that the laws be faithfully executed.” It has been said that “most modern presidents have followed Theodore Roosevelt’s ‘stewardship’ theory of executive power, which holds that article II confers on them inherent power to take whatever actions they deem necessary in the national interest unless prohibited from doing so by the Constitution or by law.” 46 The power of executive orders has been one means by which presidents have managed to exercise some authority. During the Kennedy and Johnson administrations, many of the executive orders issued were directed toward domestic disturbances resulting from the civil rights movement, 47 and one of Reagan’s executive orders brought about drug testing of federal employees. 48 Other executive orders have been used to assist the president in establishing crime control policy by the creation of crime commissions, such as the executive orders creating the President’s Commission on Law Enforcement and Administration 49 and the National Advisory Commission on Civil Disorders 50 ; the creation of executive offices, such as the establishment of the Special Action Office for Drug Abuse Prevention 51 and the Office of National Narcotics Intelligence, 52 both by President Nixon; or to establish mechanisms for generating crime control policy, such as the creation of the National Drug Policy Board by President Reagan. 53 In some cases, the executive orders were merely ceremonial, such as the one recognizing the death of J. Edgar Hoover 54 or the one establishing the official seal of the Office of National Drug Control Policy. 55 (See Box 4.2.)

**Crime Conferences**

The fourth institutional means by which presidents can focus on crime policy is largely ceremonial and symbolic in nature and operates on a more limited scale than presidential commissions; these are White House conferences. These “conferences bring together groups of experts and distinguished citizens for public forums held under presidential auspices,” and “their principal function is to build support among experts, political leaders, and relevant interests for presidential leadership to deal with the problems at issue.” 56 Since the Kennedy administration, one of these problems has consistently been the issue of crime. All the modern presidents have hosted a White House conference related to the topic of crime. The majority of these conferences have generally come late in the president’s term in office, and none have had any significant impact on crime policy. 57 In addition, many of these conferences are simply used to highlight a policy the administration has previously addressed in order to make it appear more active in the area. However, most have made various recommendations for improving the criminal justice system, and nearly all have recommended an expansion of the national government’s role in crime control. (See Box 4.3.)

**Budget**

The fifth institutional power of the president for affecting crime control policy can be found in the budgetary process, where the president proposes the annual budget and then delivers the budget to Congress for approval. 58 Although Congress does wield the “power of the purse” and can increase, decrease, or eliminate any of the president’s proposals, as Aaron Wildavsky has explained, “the president has the first and last moves in the budget process. He can both check and use Congress, and it can both check and use him.” 59 However, in the case of budget allocations for federal crime control, there appears to rarely be anything but increases in expenditures when looking at the data over time. One indication can be found in looking at the budget category “administration of justice” in the federal budget, which, “since 1965 ... has risen from $535 million to an estimated $11.7 billion in Fiscal Year 1992, an increase of over 2,000 percent.” 60 Some research has indicated that presidents have been highly responsive to rising crime rates by increasing the budget of federal law enforcement agencies, 61 and more recent research has found significant growth rates in all the agencies. 62 For example, Martinek, Meier, and Keiser have found that between 1970 and 1995 there was a 692 percent increase in the annual budget of the Bureau of Alcohol, Tobacco and Firearms; 860 percent for the Federal Bureau of Investigation; 900 percent for the Immigration and Naturalization Service; 1,389 percent for the Customs Service; 1,400 percent for the Secret Service; and 3,233 percent for the Drug Enforcement Administration. 63 Finally, when looking at the total federal expenditures on crime over time or the breakdown between direct expenditures (those to federal law enforcement agencies) and intergovernmental expenditures (those to state and local governments), it is evident that the national government has become more active in crime control at the national, state, and local levels since the last three decades of the twentieth century.

**Box 4.2:** **Examples of Presidential Executive Orders Related to Crime, 1961–2009**

| EO Number  | President  | Short Title/Description  | Date  |
| --- | --- | --- | --- |
| 10940 | Kennedy | Committee on Juvenile Delinquency and Youth Crime | May 11, 1961 |
| 11076 | Kennedy | President’s Commission on Narcotics | January 15, 1963 |
| 11130 | Johnson | Commission to report on Kennedy assassination | November 29, 1963 |
| 11154 | Johnson | Exemption of J. Edgar Hoover from retirement | May 8, 1964 |
| 11236 | Johnson | President’s Commission on Law Enforcement | July 23, 1965 |
| 11365 | Johnson | National Commission on Civil Disorder | July 29, 1967 |
| 11403 | Johnson | Restoration of law and order in D.C. | April 5, 1968 |
| 11404 | Johnson | Restoration of law and order in Illinois | April 7, 1968 |
| 11405 | Johnson | Restoration of law and order in Maryland | April 7, 1968 |
| 11412 | Johnson | Commission on Causes/Prevention of Violence | June 10, 1968 |
| 11534 | Nixon | National Council on Organized Crime | June 4, 1970 |
| 11536 | Nixon | President’s Commission on Campus Unrest | June 13, 1970 |
| 11599 | Nixon | Special Action Office for Drug Abuse Prevention | June 17, 1971 |
| 11641 | Nixon | Law enforcement activities relating to drug abuse | January 28, 1972 |
| 11676 | Nixon | Office of National Narcotics Intelligence | July 27, 1972 |
| 11727 | Nixon | Drug Law enforcement | July 6, 1973 |
| 11803 | Ford | Clemency Board to review UCMJ convictions | September 16, 1974 |
| 12045 | Carter | Relating to the Office of Drug Abuse Policy | March 27, 1978 |
| 12133 | Carter | Drug policy functions | May 9, 1979 |
| 12324 | Reagan | Interdiction of illegal aliens | September 29, 1981 |
| 12358 | Reagan | Presidential Commission on Drunk Driving | April 14, 1982 |
| 12360 | Reagan | President’s Task Force on Victims of Crime | April 23, 1982 |
| 12368 | Reagan | Drug Abuse Policy Function | June 24, 1982 |
| 12435 | Reagan | President’s Commission on Organized Crime | July 28, 1983 |
| 12564 | Reagan | Drug-Free Federal Workplace | September 15, 1986 |
| 12590 | Reagan | National Drug Policy Board | March 26, 1987 |
| 12696 | Bush | President’s Drug Advisory Council | November 13, 1989 |
| 12804 | Bush | Providing for the restoration of order in L.A. | May 1, 1992 |
| 12807 | Bush | Interdiction of illegal aliens | May 24, 1992 |
| 12880 | Clinton | National Drug Control Program | November 16, 1993 |
| 12992 | Clinton | President’s Council on Counter-Narcotics | March 15, 1996 |
| 13133 | Clinton | Working Group on Unlawful Conduct on Internet | August 5, 1999 |
| 13228 | Bush | Establishing the Office of Homeland Security and the Homeland Security Council | October 8, 2001 |
| 13300 | Bush | Facilitating the Administration of Justice in the Federal Courts | May 9, 2003 |
| 13338 | Bush | Further Strengthening the Sharing of Terrorism Information to Protect Americans | October 25, 2005 |
| 13402 | Bush | Strengthening Federal Efforts to protect against Identity Theft | May 10, 2006 |
| 13481 | Bush | Providing an order of Succession within the Department of Justice | December 9, 2008 |
| 13491 | Obama | Ensuring Lawful Interrogation | January 22, 2009 |

**Box 4.3:** **White House Conferences Related to Crime**

| Year  | Administration  | Conference Title  | Date  |
| --- | --- | --- | --- |
| 1930 | Hoover | WH Conference on Children (Delinquents) | November 19, 1930 |
| 1934 | FDR | AG’s WH Crime Conference on Crime | December 10, 1934 |
| 1939 | FDR | WH Parole Conference (Crime) | April 17, 1939 |
| 1939 | FDR | WH Conference on Children (Crime Prevention) | April 23, 1939 |
| 1950 | Truman | AG’s WH Conference on Crime | February 15, 1950 |
| 1958 | Eisenhower | WH Conference on Children (Delinquents) | December 16, 1958 |
| 1960 | Eisenhower | WH Conference on Children (Delinquents) | March 27, 1960 |
| 1962 | Kennedy | WH Conference on Narcotics (Drug Abuse) | September 27, 1962 |
| 1965 | Johnson | WH Conference on Rights (Violence and Crime) | November 16, 1965 |
| 1967 | Johnson | WH Conference of Governors (Crime) | March 18, 1967 |
| 1967 | Johnson | National Conference on Crime Control | March 28, 1967 |
| 1972 | Nixon | WH Conference on Drug Abuse | February 3, 1972 |
| 1975 | Ford | WH Conference on Domestic Policy (Crime) | September 12, 1975 |
| 1988 | Reagan | WH Conference on a Drug Free America | February 29, 1988 |
| 1990 | Bush | WH Conference on DWI | December 11, 1990 |
| 1991 | Bush | WH Conference on Crime Victims Week | April 22, 1991 |
| 1995 | Clinton | WH Conference on Character Building (Crime) | May 20, 1995 |
| 1997 | Clinton | WH Conference on Hate Crimes | November 10, 1997 |
| 1998 | Clinton | WH Conference on School Safety | October 15, 1998 |
| 2006 | Bush | WH Conference on School Safety | October 10, 2006 |
| 2009 | Obama | WH Conference on Gang Violence and Crime Prevention | August 24, 2009 |

*Source:* Data collected by author from successive volumes of the *Public Papers of the Presidents of the United States* (Washington, D.C.: U.S. Government Printing Office).

**Speech**

The sixth and last institutional power of the American president to be reviewed, which is perhaps his strongest asset, is the power of speech. Because presidents sit in a position of power and public attention, coupled with media attention focused on the president, the president has the ability to deliver speeches that will be disseminated to the American people. Therefore, they have the means by which they can deliver speeches to a largely captive audience. At a very simple level, as Marion has explained, “presidents use their speeches to communicate their agenda.” 64 Shull has elaborated that it is through their use of rhetoric that “presidents set an agenda to promote and communicate their policy preferences to those inside and outside government.” 65 As a result, “much of what appears on the public agenda can be traced to the rhetoric in presidential statements.” 66 Finally, as one author who has extensively studied the rhetoric of American presidents, Lyn Ragsdale, explains, “Presidential speeches to the nation, even relatively mundane ones, have captured considerable attention in contemporary American politics.” 67 He further states that

through the speeches, presidents gain immediate access to the public. In preempting regular broadcasting, they receive the all-but-automatic and undivided attention of millions of radio listeners and television viewers. The forum presents presidents as sole speakers, uninterrupted by queries of newsreporters and challenged only afterwards by the rebuttals of partisan foes or the interpretations of political commentators.... In this solitary setting, presidents can appear as leaders of the nation; stirring public emotions and proposing solutions to national problems. 68

Therefore, presidents have a significant power that has developed over time and has become itself an American institution. It has also become clear that this power has translated into a more focused attention on the president in American politics 69 as well as providing the president with a more refined strategy for influencing public policy. 70 (See Table 4.1.)

Table 4.1 Level of Crime Activity a by Presidential Term

| President  | Total Activities  | Yearly Average  |
| --- | --- | --- |
| Hoover | 119 | 29.75 |
| Roosevelt, I | 31 | 17.75 |
| Roosevelt, II | 26 | 6.5 |
| Roosevelt, III/IV | 9 | 1.8 |
| Truman, I | 25 | 6.25 |
| Truman, II | 59 | 14.75 |
| Eisenhower, I | 62 | 15.5 |
| Eisenhower, II | 38 | 9.5 |
| Kennedy | 99 | 33 |
| Johnson | 347 | 69.4 |
| Nixon, I | 193 | 48.25 |
| Nixon, II | 24 | 12 |
| Ford | 95 | 31.66 |
| Carter | 157 | 39.25 |
| Reagan, I | 378 | 94.5 |
| Reagan, II | 598 | 149.5 |
| Bush | 659 | 164.75 |
| Clinton, I | 1,154 | 288.5 |
| Clinton, II | 1,825 | 456.25 |
| Bush, I | 573 | 143.25 |
| Bush, II | 567 | 141.75 |
| Obama, 1st Year | 80 | 80 |

aCrime activity is defined as including all major and minor speeches (including mentions), news conferences, interviews, statements, messages, and letters related to crime.

*Source:* Coded and calculated by the author from successive volumes of the paper version of *Public Papers of the Presidents* (Washington, D.C.: U.S. Government Printing Office) and the electronic version obtained in *World Book Encyclopedia: American Reference Library* (Orem, Utah: Western Standard Publishing Company). Format of table is derived from Lyn Ragsdale, *Vital Statistics on the Presidency: Washington to Clinton*, rev. ed. (Washington, D.C.: Congressional Quarterly Press, 1998).

**The History of Presidents and Crime Policy**

Prior to the 1930s, the federal government—and particularly presidents overseeing the executive branch—had focused very little effort in the area of crime control. 71 Presidents were simply relegated to a few methods for dealing with crime indirectly, including the appointment of federal judges, the nomination of Supreme Court justices, the appointment of personnel to the Department of Justice, and dealing with the constitutionally granted power of pardons. 72 It was not until the twentieth century that presidents began utilizing the issue of crime as a political issue, one in which they could take a leadership role, influence public opinion, and place crime on their agenda. (See Box 4.4.) Although several presidents spoke on the issue of crime, such as President Taft in 1905, the majority of these speeches were mostly isolated to small groups, such as the International Association of Chiefs of Police in the early twentieth century. 73

**Hoover**

It was President Hoover who first articulated the need for the government—and specifically the president—to become involved in the issue of crime when he explained,

It may be said by some that the larger responsibility for the enforcement of laws against crime rests with State and local authorities and it does not concern the Federal Government. But it does concern the President of the United States, both as a citizen and as the one upon whom rests the primary responsibility of leadership for the establishment of standards of law enforcement in this country. Respect for law and obedience to law does not distinguish between Federal and State laws—it is a common conscience. 74

This speech was given at the height of federal concern over the increasing problem in crime due to the passage of the Volstead Act and the advent of prohibition in the United States. A dry United States created a growth industry in the underground import, manufacturing, and distribution of illegal alcohol, all contributing factors to the rising crime rates. President Hoover was not only the first to truly take up the rhetoric of crime but also the first to begin addressing the issue of crime via federal powers of office. 75

In the same year as his speech on crime, Herbert Hoover created the National Commission on Law Observance and Enforcement to conduct the first comprehensive survey on the American Criminal Justice System. 76 The president appointed Judge Wickersham to chair what would be referred to as the “Wickersham Commission.” 77 Until then, several states and local jurisdictions had conducted crime surveys, but the majority of the survey recommendations focused on state and local crime problems, meaning that the Wickersham Commission was in fact the first national survey on crime. Although the majority of citizens believed that the primary intent and focus of the commission was prohibition, the commission published fourteen reports, including *The Causes of Crime, Prosecution*, and *Police*. Each of these volumes concluded that there was a need for law observance by all citizens and the increased need for law enforcement primarily among state and local law enforcement. Although all fourteen reports would be issued throughout the years 1930 and 1931, reporting a number of findings and making a meticulous, detailed, and comprehensive agenda for criminal justice reform, the agenda was never translated into legislative policy. Given the problems the country faced with the Depression, it was not feasible to implement the required administrative bureaucratic structure, legislative authority, and a large budgetary allocation in order to implement the agenda. Therefore, the first national commission on crime created a plethora of recommendations on criminal justice reform but spurred no action.

**Franklin Roosevelt**

Among President Franklin D. Roosevelt’s first acts in office was the repeal of the Volstead Act in 1933, and the office of the president’s attention to crime began to wane. However, this did not stop the federal administration from expanding into other areas of crime, such as narcotics, thus creating the foundation for federal crime control activity in the latter half of the twentieth century.

**Eisenhower and Kennedy**

It was not until the Eisenhower administration that crime resurfaced as a presidential issue with a focus on the rising rate of juvenile crime in the late 1950s caused primarily by the increase in the number of teenagers in the United States of the post–World War II baby-boom generation. As these teenagers became adults, they became the concern of President Kennedy, and coupled with the awareness of a rapidly expanding crime syndicate, crime was once again on the presidential agenda. 78 It was the Kennedy administration that would begin defining and expanding the federal role in crime control for the latter half of the twentieth century despite his short tenure as president. 79 As one author stated, “The anti-crime initiatives of John Kennedy, while neither comprehensive nor politically and philosophically well integrated, were nevertheless responsible for much of the current context of federal involvement in programmatic solutions.” 80 Surprisingly, however, it was the failed candidacy of the Republican nominee for president in 1964 that would receive the credit for launching crime to the forefront of not only the president’s agenda but the American agenda as well.

**Johnson**

The 1964 presidential election campaign between Barry Goldwater and Lyndon B. Johnson has come to be considered as the watershed event that placed crime on the national agenda and moved the federal government further into the area of crime. 81 Goldwater seized on an issue that he and his strategists felt was a significant concern of the American people, as crime rates were reported to have risen over 15 percent in the first six months of 1964. In addition, it is important to note that the number of incidents over racial violence was sporadic throughout the United States at this time but was widely reported in the newspapers. That Goldwater was attempting to capitalize on the “law-and-order” issue 82 is evident in his acceptance speech before the Republican convention:

Tonight there is violence in our streets, corruption in our highest offices, aimlessness among our youth, anxiety among our elderly.... The growing menace in our country tonight, to personal safety, to life, to limb and property, in homes, in churches, on the playgrounds and at places of business, particularly in our great cities, is the mounting concern of every thoughtful citizen in the United States. 83

Despite losing the election, Goldwater’s attention to the crime issue placed it on the Johnson administration’s agenda and greatly expanded on what the Kennedy administration initiated. Johnson, with Robert Kennedy at the head of the Department of Justice, began focusing heavily on organized crime and the growing problems of drug abuse, gun control, and the rise in crime and racial tensions in his own backyard, Washington D.C. 84 Although Johnson’s administration was focused primarily on the “war on poverty,” part of his agenda was in reality a “war on crime,” which was actualized through the passage of the Omnibus Crime Control and Safe Streets Act of 1968 and the creation of the Law Enforcement Assistance Administration. When passed, this federal policy was the largest, most comprehensive federal crime control package in the history of the United States and utilized a broad array of measures to address the crime problem, primarily through power, influence, and money.

President Johnson, like President Hoover, appointed a national commission to begin conducting research, generating solutions to the criminal justice system, and thereby creating an agenda for reform. The President’s Commission on Law Enforcement and the Administration of Justice was appointed in 1965 and was chaired by Attorney General Katzenbach and is more commonly referred to as the “Katzenbach Commission.” 85 The Katzenbach Commission differed from the Wickersham Commission in that its mandate was to study the nation’s response to crime and the focus on “the administration of criminal justice.” 86 In other words, this commission was concerned primarily with how the criminal justice system could be improved administratively, and the commission focused most of its recommendations on making changes in law enforcement as well as the courts and corrections components of the system. The premise behind this approach was that if the system could be improved, crime rates would decrease. The Katzenbach Commission, like the Wickersham Commission before it, published several reports with detailed agendas; however, unlike the Wickersham Commission, many of the recommendations of the President’s Commission would see legislative action. For example, the Drug Abuse Control Amendment of 1965, the Narcotic Addict Rehabilitation Act of 1966, and the Juvenile Delinquency Prevention and Control Act of 1968 were all derived from recommendations by the Katzenbach Commission. 87 However, it was the final recommendations made by the commission, as reported in the general report titled *The Challenge of Crime in a Free Society*, where over 200 recommendations were made, that would formulate the first omnibus crime legislation in the history of the United States. 88 The recommendations essentially called for the federal government to expand its financial support of the criminal justice system at the state and local levels, and it was from this platform that President Johnson launched the “Safe Streets and Crime Control Act of 1967.” Despite some political maneuvering on the bill and a delay of one year, a watered-down version of the bill was passed, and on June 19, 1968, President Johnson signed into law the Omnibus Crime Control and Safe Streets Act of 1968. 89

The Omnibus Crime Control and Safe Streets Act of 1968 focused its attention on all aspects of the criminal justice system, but the majority of the legislation, the budget it fostered, and the eventual allocation of resources were geared toward the police. 90 To pursue this policy, the Law Enforcement Assistance Administration (LEAA) was created under the Department of Justice to assist state and local law enforcement agencies in a wide variety of measures, including (1) the law enforcement education program, which would promote further education and training to law enforcement personnel; (2) the National Institute of Law Enforcement and Criminal Justice, which would assist law enforcement in research and development to upgrade their crime-fighting capabilities; (3) the National Criminal Justice Information and Statistics Service to provide assistance in data collection and information sharing; (4) technical assistance and training to state and local law enforcement agencies; and, the most significant role, (5) block grants delivered to states through the establishment of state planning agencies that would allow each state to develop its own plans for improving law enforcement through the delivery of subgrants to local police. 91 As block grants were the main method by which the federal government could assist the state and local agencies, it is not surprising that the demand increased from a $25 million allocation in 1969 to a $414 million allocation in 1972, an increase of 1,600 percent in just four years. 92 In addition, Congress amended the Safe Streets Act by passing the Crime Control Act of 1973, which continued the funding to states and increased state control over the block grants. 93 While this appears to help the state and local governments, the problem was found in the details of narrowly defined grant applications, oversight into the use of grant money, and the mandates placed on the state and local governments. By 1980, the LEAA had delivered over $8 billion to state and local agencies to address the issue of crime. 94 However, in the last few years of the LEAA, the organization was left underfunded and was considered a failure because of the methods of block grant delivery through the state planning agencies. 95 The agency was quickly and quietly phased out by the Reagan administration in 1982, only to be replaced by several new and “innovative” Department of Justice agencies.

**Nixon**

Although Goldwater had been the first presidential candidate to campaign on the “law and order” theme, it was not until President Nixon entered the White House that crime control rhetoric would begin to translate into a more defined policy application. Nixon adopted policies and budget expenditures in the Omnibus Crime Control and Safe Streets Act of 1968 that reflected a focus on the crime control model of increasing arrests, speedy trials, and harsh punishments. The efforts to fight organized crime and drug abuse were redoubled, the criminal justice system was greatly enhanced, and the first “war on drugs” was launched. 96 While the accomplishments of the president’s agenda were limited, he did manage to create what would eventually become the Drug Enforcement Agency to develop a strong tie between the federal and state governments through the allocation of monetary funds, and he dramatically increased the rhetoric on crime in regard to the institution of the presidency. 97 In essence, Nixon legitimized and institutionalized crime as an item on the president’s agenda and moved the emphasis from a mixture of punishment and rehabilitation policy to one focusing strictly on “law and order.”

**Ford and Carter**

The two presidential administrations that followed would focus on the topic of crime but through different means. President Ford, primarily because of his short tenure after the resignation of President Nixon, would merely continue to emphasize the policies of his predecessor and continue much of the law-and-order rhetoric. And President Carter spent most of his tenure attempting to deal with the “runaway” bureaucracy, particularly the LEAA, which was the most visible of the Department of Justice agencies that had become increasingly large in both budget and personnel.

**Reagan**

With the election of President Ronald Reagan, the law-and-order politics and the presidential rhetoric on crime reached a new level. 98 The war on drugs was renewed once again, a war on crime was launched, and a refocusing on the victim in the criminal event became a key component of President Reagan’s agenda on crime. 99 In addition, renewed efforts to address organized crime, support of the right to bear arms, an effort to address pornography (especially child pornography), prison reform, juvenile crime, and criminal code revisions all found their way onto Reagan’s crime control agenda. 100

It was as a result of Ronald Reagan’s restoration of law-and-order politics that Congress, because of and to some degree in spite of Reagan, began taking a very active role in crime legislation. 101 Very early in Reagan’s administration, after the assassination attempt on his life, Congress began pushing for some form of gun control legislation that Reagan continued to oppose. Legislation was eventually passed in 1986 but was then rolled back by subsequent legislation in 1988. 102 In addition to gun control legislation, Reagan renewed the call for drug control legislation, and Congress passed several bills, including the Anti-Drug Abuse Act of 1986, which increased the penalties for drug use, increased authority for seizures and forfeitures, and focused heavily on expanding the federal criminal justice system to target the international drug trade, and the Anti-Drug Abuse Act of 1988, which expanded the 1986 act by increasing penalties even further and imposing the death penalty for drug trafficking and again expanded the federal budget to address the drug problem, including the creation of the cabinet-level director known as the “drug czar.” 103 Congress also targeted street crime by passing the Comprehensive Crime Control Act of 1984, which overhauled the federal sentencing system, tightened the legal definition of insanity, and required minimum mandatory sentences for career criminals, and the Crime Control Act of 1990, which created new laws, new programs, and, most important, an increased budget to address the problems of crime. 104 All these legislative acts greatly expanded the federal involvement in crime and created a renewed war on drugs, leading Congress into a steady diet of crime-related bills throughout the 1980s that would grow into a voracious appetite in the 1990s. The issue of crime was once again at the forefront of America’s agenda, the law-and-order concepts of Nixon were extended, and the politics of crime witnessed a strict adherence to the conservative ideology.

**Box 4.4:** **Presidents and Their Crime Control Policies**

|  |  |
| --- | --- |
| **Kennedy**  | Had four primary criminal justice issues: organized crime, juvenile crime, youth delinquency, and legal counsel for indigent offenders. |
| **Johnson**  | Established the Commission on Law Enforcement and the Administration of Justice to discover the causes of crime and better ways to prevent it; felt that crime control was the first duty of local law enforcement but that the federal government could help; supported outlawing all wiretapping, creating new methods to prevent juvenile delinquents from becoming criminals, adding controls on sales of firearms, and fighting illegal drug use. |
| **Nixon**  | As the first “law-and-order” president, he acknowledged that crime was a local issue but that the federal government could help. He fought against unsolicited pornographic material, organized crime, street crime, narcotics, and crime in the District of Columbia. He supported juvenile delinquency prevention programs, revision of the federal criminal code, victims’ rights, the war on drugs, drug treatment and rehabilitation programs, and grants to states. |
| **Ford**  | Had many crime control issues on his agenda, including gun control, constitutional protections restricting the search efforts of law enforcement personnel, capital punishment for shooting a police officer, mandatory sentencing, pretrial diversion, and the prosecution of white-collar crime, political corruption, and other crimes in high places. |
| **Carter**  | Did not put crime high on his agenda; supported criminal code reform, judicial reform, wiretap reform, antitrust enforcement and competition, and anticrime programs for the District of Columbia. |
| **Reagan**  | Supported victims’ rights, the death penalty, and the right to own handguns and fought against illicit drug use, organized crime, and pornography, especially child pornography. |
| **George H. W. Bush**  | Supported mandatory sentences for drug offenders and the death penalty for drug kingpins, changes in the exclusionary rule, limiting habeas corpus appeals, limits on semiautomatic firearms and pretrial preventive detention for cases involving firearms, and adding more federal agents to help fight crime. |
| **Clinton**  | Supported “three-strikes” legislation, passage of the Brady Bill, and other gun control legislation; proposed more federal agents and local peosecutors to crack down on illegal gun trafficking and dealers; and supported the Hate Crimes Prevention Act, the Violence Against Women Act, and his “100,000 Cops” plan to patrol the streets of America under the tenets of community policing. |
| **George W. Bush**  | Focused early on school resource officers to prevent school shootings and after September 11, 2001, emphasized tougher antiterrorism laws, such as the USA PATRIOT Act and the creation of the Department of Homeland Security, and Drug enforcement. |

*Source:* Adapted from the *Public Papers of the Presidents of the United States* (Washington, D.C.: U.S. Government Printing Office, 1961–2005).

**George H. W. Bush**

The politics of crime and the development of a singular focus on the conservative ideology are perhaps best captured through the presidency of George H. W. Bush, ranging from his presidential campaign to his administration’s policies on crime. During the 1988 presidential campaign, the law-and-order theme once again became the centerpiece of a Republican presidential nominee, and the conservative focus on punishment over rehabilitation is perhaps best articulated in one of his campaign ads. A convicted murderer, Willie Horton, had been released from a prison in Boston, Massachusetts, on a weekend furlough and raped a young woman. George Bush’s opponent, Michael Dukakis, was the Democratic governor of Massachusetts at the time of Horton’s crime. The political advertisement was utilized to highlight that punishment is preferred over rehabilitation and that Dukakis was soft on crime. One additional important issue centered on the ad’s highlighting the fact that Willie Horton was black and the victim was white, playing not only to the criminal issue but to the racial issue as well. 105 This campaign ad set the tone for the president’s agenda on crime.

President Bush’s agenda on crime was as conservative as President Reagan’s and was highlighted by a renewed war on drugs linking the federal and state criminal justice system through new policy and budgeting and focusing on various items related to violent crime. During his four-year tenure, President Bush expanded the criminal justice system at the federal level, increased the government’s attention to crime, and entrenched the presidential rhetoric on crime even deeper. Bush was so committed to the issue of crime control that in his 1992 State of the Union Address, he went so far as to call for a “major renewed investment in fighting violent street crime,” articulating that “it saps our strength and hurts our faith in our society, and in our future together.” 106

**Clinton**

In what is perhaps the most ironic twist of fate in regard to the politics of crime, the campaign theme of crime and violence utilized by President Bush in 1988 to win the White House was utilized by a Democrat, President-Elect Clinton, in 1992. Clinton’s ability to steal the high ground on this issue may have contributed to Bush’s defeat. Clinton surrounded himself with police officers, proposed adding 100,000 police officers to America’s streets, spoke of increasing boot camps, and criticized the Bush administration for losing the war on crime. 107 Clinton also campaigned widely for the death penalty and went so far as to demonstrate his resolve over the issue that he interrupted his campaign to fly back to Arkansas in order to preside over two executions. 108 The politics of crime were no longer divided between liberals and conservatives or Democrats and Republicans but had become a singular ideology, namely, the conservative ideology. Now the goal was to see who could be “tougher” on crime.

President Clinton, on entering the White House, continued to make the claim that he was tough on crime, and throughout 1993 and 1994 he continued to call for legislation on crime and for a comprehensive crime control package that would adhere to many of his campaign promises. What resulted was a bipartisan Congress passing the Violent Crime Control and Law Enforcement Act of 1994, which was signed by President Clinton in the fall of 1994. This act became the most comprehensive and expensive federal crime control package in the nation’s history, at a total cost of $36 billion to be expended between the years 1994 and 2000. And it became one of the most consistently conservative crime control packages that was supported and signed into law by a Democratic president. The act provided funding to hire 100,000 new police officers, build more prisons, create new drug courts, and target crime prevention and domestic violence against women, and it increased the number of federal law enforcement officers and included funding to target both illegal immigrants and street gangs. 109 In addition, the act included numerous laws that enhanced the federal use of the death penalty, created mandatory minimum penalties for numerous crimes, created a “three-strikes” law at the federal level, and increased the punishment for illicit drugs, unlawful use of firearms, terrorism, child pornography, crimes against children, and computer crimes. Despite much talk and discussion over a few programs oriented on offender counseling, drug therapy, and the much-discussed “Midnight Basketball program,” 110 the dominant theme within the Violent Crime Control and Law Enforcement Act of 1994 was the conservative ideology. Crime was no longer (if it ever was) the dominant theme of the Republican Party, and the dichotomy of two crime ideologies had definitively dissolved into one conservative ideology.

This reality was underscored in the 1996 presidential campaign between President Clinton and the Republican presidential nominee, Bob Dole. Neither of the candidates had an upper hand on the crime issue, primarily because both candidates were espousing the same solutions. If anyone could be said to have had the advantage, it would have been President Clinton, for beyond being an incumbent, he had supported and won passage of the Violent Crime Control and Law Enforcement Act of 1994, crime rates were falling, and he was endorsed by one of the most conservative organizations in the nation, the Fraternal Order of Police. However, despite these factors, Clinton continued to call for a focus on teenage drug use and curfews and supported school uniforms while also calling for the building of more prisons, an expansion of the death penalty, and targeting violent offenders. Dole, on the other hand, was calling for tougher drug policy, prison construction, harsher penalties for juvenile offenders, and targeting violent offenders. With the win by President Clinton for a second term, the emphasis continued to be on the “100,000 Cops” initiative, which was expanded to “150,000 Cops” through congressional legislation in 2000.

**George W. Bush**

In the 2000 election, Governor George W. Bush of Texas was running on the Republican ticket while Vice President Al Gore received the Democratic Party’s nomination to run for president. Despite the fact that crime had been falling for the previous eight years, crime policy remained an issue for both candidates during the election. 111 Both candidates attempted to capitalize on the issue of guns because of the increased public concern over the availability of weapons by students in a series of violent school shootings in the latter half of the 1990s. In addition, Marion and Farmer point out that both candidates utilized a number of symbolic statements to gain support for their campaigns’ position on crime while offering only little in the way of substantive proposals. 112 In the end, the actual election itself would become the more contested issue, but once the Supreme Court issued its decision, Governor Bush was inaugurated as the forty-third president. His policies regarding crime control consisted of only minor changes related to existing policies, but after the terrorist attack of September 11 2001, his administration’s emphasis, as it relates to crime, shifted to one of antiterrorism. 113

**Barack H. Obama**

President Obama has engaged in no major crime initiative since taking office. His administration has continued many of the policies of past presidents and he makes appearances and speeches at what have become annual events, such as remarks at the National Peace Officers Memorial Service, and he has issued proclamations for National Child Abuse Prevention Month and National D.A.R.E. Day. Perhaps the most significant change coming from the Obama Administration was in the May 2010 shift in the National Drug Control Strategy which emphasized community treatment and prevention programs, as well as the role of health care providers in addressing the problem of drugs. The shift, however, was met with little attention and Obama has not continued to speak on the issue.

**The President’s Agenda and Crime Policy**

The president’s agenda is but one aspect of the total government agenda, but it carries significant weight in the realm of moving policies from the systemic to the institutional agenda. The old saying that “the president proposes and Congress disposes” highlights this importance in the agenda-setting process. 114 As Kingdon explains, “No other single actor in the political system has quite the capability of the president to set agendas in given policy areas for all who deal with those policies.” 115 Shull also highlights the fact that presidents have “a far greater role in initiating national policies in the 20th century than they did previously,” 116 and Miroff believes that the president has come to “monopolize the public space.” 117 Finally, as Bosso colorfully articulates, “the presidency is the single most powerful institutional lever for policy breakthrough,” and he “is the political system’s thermostat, capable of heating up or cooling down the politics of any single issue or of an entire platter of issues.” 118 Bosso then further states, in relation to the process of moving issues onto the government’s agenda, that “presidential intervention is a key variable.” 119 Recognizing the importance of the president’s agenda in relation to the total government agenda, it is important to understand what is meant by the president’s agenda, why the president has so much influence, and how this relates to crime policy.

Paul Light’s seminal book *The President’s Agenda* has become the definitive book on understanding the president’s agenda, especially as it relates to domestic policy choices. 120 Light explains that

the President’s agenda is a remarkable list. It is rarely written down. It constantly shifts and evolves. It is often in flux even for the President and the top staff. Items move onto the agenda one day and off the next. Because of its status in the policy process, the President’s agenda is the subject of intense conflict. The infighting is resolved sometimes through mutual consent and ‘collegial’ bargaining, sometimes through marked struggle and domination. 121

Light goes on to say that

the President’s agenda is perhaps best understood as a *signal*. It indicates what the President believes to be the most important issues facing his administration. It identifies what the President finds to be the most appropriate alternatives for solving the problems. It identifies what the President deems to be the highest priorities. 122

In sum, the president’s agenda stands as a fluid list of what the president and his top staff consider to be the most important problems, coupled with what are considered to be the best alternatives for solving these problems, to create a prioritized “list” of policy-related items. However, like understanding the process of how items find their way from the systemic agenda to the institutional agenda, which explains why the government chooses certain policies for its agenda, it is equally important to understand how certain policies, such as crime, find their way onto the president’s agenda.

The key, according to Light, comes from understanding presidential power and the resources that presidents have at their disposal. 123 Light articulates that presidents have internal resources, such as time, information, expertise, and energy. 124 Kingdon adds to the list institutional resources, “including the veto and the prerogative to hire and fire”; organizational resources, such as the fact that the executive branch has a more enhanced ability for making unitary decisions than Congress; a command of public attention, “which can be converted into pressure on other government officials to adopt the president’s agenda”; and, finally, like Light, the president’s involvement (time and energy) in specific policy issues. 125 Light also delineates several external resources available to the president, such as party support in Congress, public approval, electoral margin, and patronage. 126 These resources must then be understood as being either increasing or diminishing resources. For example, in regard to the internal sources, presidents face the increasing resources of expertise and information. These two resources are not always readily available to a president when he enters office and must be built over his tenure in office. However, the other two internal resources are diminishing resources—time and energy—as the president moves further into his term. There is a clear conflict in these internal resources. As the president moves further into his term, he is finally in a position of having enhanced his expertise in the political arena and has the information to affect policy, but he is assuredly running out of time and, most likely, energy to affect said policies. In regard to external resources, party support in Congress often diminishes in the midterm elections, and public approval typically diminishes throughout the president’s four years, leaving the president with little capital at the end of his term. Thus, all these resources, internal and external, come to bear on the president’s ability to place items on his agenda and to push them through Congress to achieve a legislative victory.

Light goes on to explain the process of how items find their way onto the president’s agenda by first looking at the opportunities the president has for making choices. 127 He notes that the policy cycle, often dictated by the political election cycle, influences the items a president places on his agenda. 128 Light also explains that presidents select issues not only because they are pressing systemic issues but also because the president considers his chances for reelection (establishing himself historically), and because he wants to see “good policy” pass the legislature. 129 In a sense, the president is seeking benefits from the policies he chooses. Light then further explains that the source of policy ideas plays a role in the policies the president places on his agenda. 130 The president may be influenced by external sources, such as Congress, national events and crises, bureaucrats, public opinion polls, and political parties, interest groups, and the media. In addition, he may be influenced by internal sources, such as the party platform under which he ran his campaign, the campaign promises he made along the way, and members of his staff. All these factors come to bear on the president, who must then make the decision as to what issues to address and what issues not to address.

Once the president makes the decision to have his administration move forward on a particular issue, such as crime, he must then prioritize his agenda and determine how best to address each issue. 131 This is generally done by establishing the direction he wants to take the policy issue but is then forced to make several choices along the way. He must determine whether the program will be a new one or an old one and whether he will push the policy through legislative or administrative means, and he must determine the size of the program and what type of budget the program will receive. 132 He must then weigh the political cost, economic cost, and the technical (“workability”) costs of the policy proposal before moving on the policy. 133 Finally, the president must determine how committed he is to the policy as it moves through the political process. 134 This last part ultimately returns to the issue of the president’s resources and how he chooses to employ them. He must determine how much support already exists for the policy (external resources) and how much time and energy he, himself, is willing to devote to the policy (internal resources).

Recognizing the importance of the president’s agenda in defining the issues that the national government places on the institutional agenda, it is important then to understand the president’s agenda as it relates to crime. There are a number of reasons that presidents have come to focus on the topic of crime. These reasons tend to fall into three categories: policy, political, and ideological explanations. These various explanations, as they relate to crime policy, give the president an enormous amount of power to influence both public opinion and Congress in order to obtain legislative victories, often considered the mark of a successful president.

**Policy Explanations**

The policy explanations for why presidents focus on crime control policy first and foremost are because of the nature of crime. This first explanation may simply lie in two realities. The first is that crime is inevitable and that many crimes will rise to the level of national awareness. Second, throughout the twentieth century, presidents have become more and more a focal point for American policy, politics, and leadership. 135

**Crisis**

When an international crisis occurs, people look to the president for guidance, direction, and leadership. Likewise, when there is a major national crisis, such as a riot, mass murder, or bombing, people look to the president. As a result, the president is naturally inclined to respond or, rather, is forced into responding to the event. This leadership role carries some political influence, and these dramatic events can have either a positive or a negative effect in that it can either unify the nation around the president or dramatize and highlight the nation’s conflicts and problems. 136 Examples of presidents and national crises revolving around criminal related events include President Hoover and the Lindbergh baby kidnapping, 137 President Johnson and the series of urban riots occurring in a number of major cities across the United States, 138 President Clinton and the World Trade Center and Oklahoma City bombings, and President Bush and the terrorist attacks of September 11. In each of these cases, the public looked to the president for guidance, and the presidents responded. Perhaps President Johnson explained it best in his memoirs, which were published in 1971, when he stated, “Somehow, in the minds of most Americans the breakdown of local authority became the fault of the federal government. 139

In the end, whether or not crime is a state or a local issue does not seem to matter much. What matters in the case of a crime that rises to the level of national attention is that presidents assume their leadership role. Most presidents, even Johnson, have not ignored this responsibility.

**Substantive Policy**

The second explanation for why presidents focus on crime control policy may be derived from the possibility that crime is the type of issue that gives the president the ability to engage in substantive policy. The concept of substantive policy, as utilized here, is meant to denote the fact that the policy passed has a real and demonstrative nature about itself. This then allows presidents the capability of passing “good policy,” for, as Light explains, “there can be little question that Presidents do engage in the search for programmatic benefits” and that “Presidents do have notions of what constitutes good policy.” 140 This can also be further explained in relation to the discussion by Theodore Lowi, who argues that “good policy” today is seen as “one which is open-ended, ambiguous, and flexible,” 141 while he argues effective policies require clarity, choice, and closure. 142 In other words, according to Lowi, policies should be more definitive. Crime lends itself to all these factors in that crime policy can often be real, demonstrative, and definitive in nature.

There are numerous examples of the substantive aspects of crime policy. One such example can be derived from President Johnson’s Crime Commission in the 1960s, which published the report known as *The Challenge of Crime in a Free Society*. 143 This resulted in the legislation known as the Omnibus Crime Control and Safe Streets Act of 1968, which created the LEAA within the Department of Justice. This agency would create a program known as the Law Enforcement Education Program, designed to assist and encourage police officers to attend college and work toward furthering their education. This program would ultimately contribute to the creation and evolution of a number of criminal justice programs in institutes of higher education today. 144 Other examples include the rapid increase of federal prison facilities built across the United States during the last two decades of the twentieth century, which some have come to term the “prison-industrial complex.” 145 Regardless of whether one considers prison expansion a “good” or “bad” policy, it can clearly be categorized as being a substantive policy and has a demonstrative effect. Finally, another example was President Clinton’s “100,000 Cops” initiative. Although this was most certainly used for its symbolic effect, one can hardly argue that the passage of the Violent Crime Control and Law Enforcement Act of 1994 by Congress, which allocated $8.8 billion for local law enforcement and has been dispersed to police agencies across the country to hire additional officers, train them, and purchase new equipment, was merely “symbolic” in nature.

**Symbolic Policy**

Having stated that the second key reason for presidential involvement in crime control policy is for substantive policy reasons, it must also be stated that there is still much validity in the assertions that crime is often used extensively by presidents for purposes of symbolic politics. 146 The pioneering work by Joseph Gusfield 147 and Murray Edelman 148 provided much of our understanding about the use of symbols. Edelman explains that “every symbol stands for something other than itself, and it also evokes an attitude, a set of impressions, or a pattern of events associated through time, through space, through logic, or through imagination with the symbol.” 149 He goes further in saying that “symbols become that facet of experiencing the material world that gives it a specific meaning.” 150 In other words, symbols derive their meaning not from content but from the value of how people perceive them. This has clear application for politics in that politicians can utilize political symbols to convey a value, an attitude, or a sentiment without having to provide details or issue substantive policies. Political symbols can then be defined as “the communication by political actors to others for a purpose, in which the specific object referred to conveys a larger range of meaning, typically with emotional, moral, or psychological impact. This larger meaning need not be independently or factually true, but will tap ideas people want to believe in as true.” 151

Presidents have most assuredly found the use of political symbols in the area of crime policy to be of significant value. 152 Scheingold has explained that “the symbolic forms that define the politicization of street crime are more salient in national than in local politics.” 153 Several other authors have explained that crime was used in the early 1960s by “presidents and would-be presidents” who “used the crime issue for a short-term political advantage.” 154 They further explained that “crime in the streets as a national issue was *manufactured* and milked by presidential candidates, who began a sorry stream of symbolic politics rather than attending to practicalities and management in the war on crime.” 155 As a result, presidents became engaged in the issue of street crime, but for the most part they have dealt more with symbolic politics than with substantive politics. The reason for this focus being the role of the national government in crime control policy is still somewhat limited, and presidents have succeeded more in politicizing crime policy rather than in federalizing crime policy. As Scheingold has concluded, “The policy limitations of the politics of law and order are, in part, a product of the symbolic character of politicization.” 156 Despite these limitations, presidents for nearly three decades have continued to draw on the issue of crime, and a large portion of their attention has been purely symbolic.

**Valence Issue**

A related explanation to the argument that crime is a symbolic issue comes in the fact that crime is also a valence issue. A valence issue can be defined as one in “which the overwhelming number of voters have a single position” and in which “prevailing opinion is so strong that no opposing position seems possible.” 157 The concept was actually first articulated by Butler and Stokes in their book *Political Change in Britain*. 158 The point these authors were trying to make was that most issues are position issues, where there are clearly two opposing viewpoints to the issue. 159 In sum, valence issues are those issues on which people demonstrate a consensus but may disagree as to the means by which to address the issue; politicians use these valence issues, coupled with symbolics, to make themselves appear positive, while their opponents are painted in a negative manner.

Crime is most assuredly a valence issue. As some authors have stated, “No one is for it; therefore being against it is a safe political issue.” 160 As Jones has explained, “For a politician in an election to decry crime does not lead an opponent to defend it. Valence issues are important because politicians often link the raising of an issue to a policy solution; a crime wave demands harsher penalties.” 161 This then feeds into the process whereby politicians utilize the positive and negative symbols by trying to paint their opponents as “soft on crime” and themselves as “tough on crime.” What generally results is a consensus that crime is an important issue, but the debate then shifts to one centered on the means by which crime should be addressed. In generic terms, it falls into the punishment-versus-rehabilitation debate. Although the policy issue of crime is replete with many position issues, such as the death penalty and gun control, it is also teeming with many examples of valence issues, such as child abuse, alcohol abuse, and drug abuse as well as the issue of “street crime” itself. 162

Presidents have also played heavily on the fact that street crime is a valence issue. As Scheingold explains, “National politicians also have a strong incentive to politicize street crime ... for them it provides a unifying theme and thus a valence issue.” 163 As a result, “in national politics, especially presidential politics, street crime has been a valence issue—and more.” 164 Scheingold further highlights the fact that “not only is there overwhelming agreement that street crime should be reduced, but it has the added attraction of arousing strong emotions—something capable of gaining a firm grip on the public imagination.” 165 One such example, illustrated by Jones, is the increased attention Vice President Bush paid to the issue of drug abuse during his 1988 campaign and on entering the office of the presidency despite any evidence that there was in fact a drug epidemic. 166 He was successfully able to portray his opponent, Governor Michael Dukakis (D-Mass.), as “weak on crime” while strengthening his position as being “tough on crime.” President Bush, in his first major television address on September 5, 1989, would then announce his war on drugs. What occurred afterward was an eightfold increase in television coverage of the problem 167 and a thirty-six-percentage-point increase in drugs being listed as the “most important problem facing the country.” 168 In the end, “a peak in awareness of the drug problem was caused primarily by presidential attention to it.” 169 Bush had effectively used the valence issues of crime and drugs not only to win the office of the presidency but also to continue garnering support for addressing an issue that had little to no opposition.

**Racial Issue**

Finally, a more deeply related explanation for why presidents have focused their attention on the issue of crime draws on the symbolic and valence discussion to emphasize one of the most sinister but effective uses of the crime issue, and that is to link the issue of crime with racism. There is a growing body of evidence that as the civil rights movement began to take hold and public sentiment toward minorities, mainly blacks, began to change, it was no longer politically feasible to openly decry blacks. 170 Research indicates that to some degree this phenomenon had been driven underground and replaced with an emphasis on decrying those social events that are perceived to be highly associated with blacks. 171 For example, the issues of welfare and affirmative action are often associated with blacks and are decried by a large portion of Americans. What some research has begun to suggest is that negative opinions toward these policies are partly a result of masked racist sentiments. 172 In regard to crime, there is also a growing body of research that has begun to uncover this phenomenon, demonstrating that in many instances hatred for “criminals” and “drug abusers” is really a code word for hatred toward blacks and other minorities. 173 As a result, presidents, whether intentionally or not, by focusing their attention on crime policy, may in reality be connecting racist sentiments with anticrime sentiments. Hence, crime becomes a symbol for racism.

Although it is clearly difficult to disentangle the intent of the president in this regard, there is some evidence that this has been used by presidents as “a shorthand signal to a crucial group of white voters, for broader issues of social disorder, evoking powerful ideas about authority, status, morality, self-control, and race.” 174 One clear example comes from the Nixon administration in comments made by Nixon’s two key advisers, H. R. Haldeman and John Ehrlichman. Haldeman is quoted from an entry in his personal diary as saying, “He [President Nixon] emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.” 175 Ehrlichman, in describing the 1968 presidential campaign, explained, “We’ll go after the racists. That subliminal appeal to the anti-black voter was always present in Nixon’s statements and speeches.” 176 In addition, various works by Michael Tonry have demonstrated that both Reagan and Bush were targeting issues of crime and drugs, knowing that there would be an “adverse differential effect on blacks” and that “the justification ... [was] entirely political.” 177 Finally, there is perhaps no better example of crime posited as a surrogate for race than the infamous 1988 presidential campaign commercial detailing the convicted rapist Willie Horton. 178

In the television commercial, created by a pro-Bush political action committee, Willie Horton, a black male rapist, was granted a weekend furlough by Bush’s Democratic challenger, then-Governor Michael Dukakis. During the weekend furlough, Willie Horton raped and murdered a white female victim. The commercial was designed to raise the issue of crime and make the statement that Dukakis was “soft on crime.” While it succeeded in the endeavor, it also linked the issue of crime with the offender most often feared by white America, namely, a black male. As Jamieson explains, “The Horton story magnifies fear of crime, identifies that fear with Dukakis, and offers a surefire way of alleviating the anxiety—vote for Bush.” 179 As a result, crime in this case became a surrogate for race hatred, and the two issues became linked. While it was not considered acceptable to voice negative attitudes toward blacks, it was perfectly acceptable to target negative attitudes toward criminals.

**Political Explanations**

The political reasons that presidents engage in crime control policy present an interesting laundry list of explanations. In each of these explanations, presidents at one point or another are attempting to gain politically from their engagement in crime control policy. While presidents may find themselves focused on only one of the political explanations detailed in the following sections, most likely these explanations are working in concert. Therefore, while all these are important considerations for understanding why presidents engage in crime control policy, one is not necessarily more important than the others. All can be equally important explanations.

**Campaigning**

The first political explanation lies in the time period before a president assumes the office of the presidency, and that is along the campaign trail. It is during this time that many future presidents first begin utilizing the issue of crime for political purposes, namely, to win votes. The use of substantive, symbolic, and valence politics is often very evident during the presidential campaigns. As presidents are making promises about how they will govern, they are seeking to get their policy views communicated to the public, and they are always looking for new and innovative policies, primarily because the media are always looking for new and interesting stories. 180 As a result, crime policy has become an attractive issue on which to campaign. As Scheingold explains, “Politicians ordinarily gain electoral success by telling the public what it wants to hear ... when fear of street crime runs high, politicians have every reason to believe that the public is looking for promises to crack down on criminals fairly and expeditiously.” 181 In fact, Milakovich and Weis go so far as to say, “Well-publicized concern about the problem of crime is often a prerequisite for a successful political campaign in which crime, either an all-out war or a brush-fire response to an increase or a promised decrease, is made a key issue.” 182 As crime is always an issue in the media, providing examples on which to draw, crime has played a role in every presidential campaign since the 1964 election between Johnson and Goldwater. 183 It has also been demonstrated time and time again that crime provides a key issue on which to propose new laws 184 and policy, 185 such as Clinton’s “100,000 Cops” (substantive policy); to generate photo and campaign commercial opportunities, 186 such as the candidate being surrounded by uniformed police officers (symbolic politics); and to portray themselves as being “tough on crime” (valence politics).

**National Parties**

The second political explanation is closely related to the first, namely, that both the national parties, Republican and Democratic, have included crime as part of their party platforms since the 1960 election year. 187 In fact, while the first modern election party platforms to mention crime consisted of only a few phrases referencing “soaring crime rates,” by the 1996 campaign both parties reserved several pages to address the issue of crime and drugs. 188 Although many have concluded that party platforms should not be taken seriously because candidates use them to “run on” and not to “stand on,” 189 there is some evidence that suggests presidents sometime adhere to the party platform and that in many cases presidents up for reelection essentially write the platforms. 190 While adhering to the party platform on crime can assuredly benefit the candidate in regard to the party members themselves, a unified party–president relationship on crime cannot hurt the president and may in fact, by way of communicating the candidate’s views on crime, provide a political benefit with the electorate.

**Types of Crime Policy**

The third political explanation deals with the type of policy in which crime can be categorized. Crime has, in one form or fashion, been categorized as all four policy types, including distributive, redistributive, regulatory, and morality. More recent crime policy initiatives have been defined as “pork” by a variety of people 191 or as distributive policies. There is some evidence to suggest that one of the earliest crime policies resulting from the Omnibus Crime Control and Safe Streets Act of 1968, which created the LEAA under the Department of Justice, was essentially a distributive policy. As Cronin, Cronin, and Milakovich explain, “Not only were LEAA funds a generous pork barrel, but everyone seemed to have a piece of the action when it came to how LEAA was to be managed and even what it was supposed to do.” 192 The more recent Crime Bill of 1994, the Violent Crime Control and Law Enforcement Act, created a similar agency known as the Office of Community Oriented Policing Services within the Department of Justice and, for over six years, handed out grants for hiring, training, and equipment to any agency that applied. As of the beginning of 2000, over $8 billion in grants had been awarded to state and local agencies throughout the United States, suggesting that crime policy, at least in this case, fits the category of distributive policy. 193

Crime, for the most part, has long been considered an area of regulatory policy. Meier has suggested that crime control efforts are obviously regulatory in nature when he stated, “At the state and local level, one major form of regulation is the legal restriction of criminal activity.” 194 Spitzer has also explained that “crime control legislation, which usually includes specific prohibitions backed by firm sanctions, is classic regulatory policy.” 195 Crime’s relationship to regulatory policy is perhaps best explained in a historical framework, for, as Eisner has pointed out, “the history of regulation is the history of state economy relations and institutional change.” 196 Crime’s regulatory policy aspects are historically derived from its relationship at the federal level with the movement in the late nineteenth century to regulate interstate commerce. This would eventually lead to the creation, by President Theodore Roosevelt during the Progressive Era, of what would become the Federal Bureau of Investigation. As the Task Force on the Federalization of Criminal Law, sponsored by the American Bar Association, explains, “The last third of the nineteenth century saw a significant increase in the assertion of federal jurisdiction, marked initially by a series of Congressional statutes dealing with the misuse of the mails and asserting federal jurisdiction in connection with interstate commerce.” 197 The New Deal initiatives then created a new burst of federal regulation of crime, largely coming on the heels of the prohibition movement, with a specific flurry of dozens of crime bills in 1934. Then, “almost four decades after the election of Franklin Roosevelt, the nation experienced another burst of regulatory policy-making,” 198 and crime was no exception. Again, the Task Force explained that “in the 1960s and 1970s ... concern with organized crime, drugs, street violence, and other social ills precipitated a particularly significant rise in federal legislation tending to criminalize activity involving more local conduct, conduct previously left to state regulation.” 199 Dilulio has added that the federal government’s role in crime also “grew as the power to regulate interstate commerce was more broadly interpreted by the U.S. Supreme Court.” 200 Finally, we have seen “in the 1980s and 1990s, the trend to federalize crime has continued dramatically, covering more conduct formerly left exclusively to state prosecution.” 201 What had started initially at the end of the nineteenth century as economic regulation ultimately turned into an emphasis on social regulation in the 1960s and its expansion ever since. 202

Another way of looking at crime policy has been by way of defining it as having the qualities of being both morality and redistributive policy. In the case of crime, these may include such specific issues as drugs, alcohol, prostitution, and gambling, crimes that are often referred to as “victimless crimes.” 203 In a sense, these issues can also be defined as redistributive policies in the sense that they are redistributing values rather than income. 204 However, these issues tend to be highly salient and often leave little room for expertise because information by one side is challenged by the other side or is often simply ignored. As a result, these are not issues that presidents obviously want to be drawn into because of their divisiveness and because they tend to split the electorate, but in many cases the salience of the issue forces them into a position to either “choose a side” or attempt to find some type of “common ground” where there often isn’t any.

The benefits that a president can derive from this type of policy are clear. Because the distribution of this type of policy is not a zero-sum gain, primarily because “one recipient’s allocation” is not “dependent on what another receives,” 205 this creates a win-win situation for the president in that not only can he claim credit for these “particularized benefits” but so can members of Congress. As a result, there is a tendency to “distribute” these benefits universally, across all states, local governments, and, of course, throughout congressional districts. In the end, then, it becomes clear that the only means by which presidents and the federal government as a whole can address the problem of crime is either through regulatory policymaking, coupled with administrative enforcement, or through policy funding.

**Public Opinion**

The fourth political explanation for why presidents focus on crime results from his relationship with public opinion. It has been recognized by Brace and Hinckley that “public mobilization is critical if presidents are to succeed,” 206 and this is equally true in the area of crime policy. There is, however, a transcendent advantage to mobilizing public opinion of crime, and that is that public opinion or, rather, public fear of crime has remained relatively steady and high over time. 207 In addition, crime is always a staple of the daily media. As a result, presidents have the capability of capitalizing on these facts by attempting to influence public opinion, thereby making the president’s “visibility” on crime become the public’s “visibility” on crime. 208 In other words, it is believed that presidents have the ability to influence public opinion of crime.

**Media**

The fifth political explanation is highly related to the last as well as to many of the other explanations offered, and that is the president’s relationship with the media. As the president, by virtue of his office, has the full time and attention of the various forms of media, whatever issue is on the president’s agenda most often becomes the media’s issue of the moment. 209 Coupled with the fact that most people receive their information through the media 210 and the media report heavily on the issue of crime, 211 this combines to form a relationship that, while difficult to untangle, most certainly has an effect on the American people’s perception of crime in the United States. As the president communicates to the American people mainly through the primary forms of media (e.g., television, radio, newspapers, and newsmagazines), the media and the president’s access to it become a political explanation for why presidents focus on crime.

**Interest Groups**

The sixth and final political explanation lies in the fact that over the past thirty years, there have developed a number of interest groups related to the issue of crime, and they have become more effective in influencing criminal justice policy. 212 While there are certainly the traditional interest groups that often find themselves embroiled in issues of crime control policy, such as the National Rifle Association; Handgun Control, Inc.; and the American Civil Liberties Union, there are a number of well-established and well-organized interest groups that have specifically organized to deal with issues of crime. 213 Finally, a more recent development in this specific area is not the traditional interest group lobbying, where interest groups seek the support of the president, but rather a form of “reverse lobbying” where presidents seek the support of the interest groups. 214 This occurrence, while a relatively new method of public mobilization, was used by President Clinton in his attempts to garner support for his Crime Bill.

**Ideological Explanations**

One final explanation for the law-and-order presidency comes simply from the possibility that presidents, whether it is something about their character or ideological worldview, feel it is right to address the issue of crime. As Barber has explained, “Character is the way the President orients himself toward life,” and a “President’s world view consists of his primary, politically relevant beliefs, particularly his conceptions of social causality, human nature, and the central moral conflicts of the time.” 215 Therefore, it is possible that something within the president’s life may have had a profound impact to have shaped his character “not for the moment” 216 but for life regarding the issue of crime. Equally, the president’s life shapes his assumptions and conceptions about how the world works, thus providing a specific worldview in regard to crime, and hence, as president, generates an ideological response to the issue.

An example of the issue of character can be seen in the life of President Ronald Reagan. There is the possibility that his character was shaped by both his parents and many of his early experiences. In regard to his parents, although he reports both as being loving and caring, it is reported that his father was an alcoholic, and this may have contributed to Reagan’s profound hatred for drugs and addicts, contributing to his tough stance on drug abuse. One of his early experiences, described by Reagan in his autobiography, may also explain his future stance on crime and centers on his time as a lifeguard. As he explains, “About my second year in high school, I got one of the best jobs I ever had ... working as a lifeguard at Lowell Park ... one of the proudest statistics in my life is seventy-seven—the number of people I saved during those seven summers.” 217 This concept of being the rescuer, the “lifesaver,” can have a profound effect on an individual, and perhaps Reagan saw himself in this role. Hence, when the opportunity came to address problems of crime and drugs, he continued to see himself in this role. Finally, one has to wonder if Reagan’s days as a film star, almost always playing the hero, did not have an impact on his character, hence influencing his views on law and order.

Finally, a president’s worldview may influence his activity in the area of crime but, more important, may also influence how he goes about addressing the issue. Calder, who has given this a much fuller treatment, 218 explains “that ideological predispositions restrict the President’s ability to effect measurable reductions in ordinary crime.” 219 As he further explains, “Presidents are not unlike other people in that they arrive at their positions in life as a consequence of the actions and opportunities that they have capitalized on along the way. Their experiences and training have molded their beliefs that are subsequently incorporated in their policy positions.” 220 By way of three case studies on the Kennedy, Johnson, and Nixon presidencies, Calder demonstrates that the first two, Kennedy and Johnson, had a functionalist ideology that caused them to view crime as resulting “from the inadequate socialization of the individual into the socially acceptable norms of the community.” 221 Hence, their commitments to resolving the issue of crime centered on addressing the social environment, not specifically targeting criminals. Nixon, on the other hand, was demonstrated to have a mechanist ideology that viewed crime as being a result of “poor upbringing and insufficient moral guidance by the family and lack of respect for the law.” 222 Hence, his commitment to resolving the crime problem was more of an enforcement of the laws and a demand for the respect of the law.

**Impact**

Since presidents do not engage in policy without a reason, any and all activity related to crime policy is focused on a particular end. In fact, all presidential activity is usually focused on two particular goals: influencing public opinion and influencing Congress. 223 The reason for this is simple: The office of the president is a constitutionally weak office, and the president’s only means of affecting change is through his power to persuade. 224 The reason he attempts to persuade the public is to garner support in Congress. The reason he attempts to persuade Congress is to gain a legislative victory for his administration and party.

Presidents have been found to influence the public through their speeches and rhetoric related to crime. 225 As presidents speak more about the issue of crime, crime becomes more highly salient in the mind of the public and an important problem facing the nation. In fact, controlling for other factors such as media influence and crime rates, the president still has the capability of raising concern over crime among the American people. 226 More specifically, one study has found that the more the president mentions the issue of crime in his State of the Union Address, the more concerned people become. 227 In sum, the more the presidents talk about crime, regardless of whether it is in a substantive or a symbolic manner, the more important the issue of crime becomes for the American people.

The ability of the president to influence the American public on crime is important but only if it assists him in the passage of crime control policy in Congress. One of the most important means of obtaining a legislative victory is to ensure that the president’s agenda is the congressional agenda. The agenda of Congress is generally marked by the number and type of committee hearings being held. Research into the ability of the president to influence congressional attention to the crime issue by the increase in congressional committees related to crime has found some support in that often what presidents talk about one year becomes a focus of attention for Congress the next year. As a result, the more presidents focus on the topic of crime, the more Congress holds congressional hearings related to crime. 228 Although gaining the attention of Congress is supportive of the president’s ultimate goal—the passage of crime legislation—it is the presidents’ ability to influence Congress to pass these laws that in the end has the most impact. In analyzing the presidents’ ability to influence Congress in the passage of crime legislation, it has been found that presidents do have some qualified success in obtaining the passage of crime legislation. 229 While the president is not the sole participant in the policy process, his is a very powerful position, and it can generally be summed up that when the president speaks, the public and Congress listen.

**State Government: Governors**

The executive branch at the state level is the governor’s office. (See Box 4.5.) The governor is the state’s highest elected official and has many of the same powers and responsibilities as the U.S. president. Governors run for election on a party platform and serve for a four-year term in office. Many states have term limits on the number of times a governor can serve, and most tend to limit it to two consecutive four-year terms. Some states have other qualifications, such as Indiana, which allows governors to succeed themselves once, after which they must take a four-year respite before running again. In the Commonwealth of Virginia, governors can serve more than one term, but they may never succeed themselves; hence, effectively, they are limited to one term in office.

**Role in the Policy Process**

The governor’s role in the public policy process is, in a sense, twofold. Governors serve as the chief executive of the state, much in the same vein as the president of the United States. They propose legislation to the state legislatures, make budget requests on an annual or biannual basis, and sign legislation into law. In addition, they have the power to veto legislation, give the annual State of the State Address, and run the bureaucracy at the state level. As the president is one of the key players at the national level, this makes the governor one of the key policy players at the state level. On the other hand, the governor is also an important player, albeit less powerful, in national politics in that governors also lobby Congress for additional funding for pet projects and particular policies that will benefit their states. In addition to individual lobbying, governors will also lobby collectively. This is often done through the National Governors Association (NGA), 230 which is a forum for all fifty governors to come together to discuss policies that would benefit all their states. More important, however, the NGA is a lobbying group that can place pressure on Congress to pass specific policies proposed by the NGA.

**Box 4.5:** **State Governors and their Political Affiliation as of June 2010**

|  |  |
| --- | --- |
| Alabama | Bob Riley, R |
| Alaska | Sean Parnell, R |
| Arizona | Jan Brewer, R |
| Arkansas | Mike Beebe, D |
| California | Arnold Schwarzenegger, R |
| Colorado | Bill Ritter, D |
| Connecticut | M. Jodi Rell, R |
| Delaware | Jack Markell, D |
| Florida | Charlie Crist, I |
| Georgia | Sonny Perdue, R |
| Hawaii | Linda Lingle, R |
| Idaho | Butch Otter, R |
| Illinois | Pat Quinn, D |
| Indiana | Mitch Daniels, R |
| Iowa | Chet Culver, D |
| Kansas | Mark Parkinson, D |
| Kentucky | Steve Beshear, D |
| Louisiana | Bobby Jindal, R |
| Maine | John Baldacci, D |
| Maryland | Martin O’Malley, D |
| Massachusetts | Deval Patrick, D |
| Michigan | Jennifer Granholm, D |
| Minnesota | Tim Pawlenty, R |
| Mississippi | Haley Barbour, R |
| Missouri | Jay Nixon, D |
| Montana | Brian Schweitzer, D |
| Nebraska | Dave Heineman, R |
| Nevada | Jim Gibbons, R |
| New Hampshire | John Lynch, D |
| New Jersey | Chris Christie, R |
| New Mexico | Bill Richardson, D |
| New York | David Paterson, D |
| North Carolina | Beverly Perdue, D |
| North Dakota | John Hoeven, R |
| Ohio | Ted Strickland, D |
| Oklahoma | Brad Henry, D |
| Oregon | Ted Kulongoski, D |
| Pennsylvania | Edward Rendell, D |
| Rhode Island | Donald Carcieri, R |
| South Carolina | Mark Sanford, R |
| South Dakota | Mike Rounds, R |
| Tennessee | Phil Bredesen, D |
| Texas | Rick Perry, R |
| Utah | Gary Herbert, R |
| Vermont | James H. Douglas, R |
| Virginia | Bob McDonnell, R |
| Washington | Christine Gregoire, D |
| West Virginia | Joe Manchin, D |
| Wisconsin | Jim Doyle, D |
| Wyoming | Dave Freudenthal, D |

In terms of criminal justice, governors oversee the bureaucracy that is responsible for public safety and emergency management. State-level police agencies were primarily a development in the early twentieth century, with the Pennsylvania State Police creating the first such agency in 1905. Prior to World War II, these agencies were formed as state-level detective bureaus generally involving themselves in cases that affected the state, such as state fraud cases. In the post–World War II era, with the construction of the interstate highway system, state police turned their attention to patrolling the highways and became more identifiable by today’s standards regarding what most people think of when they think of state police agencies. There are, however, only 49 state police agencies, as Hawaii does not have the need for interstate patrol.

Many states also developed civil defense agencies during World War II as a means of protecting the home front during the war. Many of these were disbanded or rolled into the departments of public safety. In other states, they became the office of emergency management. In still other states, they were made a part of the state police function. More recently, with the September 11 terrorist attacks, many states, including Alaska, Texas, and New Jersey, have created state offices or departments of homeland security.

Although crime has generally had a history of being a local issue, states have always been looked to for providing additional resources to local governments or as the final level of government for dealing with the issue of crime. In the early twentieth century, the creation of the state police agencies brought the state more into a crime control role, albeit it was severely limited. In the 1920s, many of the states sanctioned surveys that addressed the rising levels of crime and what the states could do to address the various problems associated with crime. More specifically, these surveys often talked about changes in the organizational structure of the criminal justice process and how state oversight could improve justice. Although these surveys brought about some changes, it was not until after World War II that many would be actualized. It was the period of social change in the 1960s and 1970s that fundamentally changed the dynamics of the responsibility of the state in crime. As the federal government began creating various grant programs, in particular the LEAA, to funnel grants to local law enforcement, each state was required to create a state planning agency that would be responsible for moving these grants from the federal level to the local level. When the LEAA folded in 1981, many of these agencies became the state-level departments or divisions for criminal justice services, which are bureaucratic departments responsible for continuing to procure federal grants, conducting research, and disseminating crime information.

In the 1990s, when crime became such a major issue and was highlighted by President Clinton’s “100,000 Cops” plan, the state governors also became heavily involved in the issue of crime. In fact, as much of the debate on Clinton’s Crime Bill came in 1994, one member of the NGA observed that same year that the “top three issues in the gubernatorial campaigns this year are crime, crime, and crime.” 231 The observation wasn’t too far off the mark, as the issue of crime did play a major role in many of the gubernatorial campaigns, including the 1994 campaigns in Texas and Florida for President George W. Bush and his brother Jeb Bush, respectively. Many of the issues in these campaigns and others revolved around the death penalty and which candidate could appear the toughest. Other issues centered on creating tougher sanctions for certain crimes and creating mandatory minimums for certain offenses, especially those involving a firearm in the commission of a felony. In fact, taking the issue of firearms further, the issue of gun control became an important issue as more and more states moved toward loosening the restrictions of the past. 232 And still others during the 1990s were focused on building more prisons in order to house more offenders in an attempt to drive down crime. One author, Joseph Dillon Davey, has argued that the primary reason for the prison boom of the 1980s and 1990s was because of the advocacy by state governors in order to appear tough on crime. 233

Since it seemed that most of the 1990s was about governors trying to appear tough on crime, that is probably why former Illinois Governor George Ryan’s decision, as he was nearing the end of his term in office in 2000, to declare a moratorium on executions and to commute the death sentence of 167 death-row inmates was received with such controversy. Although his act was appealed to the Illinois Supreme Court, that court upheld the governor’s power to commute sentences under the Illinois Constitution. The next governor, Rod Blagojevich (currently under indictment for bribery), continued the moratorium, but also upheld the state’s right to sentence an individual to death. What is perhaps more interesting in this case is the fact Governor Ryan is a Republican and Governor Blagojevich a Democrat, thus blurring the lines between the positions of these two parties regarding the death penalty.

**Local Government: Mayors**

The executive branch at the local level is generally found within the local mayor’s office. Municipal governments consist of local towns, townships, or cities. They do not constitute counties or parishes because these are not sovereign governments but rather are given power for administration by the state. Local municipalities, on the other hand, have their own sovereignty and are granted executive, legislative, and judicial powers. Mayors, like other executives, tend to serve in four-year terms through elective office by running on one of the two party platforms. Many of these municipalities have term limits similar to those at the state level. In addition, the mayor often has the power to veto any of the municipal ordinances passed by the city council, can appoint such people as the chief of police, and have the power to run the city administrative offices.

There is one distinct difference between the mayor as executive and the other levels of government, and that is the differing styles of municipal government. There are essentially three types of municipal governments: the strong mayor–weak council, the weak mayor–strong council, and the city mayor–city manager format. 234 In the strong mayor–weak council style of local government, the mayor is voted into office, serves as the chief executive officer, and presides over the city council. The mayor also has the power to vote on any bills, so along with all the other powers of the mayor’s office, this gives the individual an enormous amount of power to control the bills that come before the council, the passage of the bills, and their implementation. In the weak mayor–strong council style of municipal government, the mayor is either elected or selected by the council but does not preside over the council and can vote only if there is a tie. In many cases, the mayor does not have any veto power over the city council, and all actions by the mayor must be approved by the council. Hence, control over the bureaucracy, such as the hiring of the police chief, rests more in the hands of the council. Finally, in the event that a municipal government has a city manager, duties between the mayor and city manager are split, with the mayor receiving more of the ceremonial duties and the city manager having more of the administrative duties. This can greatly weaken the office of the mayor (elected official) and strengthen the office of city manager (appointed official), but ultimately it is the relationship that these two have with the city council that will determine their power.

**Role in the Policy Process**

The mayor’s role in the policy process is perhaps more complex because the type of municipal government employed will determine how active a role the mayor can actually play. In the strong-mayor system, the mayor plays an extremely important role in shaping crime policy in his or her city. In the weak-mayor system, he or she may advocate for a particular policy but may have no more say than other actors in the policy process. Mayors can also serve as lobbyists for state and federal funding, and they often do. Mayors can also join collectively to voice their advocacy for certain policies, often doing so under the U.S. Conference of Mayors, a federal lobbying interest group. 235

In terms of crime policy, mayors play a significant role that usually centers on their selection, appointment, and working relationship with the police chief. This relationship is perhaps one of the most important ones in that if the citizens of a particular municipality believe that crime is a problem in their community and is not adequately being addressed, while they know the police chief is responsible for managing the department, it is the mayor that they generally hold accountable. Therefore, one source of vulnerability for a mayor as an elected official and one area of critical concern to them is the issue of crime.

Mayors in recent years have been instrumental in the implementation of community policing within cities and towns across the United States. In many cases, the ability to implement such a program begins with the hiring of a new chief and the mayor giving that chief a specific charge. 236 The implementation of such a program, however, can also be laden with political issues that surround the relationships between local government and citizens in specific neighborhoods that must be resolved for a program such as this to move forward. 237 The mayor is again only one actor in the process, but as the executive officer, he or she is a critical actor in the success of any program.

A leading example of the impact of a mayor as related to crime policy can be found in former New York City Mayor Rudolph Giuliani’s administration. While New York City had attempted the implementation of community policing in the 1980s, specifically under Police Commissioner Lee Brown, when the administration changed hands in 1994 and Giuliani was ushered in as mayor, he hired William Bratton as his police chief to implement a tougher policy of crime control, often called zero-tolerance policing and one based loosely on the broken windows theory. 238 This method of targeting specific crimes and enforcing the law on smaller petty crimes did have a dramatic but controversial impact on New York City. While crime did rapidly fall during the 1990s, it was also falling nearly everywhere across the country. 239 And while many people cheered the police for finally cracking down on the criminals and derelicts, many cited the corruption and brutality of the police force as being a reflection of the Giuliani administration. 240 Although the police chief played an important role during the 1990s in policing New York City, its driving force was assuredly the mayor. More recently, the role distinction between police chief and Mayor has blurred as many former police chiefs have become the Mayor, such as Lee P. Brown in Houston, Jerry Sanders in San Diego, and Robert J. Duffy in Rochester, New York.

**Executive Role in the Policy Process**

The executive role at the federal, state, or local level is extremely important to the police process. Whether president, governor, or mayor, these chief executives are instrumental in every step of the public policy process. As related to crime policy, each of these serves to address the problem of crime in a very similar manner, but there is one dichotomy here. While mayors have more direct influence on shaping crime policy, it is the president of the United States who usually garners more attention. And although presidents can assist in addressing the problem of crime, they are severely limited in what they can do, while mayors have far more powers to intervene in this particular policy area. Regardless, all three are instrumental in every step of the policy process.

**Problem Identification**

Presidents, governors, and mayors are often the individuals who are responsible for bringing many of the problems to the attention of governments. One venue where this most often happens is on the campaign trail. This is the one time that the individual who ultimately will find him or herself in office spends most of his or her time talking to citizens. As a result, they come to learn about many of the problems facing the United States as a whole, a particular state, or a city. Often they will acknowledge these problems and make promises about what they would do to address these problems if elected. Once in office, the executives try very hard to achieve the promises they make, and if they promised to address a particular crime problem, they usually try to at least place the problem on the government’s agenda. 241 In other cases, while in office, executives are often given information through their administrative agencies that may make them aware of a problem, and hence they will attempt to place it on the government’s agenda. A good regional problem, especially in the South and in rural areas, is the amount of abuse and pharmacy theft of the painkiller oxycontin. In still other cases, issues come to everyone’s attention, and we often look to the executive to do something about the problem. No better example of this can be found than the events of September 11.

**Agenda Setting**

Once the problem has been identified, it is often the chief executive who will bring it to the attention of both the public and the appropriate legislative body. Presidents, governors, and mayors will often talk to the public about a specific problem in newscasts and conferences, and at these events they explain the types of policies they are proposing to address the problem. This serves two purposes: (1) to gain the attention of the public and demonstrate to them that the executive branch is attempting to address a particular problem and (2) to place pressure on the legislative body to take up the executive’s policy proposal.

**Formulation**

Once a policy comes before the legislative body, be it Congress, a state legislature, or a city council, it is up to that body to determine exactly how the problem will be addressed and what the policy will ultimately look like. Although the legislative body is the one that will craft the final policy, the executive must stay involved in the process in order to see his or her vision and plans for addressing a specific policy come to reality. The executives do this by lobbying his or her party members in the legislative body, specific voting blocks within the legislature, and individual members as well. The purpose is to retain as much of the executive branch’s original policy proposals so that when it comes to implementing the policy, the executive has the same powers and capabilities that he or she originally proposed. If changed too dramatically from what the executive originally wanted, then he or she must determine if the policy is still viable from his or her perspective or whether he or she should veto the bill.

**Implementation**

Once the legislative branch passes a specific policy, the responsibility for implementing that policy generally falls back to the executive branch. This is why the executive must remain active in the policy formulation process so that the policy that he or she proposes will be the policy that is implemented. Even if it is not, however, it is still the responsibility of the executive branch to implement the policy as the legislature requests because of the powers that the executive has in running the bureaucracy. How the executive responds to the legislative charge will greatly impact the policy’s implementation.

**Evaluation**

Once the policy has been implemented, it is also the executive’s responsibility to ensure that the policies are implemented as originally intended and that the policy has some impact. These two pieces of information are obtained through the process of policy evaluations, which is the responsibility of the bureaucracies and ultimately the executive. While the legislative bill may call for some type of evaluation, many do not. Regardless, the executive branch must ensure that process and impact evaluations are conducted to determine the type of policy change that is necessary. This information assists the executive in making future policy decisions.

**Policy Decisions**

Once the policy evaluations are released, it is the responsibility of the executive to determine how a particular policy will proceed. If the policy is successful, the executive may simply laud it or request for additional funding to enhance or expand the program. If the latter is done, then the executive must place the policy back on the agenda and again try to obtain the expansion of the program through a legislative bill. If the policy is not successful, the executive must make a policy decision on whether to kill the program or alter it. In either case, the executive must once again exercise the public policy process, and the cycle continues.

**Conclusion**

The executive branches of government, whether it is the president (national level), the governor (state level), or the city mayor (local level), are significant players in the policy process. Although all are constrained by the limitations of their office, it is their power to persuade the public and their respective legislative bodies that gives them an enormous amount of power to oversee crime policy in America. Whether it is placing an item on the agenda, advocating for the formulation of its proposed policy, or implementing a policy through its oversight of the bureaucracy, the executive branch clearly plays a very important role in the public policy process.

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The Public Policy of Crime and Criminal Justice, Second Edition

Chapter 4: The Executive Branches

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**Legislative Branches**



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**Introduction**

The federal, state, and local legislatures have the basic responsibility to provide a safe and secure environment where citizens can own property and seek happiness. They do this through considering and creating laws that attempt to prohibit people from committing acts that would be dangerous or potentially harmful to others. The resulting laws, called the criminal code, define what acts are prohibited and the punishment that may be applied if that act is carried out. The federal, state, and local legislatures are each involved in creating criminal laws or criminal codes that attempt to reduce crime. Each of these bodies also plays an important role in the policy process and has a major impact on the administration of criminal justice.

**Federalization of Crime**

As the Founding Fathers were writing the U.S. Constitution and creating a new government for the nation, they viewed crime control as a function for the state and local government indicating their fear of a central police authority that was housed in the national government. 1 In Federalist 17, Hamilton wrote, “It will always be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities.” He also wrote, “There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light,—I mean the ordinary administration of criminal and civil justice.” This “would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not infrequently, dangerous rivals to the power of the Union.” Based on these ideas, the Founding Fathers defined only three acts as federal crimes in the Constitution, including treason against the United States, counterfeiting securities and currency, piracy and felonies committed on the high seas, and treason. 2 Instead, they created a system whereby states were able to define and prosecute nearly all criminal behavior in individual state courts. 3

But over the past 200 years, crime became more of a national concern and the federal government has become more involved in crime control issues. 4 The trend toward more congressional action or intervention in crime-related issues is called the “federalization of crime.” The federal government’s role in the crime arena has increased dramatically since the 1960s and continues to be an important factor in many if not all areas of criminal justice. Many pieces of legislation concerning crime have passed, starting with the Interstate Commerce Clause, which is how crime came to be regulated by the U.S. Congress. The agency created by Congress in 1887 to enforce the Commerce Clause was the Interstate Commerce Commission, which would regulate railroad rates for goods carried in interstate commerce and was the first federal regulatory agency. Congress also passed the Comstock Law in 1873 and the Mann Act in 1910. The former law was intended to prevent any “obscene, lewd, or lascivious” material from being sent through the U.S. mail, while the latter law was intended to prevent the transportation of white women across state lines for purposes of prostitution.

The government’s role in fighting crime was enhanced during Prohibition. The Eighteenth Amendment to the Constitution outlawed the manufacture and transportation of alcoholic beverages. To enforce the law, Congress created the position of federal Prohibition agents as part of the U.S. Treasury. Yet not only did the Eighteenth Amendment create a new class of criminals, those that manufactured, sold, or transported “intoxicating liquors,” but it also spawned a new wave of street crimes because of the illegal black market, which in turn gave rise to the Mafia.

Congress also became involved in crime issues when it passed the 1934 Crime Bill, which regulated machine guns. Also called the National Firearms Act of 1934, it put regulations on machine guns, sawed-off shotguns and rifles, silencers, and concealable firearms other than pistols and revolvers and added a transfer tax of $200 on the purchase of machine guns. The new law also required existing firearm owners to register their arms within 60 days. 5 Congress modified the law in 1938 with another Federal Firearms Act. This time, the law required that any firearms dealer obtain a $1 license from the secretary of commerce before transporting, shipping, or receiving any firearm in interstate or foreign commerce. These dealers were, under the new law, forbidden to ship firearms in interstate commerce to any person who was under indictment for a crime, who had been convicted of a violent crime, or who did not have a state license to own firearms. The bill also required gun dealers to keep records of their sales and shipments. The federal license could be revoked if the dealer was convicted for a criminal offense or found to have violated the new law destination. Together, the 1934 and 1938 gun bills set the groundwork for all federal firearms law for the next three decades. 6

There are many reasons for this recent trend beyond just gun control. One is the emergence and understanding of organized crime in America. Although organized crime had become a problem during the era of Prohibition, according to the FBI’s very own J. Edgar Hoover, it was deemed to have been eradicated. However, realizations that this was not the case began to surface in 1950 and 1951, when the Senate Special Committee to Investigate Crime in Interstate Commerce, more simply known as the Kefauver Committee, traveled across the nation to hold hearings to probe into the existence of organized crime. Hundreds of top mobsters and law enforcement agents were called to testify in front of the committee. Because the hearings were televised, the American public was also able to hear the testimony and see the actual men and women who were involved in the organization. They were no longer mythical figures but real people who committed serious crime. Because of the media attention the hearings received and the popularity of the hearings by average Americans, it became one of the most important probes of organized crime in the United States. The hearings successfully publicized the facts about organized crime and proved the existence of an underground criminal organization that existed across the nation. When it was over, many citizens called on action from the federal government to get more involved and punish the members of the organized crime syndicates and to abolish the organization.

Another reason for the federalization of crime was the dramatic increase in drug abuse during the 1960s, especially by Caucasian, middle-class youth. Citizens saw that states were not able to stop the influx of drugs into the country or its use by so many people, so they called on Congress for action. Additionally, since there was a need to cooperate with other nations to deal with the importation of drugs, there needed to be an international approach to drug control, which states are not allowed to do. This emphasis would expand greatly during the Nixon administration and became hallmarks of both the Reagan and the Bush administrations.

Also during the 1960s, reported crime was increasing across America. 7 The FBI’s Uniform Crime Report indicated that crime was increasing from 1.8 million in 1960 to almost 5 million in 1969. 8 Along with the increase in crime was an increase in public fear of becoming a victim of crime and more pressure on the government to make stricter penalties to deter potential offenders and at the same time lessen the chances of becoming a crime victim. Among the states around that time, there was a general perception that the federal government had more resources than the other levels of government to “solve” these problems, which tended to push the problem upward to the level of Congress. 9 Many citizens felt that the federal government had more money, more technology, and more personnel than states, thus making them more effective, potentially, to fight crime.

During this same time period, changes in the political scene also raised crime from the local and state levels to the federal level. Candidates for national public offices, including candidates for president and Congress, began to address crime-related issues (including drug use by youth, increased crime rates, and the natural ability of the federal government to fight crime), making crime control a viable campaign issue. 10 In 1964, conservative Republican Barry Goldwater and Democratic President Lyndon Johnson were the first to debate the crime issue at length and elevate it from a state concern to a national concern. Goldwater blamed the increase in crime on the liberal Democratic policies that were “soft on crime” and “coddled the criminals.” He argued that conservative Republican policies toward crime would be more effective in reducing the crime rate and the resulting fear of crime across the nation.

Federal crime control policies became election fodder in many campaigns after that. As detailed in the previous chapter, in 1968, Nixon labeled himself the “law-and-order” president, arguing for stricter punishment and a more active federal role in crime control. In 1988, Democratic nominee Michael Dukakis was held responsible by a pro-Republican group for crimes committed by a convicted felon Willie Horton, who committed crimes while out on parole. George H. W. Bush and Bill Clinton debated the crime issue in 1992, and it was also an issue between George W. Bush and Al Gore in 2000.

In the most recent election in 2008, Barak Obama supported the death penalty for the most heinous crimes, but called for reforms to guard against wrongful convictions. 11 He argued for a national drug policy that included tougher enforcement measures as well as prevention and treatment. He believed in an individual’s right to own a gun 12 , but at the same time argued that there should be reasonable and commonsense gun-safety measures. 13 During the campaign, he promised to invest in innovative youth crime prevention programs to keep youth out of trouble and help them grow into law abiding citizens. He also supported prisoner reentry programs. Obama’s opponent, John McCain, supported expanding the death penalty for federal crimes. 14 He believed in the second amendment and opposed gun control. 15 He supported the war on drugs, but at the same time believed that treatment was essential for eradicating illicit drug use.

Not only did the presidents and other politicians talk about crime, but they acted on it as well. Congress, in the 1968 Omnibus and Safe Streets Act, created the Law Enforcement Assistance Administration. This was a federal grant program that provided millions of dollars to states to help them become more effective at fighting crime. Under this program, Congress provided direct financial assistance to states and localities for research on crime and justice that allowed researchers to fund projects on the causes of criminal behavior, the decision-making processes with the criminal justice system, and the effectiveness of punishment programs. He promised, if elected president, that he would fight gang-related crimes, tougher punishments for violent offenders, and vocational training for prison inmates.

Additionally, Congress created many agencies or bureaucracies that are active in criminal justice. For example, the Office for Juvenile Justice and Delinquency Prevention was created by Congress in the Juvenile Justice and Delinquency Prevention Act of 1974. This office was created to coordinate federal, state, and local government programs related to juvenile delinquency and to develop a comprehensive plan for coordinating juvenile delinquency programs. The legislation also created the National Institute for Juvenile Justice and Delinquency Prevention, which is responsible for conducting research and evaluation projects related to juvenile delinquency. The DEA was created during the Nixon administration as a way to fight illicit drug use in our country, and the Department of Homeland Security was created after the terrorist attacks of September 11, 2001 during the Bush administration.

It has been argued that the federalization of crime is a positive trend for crime control. When the federal government takes the lead in fighting crime, it can raise issues and debate alternatives on the national level. In doing so, it can set the tone of the discussion about crime prevention and make communities and officials more aware of problems and solutions. Additionally, the federal government can establish a funding agenda for state and local governments to help them design programs without adding additional tax burdens on citizens. This allows the states to become more active in fighting crime and help them to respond to increased crime rates more effectively. States, counties and cities have received significant amounts of money from the federal government to run anticrime programs and now rely on federal money to fund a large portion of their criminal justice systems. 16 Another positive aspect of the federalization of crime is that the federal government is able to create national databases to find missing persons or solve crimes better than individual states. There are many crimes that can be most appropriately and effectively addressed by the federal government rather than states. Crimes such as drug trafficking or cybercrime are ones in which the offender can easily cross state (and international) borders, and thus would be more effectively fought at the federal level.

Of course, there are others who would argue that the push toward the federalization of crime is a negative trend. Some have argued that the federalization of crime is a shift in power from the state governments to the federal level so that it increases the power of Congress while decreasing the ability of states to respond to their own problems and make decisions for themselves. Instead, Congress now has power when it makes laws to tell people how to act or not to act and what the punishment will be for that behavior. Additionally, federalizing crime puts additional demands on the federal system, including demands for funding, more judges and other court personnel, police agencies, and correctional facilities. 17

Critics of federalization have argued that the more active federal role in crime control is motivated by political concerns rather than a real concern for public safety and should therefore be limited. They point out that crime control is not an area noted in the Constitution as being under federal jurisdiction. Throughout the document, the Constitution is very specific as to what things the federal government will do and what things the state governments will do. Those powers or responsibilities that are under the jurisdiction of the federal government only are therefore denied to the states. Examples of these powers are printing money, declaring war, and conducting foreign policy. These are tasks that only the federal government can carry out, and states are denied this power.

Some authors have outlined specific times when the federal government should get involved in crime control. The federal government should get involved to protect the civil rights of citizens, and in emergency situations such as natural disasters, in order to protect the safety of the residents. Another time that federal action would be appropriate is when financial or technical assistance is needed by the states. This may happen if a state experiences a large-scale offense such as a terrorist act. In these cases, the offense may be “too big” for the states to handle, leaving the state overwhelmed. The federal government should also get involved in order to protect its own facilities, such as landmarks. Crimes where foreign nations are involved, or there are particularly dangerous subjects, may require federal action. Finally, if there are major local government officials or industries accused of criminal actions, federal involvement may be needed in order to ensure a fair and legitimate investigation of those charges.

Nevertheless, the federalization of crime has continued to expand, and Congress has become more involved in fighting crime than ever before. In recent years, Congress created more than 3,000 crimes that can be prosecuted by the federal courts, much of which had previously been left to the states. 18 Most of the legislation has been passed in the past forty years. In fact, “more than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.” 19 In the 105th Congress alone, there were an estimated 1,000 bills relating to crime introduced for consideration, many of which would create new federal laws. 20 In addition, the federal government has created hundreds, if not thousands, of agencies aimed at different aspects of crime. Thus, over the years, crime control has become an issue over which Congress has become very active, and it has become a major responsibility for congressional action.

An example of an area in which Congress has become actively involved in a typically state offense is drunk driving. In 1996, the issue of drunk driving moved from the state to the national level when Congress passed the National Highway Safety Act. This legislative act established the National Highway Safety Bureau, which was responsible for funding research on drunk driving issues 21 and promoted the drunk driving issue before Congress and in other venues. 22 This action served to institutionalize alcohol abuse and drunk driving on the formal agenda of Congress and the federal government. The resulting congressional attention led to additional laws and the creation of new federal agencies to administer them. 23 Other offenses that are typically regarded as offenses against the state that are now also federal crimes include arson, carjacking, and failing to pay child support. 24

Thus, crime control has become a policy venue for Congress, but it also remains one for the states. That means that the issues revolving around crime are simultaneously subject to the jurisdiction of several institutions rather than being within the domain of only one institution. 25 At this point, the federal, state, and local governments each pass laws and are involved in the policy process.

**Federal Legislature: Congress**

The legislative branch of the national government, defined in article I of the Constitution, is called Congress. This branch is made up of two houses: the House of Representatives and the Senate. Congress has a number of responsibilities, each of which is defined in the Constitution. These include fiscal powers (defining tax levels and the spending of money), foreign policy powers (ratifying treaties with other countries, confirming ambassadors and other public officials, and declaring war), commerce powers (the power to regulate commerce with foreign nations and among the several states), impeachment powers (the ability to remove a president or other high federal employee from office), confirmation powers (the authority to approve nominations made by the president for cabinet members, the U.S. Supreme Court, and lower-court justices, ambassadors, and other federal branch officials), amending powers (to amend the Constitution), and electing powers (to elect a president if the electoral college does not).

The primary purpose of Congress, however, is to create new laws and policies that, in the long run, will create and/or maintain a safe and secure society. The laws that they pass are considered federal offenses, and people convicted of these crimes are punished in the federal correctional system. Examples of federal crimes include treason, airplane hijacking, and counterfeiting currency.

**Role in Policy Process**

On the federal level, Congress plays an important role in the policy process. It plays a key role in problem identification, agenda setting, and policy formulation (or creating the law). Although Congress does not formally implement the law (that role belongs to the bureaucracies), it does assist in the funding aspects of implementation. Finally, Congress plays a role in the program evaluation and reassessment of the policy implemented by the bureaucracies.

**Problem Identification**

The members of Congress are key players in identifying what problems throughout the nation are significant enough to demand attention. These elected officials determine what issues are discussed and even what issues are acted on. This may be the result of some event, called a “trigger event,” that can often translate a social situation into a public issue. These are events that symbolize a situation, forcing it onto the public agenda. 26 Trigger events often put criminal justice problems onto the agendas of governments. An example would be the Virginia Tech massacre in 2007, which resulted in new federal legislation that improved the National Instant Criminal Background Check (NICS) system, 27 or the terrorist attacks of September 11, 2001, which resulted in action that created the USA PATRIOT Act.

Problem identification can also be triggered by media coverage. An increase in media coverage of an issue can eventually lead to the emergence of that issue on the congressional agenda. A good example of this is the extensive media coverage of drug abuse, which became a major topic on the congressional agenda for many years. As the increased media coverage of drug abuse occurred, various forces within Congress were activated, and they attempted to define the national response to the drug problem. 28

Sometimes members of Congress get ideas from their constituency, or the people who elected them to represent them in Washington. They may have a particular concern and ask for their representative to propose legislation that will alleviate that concern. In this case, the constituencies identify the problem, and the representatives translate that into action.

Members of Congress can also be influenced in identifying a potential problem by members of interest groups or bureaucracies. These other unelected actors often attempt to convince the members of Congress that an issue is worthwhile for their attention. If they are successful in convincing the member of Congress about the importance of an issue, that topic may appear in front of Congress as a legislative proposal.

**Agenda Setting**

Topics for the political agenda come from a variety of sources. First, they can come from the members of Congress themselves. The members choose what issues will be given attention and brought to the forefront, and select what issues will be postponed until a later date or even ignored altogether. Some problems are given top priority, and others are dismissed for a later session. Every public official has his or her own preferred issues and ideas to support. Only a portion of these will succeed in securing a position on the congressional agenda. 29

Individual members of Congress often serve as agenda setters. In a study of agenda setting in the Senate, Professor Jack Walker concludes that there are some “activist legislators, motivated by a desire to promote social change, and anxious to gain reputations as reformers [who] constantly search for issues that might be transformed into new items on the Senate’s discretionary agenda.” 30 Those members of Congress who push policy proposals are often referred to as “policy entrepreneurs.” These members attempt to keep an issue alive, build support for it, get it on an agenda, and secure action on it.

In choosing to put an issue on the agenda, political leaders can be motivated by thoughts of political advantage, the public interest, or their political reputations. 31 Since crime issues often bring positive media attention to a member of Congress, they are often recognized as important problems and put on the congressional agenda. In many cases, however, this could be no more than an attempt to get positive media coverage and improve their public image.

In some cases, issues are put on the agenda as a result of a “moral panic.” This is when there is a general hysteria about crime or a group of people that becomes defined as a threat to society’s values and interests. 32 Generally, there is nothing out of the ordinary occurring, but the media present the issue in such a way that it becomes a threat. Chiricos argues that we have seen many moral panics in recent years that have either put issues on the political agenda or served to keep them on the agenda. He lists drugs (particularly crack cocaine) and juvenile violence as two moral panics that have resulted in legislation toward more punitive punishments for these offenses. 33

Members of Congress often engage in agenda setting because they want to satisfy their constituents. Since many constituents are concerned with crime, it is easy to focus on crime issues to please the constituents. The resulting positive publicity is essential for elected officials. 34 Another reason a member of Congress would engage in agenda setting is to enhance his or her intra-Washington reputation. A member of Congress who successfully navigates a bill through the process of becoming a law may get a reputation of being a “heavyweight” who must be taken seriously. These members are successful at carving out a policy turf. 35 Of course, many members of Congress put anticrime legislation on the agenda simply because of a basic desire to set or create good public policy that will improve society as a whole. 36 Since crime is a major public policy issue and has remained so for many years, there are representatives who simply want to put forth a serious attempt to protect citizens and/or punish those who harm others.

The second source of agenda setting issues for Congress is the president. In some cases, the president may play a role in getting Congress to consider a policy proposal. The president may campaign on a particular issue and want Congress to follow through on the idea. In this case, the president must find enough support for the proposal not only to get the bill introduced in Congress but also to get enough votes to get it passed. The president may give speeches to Congress where he attempts to garnish support for his ideas, or he may go to numerous organizations and ask for their help in getting Congress to support a proposed bill.

The effectiveness of a president to work with Congress varies and depends on the president’s personality or his relationship with the members of Congress. In some cases, the president’s role as an agenda setter for Congress is diminished when Congress is controlled by the opposition party. In this case, the majority party leaders may be reluctant to accept the president’s agenda as the starting point for policy dialogue. They take on more responsibility for agenda setting, drawing issues from the complex of matters under examination in committees and elsewhere in Congress. In selecting issues, they are influenced by public opinion, congressional support, triggering events, and other criteria. 37

In some cases, an issue can even be put on the political agenda in the campaign for political office. Often, candidates running for office make campaign pledges or promises about how they will deal with a particular issue or problem if they are elected. In essence, the agenda can be influenced by those who are running for office, not just those who have been elected. Once in office, the candidate (now elected official) must follow through with that campaign promise, or risk a reputation of inaction. The first candidate to discuss the crime issue was Barry Goldwater in 1968, and since then it has been on the agenda of many candidates for office. 38

The issues for the agenda may also come from interest groups. Each of these groups will frequently be competing with others for the attention of the legislator, each attempting to demonstrate or prove that its problem, as it has defined it, is the most needing of the attention of that public official.

In order to better understand the agenda-setting process in Congress, it is helpful to return to Cobb and Elder’s distinction between a systemic agenda and an institutional agenda (see Chapter 3). The first consists of those issues that members of Congress agree merit their attention and are legitimate areas of concern for Congress. In this case, there is agreement that some type of action is needed. However, this agenda is vague and does not suggest specific policy options to solve the problem. The second type of agenda is the institutional agenda, in which there are explicit options or policy proposals suggested to solve a problem. This has been called an action agenda, which is more specific and concrete than a systemic agenda, where there are more fully developed plans. 39

Some issues are always on the congressional agenda, whereas others come and go. For the most part, crime is always on the political agenda of most members of Congress, but the specific topics discussed and the extent to which they receive public attention vary. For example, illicit drugs were not a primary concern across the nation during the first part of the 1900s. Small blips of attention occurred in the 1930s, 1940s, and 1950s, but it was not until the mid-1960s that drug abuse emerged as a major issue. Even this attention was short lived, however, as the issue declined during the 1970s. It then began another increase in the mid-1980s. Overall, the topic of illicit drugs was on the systemic agenda of Congress during two periods: the late 1960s and the late 1980s. 40

Finally, the agenda may be influenced by the bureaucracies that are responsible for carrying out policies created by Congress. These bureaucracies can provide information to the legislators about issues or concerns facing their communities and work aggressively to keep those issues in the forefront until they receive action. In the area of crime control, there are many bureaucracies that have developed a direct relationship with legislators and that are successful in influencing what topics are addressed by Congress. These can include the Justice Department, the FBI, or even the individual state attorneys general offices.

**Policy Formulation**

The most significant role that the members of Congress play in the policy process surrounds the political tasks of policy formation and lawmaking. 41 This involves passing new laws that prohibit certain behaviors and at the same time setting punishments for those behaviors. Proposals are made to solve the problem that was identified in earlier stages. Once the different proposals are discussed, one of them is chosen as the best alternative to address the problem. The process for making new laws and/or punishments is complex and involves many different actors.

**How a Bill Becomes a Law**

The formal process of creating a new law may seem complicated because of its many steps; however, the process is logical and simple at the same time. The process was intentionally created to have many steps, allowing many people to potentially have access to lawmakers so that they have the chance to influence the final bill and/or law. This, in turn, helps prevent individuals from creating policies to benefit only themselves (rule by the elite).

The process begins when a proposal for a new law is written. Proposals can come from many sources, including but not limited to legislators, the president, interest groups, agencies, or even average citizens. Once that proposal is made, it must capture the attention of a member of either the House of Representatives or the Senate who will introduce the proposal by presenting it to a clerk of the House or Senate. That proposal is given a sequential identification number, such as SB 449 (for a proposal introduced into the Senate) or HB 226 (for a proposal introduced into the House). This simply means that the bill is the 449th bill introduced into the Senate or the 226th bill introduced into the House during that congressional session.

After the proposal is introduced into either the House or the Senate, it is referred to the most relevant committee, and the chairperson of the committee refers it to the most relevant subcommittee. Committees and subcommittees are simply small groups of House or Senate members that work on a proposal so that the entire House or Senate does not have to. This makes Congress more efficient. Once they get the proposal, the subcommittee members have many options. They can choose to do nothing, and the bill will die, or they can choose to hold hearings on the proposal where interested and knowledgeable people testify and provide subcommittee members with information about the problem. Based on this information, the subcommittee members can choose to mark up, or edit, the proposal. They then vote on the proposal. If the members vote no on the bill, it goes no further. If they vote yes, the bill heads back to the full committee. The committee also has the option of voting on the bill “as is,” of holding hearings on the bill, or of doing research on the proposal. They can also choose to mark up the bill or to add amendments to it. A vote is taken in the committee, and if the vote is no, the bill dies. If the vote is yes, the bill goes on to the next step, which is consideration in the full House or Senate, depending on where the bill originated. Members then have the opportunity to debate the proposal. Debate could result in additional amendments or changes added to the bill, each of which must be voted on and either accepted or rejected by the entire membership. When debate is concluded, a vote is taken on the proposal. A simple majority is needed to approve it.

If the proposal has traveled through only one body, it must go through this process in the other body. For example, if a proposal was introduced only into the House, the proposal must go through the Senate. If the House acts on a bill and the Senate does not, the bill dies. A bill can be introduced into either the House or the Senate separately or into both at the same time. Some bills go through the entire process first in one body, then the other, while others go through both bodies of Congress simultaneously. In any event, once both bodies have passed a bill, they then send it to the president for his action. This can happen only if the bills that come out of the House and Senate processes are identical. If not, there is a conference committee, made up of members of the House and Senate. Here they try to iron out the differences between the two versions and come up with one version. If this is done, the compromise version must then be voted on by the members of the House and Senate for their approval. If both bodies do not accept the conference version, then either it has to go back to the conference committee or it will die. If the House and Senate vote positively on the bill, then it goes to the president.

The president then has a number of options. He can sign the bill, at which point the bill will go into effect on the date specified in the bill. The president can also choose to veto the bill, or reject the legislation. In this case, the president must send Congress a message outlining why he vetoed the bill. Congress can choose to override the president’s veto by the vote of two-thirds of its members in both the House and the Senate. If this does not happen, the bill dies. Another option for the president is to not sign the bill within ten days of receiving it (excluding Sundays) and return it to Congress. If Congress adjourns during those ten days, then it is considered a “pocket veto,” and it does not become law.

This entire process must be completed within a two-year span. This is because a congressional session is two years long and starts over every two years. At the end of each session, all the bills that were in the middle of this process are dropped. Each new Congress starts fresh every two years. Although the bills can be reintroduced into the next Congress, they are given new numbers and designations, and the process starts all over again.

**House/Senate Judiciary Committees**

Both the House and the Senate have, over the years, developed a system of committees and subcommittees that help the members get things done quickly and efficiently. 42 It is much easier for a committee or subcommittee with only a few members to look over a proposal and recommend changes or maybe debate issues than it is the entire membership of the House or Senate. Members who are not on the committees rely on the committees for their expertise and thus give them time to work on their own bills. On the whole, the committees play an important role in the policy process, but their efforts often remain unnoticed by the public.

To begin with, the makeup of the committee can have a lot of influence over the outcome of a proposal. A more liberal committee will more likely support a more liberal policy proposal, and a more conservative committee will more likely support a more conservative bill. The committee chairs are chosen by many factors. One of those depends on the majority party in the House or the Senate, and the second depends on the seniority of the individual member. Other members are added to the bottom of their party in that committee. They climb the seniority ranking by remaining on the committee and accruing years of seniority. New members of Congress want assignments to the most influential committees. When an opening occurs, it is filled by the next-highest-ranking majority party member. The assignments are handed out by the party leaders in the House and Senate when new members arrive. 43

The chairmen are also responsible for appointing the committees’ staff members and allocating the committees’ budgets. The committees and subcommittees have staff and legal help to assist them. They help draft bills, develop political support, work with agency officials, and attempt to achieve compromises on disputed resolutions. Thus, committee and subcommittee staff possess substantial influence on the development of legislation.

Once it receives a proposal, the committee determines the content of the bill. These small bodies review suggestions for legislation. The committee can hold hearings on a proposed bill, and in this sense it is deciding the agenda of the full committees. It can amend the proposal, rewrite portions of it, or even write its own bills. 44 In the end, the membership makes recommendations to the whole Senate or House about the proposed bill. In most cases, a proposed bill is not submitted to the entire House or Senate for a vote without prior approval of a committee. Over time, the members develop expertise in a particular area and eventually can be regarded as more competent to make decisions concerning a policy than the whole committee or whole House. 45 The committee and subcommittee system actually encourages members to concentrate on particular policy areas. This creates policy specialists within Congress. Such specialization gives members more opportunity to influence policy in their areas of expertise. 46

The individual committee and subcommittee members are often sought out by interest groups because of their expertise in an area. 47 The interest groups will provide information to the committee member and hope that the member will support that interest group during the hearings. Groups such as corporations, banks, law firms, unions, or lobbyists hand over billions of dollars to politicians in exchange for a return on their investments. It is hard to follow the money trail from contribution to legislation; however, members of Congress admit that people who contribute get to meet with members of Congress personally. 48

The congressional subcommittees are not unbiased and in most cases show favoritism to the interests they are intended to oversee and control. This can be because members of Congress appointed to serve on a particular subcommittee tend to represent constituencies whose interests are affected by the policy in question. 49 Thus, the congressional members want to support their constituents and can do so by serving on committees which focus on topics of interest to those voters, thus potentially having an impact on the legislative proposals that come out of the subcommittee.

All the committees and subcommittees that have been set up by Congress over the years perform different functions. One type of committee is the conference committee. Any differences between the House and Senate versions of a proposed bill must be ironed out, as only one bill can be sent to the president for his approval. A conference committee is made up of members of both the House and the Senate, where they meet and attempt to come to a compromise between the two versions of the bill. If they are successful, the “compromise version” of the bill is returned to the entire House and Senate for a revote by the entire membership. If the differences cannot be worked out, then the bill dies or proceeds no further in the process. These committees are temporary and exist only for the process of coming up with a compromise bill. The members are appointed by the leadership of each house. They almost always include the chairs of both committees as well as the ranking minority party member. These conference committees are powerful actors in the policy process. They have a lot of power because they shape the final legislation. They are not obliged to accept either the House or the Senate wording of provisions. Instead, they may choose to write new wording themselves. 50

Both the House and the Senate have committees and subcommittees that deal exclusively with criminal justice issues. These judiciary committees are among the most powerful committees in Congress. In the House, the relevant committee is the Committee on the Judiciary. This committee was established as a “standing” committee in 1813 and currently oversees legislation concerning civil and criminal judicial proceedings (including federal courts and judges), bankruptcy, espionage, terrorism, civil liberties, constitutional amendments, immigration and naturalization, interstate compacts, claims against the United States, national penitentiaries, presidential succession, antitrust law, revision and codification of U.S. statutes, state and territorial boundary lines, and patents, copyrights, and trademarks. They have oversight responsibility for the Departments of Justice and Homeland Security. As such, they must seek an appropriate balance between citizens’ constitutional rights and national security. The Committee members also play a role in impeachment proceedings if that situation presents itself. 51

The subcommittees of the House Judiciary Committee include the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, the Subcommittee on Commercial and Administrative Law, the Subcommittee on Crime, Terrorism, and Homeland Security, and the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. It can be seen that each subcommittee narrows in on a particular subject. When proposals are sent to the Judiciary Committee, they are further divided and sent to the most relevant subcommittee. Here, a small number of House members can work diligently on that proposal and help ensure its passage in the entire House of Representatives.

The Senate also has a committee that is devoted to issues surrounding crime and criminal justice: the Committee on the Judiciary. As one of the original “standing” committees, it was first authorized in 1816. The members consider legislation related to criminal justice, the expansion of the judicial system to new territories, and judicial salaries. They also consider legislation on terrorism, human rights, immigration, intellectual property rights, antitrust law, and internet privacy. When needed, the Senate Committee on the Judiciary plays a role in approving the president’s nominees for federal judges. The subcommittees in the Senate include Administrative Oversight and the Courts; Antitrust, Competition Policy and Consumer Rights; the Constitution; Crime and Drugs; Human Rights and the Law; Immigration, Refugees and Border Security; and Terrorism and Homeland Security. 52 As in the House, each of these subcommittees focuses on specific areas within crime and criminal justice. The members of each of the subcommittees are responsible for editing a proposed bill so that it can receive enough support from the members of the Senate to pass.

**Congressional Bureaucracies**

The ability of Congress to make effective policy has been enhanced by expanded assistance provided by staff and different research agencies. This is especially important because the issues that members are called on to resolve in recent years have become more complex. This means that they have a need for technical and expert assistance like never before.

Most if not all members of Congress have personal staff. This includes those people who work for the members of Congress either in Washington, D.C., or in their home districts. Congressional staff workers handle much of the actual writing of legislation. They must deal with the details of proposed legislation, such as the research and writing of bills, including the choice of words or phrases, the inclusion of particular provisions, and whether it will do what its supporters want done once enacted. They also have input as to the member’s position on a bill. When the time comes, the staff members are involved with much of the bargaining over legislative details. In addition to helping with legislation, the staff assists the congressional member with administrative duties, such as answering phones and writing letters to constituents. They prepare the members of Congress for press interviews, give them guidance, handle constituents, screen lobbyists, and prepare the agenda for committee hearings. The staff can range from experienced attorneys who provide legal advice to college interns who may be responsible for making copies and disseminating them to interested people. On the whole, the staff for the individual members or the committees may be quite prominent because of their expertise in a specific area. In many instances, the staff are able to devote their full attention to one particular substantive policy area and become knowledgeable in that field. Of course, their immediate influence depends on the individual staff member and the congressional member. 53

Another group of staff, the institutional staff, has also been developed to assist members of Congress in their legislative tasks. This refers to those agencies that provide informational services to members of Congress. Examples include the Congressional Research Service, the General Accounting Office, and the Congressional Budget Office. These offices provide members of Congress with research studies, policy evaluations, and budgetary data in a nonpartisan and objective manner. The Office of the Legislative Counsel, found within both the House and the Senate, was also created to help members make better policy. They employ several dozen lawyer-technicians who operate under strict rules of nonpartisanship and objectivity in order to perform the technical work in drafting legislation, which includes fitting it into the existing body of law. 54

One agency designed to help members of Congress create informed laws is the Congressional Research Service (CRS). The CRS was created in 1914 as the research arm of the Congress. Currently housed within the Library of Congress, the CRS works for members of the Congress, committee members, and staff and provides nonpartisan analysis and research on issues related to proposed legislation. The CRS not only provides bill analysis but also identifies policy alternatives, assists in framing legislative proposals, develops quantitative databases, evaluates new research findings, and delivers expert testimony before congressional committees. 55

Another congressional research agency is the General Accountability office (GAO). The GAO works as the investigative arm of Congress. Congress may ask the GAO to study the programs and expenditures of the federal agencies to determine if tax dollars are being spent effectively. The GAO also advises members of Congress and heads of agencies about ways to make programs more effective. Like the CRS, the GAO is independent and nonpartisan. 56

A third research agency for Congress is the Congressional Budget Office. Since its creation in 1974, this agency provides congressional members with nonpartisan analyses of economic and budgetary information. The estimates it provides assist the members of Congress in preparing the federal budget each year. Their reports do not contain any policy recommendations to Congress, but instead focus on cost estimates, budget options, and long-term outlooks. 57

**Other Actors: Interest Groups, Media, Political Parties, and Public Opinion**

Other actors, such as interest groups, media, political parties, and public opinion, also have an impact on the legislative process. Interest groups are actively involved in influencing the final content of the proposal as well as influencing legislators’ voting on a proposal so that the final policy outcome reflects their interests. Political parties, most often the Republicans and Democrats, are also involved in attempting to influence legislation so that it reflects their political ideology. Public opinion, or the general feelings and ideas of the American public (the voters), additionally has an impact on the policies that are passed by Congress. The elected representatives are continually concerned with the views and opinions of their constituents, especially those who may be seeking reelection, and will keep those views in mind when voting on bills and creating policy.

**Example of a Federal Crime Bill: The Brady Law**

Many pieces of federal anticrime legislation have been created in Congress over the past thirty to forty years. 58 One example of federal anticrime legislation is the Brady Bill, more formally known as the Brady Handgun Violence Protection Act. This was first proposed after the attempted assassination of President Ronald Reagan on March 30, 1981. After the attack, a number of proposals were put forth that entailed a waiting period for the purchase of a handgun. The thought was that a mandatory waiting period before the purchase of a handgun would provide a “cooling-off” period for persons who were purchasing a gun during a moment of anger. It also gave the seller time to run a background check on the person purchasing a weapon to help identify those persons who were prohibited from owning a weapon.

Many versions of the bill were proposed in 1988, 1990, and 1991. For example, one early version proposed a seven-day waiting period and a background check for the purchase of a firearm. Another version required gun dealers to report the names of the people who buy more than one firearm within thirty days. 59 Yet another version prohibited anyone convicted of a violent crime or drug felony from ever purchasing a firearm. 60 None of these versions passed. The bill that eventually became law was introduced into the House of Representatives in the 103rd Congress in 1993. It was given the designation HB 1025 and referred to the House Judiciary Committee and subsequently to the House Crime Subcommittee. The subcommittee heard testimony from many interested parties, such as Jim and Sara Brady, who supported the bill, and the National Rifle Association, which opposed the proposal. The proposal was passed by the subcommittee on October 29, 1993, and sent back to the Judiciary Committee. The members of the committee approved the proposal on November 4, at which point the bill was referred to the House Rules Committee. Rule was granted on November 9, 1993. The members of the House held debate on the proposal and finally passed their version of the Brady Bill on November 10, 1993, by a vote of 238 to 189.

The Senate also introduced a version of the Brady Bill. Its version was introduced on February 24, 1993, and given the designation SB 414. The bill was placed on the calendar for debate on March 3, 1993, and after only limited debate, the members (on November 20, 1993) voted to indefinitely postpone their version of the bill and pass the House version instead. Because the Senate version included additional amendments, a conference was requested, and the House members agreed. The conference report was filed on November 22, and the House members immediately agreed with the conference version. The Senate agreed two days later with the stipulation that a proposal from Senator Done (R-Kans.) be considered at a later date. The final bill was sent to the president and was signed by President Clinton on November 30, 1993. The new law was given the designation PL 103-159. This indicated that the Brady Law was passed during the 103rd Congress and was the 159th bill signed during that session. The Brady Law became effective on February 28, 1994.

There are many other examples of federal legislation designed to reduce crime across the country. Box 5.1 gives a list of selected federal anticrime legislation since 1914, and Box 5.2 provides some of the details of particular federal anticrime laws.

**Box 5.1:** **Major Legislation Related to Crime**

| Year  | Administration  | Legislative Title  |
| --- | --- | --- |
| 1914 | Wilson | Harrison Act |
| 1919 | Wilson | National Motor Vehicle Theft Act |
| 1922 | Harding | Narcotic Drug Import and Export Act |
| 1932 | Roosevelt | Lindbergh Kidnapping Act of 1932 |
| 1934 | Roosevelt | National Firearms Act of 1934 |
| 1934 | Roosevelt | Fugitive Felon Act of 1934 |
| 1937 | Roosevelt | Marijuana [*sic*] Tax Act |
| 1938 | Roosevelt | Federal Firearms Act of 1938 |
| 1956 | Eisenhower | Narcotics Control Act of 1956 |
| 1961 | Kennedy | Juvenile Delinquency and Youth Offenses Control Act |
| 1964 | Johnson | Criminal Justice Act of 1964 |
| 1965 | Johnson | Drug Abuse Control Act of 1956 |
| 1965 | Johnson | Prisoner Rehabilitation Act of 1965 |
| 1965 | Johnson | Law Enforcement Assistance Act of 1965 |
| 1966 | Johnson | Bail Reform Act of 1966 |
| 1966 | Johnson | Narcotic Addict Rehabilitation Act of 1965 |
| 1966 | Johnson | Federal Criminal Law Reform Act of 1966 |
| 1966 | Johnson | Act to Extend the Law Enforcement Assistance Act of 1965 |
| 1967 | Johnson | Act to Prohibit Obstruction of Criminal Investigations |
| 1967 | Johnson | Act to Create the Federal Judicial Center |
| 1967 | Johnson | District of Columbia Crime Act of 1967 |
| 1968 | Johnson | Act to Provide Indemnity Payments for Police Officers |
| 1968 | Johnson | Omnibus Crime Control and Safe Streets Act of 1968 |
| 1968 | Johnson | Juvenile Delinquency Prevention and Control Act of 1968 |
| 1968 | Johnson | Gun Control Act of 1968 |
| 1968 | Johnson | Traffic in or Possession of Drugs Act of 1968 |
| 1970 | Nixon | District of Columbia Reorganization and Criminal Procedure Act |
| 1970 | Nixon | Organized Crime Control Act of 1970 |
| 1970 | Nixon | Comprehensive Drug Abuse Prevention and Control Act of 1970 |
| 1974 | Ford | Juvenile Justice and Delinquency Prevention Act |
| 1984 | Reagan | Comprehensive Crime Control Act of 1984 |
| 1986 | Reagan | Anti–Drug Abuse Act of 1986 |
| 1986 | Reagan | The Firearms Owners’ Protection Act of 1986 |
| 1988 | Reagan | Anti–Drug Abuse Act of 1988 |
| 1990 | Bush | Crime Control Act of 1990 |
| 1990 | Bush | Gun-Free School Zones Act of 1990 |
| 1993 | Clinton | Brady Handgun Violence Protection Act of 1993 |
| 1994 | Clinton | Violent Crime Control and Law Enforcement Act of 1994 |
| 2003 | Bush | Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM) |
| 2006 | Bush | Adam Walsh Child Protection and Safety Act of 2006 |
| 2008 | Bush | Sex Offender Registration Law |

**Box 5.2:** **Other Examples of Federal Crime-Related Bills**

**Juvenile Delinquency Prevention and Control Act of 1968**

Provided financial assistance to state and local governments and provided training to juvenile justice personnel.

**1968 Omnibus Crime Control and Safe Streets Act**

Passed after the assassinations of Robert Kennedy and Martin Luther King, Jr.; provided money to state and local agencies to help them perform their duties; created the Law Enforcement Assistance Administration (LEAA) to improve the nation’s criminal justice systems, provide for research into crime, and collect reliable statistics on crime and victims; and paid for higher education for criminal justice personnel and improved curricula in colleges and universities (LEAA 1980). In 1970, Congress amended the law to improve LEAA operations and its effectiveness.

**Juvenile Justice and Delinquency Prevention Act of 1974**

Consolidated federal juvenile justice policy under one department, the Office for Juvenile Justice and Delinquency Prevention, and set priorities for federal government involvement in juvenile delinquency prevention. The bill was revised in 1980 to require that all juveniles must be removed from adult jails and lockups within five years and again in 1984, which created the Missing Children’s Assistance Act to locate and treat abducted youngsters. Extensive amendments in 1992 addressed juvenile gangs, mentoring, and juvenile crime prevention.

**Justice System Improvement Act of 1979**

Made significant changes in the operations and organization of the LEAA. Signed on December 27, 1979, by Carter, it replaced LEAA with the Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, and the Bureau of Justice Statistics.

**The Anti–Drug Abuse Act of 1988 (ADAA-88)**

Addressed the importance of coordination between federal and state authorities, between state and local criminal justice systems, and between state and local officials and substance abuse treatment and prevention; created the Public Housing Drug Elimination Program, which provided for grants to public housing authorities attempting to control drug-related problems; provided over $2 billion for antidrug activities, including increased drug education and treatment programs and broader federal drug interdiction efforts; also created the Office of National Drug Control Policy, headed by a “drug czar,” to coordinate the national drug policy. Other provisions increased funding for school drug abuse and mental health programs, provided for more funding for drug abuse education throughout the country, increased efforts to deal with international narcotic problems, and provided for stricter criminal sanctions, including the use of the death penalty for major drug traffickers who intentionally kill someone as part of their drug-related transactions.

**Crime Control Act of 1990**

Provided for improvements in public defender services, implementation of “shock incarceration” programs in federal and state correctional systems, reforming the investigation process for child abuse cases, aiding crime victims through the Victims Rights and Restitution Act, authorizing a study of mandatory sentencing by the U.S. Sentencing Commission, and developing new offenses and penalties relating to the savings and loan scandals.

**Brady Handgun Control Law of 1993**

This law mandates a five-business-day waiting period before an individual can buy a handgun.

**Violent Crime Control and Law Enforcement Act of 1994**

Congress allocated over $22 billion to expand prisons, impose longer sentences, hire more police officers, and fund prevention programs; provided for a ten-year ban on the manufacture, trade, and possession of nineteen semiautomatic assault weapons; provided for mandatory life sentences on third conviction for a violent offense when the last is a federal offense; expands the number of federal crimes punishable by death; provides for “truth in sentencing” laws that require offenders to serve at least 85 percent of their prison sentences; and renders all prisoners ineligible for Pell grants.

**Violence Against Women Act of 1994 (VAWA or Title IV of the Crime Act)**

Part of the Crime Control and Law Enforcement Act of 1994; intended to reduce domestic violence and promote the arrest of batterers. It attempted to improve the police and prosecutors’ response to these crimes and offers protections for victims, including the requirement that sex offenders pay restitution to their victims; strengthened protection orders against abusers and banned firearms possession by convicted domestic abusers; increased funding for battered women’s shelters; and established federal penalties for sex crimes. Under VAWA, a national domestic violence hotline was created that promises to reach every community in the nation. Grants are available to the states and units of local government for programs in prosecution, education, outreach, and prevention.

**USA Patriot Act of 2001**

Gave federal officials greater authority to track and intercept communications for purposes of law enforcement and intelligence gathering. The bill created new crimes, new penalties, and new procedures that can be used against potential domestic and international terrorism. Despite its controversial components, it was reauthorized in 2010.

The Brady Bill, like all other proposals to Congress, had to pass through the formal process by which a bill becomes a law. However, there is also an informal process for policymaking, called the “iron triangle,” or “cozy triangle,” which some scholars argue is sometimes more important than the formal process itself. This refers to the informal relationships that have been developed between the bureaucracies or agencies that are involved in a particular issue, interest groups, and congressional committees and/or subcommittees. In the case of the Brady Bill, many interest groups influenced the final piece of legislation. For example, both anti-gun (or pro–gun control) groups such as Handguns Control Incorporated as well as pro-gun (or anti–gun control) groups such as the National Rifle Association have long-standing ties to members of Congress. Members of these two groups lobbied the members of the committees and Congress as a whole in an attempt to convince them to vote a particular way or to word the bill in a particular way. Although the exact influence of these groups is difficult to measure, the informal policymaking process cannot be ignored.

The relationships developed in the iron triangle are not the only influences that affect voting patterns by the members of Congress. When considering legislation, members of Congress will often vote on the basis of party loyalty. This can be an important decision-making criterion for many members of Congress. At the same time, party leadership pressures, ideological commitments, and constituency interests are also factors that members consider when deciding how to vote. Often, however, political party affiliation is the best single predictor as to how members of Congress will vote on legislative issues. 61

**Other Roles**

In addition to passing new policies, Congress plays other roles in the policy process. For example, members of Congress play an important role in the funding process. Congress allocates federal funds that allow agencies to implement laws or carry out congressional mandates. Without money, agencies would be hard pressed to hire the necessary personnel and equipment to follow through with the new law. Congress can choose to increase or decrease allocations to existing agencies as well, and by doing so, it is making an important political statement about the importance and effectiveness of that program.

Congress also has a role in the implementation of policies. Although it does not formally carry out the laws passed, Congress can influence administrative action and hold agencies accountable for what they do. Congress can hold committee hearings and investigations to gather information about the effectiveness of an agency or of a policy and can review the implementation of policies, publicize agency actions, put pressure on agency officials, and enhance the political reputations of its members. 62

Another control device that Congress has is the specificity of legislation. The more detail that Congress puts in the legislation, the less discretion agencies usually will have. For example, Congress can include specific limitations on how the funds should be used in the statute or can specify deadlines for using the money. In some cases, strict rules or requirements may be incorporated into the body of a law, which become effective if an agency does not act in accordance with specific standards. 63 In other cases, committee reports that accompany bills include statements explaining how the legislation should be implemented by an agency. These reports do not have the force of law behind them, but agency administrators who choose to ignore them may pay a high political price. 64

Yet another role that Congress plays in the policy process is an oversight function. Congressional oversight is the formal power granted to Congress to supervise and evaluate the administration and execution of federal laws and policies. 65 This can involve evaluation of existing programs to determine if they are effectively reaching their goals or being economically efficient. Or, it might involve evaluation of a proposed program to determine if it might work or which program should be chosen. Since members of Congress are not trained to carry out program evaluations or do not have the time to do so, they rely on the GAO to perform the technical analyses. Members of Congress or committees can call on the GAO to perform a statistical analysis of a program to determine if the program should be re-funded and, if so, on what level or whether it should be abolished entirely. In other words, members of Congress not only pass the initial legislation but also look over the shoulders of the implementors to try to ensure that their intentions are followed. 66

In many cases, Congress plays a major role in oversight. The committees that initially adopted the legislation may choose to monitor how the agencies implement that legislation. If problems occur, the committee can then act legislatively to correct any deficiencies or things the agencies may be doing incorrectly. Sometimes, Congress may act indirectly by relying on its implicit authority over legislation and budgets to gain compliance from the agencies. 67

Some might argue that congressional oversight might be the most important function a legislature performs, even though a member of Congress is more likely to be involved with the initiation and adoption of policy. By evaluating agency actions, the legislatures control the actions of agencies. The evaluations may be performed by casework, committee hearings and investigations, the appropriations process, the approval of presidential appointments; and committee staff studies. By doing so, members of Congress reach conclusions about the efficiency, effectiveness, and impact of policies and programs. Because of this, the evaluations can have profound consequences for the policy process.

Over the years, a different type of control over the agencies has been developed by Congress that allows the administrative agencies the flexibility they desire in the implementation of legislation while at the same time allowing Congress to maintain some control over how a policy is implemented. Called the legislative veto, it requires that either congressional approval be secured before an administrative action is taken or a specific action can be subsequently rejected by Congress or the committees. The legislative veto permits Congress to exercise control over what is done by the agency and gives Congress the ability to become involved in the details of the administration of the legislation. Even though the Supreme Court declared the legislative veto unconstitutional in 1983, it is still used on occasion. There may be provisions for legislative veto arrangements included in the law, or sometimes it is put in place by informal agreements between Congress and the executive. 68

Congress also plays a public education role that revolves around informing the public about policy issues and solutions being debated and discussed. The members attempt to make the public more aware and educate their constituents about a given problem. They do this through traditional means, such as speeches and hearings, but have also begun to use the media, including the Internet, to reach out to the public. 69

**Theories of Law Formation**

There are many theories that help one understand changes in laws over time or even the creation or formation of new laws. These theories also help demonstrate the public policy process. Some of these theoretical foundations originate in political science, whereas others come from the study of criminal justice.

The first theory is the theory of consensus, which finds its basis in criminal justice literature. According to this perspective, there is a general agreement, or consensus, about what the laws of a society ought to be and the punishment for breaking a law of society. In other words, most members of a community generally agree as to what is acceptable and unacceptable behavior, and the law is simply a way to make those values and ideas more formal. The creation of the law is a rational process whereby the law reflects a common conscience and interest of society. Most citizens, therefore, do not commit crime because they agree with the laws and the system rather than because of the threat of punishment. 70

The second theory of law formation, called the theory of conflict, also finds its basis in criminal justice. Underlying this theory is the idea that there are many different interests in society that come into conflict with one another over the content of criminal law and punishments. One of these groups is able to dominate the others and influence the outcome of policy that emerges from Congress or another legislative body. The law, therefore, is not in the best interests of all of society but rather reflects the concerns or ideals of a particular group. This group uses the law and the policy process to express its interests and dominate over the others. According to this theory, people obey laws only because of the risk of punishment that is tied to the behavior.

A theory of law formation that has its roots in the study of political science is called elitism. This theory is much like the conflict theory and has to do with an elite group that has the power to influence policy to benefit its group or economic class. This theory was first described by C. Wright Mills in *The Power Elite* (1956) and then further described by Domhoff in *The Power Elite and the State* (1990). This theory underscores the fact that society is divided along class lines. An upper-class elite has emerged that is able to make policy to benefit their economic class. They often dominate policy decisions because they can afford to finance election campaigns and control key institutions, such as large corporations. Criminal justice policies reflect their positions at the expense of the lower classes. 71

Another theory that focuses on the importance of groups in the policymaking process is called pluralism. This also finds its roots in the study of political science. The idea of groups playing a role in legislation was discussed by James Madison in Federalist 10. He notes that in a free society, people with similar interests will come together and create factions (or interests). The danger to this is that when these groups inevitably form, they could have a major impact on policy, especially if left unchecked. In response to this concern, the nation’s founders created a government system whereby groups could have access to the policy process and, in the long run, compete with one another in their attempts to influence legislation. This is the essential nature of pluralism: Many groups form and vie for political power and control. Our system of government is set up with multiple access points, and groups compete with one another for control of policy. No one group or set of groups is ever completely successful at dominating the system; so the result is policy that is a rough approximation of the public interest. 72

When pluralism is taken to an extreme, it is sometimes referred to as hyperpluralism. This is the next theory that helps us understand policymaking, and it finds its roots in political science as well. This is when too many groups become involved in the process and the government can get nothing done. Too many groups compete for power and hinder the government from being effective. Many groups are so strong that they divide the government and its authority. Government tries to satisfy every group, and the only outcome is confusing, contradictory, and muddled policy if anything is done at all.

Often, crime policies have been identified as “symbolic.” 73 Symbolic policies are those that do not provide any tangible award, such as those that can be seen, felt, or used, to give a benefit to a particular group in society. Instead, symbolic policies provide intangible rewards that make us feel good or make us feel as though the politicians are acting on a particular problem. In the long run, however, symbolic policies do not result in real changes that solve a problem or provide additional benefits to those in need. 74 Many times, crime policies are identified as symbolic policies, as they produce no real changes in crime levels or treatment alternatives, but instead are emotionally satisfying and reassure constituents or interest groups that their concerns are being met and acted on. 75 Former Attorney General Edwin Meese III even admitted that sometimes Congress passes “misguided, unnecessary and harmful” anticrime laws because they are afraid of being considered “soft on crime” if they fail to act. 76

An early example of how symbolic policies were used to help us understand criminal justice policy was by Gusfield when he examined Prohibition. He argued that Prohibition was a symbolic effort by white Anglo-Saxon Protestants to control the behavior (particularly with regard to drinking alcohol) of then-recent immigrant groups, including the Irish, Germans, and Italians. He shows that most people did not support the laws, and judges were left to support what were largely unenforceable laws. 77 A more recent example of symbolism is identified by Stolz (1992), who shows that antidrug legislation is a symbolic gesture to reassure the public that the government is addressing and solving the nation’s drug problem when in fact there is very little impact on the problem. 78 Another example, also provided by Stolz, demonstrates the symbolic nature of the 1994 Violence Against Women Act. When Congress passed the act, it sent a message to the public that domestic violence is a serious criminal act that deserved severe criminal penalties. 79

Yet another example of symbolic actions by the Congress is its action on the exclusionary rule that prohibits illegally seized evidence to be admitted into trial. McCoy writes that Congress proposed legislation that would allow a “good-faith” defense when evidence was seized illegally. Although the proposal did not pass through Congress, it probably would not have changed police accountability since the exclusionary rule only minimally deters police misconduct. Thus, the proposal sent a symbolic message to the public about the practice of good-faith searches by law enforcement but probably would not have made any changes. 80

Symbolic offenses are also passed by state legislatures. Galliher and Cross (1982) provide an example of the use of symbolic policies, this time on the state level. They use Nevada’s punishments for marijuana offenses as an example of how legislators passed laws that seem tough. However, it is recognized that the high penalties are seldom enforced, but the residents feel that the laws help give the state a more respectable image. 81

Some might argue that the 1994 Crime Bill had strong symbolic elements included in it along with some major anticrime initiatives. The legislation provided a way in which federal legislators (i.e., members of Congress and even the president) could be seen as concerned about a rising crime rate. Because of this apparent show of concern, they agreed to support the proposed legislation. 82 This action demonstrates the symbolic nature of the bill.

**State Legislatures**

The Constitution sets up a federal form of government where power is divided between the central government and state and local governments. These governments share power, meaning that each has responsibility in different areas. The Founding Fathers intentionally divided power between the federal and state and local governments so that no one branch could dominate the lawmaking process at the exclusion of the others. This means that no single level of government is independent and that each one can act as a “check” on the behavior of the others to ensure that one branch cannot make unfair policy. In other words, each branch oversees the actions of the others to ensure that they are acting constitutionally. While they are watching the behavior of the other branches, they are in turn being watched by the others. This ensures that the laws that are created are fair and in the best interest of all citizens. This is referred to as the process of checks and balances.

The Constitution defines the areas over which the federal and state governments have responsibility (as described previously). In essence, state governments are given jurisdiction in any area in which the Constitution has not prohibited action or in any area that has not been delegated to the national government. These are considered “reserved” powers, which are reserved for the states. Examples of reserved powers for the states are establishing taxes, spending fiscal resources, regulating intrastate commerce, maintaining a general police presence, and otherwise maintaining the health, safety, welfare, and morals of their citizens.

The presence of state governments allows for flexibility in meeting local problems. States may face different policy problems for which they have developed different solutions. Additionally, states may have differing amounts of money to spend on solving problems. Some may be forced to make tough choices about how to address some areas over others. The wide variety of problems and solutions found from state to state can also lead to confusion and inconsistency in policies across the nation. For example, there are variations in the definitions and punishments for victimless crimes, such as prostitution, gambling, homosexual behavior between consenting adults, and obscenity. These offenses and punishments have more variation from one state to the next. At the same time, these are the offenses that place a heavy burden on police and the courts. It should be noted, however, that the states generally have agreement on major, significant crimes, such as homicide, rape, assault, and robbery. Today, state and local governments retain control over many important public policy decisions in criminal justice. They have the predominant responsibility for policing and public security but are often influenced by federal initiatives, fiscal or otherwise.

Crime rates vary from one state to another, as do social environments, and states have found different programs to be variously successful in their particular jurisdictions as compared to others. The highest crime rates are in Texas and California, whereas the lowest are found in the least populous states, such as Vermont and North Dakota. Box 5.3 shows the crime index in each of the states as provided by the FBI’s *Uniform Crime Report*. This shows the differences in crime between the different states.

**Differences in State Legislatures**

Each state has its own constitution that is subordinate to the Constitution. In each of these documents, each state has established the structure of its own government. Every state but Nebraska created a system with two legislative bodies. Nebraska has a unicameral legislature, meaning that there is only one legislative house. In the other states, the lawmaking bodies are bicameral (two houses). They have different names, such as legislature, general assembly, legislative assembly, or, in Massachusetts, general court. The upper state house is called the senate in every state, and the lower house is known either as the house of representatives, the assembly, or the house of delegates. Despite the differences in names, all have the same general responsibility: to make laws.

Each state’s legislative system includes political parties, presiding officers, committees, and legislative staff, just like on the federal level. Each has some form of leadership, both formal and informal. This can include a president pro tempore in charge of the senate and a speaker in charge of the house. The officials in these positions are responsible for making sure the legislature runs smoothly and accomplishes its tasks. The leadership also assists in appointing committee members and chairs.

**Box 5.3:** **State Crime Index and Rate, 2008**

|  |  |
| --- | --- |
| Alabama | 21,111/452.8 |
| Alaska | 4,474/651.9 |
| Arizona | 29,059/447.0 |
| Arkansas | 14,374/503.4 |
| California | 185,173/503.8 |
| Colorado | 16,946/343.1 |
| Connecticut | 10,427/297.8 |
| Delaware | 6,141/703.4 |
| Florida | 126,265/688.9 |
| Georgia | 46,384/478.9 |
| Hawaii | 3,512/272.6 |
| Idaho | 3,483/228.6 |
| Illinois | 67,780/525.4 |
| Indiana | 21,283/333.8 |
| Iowa | 8,520/283.8 |
| Kansas | 11,505/410.6 |
| Kentucky | 12,646/296.2 |
| Louisiana | 28,944/656.2 |
| Maine | 1,547/117.5 |
| Maryland | 35,393/628.2 |
| Massachusetts | 29,174/449.0 |
| Michigan | 50,166/501.5 |
| Minnesota | 13,717/262.8 |
| Mississippi | 8,373/284.9 |
| Missouri | 29,819/504.4 |
| Montana | 2,497/258.1 |
| Nebraska | 5,416/303.7 |
| Nevada | 18,837/724.5 |
| New Hampshire | 2,069/157.2 |
| New Jersey | 28,351/326.5 |
| New Mexico | 12,896/649.9 |
| New York | 77,585/398.1 |
| North Carolina | 43,099/467.3 |
| North Dakota | 1,068/166.5 |
| Ohio | 39,997/348.2 |
| Oklahoma | 19,184/526.7 |
| Oregon | 9,747/257.2 |
| Pennsylvania | 51,036/410.0 |
| Rhode Island | 2,621/249.4 |
| South Carolina | 32,691/729.7 |
| South Dakota | 1,620/201.4 |
| Tennessee | 44,897/722.4 |
| Texas | 123,564/507.9 |
| Utah | 6,070/221.8 |
| Vermont | 844/135.9 |
| Virginia | 19,882/255.9 |
| Washington | 21,691/331.2 |
| West Virginia | 4,968/273.8 |
| Wisconsin | 15,421/274.0 |
| Wyoming | 1,236/232.0 |

*Source:* FBI, Crime in the United States, 2008, available online at [www.fbi.gov/ucr/cius2008/data/table\_05.html](http://www.fbi.gov/ucr/cius2008/data/table_05.html).

**Role in Policy Process**

The state legislatures’ roles in the policy process are very similar to those on the federal level. They are first and foremost responsible for creating policies that will make society safer by prohibiting actions that are dangerous and/or harmful. In the area of criminal justice, state legislatures are often more active than the federal legislature in making crime policy since this is primarily a state issue despite the recent increased role of the federal government. Through legislation, each state has evolved its own system of criminal justice, causing there to be differences between states. However, for the most part, state legislatures are very similar and play a consistent role in making policy.

**Problem Identification**

State legislators, in similar fashion to those on the federal level, are key players in determining what issues will be given attention and ignored. They are influenced by members of the public, interest groups, bureaucracies, and even the media. In the case of states, they can also be influenced by the federal government. Often, the federal government will pass policies that act as models for the states to follow. Or, in some cases, the federal government will provide funding for programs, requiring that states follow certain stipulations to receive the money. In doing so, the federal government is influencing the actions and policy outcomes on the state level.

Over the past three decades, state and local governments have increased their involvement in organizations such as the National Governors Association and the U.S. Conference of Mayors and in many instances have established their own offices in Washington, D.C. 83 These agencies help states not only identify problems but also get these problems on the agendas.

**Agenda Setting**

The state legislatures influence the criminal justice agenda by proposing legislation that may be considered for law. They may be reacting to an event that occurred in their state or another state (a “trigger event”), or they may be “encouraged” to act by the federal government. In some cases, the federal government may have a policy that makes states act in a certain way. For example, the federal government declared that it would withhold federal highway funds to any state that did not lower the legal blood alcohol level to determine if a person is driving under the influence. 84 Although states were not formally required to change the blood alcohol level, most have come to depend on those funds and were in essence forced to change their drunk driving statutes.

The states’ crime control agendas may be set by the governor who proposes a piece of legislation or by members of the legislature. The legislators are just as likely as the governor to try to set the state’s policymaking agenda. 85 They want to get support from their constituents who become supporters and voters. They can also be influenced by interest groups, political parties, and private citizen groups, and they each want the agenda to reflect their concerns and provide benefits to their constituents.

One study of state legislator ideologies on crime control issues showed that legislators’ attitudes toward crime police are complex and diverse. The members of the legislature had attitudes that differed dramatically about the causes and the solutions to crime problems. As a result of their findings, state legislators questioned how differences in opinions can affect policy. Obviously, there is a link between ideology and lawmaking that has significant implications for understanding criminal justice legislation.

Another study of state legislator attitudes toward one particular criminal justice policy (domestic violence) found that the legislators had different perspectives about the meaning of the policy and that the sources of their attitudes were very different. The results of this study showed that legislation did not vary in terms of the legislator’s gender, education, political party, criminal justice contact, or criminal justice ideology but did vary in terms of the fundamental assumptions concerning the administration of criminal justice in America. As a whole, the legislators were supportive of legislation that increased the punishment for the offense, following the general trend across the nation at that time. 86

**Policy Formulation**

Probably the most obvious and important way state legislatures affect the policy process is by making legislation. This process of making a law on the state level is very similar to that at the national level. Generally, a proposal must be formulated, introduced into each house, referred to committees that may hold hearings, passed by a majority in both houses, sent to a conference committee to iron out any differences in the way the measure passed the two houses, and finally sent to the governor, who either signs or vetoes the measure. This process is true in every state but Nebraska, which lacks the need for laws to get approval from a second house. Specifically, the steps include the following:

1. ***Drafting the bill:*** The proposal must be written in a technically appropriate form, and this often requires the legal skills of a lawyer. Some states have a staff of lawyers in a bill-drafting agency to assist in this part of the process. Often, legislators introduce bills for electoral purposes, claiming political credit for what they introduce and pass. 87 Ideas for a proposal can come from a variety of people, including the governor, legislators, interest groups, lobbyists, state agencies, constituents, and citizen groups.
2. ***Committee review:*** The proposed bill is referred to the appropriate committee of the house in which it was introduced. Here, they receive a detailed review of the proposal. At this point, the proposal might receive consideration. Public hearings may be held where members of the public, interest group members, or other interested persons may testify either in support of or against a bill. A bill may be voted down at this point, or it may receive a positive vote and move on.
3. ***Debate and vote by legislature:*** The entire membership of the legislature debates a proposal. Often, there may be political support or opposition in the entire body that was not present in the committee. When a proposal is scheduled for floor action, the bill often is given a second reading, meaning that it is put formally before the house for consideration. The third reading is the final passage of the bill.
4. ***Governor’s approval or veto:*** When a bill is presented to a state governor, he or she can sign it, in which case the proposal becomes a law. In all states but North Carolina, the governor can also choose to veto the proposal, in which case the proposal does not become law. However, a piece of legislation that has been vetoed can still become a law if the legislature overrides the veto. In some states, if the session has ended and the governor has not acted on the bill, it becomes law without the governor’s signature. In other states, the governor’s inaction is a pocket veto of the bill, and it is dead.

Like the national process for making a law, there are also many “outside” political influences on the legislatures during the lawmaking process. Since the early 1970s, citizen’s participation in state policymaking has exploded. 88 People involved may include judges, commissions of lawyers, police, and prison officials. There is also action by interest groups, political parties, and governors. Business, labor, local governments, school boards, and other traditionally powerful groups still wield the most influence in state politics, but environmentalists, consumer advocates, and senior citizens have become more effective.

Additionally, most states have legislative reference services that provide pertinent information to legislators, make research reports on particular proposals, and maintain legislative records. Some states also have legislative councils comprised of professional staff members. These members carry out functions similar to those provided by legislative reference services and may prepare an annual legislative program. Some of these are listed in Box 5.4.

**Policy Evaluation**

Many state legislatures play an oversight function to guarantee that the programs being implemented by agencies are effective and cost efficient, similar to the oversight role played by Congress. Since legislators must decide whether to appropriate money to these programs, it is necessary to know if they are working or if they are a waste of the taxpayer’s money. States have different ways to evaluate programs. Many times, the evaluation is very simple and consists of legislators conferring with department heads, or the legislatures may complete their own evaluations. In some cases, the evaluation is much more complex and must be initiated by the state legislature. Most states have agencies that are responsible for reviewing and evaluating policies to determine if they are effective. This can be some kind of an auditor that evaluates programs and looks for efficiency or waste. Many states have sunset laws that provide that state agencies will be terminated unless they are periodically evaluated and reauthorized. This helps ensure that the programs are implemented in the way they were intended.

**Box 5.4:** **State Research Agencies**

|  |  |
| --- | --- |
| **Arkansas**  | Arkansas Crime Information Center: to provide information technology services to law enforcement and other criminal justice agencies in Arkansas |
| **Hawaii**  | Crime Prevention and Justice Assistance Division of the Attorney General’s Office |
| **Minnesota**  | Criminal Justice Statistics Center: provides criminal and juvenile justice information, conducts research, and maintains databases for policy development |
| **Maryland**  | Governor’s Office of Crime Control and Prevention: administers millions of state and federal dollars in grant awards to other state agencies, local units of government, and nonprofit organizations responsible for adult and juvenile justice, public safety, victims’ rights, and law enforcement in an attempt to prevent future victims of crime |
| **Indiana**  | Indiana Criminal Justice Institute: serves as the state’s planning agency for criminal justice, juvenile justice, traffic safety, and victims’ services |
| **Nevada**  | Office of Criminal Justice Assistance (Department of Public Safety): administers grant money to state and local units that perform law enforcement functions related to improving the criminal justice system with regards to the use and sale of controlled substances, faith-based and not-for-profit agencies providing drug treatment programs, prevention and education programs, and court programs. |
| **Pennsylvania**  | Commission on Crime and Delinquency: established in 1978 to improve the criminal justice system in the state, they work to improve communication between agencies, and in turn increase effectiveness and efficiency. |
| **Utah**  | Commission on Criminal and Juvenile Justice: serves as the state’s Statistical Analysis Center. The Center is used by many agencies in order to create more effective criminal justice policy. |

*Sources:* Indiana: [www.state.in.us/cji/about.htm](http://www.state.in.us/cji/about.htm). Maryland: [www.goccp.org//about](http://www.goccp.org/about). Arkansas: [www.acic.org/about/index.htm](http://www.acic.org/about/index.htm). Hawaii: [www.cpja.ag.state.hi.us/](http://www.cpja.ag.state.hi.us/). Minnesota: [www.mnplan.state.mn.us/cj/](http://www.mnplan.state.mn.us/cj/). Nevada: <http://ocj.nv.gov/Welcome_Page.shtml>. Pennsylvania: [www.pccd.state.pa.us/portal/server.pt/community/pccd\_home/5226](http://www.pccd.state.pa.us/portal/server.pt/community/pccd_home/5226). Utah: [www.justice.utah.gov/Research/default.htm](http://www.justice.utah.gov/Research/default.htm).

**Committees**

To make the legislative process run smoothly and quickly, each of the state legislatures has created a committee system similar to that on the national level. This consists of standing (permanent) committees and temporary committees. Some states have created joint standing committees that are comprised of members of both houses. The primary function of the committees is to consider proposals and act on those proposals to increase the chance that it will be passed. In most cases, the committee members hear testimony, amend bills, and approve or reject them.

For the most part, the committees focus on different subject or topic areas. Each state has a committee that considers criminal justice issues, as described in Box 5.5. As this box shows, the agencies vary by state. The names are different from one state to the other, but the committees’ jurisdictions are similar.

**Other Roles**

The state legislatures often become involved in the appointment process for different personnel to head agencies or to act as members of committees for the state. The legislatures may hold hearings on nominees and may support or oppose them. By doing this, the legislatures play an oversight function over the state executive. The legislatures also have investigative functions that are intended to allow representatives to collect information relevant to proposed legislation but that can also be used to examine the activities of administrative agencies. Finally, state governments have intergovernmental functions, such as making decisions related to the proposal and ratifications of amendments to the Constitution, considering interstate compacts and agreements, passing legislation affecting local levels of government, and deciding whether to participate in federal programs.

Like federal legislatures, state lawmaking bodies play only a minor role in the implementation of policies created in the legislatures. Beyond defining the new policy through the legislation, the role of the state legislatures is minimal. Implementing the new policies is the primary responsibility of the bureaucracies and agencies affected by the new legislation. However, state legislatures can affect implementation through their role in funding the agencies. If the legislatures fund the new program adequately, the program has a better chance of succeeding than if it is minimally funded. The same is true of existing programs, which can see their budgets cut significantly by legislatures, thus reducing their ability to serve their clients. On the other hand, a legislature can also fund an existing program at a high level, thus providing more chance of successful program implementation.

**Examples of State Legislation**

Most criminal law has been enacted by state legislatures rather than by Congress. Because each state can define acts or behaviors as criminal as well as define an associated punishment for that act or behavior, there can be some variation from one state to another in either how a crime is defined or the punishment for conviction of that offense. Although there are too many state laws to list here, Box 5.6 has some examples of legislation passed by state legislatures to deter harmful behavior.

**Relationship with Congress**

The states have developed relationships with Congress in the area of crime control that allows the states to be even more effective in fighting crime. For example, state governments sometimes lobby the federal government to pass laws. In fact, the states have become important players in the shaping of many federally mandated policies. States can influence national policy through their elected congressional representatives. These state representatives fight for their state’s interest when legislation is being considered.

**Box 5.5:** **State House and Senate Criminal Justice Committees/Subcommittees**

| State  | House  | Senate  |
| --- | --- | --- |
| Florida | Criminal & Civil Justice Policy Council | Criminal & Civil Justice Appropriations |
|   | 1. Civil Justice & Courts Policy Committee
2. Public Safety & Domestic Security Policy Comm
 | Criminal Justice |
| Mississippi | CorrectionsConstitutionJudiciary AJudiciary BJudiciary En BancJuvenile Justice | CorrectionsConstitutionDrug PolicyJudiciary, Division AJudiciary, Division B |
| Louisiana | Administration of Criminal JusticeCivil Law and ProcedureJudiciary | Judiciary AJudiciary BJudiciary C |
| Pennsylvania | JudiciaryLiquor Control | JudiciaryLaw and Justice |
| North Carolina | Alcoholic Beverage Control | Appropriations on Justice and Public Safety |
|   | Appropriations Subcommittee on Justice and Public SafetyHomeland Security, Military and Veterans AffairsJudiciary IJudiciary IIJudiciary IIIJuvenile Justice | Judiciary IJudiciary II |
| Alabama | JudiciaryPublic Safety | Constitution, Campaign Finance, Ethics and ElectionsJudiciary |
| Nebraska | Judiciary |   |

*Sources:* State Web sites. Florida House: [www.myfloridahouse.gov/Sections/Committees/committees.asp](http://www.myfloridahouse.gov/Sections/Committees/committees.asp), accessed 1/25/2010. Florida Senate: [www.flsenate.gov/Committees/index.cfm?Tab=committees&CFID=183128211](http://www.flsenate.gov/Committees/index.cfm?Tab=committees&CFID=183128211), accessed 1/25/2010. Mississippi House: <http://billstatus.ls.state.ms.us/htms/h_cmtememb.xml>, accessed 1/25/2010. Mississippi Senate: <http://billstatus.ls.state.ms.us/htms/s_cmtememb.xml>, accessed 1/25/2010. Louisiana House: <http://house.louisiana.gov/H_Reps/H_Reps_StandCmtees.htm>, accessed 1/25/2010. Louisiana Senate: <http://senate.legis.state.la.us/committees/default.asp>, accessed 1/25/2010. Pennsylvania House: [www.legis.state.pa.us/cfdocs/legis/home/member\_information/representatives\_sc.cfm](http://www.legis.state.pa.us/cfdocs/legis/home/member_information/representatives_sc.cfm), accessed 1/25/2010. Pennsylvania Senate: [www.legis.state.pa.us/cfdocs/legis/home/member\_information/senators\_sc.cfm](http://www.legis.state.pa.us/cfdocs/legis/home/member_information/senators_sc.cfm), accessed 1/25/2010. North Carolina House: [www.ncga.state.nc.us/gascripts/Committees/Committees.asp?sAction](http://www.ncga.state.nc.us/gascripts/Committees/Committees.asp?sAction), accessed 1/25/2010. North Carolina Senate: [www.ncga.state.nc.us/gascripts/Committees/Committees.asp?](http://www.ncga.state.nc.us/gascripts/Committees/Committees.asp) accessed 1/25/2010. Alabama Senate: [www.legislature.state.al.us/senate/senatecommittees/](http://www.legislature.state.al.us/senate/senatecommittees/), accessed 1/25/2010. Alabama House: [www.legislature.state.al.us/house/housecommittees/](http://www.legislature.state.al.us/house/housecommittees/), accessed 1/25/2010.

**Box 5.6:** **Examples of State Criminal Laws**

|  |  |
| --- | --- |
| **Washington**  | Penal Code 9.35.010: “No person may obtain or attempt to obtain, or cause to be disclosed or attempt to cause to be disclosed to any person, financial information from a financial information repository, financial services provider, merchant, corporation, trust, partnership or unincorporated association. Violation of this section is a Class C felony.” |
| **Oregon**  | Chapter 163 section 149: “Criminal homicide constitutes aggravated vehicular homicide when it is committed with criminal negligence, recklessly or recklessly under circumstances manifesting extreme indifference to the value of human life by a person operating a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 and (a) the person has a previous conviction for any of the crimes described in subsection (2) of this section; and (b) the victim’s death in the previous conviction was caused by the person driving a motor vehicle.”Chapter 163 Section 145: “A person commits the crime of criminally negligent homicide when, with criminal negligence, the person causes the death of another person. Criminally negligent homicide is a Class B felony.” |
| **Massachusetts**  | Chapter 151b, Section 3A: “All employers, employment agencies and labor organizations shall promote a workplace free of sexual harassment.” |
| **Florida**  | Chapter 561.1105: “In conducting inspections of establishments licensed under the Beverage Law, the division (the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation) shall determine if each coin-operated amusement machine that is operated on the licensed premises is properly registered with the Department of Revenue. Each month, the division shall report to the Department of Revenue the sales tax registration number of the operator of any licensed premises that has on location a coin-operated amusement machine and that does not have an identifying certificate conspicuously displayed as required by s. 212.05(1)(h).” |
| **Alabama**  | Section 3-2-20: “The Director of Public Safety shall provide for taking up and impounding livestock or animals running at large upon state and federal aid highways which have been officially designated as such and regularly and customarily patrolled by the state highway patrol or upon the rights-of-way of such highways and, to that end, within the limit of the funds provided by this article, the Director of Public Safety is hereby authorized and empowered to contract with persons, firms or corporations within the several counties to take possession of and impound such livestock or animals.” |

*Sources:* Washington: <http://law.onecle.com/washington/crimes-and-punishments/9.35.010.html>. Oregon: <http://law.onecle.com/oregon/163-offenses-against-persons/163.149.html>. Massachusetts: <http://law.onecle.com/massachusetts/151b.3A.html>. Florida: <http://law.onecle.com/florida/alcholic-beverages-and-tobacco/561.1105.html>. Michigan: <http://law.onecle.com/alabama/animals/3-2-10.html>.

Many state and local government officials routinely seek to influence the content of national policies. Three factors seem to have been especially significant in generating this “intergovernmental lobby.” One is the increasing professionalism in state and local governments. This gives these units the knowledge base and ability to meet with legislators and provide information that may influence legislation. The second is growth in federal grants-in-aid to state and local governments. These programs have the potential for the federal government to regulate the behavior of the state and local governments. Third are the many regulations and requirements that federal programs impose on the states and localities. Many times, these regulations are open to modification and give discretion and power to state and local officials. 89

In fact, many states have hired lobbyists or even established offices in Washington, D.C., to keep track of proposed legislation that might impact their state. They might even lobby for their state’s interests. For example, the National Governors Association (which used to be the Governors Conference) represents the interests of the nation’s governors. The National Conference of State Legislatures pursues the interests of state legislatures. Additionally, the National League of Cities, the U.S. Conference of Mayors, and the Advisory Commission on Intergovernmental Relations are agencies that represent state interests in Washington.

The National Governors Association represents governors and their senior staff on Capitol Hill and the executive on issues that affect state governments. It is an agency through which state governors work to provide effective policies for their states. They have a “best practices” group that helps governors develop and implement innovative solutions to solving key problems in their states. They help governors learn about emerging issues and how to deal with them. 90 They press legislators and administrators to act favorably on requests for financial assistance and regulatory decisions. 91

The National Conference of State Legislatures was founded in 1975 as a bipartisan organization to serve the legislators and their staff in the states, commonwealths, and territories and provides research, technical assistance, and other opportunities for legislators to exchange ideas. It also advocates for the interests of state governments in Congress and other federal agencies. 92

States also lobby the federal government for financial assistance. When money passes from one level of government to another, it is referred to as fiscal federalism. There are many ways in which money can be provided to the states from the federal government. One of those is called “categorical grants.” This money can be used only for the specific purposes declared by Congress or detailed in the federal administrative code. Categorical grants are provided to states for specific purposes and cannot be used for any other program or purpose. The state or local governments, when they accept the grant funds, then become obligated to comply with the requirements. There are generally two types of categorical grants. One of those is a formula grant, which is distributed to state and local governments based on a specific formula approved by Congress. The formula could include such factors as population, tax base, crime rates, and prison populations. The second type of categorical grant, project grants, are funds provided to state and local governments that cover the costs of a specific project or program. These are typically assigned after many competing proposals are reviewed.

Block grants are another type of federal funding. These grants can be used for many related purposes as long as they are consistent with the authorization as described by Congress. Block grants carry fewer restrictions and administrative regulations. With block grants, the recipients can decide how to use the funds among many possible purposes authorized in the legislation.

Another type of funding is general revenue sharing, under which the federal government provides funds to state and local governments based on a formula that takes into account many factors, as with formula grants described earlier. However, in this case, there are very few strings attached to the money. This type of grant increases the ability of state and local governments to make choices and spend money on programs of their choice. For the most part, this grant program no longer exists.

In 1994, when Congress passed the Crime Bill, state and local policymakers had the opportunity for federal financial support. In fact, a large share of the $30.2 billion provided by the bill went to state and local governments. The biggest portion ($8.8 billion) was to be used to hire approximately 100,000 state and local police officers in state and local police departments. Another $7.9 billion went to states in the form of construction grants to support prisons and correctional “boot camps.” The third-largest share, $6.9 billion, was allocated to local communities by a formula grant in support of crime prevention programs. Smaller amounts ($1.8 billion) went to state and local governments to reimburse them for the costs of incarcerating illegal aliens convicted of felony offenses. Another $1.6 billion was provided by the federal government to finance the Local Partnership Act. As part of the legislation, there was a five-year limit on the funding, with a descending percentage of federal funds distributed over the period. 93

Another way that states can impact policy is by their willingness to take on a federal law. The state or local government may decide to implement the law only minimally, whereas another state may decide to put more emphasis on the new law. Additionally, a national bill may set broad policy goals with few specific details or even only minimum details about a policy. This means that the state and local governments have a great deal of discretion or latitude in defining details and procedures for the implementation of that law. This, too, can greatly affect the success of the law.

On the other hand, a state can choose to oppose a federal law and pass legislation contrary to federal policy. To date, fourteen states have passed laws allowing for the cultivation and distribution of medical marijuana, laws that are in direct opposition to federal anti-drug policies that outlaw possession, selling or cultivating marijuana. During his campaign for the presidency, Obama claimed he did not support raiding legitimate dispensaries. In early March of 2009, Attorney General Eric Holder announced that the Justice Department would not arrest providers who were obeying the law. However, federal raids on marijuana dispensaries have continued. The DEA claims that federal law trumps state law, and that those who operate such businesses are violating federal law. Nonetheless, states have continued to support laws that allow the distribution of marijuana even though it clearly conflicts with federal laws. 94

**Local Governments**

Many citizens feel that federal institutions and agencies have grown too large to meet on a regular basis with concerned citizens. Additionally, for many people, federal agencies, which are typically based in Washington, D.C., are simply too remote to allow for a face-to-face meeting to discuss issues and seek common solutions. As a result, some Americans have become uninterested or even apathetic in national government. Instead, they are now turning to neighborhoods and communities to become involved in the political process and making decisions that directly affect their lives. They have found that the smaller the government unit, the greater the opportunity for participating in decisions. 95 In other words, the small units of government are more conducive to grassroots democracy, providing a sense of belonging. There can be close contact between political elites, leaders, and ordinary citizens, something that can’t be done on the federal level. 96

The focus of local governments is on neighborhoods or communities. These government agencies are responsible for the provision of a host of public services, including police and corrections. The ability of local governments to control their own area is called “local home rule.” In most places, the state governments allow local governments to exist. This also means that they can dissolve them.

**Types of Local Governments**

There are many types or forms of local governments, each responsible for providing services to local communities. “To qualify as a local government under the U.S. Bureau of the Census definition, a jurisdiction must be an organized entity with governmental character and substantial autonomy.” 97 There are over 82,000 local governments, including 19,000 municipalities, 3,000 counties, 17,000 townships, 15,000 school districts, and 29,000 special districts. 98 States create local governments, define their authority, determine possible forms of government they may adopt, and may even abolish local government. The amount of independent authority exercised by local governments varies from state to state and by type of government. There are five categories of local governments: counties, municipalities, towns and townships, special districts, and school districts (which is a particular kind of a special district). 99

Counties are the basic administrative subdivision in a state and were created by states to manage activities of statewide concern at the local level. They generally have the broadest or far-reaching responsibilities, including the local administration of some state services, including law enforcement, justice, welfare, and roads. Often, states use counties as the basic administrative units for courts and law enforcement. All states except Connecticut and Rhode Island have counties, although in Louisiana they are called parishes and in Alaska boroughs. In some large cities, such as New York and San Francisco, the county government has merged with the city, but in most places, counties overlap and coexist with others. They are often concerned with jail expansion and law enforcement planning. The law enforcement agency in the county is the sheriff’s department.

Townships are geographic entities rather than forms of government. In some states, a town is a medium-size city. In other states, a town is a form of local government where the community members meet once a year in the town hall to elect officers, pass ordinances, adopt budgets, and levy local taxes. The townships perform many of the functions that the county officials perform except at the local level. These types of government exist mostly in the midwestern states. In New England, the town rather than the county has been the predominant form of local government. In these areas, towns perform many of the same functions as counties, but they oversee a much smaller geographic area. In recent years, many townships have been replaced by elected councils and mayors. The law enforcement agency within the town is the constable.

Municipal governments, also called city governments, include towns, villages, and cities. These were created in response to the needs and demands of people living in close proximity. These governments come into existence only when they are incorporated by a charter that prescribes the basic structure of city government and outlines its powers. 100 Most cities are run by a city council. City council functions vary with the size of the population they serve. Overall, they concentrate on areas such as zoning or planning. There are differences in the council structure. There are usually five or nine members with council–manager forms. Some areas have a council–mayor form. In larger cities with this form of government, they play a more legislative role. In most places, council members are elected.

Elected municipal officials are represented by an organization called a state municipal league that assists officials in carrying out their jobs. Such leagues monitor state legislation, attempt to get favorable state action on financial issues, lobby for policies that affect them, act as a clearinghouse for information, sponsor training seminars, and provide networking opportunities. They are found in nearly every state and are usually located in or near the state capital.

Special districts are government bodies that surround a specific policy area or function. Examples include school districts and airports. They make policies that guide those specific geographic areas.

Most local government must, at least partially, rely on the states for money. However, in recent years, many local officials have also turned directly to the federal government for financial assistance. Most state representatives want to protect their communities they represent, so they actively fight to receive their share of funds.

**Types of Offenses**

Obviously, crime rates vary from one city to the next. For the most part, crime rates are highest in the largest cities with populations of over 250,000 residents. This fact may reflect not necessarily the actual violence in that city but rather the differences in police practices and the quality of police reporting. Box 5.7 indicates the number of criminal offenses reported in local areas.

**Role in Policy Process**

The local form of government plays a similar role to that of Congress and the state legislatures in the policy process except on a smaller scale. The local elected officials help establish a local system of criminal justice that, once again, has the goal of keeping the community safe from crime to the extent that it can.

**Box 5.7:** **Offenses Known to Law Enforcement, 2008**

|  |  |
| --- | --- |
| Alexander City, Alabama | 204 |
| Lincoln, California | 55 |
| Milford, Connecticut | 68 |
| New Smyrna Beach, Florida | 120 |
| Waterloo, Iowa | 510 |
| Shreveport, Louisiana | 1,897 |
| Peabody, Massachusetts | 144 |
| Golden Valley, Minnesota | 0 |
| Fremont, Nebraska | 53 |
| Newark, New Jersey | 2,660 |
| Oklahoma City, Oklahoma | 5,400 |
| State College, Pennsylvania | 44 |
| Watertown, South Dakota | 35 |
| Fort Worth, Texas | 4,601 |

*Source:* FBI, Uniform Crime Reports, Crime in the United States, 2008, table 8; [www.fbi.gov/ucr/cius2008/data](http://www.fbi.gov/ucr/cius2008/data).

**Problem Identification**

Local officials and community members are key players in identifying problems in the local communities that need to be addressed. Problems can be identified by local law enforcement, community members, schools, and many other individuals. Once the problem is identified, it becomes a possible topic for the political agenda.

**Agenda Setting**

The members of the town councils, similar to members of the federal and state legislatures, are important in setting the agenda for the local government. They may be influenced by the public, schools, law enforcement, and store owners. Since the mayor acts as the chief executive of the city, he or she plays an important role in setting the public agenda. The agenda can also be set by city councils. However, conditions can be imposed on local governments by either state or local officials. In most cities, interest groups are not normally involved.

**Make Local Laws**

The process for making a law on the local level is not the same as the process for making a law on the national or state level. Instead, most local governments have regular city council sessions where the mayor presides. The mayor is traditionally viewed as the chief executive of the city. Most local governments have regular city council sessions. The sessions may result in a consensus. Council members are briefed on policy matters by administrators and have read the reports of zoning and other commissions before the session, and then a public meeting is held. Depending on the issue, the hearing may be intense. Often, city council decisions are made immediately following a public hearing. There are usually no committees. In most places, the public takes an active role in the process, depending on the issue.

**Other Roles**

The local governments, like the federal and state governments, play little role in the implementation of the new policies they create. This responsibility is left to the bureaucracies and agencies that are relevant to the new program. Nor do they usually play a direct role in the evaluation of new policies, but there is some oversight by the service director and/or city council. Typically, all money that local departments receive and spend must be approved by these officials. Any grant money received from the state or federal government must also be approved by the city council, yet it still must be spent for the purpose it was intended. This is also monitored by the state auditor’s office.

In some cases, a city council may ask an outside agency to come in and complete a program evaluation of some kind and then report that back to the requesting body. In this role, city government officials play an oversight function in attempting to guarantee that the agencies are carrying out the policy in the most cost-efficient and effective way possible.

**Examples of Local Laws and Ordinances**

Local laws and ordinances regulate behavior to protect the safety of the citizens in that local area. Typically, these are lesser offenses with less serious punishments. These laws are created by city councils, township supervisors, or similar groups. Examples of local laws and ordinances are found in Box 5.8.

**Effect on State and National Policy Process**

One might think that the local government plays little or no role in the federal or state legislative process. However, in recent years, specific organizations have been established to represent local interests in both of these political arenas. This is important because the local government can influence what the state and federal governments do. The state and government officials may not be aware of local issues, or they may differ with respect to how serious a specific problem is. The local governments can influence how the state and federal governments address problems and how much financial assistance they may receive.

**Box 5.8:** **Examples of Local Laws and Ordinances**

|  |  |
| --- | --- |
| **Borough of Riverside; Northumberland County, PA**  | Ordinance No. 86-4: Junk Vehicle Ordinance: Section 1: It is declared to be a violation of this Ordinance to accumulate, store or have abandoned junk motor vehicles on any private or public property.Ordinance 1296: The Dog Law: If dogs are confined in outside quarters (including leashed), they shall be kept no closer than ten feet from the exterior limits of any neighboring dwelling. Any person who walks any dog within the Borough shall not permit such dog to be unattended. The dog shall be restrained by leash or other appropriate device of control so that it will not stray. Any person who walks such a dog shall immediately remove all feces deposited by such dog by any sanitary method and same shall be deposited in the owner’s garbage or disposed of in some other sanitary method. The deposit shall be properly wrapped, packaged or protected so as to prevent unsightly disposal, smell or interference with the health and welfare of the community. |
| **Town of Grand Chute, Wisconsin**  | Section 7.15: All swimming pools as defined above, whether in ground or aboveboard types, shall be enclosed with an adequate and secure fence at least 44 inches high above adjoining grate to prevent straying into pool area. For a violation of this ordinance he shall forfeit not more than $25.00 and the costs of prosecution and in default of such forfeiture and costs of prosecution shall be imprisoned in the County Jail until forfeiture and costs of prosecution are paid, but not exceeding five days. |
| **Stillwater, Minnesota**  | Code 1980 & 38.02: No person may congregate or participate in any party or gathering of people from which noise emanates of a sufficient volume or of such nature to disturb the peace, quiet or repose of other persons. No person shall, between the hours of 10:00 p.m. and 8:00 a.m. drive or operate any minibike, snowmobile or other recreational vehicle not licensed for travel on public highways, in such a manner that it is plainly audible at a distance of 50 feet from its source.No person may engage in or permit construction activities involving the use of any kind of electric, diesel or gas-powered machine or other power equipment except between the hours of 7:00 a.m. and 10:00 p.m. on any weekday or between the hours of 9:00 a.m. and 9:00 p.m. on any weekend or holiday. |
| **New Lenox, Illinois**  | Section 54-191: It shall be unlawful for any person to carry any concealed weapon in the village unless permitted to do so by state law.Section 54-211: It shall be unlawful for anyone to do any of the following acts within the corporate limits of the village: (a) Hunt, with or without the aid of a weapon or other device, any animal; (b) Trap, with or without the aid of a trap or other device, any animal; (c) possess or display any loaded weapon.  |

*Sources:* Pennsylvania: <http://www.riversideborough.org/Ordinances.html>. Ohio: <http://www.fairfaxohio.org/index.php?view=article&catid=13%3Apolice-department&id=>. Wisconsin: [http://www.grandchute.net/gradchute/municipal+code/chapters/chapter+7/chapter+7](http://www.grandchute.net/gradchute/municipal%2Bcode/chapters/chapter%2B7/chapter%2B7). Minnesota: <http://www.stillwater.govoffice.com/index.asp?Type=B_BASIC&SEC=>. Illinois: [www.newlenox.net/code.html](http://www.newlenox.net/code.html).

Big cities are represented in the state and federal arena by the U.S. Conference of Mayors. This organization was created in 1932 as an agency to work to strengthen the relationships between the city and federal governments and to help ensure that federal policy meets the needs of the cities. The Conference provides city mayors with leadership training and tools and provides a forum where mayors can meet and exchange information. 101

Small and medium-size cities are represented by the National League of Cities. This national organization was created in 1924 to represent municipal governments and to strengthen cities across the nation. It conducts research, shares the information with city government officials, and represents city government interests in the national policy process. 102

Small governments, such as towns and townships, are represented by the National Association of Towns and Townships. This organization works to strengthen the effectiveness of towns and township governments through educating lawmakers and other officials about how small governments operate. They also advocate for related policies in Congress and help local governments meet federal requirements for grants and other benefits. 103

Finally, counties are represented in the state and federal arenas by the National Association of Counties, which was created in 1935 to give county officials a voice in the national legislative process. Today, they still represent county governments and their interests on Capitol Hill. They provide legislative, research, and technical help to county government and generally work as a liaison between county government and the national government. 104

The National Association of Neighborhoods is a nonpartisan agency that was founded in 1975 by concerned individuals in neighborhoods as a way to improve the quality of life there. It works with community leaders, church leaders, and members of small businesses to support policies that will improve neighborhoods. It also works with national organizations to tackle neighborhood problems, such as crime prevention. 105

**Conclusion**

The legislative branches of government, whether they be national, state, or local, have a dramatic impact on the policy process. Although the state is the primary branch in criminal justice policymaking, the federal government has become more active in recent years in the battle against crime. The legislatures are involved in the entire policy process, from problem identification to program oversight. While creating policy, the legislature is directly influenced by other political actors and in turn influences the legislatures.

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The Public Policy of Crime and Criminal Justice, Second Edition

Chapter 5: Legislative Branches

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**Judiciary**



**Chapter Outline**

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**Introduction**

According to Alexander Hamilton, one of our Founding Fathers, the courts were intended to be an intermediate body between the people and the legislature and were responsible for, among other things, keeping the legislature within its boundaries. 1 He noted in Federalist 78 that the judiciary “will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them ... (it) has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

Based on these ideas, the broad outline of the court system in the United States was initially established in article III of the U.S. Constitution. In part, article III states that “the judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” In the Constitution, the U.S. Congress was given the power to set up whatever federal courts, other than the U.S. Supreme Court, became necessary. It also gave them the power to impeach, convict, and remove justices from the Supreme Court for crimes such as treason, bribery, or other high crimes and misdemeanors. 2 More details about the courts were filled in by Congress in the Judiciary Act of 1789. This congressional act set up a judicial system composed of a Supreme Court, which consisted of a chief justice and five associate justices; three circuit courts, each constituting two justices of the Supreme Court and a district judge; and thirteen district courts, each presided over by one district judge. 3 Despite these initial attempts to define the role of the court, it was left chiefly to the Supreme Court to define the exact jurisdiction and powers of the federal courts—itself included—with precision. 4

Since then, the courts have evolved into a complicated system of ensuring justice. To an outsider, the court can be a confusing place. It is often noisy and congested with what appears to be a focus on mass production. In some instances, the presiding judge accepts guilty pleas and plea bargains and imposes sentences ranging from fines to death. Despite this, the courts play many important roles, including a key role in the policy process and in criminal justice policymaking.

**Function of the Courts**

The role of the courts stems from three sources. The first is article III of the Constitution, which defines the Supreme Court’s original jurisdiction. The Supreme Court has original jurisdiction over specific kinds of cases or controversies, such as those affecting ambassadors or other public ministers and consuls and disputes to which the United States is a party between two or more states, between a state and a citizen of another state, and between a state (or its citizens) and foreign countries. It also has appellate jurisdiction, meaning that significant cases of constitutional issues can be appealed to it through lower courts. The jurisdiction of the Supreme Court is outlined in Box 6.1.

The second source of power from the courts is congressional legislation, which helps define the courts’ jurisdiction. Congress can establish and/or change the jurisdiction of the federal judiciary, including the Supreme Court. As the Court’s caseload increased, Congress expanded the Court’s discretionary jurisdiction by replacing appeals with petitions for *certiorari*, which the Court may choose to grant or deny.

Third, the courts’ power comes from their own interpretation of the previously mentioned powers together with their own rules for accepting cases. 5 The power of the federal courts to invalidate laws that are unconstitutional is widely accepted. This power is called judicial review, and it stems from *Marbury v. Madison* (1803). In this case, Chief Justice John Marshall interpreted the Judiciary Act of 1789 to have unconstitutionally expanded the Supreme Court’s original jurisdiction as described in article III of the Constitution. At the same time, it also struck down an act of Congress. Over time, the Supreme Court also overturned a number of state laws that enforced its power of judicial review. 6

Since *Marbury v. Madison*, it is widely accepted that the courts have the power to review the acts or laws made by Congress, the president, and state and local legislatures to ensure that the laws are constitutional. In other words, the courts review acts by others to determine if they are in conflict with the Constitution, federal laws, or federal treaties. 7 “With its rulings, the court engages the country in a dialogue over the meaning of the Constitution.” 8 The courts can overturn laws that conflict with either a state or the federal Constitution. 9

A second role of the courts is to resolve legal disputes between actors. In this role, the justices play the role of a third, neutral party who will apply the law to a dispute and resolve conflicts that may arise between two parties. 10 They are an outside, disinterested party that will look at the facts surrounding a situation in an unbiased way and attempt to bring the disagreement to an end. 11

Additionally, the courts sometimes play administrative roles. 12 They get involved in the administration of policies. 13 For example, the courts sometimes must define laws more clearly when they are too vague or if there is disagreement about the exact meaning of a particular phrase or wording of a new law.

Some courts are also responsible for issuing search warrants, arrest warrants, or other related documents and thus play a role in arraignments, trials, and sentencing to ensure a defendant’s due process rights. These are typically lower-level courts that ensure that the procedures for arresting a defendant, collecting evidence against that defendant, and the court process that decides if that defendant is guilty or not guilty is fair and that each defendant is afforded his or her rights as described and guaranteed under the Bill of Rights.

The different roles of the different courts can be easily understood when they are examined in light of Herbert Packer’s two models of criminal justice described earlier. 14 The first, the crime control model, revolves around a presumption of guilt, followed by a high rate of apprehension and conviction, with a focus on speed and finality. The criminal process must not be cluttered up with ceremonious rituals (i.e., appeals or pretrial motions) that do not advance the progress of a case. The second model, the due process model, relies on an assumption of human error and the need for fact-finding. Thus, it is imperative that there are legal protections in place to protect the innocent defendant. Taken together, these models show the dichotomy between the two roles of the court: to punish and to provide legal protections that guarantee a defendant’s rights.

**Box 6.1:** **Summary of Supreme Court Jurisdiction**

|  |
| --- |
| **Original jurisdiction** 1. Disputes between states
2. Some types of cases brought by a state
3. Disputes between a state and the federal government
4. Cases involving foreign diplomatic personnel
 |
| **Appellate jurisdiction** 1. All decisions of federal courts of appeals and specialized federal appellate courts
2. All decisions of the highest state court with jurisdiction over a case, concerning issues of federal law
3. Decisions of special three-judge federal district courts
 |

*Source:* L. Baum, *The Supreme Court*, 6th ed. (Washington, D.C.: Congressional Quarterly Press, 1998), p. 12.

**Organization of the Courts**

The Constitution set up a dual system of courts, meaning that there are two court systems operating simultaneously. There are courts on the federal, state, and even local levels, all operating at the same time. Whether a court is federal, state, or local, it generally has the same responsibilities: to resolve disputes and maintain justice.

There are many kinds of courts with different responsibilities. Courts can be established either under a constitution or by legislation. The Supreme Court was established under the Constitution, but many state courts were created by legislation. Those established under the Constitution are called constitutional courts, and those established by legislation are considered legislative courts.

The courts differ as to their jurisdiction or their authority to hear a case. A court of general jurisdiction has the ability to hear a variety of cases. For example, county or district courts hear both criminal and civil cases involving such issues as murder, probate, divorce, and suits for monetary damage. A court of limited or specific jurisdiction hears only a narrow range of cases. For example, a juvenile court will hear only cases involving defendants of a specific age-group. Original jurisdiction means that a court is empowered to hear a case initially, as opposed to appellate jurisdiction, which means that a specific court can hear a defendant’s appeal of conviction by the court of original jurisdiction.

The responsibilities of the different courts can be categorized by the type of court rather than level. There are two types of courts: trial and appellate. Trial courts are most well known for handling criminal cases where people or companies are charged with violating a law and causing harm to an individual or a group of individuals. They also handle civil cases, which are disagreements between individual citizens, between individuals and private institutions (such as business firms), or between individuals and government agencies. In these cases, there is usually an adversarial process whereby the prosecution attempts to prove an offender’s guilt and a defense attempts to prove an offender is not guilty. Presiding over the case is the judge, who will respond to questions of courtroom procedure. In some cases, a jury is present to help determine guilt or innocence.

Appellate courts have been granted the power of judicial review, meaning they review the acts of other courts/legislatures and determine if they are constitutional. Some appellate courts must hear all cases appealed to it, while others have discretion to choose what cases they will hear. These courts do not hear evidence as do the trial level courts but rather simply review court records and other legal documents to determine if errors or mistakes were made during trial. If a mistake is found, the court will not hear the case but rather remand it back to the lower court, where another trial may take place.

Figure 6.1 shows the organization of the court system in the United States and demonstrates the nature of the dual court system. The state courts are represented on one side and the federal on the other. The two systems overlap only when they reach the Supreme Court. In order for a case to be heard by the Supreme Court, it must go through either the state or the federal system, and this is determined by the type of offense committed. No case can go through both the federal and the state system concurrently (unless the crime included both federal and state offenses and the defendant is charged with such offenses).

Figure 6.1 Relationship between State and Federal Court Systems.



**Courtroom Personnel (Courtroom Work Group)**

Regardless of the type of court, there are certain personnel who play a specific function in the court. These include the prosecution, defense, and judges. Each fulfills its own role but must also interact with others to process defendants through the system.

**Prosecution**

In a trial-level court, the prosecution is responsible for enforcing the law by filing criminal cases and bringing the state’s case against the accused. The prosecutor is responsible for starting legal proceedings in a case, which begins when he or she files formal charges or grand jury indictment with the court. The prosecutor works with police to investigate possible violations of law, determines what the charge will be, interviews witnesses in criminal cases, reviews applications for arrest and search warrants, subpoenas witnesses, represents the government in pre-trial hearings and in motion procedures, enters into plea-bargaining negotiations, prosecutes criminal cases, recommends sentences to courts on conviction, and represents the government in appeals.

There are prosecutors in the federal, state, and local court systems. At the federal level, they are called U.S. attorneys. These are the officials who are responsible for representing the people (the state) in the prosecution of federal crimes. They are appointed by the president and assigned to a U.S. district court jurisdiction. On the state or local level, the prosecution is referred to as a district attorney, state’s attorney, county attorney, or prosecuting attorney.

The prosecution has a major impact on the court activities. His or her daily decisions can have a tremendous influence on the values in the community. 15 By determining which cases will be prosecuted, the charges to be made, and the bargains to be agreed on with defendants, the prosecution can make powerful statements about acceptable behavior.

The prosecution also affects others within the system since their actions could potentially influence the operations of the police, coroner, grand jury, and judge. 16 Prosecutors are the link between the police and the courts. When law enforcement arrests a suspect, the prosecution determines the specific charges to be brought against that suspect or if charges should be brought at all. In making that decision, the prosecution is determining the type of cases that go to the court and how many. Because of this, the prosecutor “has been called the most powerful single individual in local government. If the prosecutor does not act, the judge and the jury are helpless, and the police officer’s word is meaningless.” 17

Prosecutors must also learn to work with (or in some cases manipulate) members of the media. Often, the prosecution deals with dramatic, sensational materials and information that the media wants to present in some fashion (i.e., print or broadcast). The media may call on the prosecutor for information about a case. Some prosecutors are able to use the media to create a favorable climate of opinion for the prosecution. 18

In many jurisdictions (both state and local), prosecutors are elected. They are usually elected on a partisan basis for a four-year term. With the exception of the electoral process, there are few other public checks on their actions. The prosecutor’s discretionary powers may be used so that the voters will be impressed with their abilities. Charges may be dropped to avoid difficult cases, investigations initiated at politically opportune times, and disclosures made of suspected wrongdoing by members of the opposition. Since they can use their staff for campaign work and hold offices where political contributions may be easily gathered, prosecutors may appear to be irresistible forces in local politics. 19 Prosecutors, like other political actors, have many ties to political parties. Prosecutors are recognized as having a lot of power within the system and as having many positions to fill. Thus, they have become key figures in local political organizations. 20

**Defense**

Under the Sixth Amendment to the Constitution, an accused offender has the right to legal counsel who must serve the interests of the accused. The defense counsel is an attorney and an officer of the court but also a representative of the defendant. It is the defense attorney’s role to see that his or her client is properly represented at all stages of the system (police station, initial appearance, preliminary hearing, arraignment, pretrial, trial, sentencing, and appeal), that the client’s rights are not violated, and that the client’s case is presented in the most favorable light possible within legal bounds. The defense attorney must make sure that the prosecution proves its case in court or has substantial evidence of guilt before a defendant pleads guilty or is convicted and punished.

The responsibilities of the defense include investigating the alleged offense; seeking pretrial release of the accused; interviewing the client, police, and other witnesses; discussing the matter with the prosecutor; filing motions to suppress evidence illegally obtained; representing the defendant at the various pretrial procedures, such as arrest, interrogation, lineup, and arraignment; entering into plea negotiations; preparing the case for trial, including developing tactics and strategy; filing and arguing legal motions with the court; representing the defendant at trial; providing assistance at sentencing; and determining the appropriate basis for appeal.

While they are defending indigent offenders, public defenders may also be impacting public policy and the policy process. When needed, public defenders may undertake activities to influence criminal justice policies that affect the status of indigent defendants. A public defender’s office can initiate and sustain litigation that supports desired policy goals. Public defenders can force a court to halt a practice or order an action to assist defendants. In turn, then, they are establishing a long-term policy to protect all future defendants in some way. 21

The Fifth Amendment to the Constitution guarantees the right to legal counsel in trial proceedings. If a defendant is unable to afford adequate legal counsel, the government must provide representation to that defendant. Over the years, state and local governments have devised different methods to ensure that indigent offenders have legal counsel. These methods include public defenders, assigned counsel, and contract counsel.

Public defenders are used in many of the most heavily populated urban areas as well as in the federal government. 22 A public defender is typically an attorney who is employed by the state or federal government and acts as legal counsel for indigent defendants. In some states, there is a statewide public defender’s office that is headed by a chief public defender. In most states, the public defender’s office is organized on the county level. In this situation, each office is autonomous. The attorneys working for the public defender’s offices are salaried attorneys who represent all or most defendants deemed indigent.

These offices typically have high caseloads and are thus unable to spend significant time on any one case. As a result, they are often criticized for not being as legally qualified as private attorneys and thus provide a poor quality of legal counsel. They are also criticized for being overworked, not putting in as much time on cases, and lacking expertise in criminal law and plea bargaining. In many areas, the nonlegal community has a very negative perception of public defenders. However, most public defenders have years of experience and work diligently to provide a defendant with the best possible legal advice.

Another method to provide legal counsel to indigent offenders is by assigned counsel. This is the most common means of providing representation for the poor. 23 In this situation, the court assigns private attorneys to represent indigent defendants in court proceedings. In some areas, all qualified practicing attorneys are placed on a list that is used by a judge to select an attorney for a case. The attorney is usually reimbursed by the state or county for his or her services. This system is often used in rural areas that may not have a high caseload and do not have the need or the monetary support for a public defender’s office. In some cities, the judges select attorneys, using a system of strict rotation from a list submitted by the bar association. In these cases, it is often the youngest attorneys who are called on to perform this service as a civic and professional duty. In other areas, the choice of attorneys for the indigent is limited to those who have indicated to the judge that they are willing to take such cases. This system distributes the burden of indigent representation among members of the bar.

The contract system is another method for providing legal counsel for indigents. Under this system, a county or township invites private law firms to submit proposals on the cost for providing a system of public defense. For example, the county may ask for a bid on the costs for providing legal representation for a certain number of cases. The government then selects the firm that provides the lowest bid. The chosen law firm is responsible for providing indigent defendants with legal representation in court. This is a newer system for providing public defense than the other systems, but its popularity has grown considerably, and now many states are using it to supplement an existing public defender’s office system. 24

In some states, a system of providing services to indigent offenders has evolved to become a mixed system, including elements of each of these methods. Some use a public defender’s office alongside private attorneys. In this case, the public defender system operates simultaneously with the assigned counsel or contract system. Mixed systems allow states to draw on the strength of each to provide better advice to indigent offenders.

**Judges**

Judges in the courtroom have many responsibilities. They preside over the courtroom proceedings (even acting as an umpire during a trial), supervise jury selection, interpret and decide questions of law (questions about evidence), instruct (or “charge”) the jury, sentence guilty offenders, ensure that a defendant’s plea is voluntary, and preside over the plea-bargaining process. They also sign warrants, fix bail, arraign defendants, rule on legal motions drafted by the prosecution or defense, rule on motions to exclude evidence, and accept or negotiate guilty pleas through plea bargaining. Many judges also draft legal opinions setting forth reasons for their decisions. Their administrative duties include responsibility for support staff (getting help from bailiff and administrators), lending assistance in the preparation of the budget, keeping their dockets current (dates for hearing pretrial motions and for trial must be established), and management of the case flow within the court, such as scheduling cases and trials. Judges are supposed to ensure that all defendants are treated fairly.

Theoretically, judges are the most powerful figures in the courtroom. Their rulings and sentencing decisions influence the actions of police, defense attorneys, prosecutors, and other courtroom actors. They determine whether individuals will lose their liberty by being sentenced to a prison term and whether people will live or die by a sentence of death.

The behavior of trial judges and appellate judges differs. Trial judges rule on the appropriateness of the conduct of all others involved in the court process, including spectators. They decide if an attorney questions a witness inappropriately or if spectators are interrupting the legal proceedings. They determine what evidence is admissible and, during jury trials, which instructions of law the juries will receive. Only the judge can make a decision on any motions filed, questions of law, objections, and, in most states, the sentence imposed. They also have extensive control over probation officers and court clerks and, indirectly, over the police, for example, when they decide whether evidence was collected legally or whether a suspect was treated fairly.

Appellate judges have very different responsibilities and duties from the trial judge. They are responsible for examining the record of trial, trial brief, notice of appeal, and other matter submitted with the appeal to determine if the appeal is properly presented and the appropriate issues are presented properly before the court. They also preside over oral arguments and are involved in negotiating a decision among the justices considering the appeal. Finally, they must write an opinion that explains the logic and reasons for the decision.

Whether judges preside over a trial or an appellate court, there is a mystique surrounding the bench that sets them apart from the other courtroom personnel. They are referred to as “your honor” while they are seated far above the other actors in the courtroom. They are dressed in black robes, while others in the courtroom are dressed in business attire. Other courtroom personnel can be punished if they do not obey the orders of the judge. Most judges portray themselves as “above the fray” of politics and do not allow political considerations to affect their decisions. 25

**Other Personnel**

There are many other courtroom personnel who play a significant role in daily court procedures. These personnel often do not receive as much publicity as the major players (including the defense, prosecution, or judges) but are nonetheless just as important to the efficient functioning of the courtroom. They work regularly in the court and develop personal and professional relationships with the other actors over time. Without these personnel, the court could not function as it does.

One of those personnel is the court clerk, who assists the judge with many of the administrative duties that surround the trial process. The clerk performs such duties as docketing cases (scheduling cases), collecting court fees, arranging a jury pool, issuing jury summonses, and subpoenaing witnesses for both the prosecution and the defense. The clerk also maintains court records of criminal cases, including all pleas and motions made both before and after the actual trial. In addition, the clerk is responsible for administering the oath to jurors and witnesses before they testify (otherwise known as swearing them in), marking evidence as instructed by the judge, keeping a log of what exhibits have been admitted as evidence into trial, and maintaining the custody of any evidence admitted. Because the clerk is really the official record keeper of the court, he or she is responsible for all the legal documents filed with the court.

Another key position in the courtroom is the court administrator. This position was created in many courtrooms based on recommendations made by the National Advisory Commission on Criminal Justice Standards and Goals. The commission recommended that all courts with five or more judges have a court administrator to make the trial process more efficient. Connecticut was the first state to respond and created the first court administrator position in 1937. In some places, the court administrator has replaced the court clerk.

Court administrators handle the day-to-day routines of the court and assist judges in administrative and nonjudicial functions, such as record keeping, making courtroom arrangements, scheduling cases, case flow analysis, data gathering and analysis, personnel administration, research and planning, space utilization, facilities planning, and budget preparation and management. In some cases, the administrator helps manage the jury pool in an effort to reduce the time potential jurors waste waiting to be chosen for a jury or to help deal with requests to be excluded from jury duty. They may also collect court fees and fines and disburse judicial monies. The court administrators are typically appointed by individual judges.

Another courtroom personnel member who has become essential to the effective functioning of the court is the bailiff, sometimes called the “court officer.” In most cases, the bailiff is an armed officer who helps keep order in the courtroom. The bailiff announces the judge’s entry into the courtroom, calls witnesses, and helps prevent the accused from escaping. The bailiff will often assist the jury when it is not in the courtroom, especially if a jury is sequestered and is not allowed to have any contact with outside influences. In this case, the bailiff may bring jurors items they request, such as evidence presented at trial. In a federal trial, the bailiff is a deputy U.S. marshal.

The court reporter is another member of the courtroom personnel who is important in the trial proceedings. Sometimes known as the court recorder or court stenographer, the court reporter records all the events that occur in the courtroom. This includes the testimony of witnesses, oral arguments, instructions, and any words spoken during any court proceedings. The court reporter must keep track of all verbal comments made in the courtroom, including testimony, objections, rulings of the judge, the judge’s instructions to the jury, arguments made by attorneys, and the results of conferences between the attorneys and the judge. These are often taken on a stenotype machine but are sometimes recorded with an audio recorder. The information is later transcribed in manuscript form. The transcripts become the official trial record and may be used if an appeal is made. In courts where there is no position of court clerk, the court reporter is also responsible for listing all exhibits offered into evidence.

Some other actors who are consistently involved in the courtroom but who are not employees of the court can include witnesses, parole officers, court psychiatrists, social workers, and defendants’ families and friends. Each plays an important role in the disposition of each case that comes into the courtroom.

Together, these major courtroom personnel (judge, prosecution, defense, and other personnel) are often called the courthouse work group. These members of the court must work together and cooperate with each other on a daily basis to make decisions about and dispose of the defendants’ cases. In most courtrooms, the same prosecutors, judges, and defense attorneys come into contact with each other as they represent or hear the same type of cases time after time, with the only difference being the defendant, the plaintiff, and the facts of the case. The court personnel are forced to interact with each other on a constant basis, and over time they come to know each other well and rely on each other to carry out a particular function to reach the ultimate goal of processing the defendant. As this happens, the courthouse work group develops a close network of mutual relationships. In addition to the formal interaction that must occur to keep cases moving through the system, the work group members often have informal discussions about the cases as well. These discussions, both formal and informal, help keep the court operating smoothly and efficiently.

Each member of the work group has a specialized position and is expected to carry out that role. All the members become proficient at their task and are responsible only for that task. New employees are socialized to be part of the work group. They learn the formal requirements of the job but also the informal rules of behavior. Eventually, the members may even come to share common goals and norms. Since the members often have similar educational backgrounds and career goals, they tend to share a social status with similar values that may be different from the predominantly lower-class defendants being processed. Actors within the work group who violate the norms are sanctioned, and those who cooperate are rewarded. 26

**The Process of Judicial Selection**

There are many ways to place judges on the bench. Debate continues to rage over which method of judicial selection is “best” and results in the most qualified person serving as judge. 27 These methods include judicial election, appointment, or a combination of the two. No matter which method is used to seat a judge, his or her career is linked to the political arena. 28 The position of judge is a “political position to which ... most bring a background of political activity and interest.” 29 In seating a judge, there is controversy over judicial accountability versus judicial independence. Judicial accountability relies on elections of judges to make them responsive to the people. On the other hand, judicial independence (from merit appointments) allows a judge to make decisions objectively and without political pressure. 30

**Election**

Some states have developed a system whereby the judges are elected. In most states, lower-court judges are elected, but in some, the appellate level justices are elected as well. The theory behind judicial elections is that the people can choose the type of judge they want serving the people. Throughout a campaign, a judicial candidate must impress the voters with his or her experience and qualifications. After a few years in office, if the judge does not live up to the voters’ expectations, he or she is not reelected. 31 Additionally, it is argued that wealthy and powerful voters would not be able to control judicial appointments as they might be able to do if the judges are appointed. Most states decided to select judges through partisan ballots on the theory that this makes them accountable to the voters to the same degree as members of the legislative and executive branches.

The campaigns are partisan (where the candidate’s political party affiliation is made known), nonpartisan (where the candidate’s political party affiliation is not designated), or a combination of the two, sometimes referred to as a semipartisan system. This might happen when a primary election is partisan and candidates run on a party ticket, followed by a general election in which the candidates’ political party affiliations are not identified. This is what occurs in Ohio, for example.

Until recently, most judicial campaigns were low key and did not receive much public attention or analysis. Since most justices are prohibited from discussing issues throughout a campaign (as most states have adopted a code of judicial conduct that prohibits a judge from announcing his or her views on disputed legal or political issues), they received little attention. As a result, voter turnout for these elections has been low—about 20 to 25 percent of eligible voters turn out to vote. This also meant that incumbent judges were often successfully reelected. In fact, incumbent justices won over 90 percent of the time. 32

However, in more recent elections, the campaigns for state judicial positions have become multi-million-dollar political affairs with fund-raising and spending becoming major parts of the campaign. Judicial candidates now hire and rely on political consultants, lawyers, media advisers, political parties, and pollsters to help them win office. Some justices have even begun testing the limits of ethics rules that limit their speech, making vague promises about cases or policies during a campaign that were once prohibited.

Now, one of the major issues in judicial races revolves around campaign finance. Millions of dollars in campaign contributions are being raised for judicial races. There is obvious concern that some lawyers, interest groups, or corporations are exerting influence—or at least attempting to exert influence—on the outcome of these elections. In response, some states have tried to pass new ethics rules that limit what candidates can say and how much they can spend. But many court rulings said that the First Amendment prohibits these laws. Since they curtail political speech, they are in violation of the First Amendment and are thus unconstitutional.

The issues surrounding judicial campaigns have become so serious that two U.S. Supreme Court justices, Stephen Breyer and Anthony Kennedy, have spoken publicly about their concerns. Each has expressed concern that the money coming into judicial races is rising faster than money in other federal campaigns. At the same time, there has been an increase in the instances in which a judge may potentially rule on cases involving those big donors and cases in which judges are told that ruling against moneyed interests may cost them their seats.

There is a concern in states where judges are elected that they may make decisions that will increase or maintain their popularity rather than decisions based on law. Judges who are concerned about their next campaign may be tempted to ignore the Constitution and relevant statutes and make a popular decision. Or, they may avoid controversial, difficult, or unpopular decisions rather than risk opposition from voters in the next election. Or, they may follow the wishes of the campaign contributors and political party leaders who help them win elections and stay in office.

Furthermore, judicial elections do not permit judges to be chosen on the basis of their qualifications. Instead, judges are chosen in part because of their service to the party. “The selection of candidates for judicial office is not based on ideal criteria for selecting the ‘most qualified’ judge but focuses on such factors as who can raise the most campaign money, who has worked diligently for the party and who can win an election against the opposing party’s candidate.” 33

Even if a campaign is nonpartisan, it does not mean the political parties are not involved. The party funds its chosen candidate regardless of whether the party affiliation is listed on the ballot and helps the candidate throughout the campaign by providing campaign volunteers, literature, and other campaign assistance. It is easy to discover which political party backs the candidates.

**Appointment**

In some states and the federal government, lower-court judges are appointed by an executive (governor or president) and confirmed by a judicial appointment committee that contains representatives from the state legislatures and the judiciary. The appointment is sometimes made by an executive and is then confirmed by the state senate, the governor’s council, a special confirmation committee, an executive council elected by the state assembly, or an elected review board. In other states, the legislature appoints a judge. Eventually, the appointed judge must also be confirmed by voters in the next general election.

It is argued that since the electorate is uninformed about the courts and issues related to the courts, knowledgeable groups, such as bar associations, law professors, current members of the bench, and citizen groups, can advise the legislators and governors in appointing the state’s judiciary. It is assumed that these individuals are able to choose qualified judges as opposed to the nonlegal community, which has little or no knowledge about the court system. It has also been argued that more and better-quality lawyers would be willing to seek judicial positions if they did not have to subject themselves to the rigors and frustrations of a public campaign.

The appointment process for seating judicial nominees is not without its fair share of politics. In fact, the nomination process is very political. In most cases, the executive does not personally know every candidate for a judicial position, and he or she must depend on others for advice. They might rely on a nominating commission, a bar association, or lay members within the legal community. 34 When selecting nominations, executives rely on certain factors. One is the candidate’s merit. A candidate must have strong legal credential and unquestioned ethical behavior. Another factor is a nominee’s personal and political friendship and support. Executives often “reward” political support for themselves or the party with a nomination. 35 The policy preferences of the nominee are crucial. President Reagan appointed four justices to the court, all with conservative views. President Clinton, on the other hand, nominated justices were more moderate. 36 President Obama nominated a liberal law professor, Goodwin Liu, to serve on the 9th Circuit Court of Appeals, which drew criticism from conservatives. 37 Executives also look to other symbolic factors when appointing a justice, such as a nominee’s geographic background, religious preference, race, ethnicity, or gender. 38

Most nominations sail through the approval process with no problems. 39 But on occasion, politics overshadows the process. There are many examples of the political influence surrounding judicial appointments. More recent examples are those of Robert Bork, Clarence Thomas, John Roberts, and Sonia Sotomayer. These nominations show some general themes surrounding judicial appointments: that judges have political backgrounds, they are members of the president’s political party, have been active in party politics, and have held prior government positions either as a judge or prosecutor. 40 More information about judicial nominations to the Supreme Court is outlined in Box 6.2.

**Robert Bork**

Robert Bork was nominated in 1987 by President Reagan to be an associate justice on the Supreme Court to replace retiring Justice Powell. Bork was a graduate of the University of Chicago Law School and a professor of law at Yale University. He had served as solicitor general in the Nixon administration and was well qualified to serve as a justice on the Court. Bork was an academic with nearly impeccable ethical credentials.

**Box 6.2:** **Nominations to the Supreme Court, 1969 to Present**

| Name  | Nominated by  | Replaced  | Senate Vote  | Years Served  |
| --- | --- | --- | --- | --- |
| Warren Burger | Nixon | Warren | 74–3 | 1969–1986 |
| Clement Haynsworth | Nixon | (Fortas) | 45–55 | Not confirmed |
| G. Harrold Carswell | Nixon | (Fortas) | 45–51 | Not confirmed |
| Harry Blackmun | Nixon | Fortas | 94–0 | 1970–1994 |
| Lewis Powell | Nixon | Black | 89–1 | 1971–1987 |
| William Rehnquist | Nixon | Harlan | 68–26 | 1972 to present |
| John Paul Stevens | Ford | Douglas | 98–0 | 1975 to present |
| Sandra Day O’Connor | Reagan | Stewart | 99–0 | 1981 to 2006 |
| William Rehnquist | Reagan | Burger | 65–33 | 1986 to 2005 |
| (Chief Justice) Antonin Scalia | Reagan | Rehnquist | 98–0 | 1986 to present |
| Robert Bork | Reagan | Powell | 42–58 | Not confirmed |
| Douglas Ginsburg | Reagan | (Powell) | Withdrew | No action |
| Anthony Kennedy | Reagan | Powell | 97–0 | 1988 to present |
| David Souter | G. H. W. Bush | Brennan | 90–9 | 1990 to 2009 |
| Clarence Thomas | G. H. W. Bush | Marshall | 52–48 | 1991 to present |
| Ruth Bader Ginsburg | Clinton | White | 96–3 | 1993 to present |
| Stephen Breyer | Clinton | Blackmun | 87–9 | 1994 to present |
| John Roberts, Jr. | G.W. Bush | O’Connor | Withdrew |   |
| John Roberts, Jr. | G.W. Bush | Rehnquist | 78–22 | 2005–present |
| Harriet Miers | G.W. Bush | O’Connor | Withdrew |   |
| Samuel Alito, Jr. | G.W. Bush | O’Connor | 58–42 | 2006–present |
| Harriet Miers | G.W. Bush | (O’Connor) | Withdrew |   |
| Sonia Sotomayor | Obama | Souter | 68–31 | 2009–present |

*Source:* L. Baum, *The Supreme Court*, 6th ed. (Washington, D.C.: Congressional Quarterly Press (1998), pp. 32–33, 51; United States Senate, Supreme Court Nominations, [www.senate.gov/pagelayout/reference/nominations/Nominations.htm](http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm).

Despite that, there were many groups that got involved in the nomination process and voiced support or opposition to the nomination, including civil rights groups, women’s groups, and abortion rights groups. These organizations found him to be insensitive to the needs of their members. They organized press conferences and sent mailings against the nomination. 41 On the other hand, conservative groups sponsored television ads and made telephone calls in favor of Bork.

During the confirmation hearings, Bork was questioned about how he would vote on specific cases. In answering the questions, he contradicted his past behavior. 42 Because of his contradictions, 1,925 law professors signed letters opposing Bork. 43 Eventually, the Judiciary Committee voted 9 to 5 against the nomination, and he was defeated in the full Senate by a vote of 58 to 42. 44

Even today, scholars debate if Bork received fair treatment. They point to the politicization of the nomination process and the range of players involved as well as the techniques they use to show support or opposition for a nominee. 38

**Clarence Thomas**

In 1991, President Bush nominated forty-three-year-old Clarence Thomas to be a Supreme Court justice to replace retiring Justice Thurgood Marshall. Thomas was the grandson of a sharecropper and as a child attended a Roman Catholic school run by white nuns for poor black children. He graduated from Yale Law School and had a successful political career. He served as chairman of the Equal Employment Opportunity Commission (EEOC), served on the U.S. Court of Appeals, was a federal appellate judge for sixteen months, and was an assistant secretary for civil rights in the Department of Education during the Reagan administration. Like Bork, Thomas was well qualified to serve on the Court.

Almost immediately, even before the confirmation hearings began, there were both supporters and opposition to Thomas’s nomination. There were grassroots organizing, news conferences, rallies, public opinion polls, fund-raising, and negative advertising surrounding Thomas. Support for the Thomas nomination came from the Citizens Committee to Confirm Clarence Thomas, the U.S. Chamber of Commerce, the Coalition for Self-Reliance, the Coalitions for America, the American Conservative Union, Concerned Women for America, the Eagle Forum, the Family Research Council, the Council of 100, the Simon Wiesenthal Center, and Women for Judge Thomas. There was even a busload of friends, relatives, and neighbors from Georgia (Thomas’s home state) that came to Washington, D.C., to support the nomination.

However, at the same time, an active grassroots movement against the nomination also began. This included Jesse Jackson, feminist groups such as the National Organization for Women, and labor organizations such as the American Federation of Labor–Congress of Industrial Unions (better known as the AFL-CIO). These groups claimed that Thomas was an unorthodox conservative whose legal theories could seriously damage the rights of all Americans, especially women and minorities. These organizations alleged that he failed to comply with antidiscrimination laws while he was chair of the EEOC and claimed that he criticized Supreme Court decisions that expanded the rights of privacy, endorsed affirmative action programs, and enforced school desegregation. Furthermore, they claimed that even though Thomas was admitted to Yale Law School under an affirmative action program that gave preference to black Americans; Thomas attacked affirmative action as more of a hindrance than a help. They claimed that Thomas cited welfare as a trap to prolong dependency and break up families. Other groups that came out against Thomas were the National Abortion Rights Action League; the United Church of Christ; the League of United Latin American Citizens; the Congressional Black Caucus; the National Education Association; Americans for Democratic Action; the Women’s Legal Defense Fund; the Service Employees International Union; the Alliance for Justice; the American Association of University Women; the American Federation of State, County and Municipal Employees; the Coalition of Labor Union Women; the Nation Institute; the National Federation of Business and Professional Women; and People for the American Way. Even the American Bar Association (ABA) rated him as “qualified,” which was a midlevel assessment of Thomas’s legal ability. In fact, that is the lowest ABA rating of any Supreme Court nominee in the previous decade.

During the confirmation hearings, a former assistant of Clarence Thomas, Anita Hill, made startling charges of sexual harassment. Hill claimed that Thomas had sexually harassed her when they worked together at the Department of Education and the EEOC in the early 1980s. There were extensive hearings to determine the accuracy of the charges, but the Senate did not have strong enough evidence to confirm the charges. Eventually, the Democrat-controlled Senate voted to seat Thomas on the Court. The vote was 52 to 48, and Thomas became the first African American conservative Supreme Court justice in the Court’s history.

**John Roberts**

President Bush originally nominated John Roberts to replace Justice O’Connor as an associate justice on July 19, 2005. When Chief Justice Rehnquist died on September 3, the Roberts’ nomination was withdrawn and replaced with a second nomination to be chief justice. Roberts had clerked for Chief Justice William Rehnquist before practicing law at a private law firm. In that capacity, he argued 39 cases before the court. Prior to appearing before the Court, Roberts studied the personalities of the different justices so that he would know to whom he should direct his arguments. He also served as a Special Assistant to the Attorney General and as the principal deputy solicitor general in the Department of Justice. He served briefly on the D.C. Circuit Court before being nominated for the Supreme Court.

There was some controversy regarding Roberts’ qualification for chief justice. Even thought the American Bar Association gave him a “well qualified” rating, some were opposed to the nomination. [MoveOn.org](http://moveon.org/) was opposed to Roberts because as a lawyer for the Bush Sr. and Reagan administrations, he asked the Supreme Court to limit the ability of district courts to desegregate public schools. He also argued for a law banning doctors from even discussing reproductive options in many cases and argued to the Supreme Court that public schools could force religious speech on students. 45

The National Council of Jewish Women was also opposed to Roberts. They argue that he did not support the right to privacy, civil rights, affirmative action, gender equality and the separation of religion and state. There were many other organizations opposing the nomination, such as the Alliance for Justice, the AFL-CIO (American Federation of Labor—Congress of Industrial Organizations), the Congressional Black Caucus, Equal Justice Society, Hispanics for a Fair Judiciary, NAACP Legal Defense and Education Fund, NARAL pro-Choice America, National Gay and Lesbian Task Force, National Organization for Women, National Urban League: Many others listed here. 46 He was opposed by the Lambda Legal Defense Fund. 47

Conversely, the Roberts’ nomination was supported by the Heritage Foundation, which issued a statement saying that Roberts had unquestionable integrity, that he had valuable experience, that he had a keen knowledge of the government and the federal justice system. They felt he understood how the law affects the lives of ordinary citizens. 48

Confirmation hearings on the nomination began in the Senate Judiciary committee on September12. The Senate Judiciary Committee voted 13 to 5 to send the nomination to the Full Senate with favorable recommendations. On September 29, Roberts was confirmed by the entire Senate by a vote of 78 to 22.

**Sonia Sotomayor**

Sotomayor was nominated to serve on the Supreme Court by President Barak Obama on May 26, 2009 to replace retiring Justice David Souter. She received a BA degree from Princeton University and a law degree from Yale University Law School. At the time of her nomination, Sotomayor was serving on the second circuit appeals court in New York, after being nominated to that position by President Clinton. Prior to that, she had nominated to be a district judge by George H.W. Bush. She was probably best known for issuing an injunction that ended a Major League Baseball strike in 1995.

The National Rifle Association and other pro-gun groups opposed her nomination because they argued that she did not support the Second Amendment right to own guns. Other groups supported the nomination. The American Bar Association, for example, gave her a “well qualified” rating.

Sotomayer’s confirmation hearings in the Senate Judiciary committee began on July 13, 2009. On July 28, the Committee approved her nomination in a nearly party-line vote of 13 to 6. Her nomination was confirmed by the full Senate by a vote of 68 to 31. She became the first Hispanic and third female justice on the Supreme Court. It is expected that she would be a moderate or centrist judge, 49 or a “favorite of the left.” 50

**Lower Federal Courts**

Appointment to lower federal courts is not as complex or public. Perhaps because there are many lower federal positions, the president and the Senate cannot spend as much time on each individual judge as with the nominees to the Supreme Court. Additionally, these judges have less of a potential impact on policy as opposed to Supreme Court justices. The justices appointed to federal appellate courts typically have served in political positions in the past, have developed close ties to other members of the president’s party, and share the general ideological positions as the president. 51

But the appointment process is very political. One example of this is Daniel Manion. Daniel Manion was nominated to be a judge on the Seventh Circuit Court of Appeals by President Reagan in 1986. Manion had little experience in the federal court and no prior judicial experience. He also had no record of publications in law reviews, and some of his legal briefs given to the Senate had spelling and grammatical errors. There was even evidence that Manion at one time suggested posting the Ten Commandments in public schools and was associated with the John Burch Society. In the end, he was accused of being too conservative. The Senate vote was a 47 to 47 tie. In this case, the Senate rules allowed for a reconsideration of the vote. The vote was put off for several weeks, and a second vote was again a tie, 49 to 49. This time, the tie was broken by Republican Vice President Bush’s vote in Manion’s favor.

The politics surrounding court nominees was obvious during the Bush administration, when many of his nominations to fill open judicial seats both in federal district and appeals courts were blocked by Democrats in the Senate. Even though many appointments were approved, there were many open positions. Bush then turned to using “recess appointment” to install nominees onto the bench, angering Senate Democrats who claimed that Bush was attempting to circumvent Constitutional procedures for seating federal justices. 52 Then, in December 2006, the Bush administration’s Department of Justice fired seven US Attorneys, some say simply for political advantage. They claimed he did so because the fired attorneys did not investigate charges against Democratic politicians. The Bush administration pointed out that U.S. Attorneys serve at “the pleasure of the president” and that it was simply a personnel matter. 53

**Merit**

The third method for seating a justice is the merit plan, also called the Missouri Plan. This was originally created in 1940 in Missouri to eliminate political patronage when judges were appointed. Merit plans vary, but there are some general foundations. When a vacancy occurs in a judicial position, a judicial nominating commission made up of citizens and attorneys is established. The commission is usually made up of both lawyers and nonlawyers. It evaluates potential judicial appointees and sends the governor (or other decision-making body) the names of three potential judges. The governor then makes the appointment based on the list of names provided by the commission. The newly appointed judge serves a time in office, at which point he or she must be confirmed by the voters in a nonpartisan, unopposed election. In this race, the judge simply runs against his or her record. In this case, the ballot simply asks, “Shall Judge X remain in office?” If the judge is not approved by the voters, the process begins all over again with the committee nominating a successor. If the judge is approved, he or she remains on the bench but must go through the approval process at regular intervals. 54

Although some might argue that the merit system is less political than other methods, it still has the potential of being influenced by political actors. When attempting to determine the “best” way to seat judges, one study concluded that “appointive methods are no more effective than the elective process in placing qualified judges on the bench, while neither method is successful in fulfilling philosophical expectations.” 55 Thus, it appears as if each method has its benefits, but political influences cannot be removed from the judicial selection procedures completely.

**Federal Court System**

The federal court system hears cases involving violations of federal laws. They hear both civil and criminal cases that are violations of acts of Congress, such as cases concerning counterfeiting, kidnapping, smuggling, and drug trafficking. There are different types of courts, each with its own jurisdiction.

**Supreme Court**

As noted earlier, the foundation for the Supreme Court is found in the Constitution, but the Supreme Court was actually created in the Judiciary Act of 1789. It is the nation’s highest appellate court and is the court of last resort for all cases in the federal and state systems. It oversees both federal and state systems. The Supreme Court is made up of the chief justice and such number of associate justices as may be fixed by Congress. Currently, the number of associate justices is eight. The justices sit for life (or good behavior), but they may be removed by impeachment or voluntary retirement.

The jurisdiction of the Supreme Court is defined in the Constitution. According to article III, section 2,

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The Supreme Court has both original and appellate jurisdiction. Original jurisdiction means that the cases will originate in the Court: these cases must be heard by the Court. Any cases that involve treaties made by the federal government, controversies in which the U.S. government is a party, and disputes between two states will go directly to the Supreme Court. The Court will hear those cases first. The Court also has original jurisdiction with discretionary cases, meaning that the Court may accept the case but is not required to hear it, as in cases brought by a state, disputes between a state and a foreign government, or cases involving a foreign diplomat.

The Supreme Court also has appellate jurisdiction. This means that the Court hears cases on appeal from a lower court. Despite the fact that the Court can basically decide what cases to hear, there are some appellate cases that it must hear (it has appellate jurisdiction with mandatory cases). If a federal court holds an act of Congress to be unconstitutional and the federal government is a party, if a U.S. court of appeals finds a state statute unconstitutional (a state law is in violation of the federal constitution), or if a state’s highest court holds a federal law to be invalid or unconstitutional, the Supreme Court must hear the case.

The Supreme Court does not hear all cases that are appealed to it. It has discretion over the cases it will consider and can decide what cases to hear. The Court hears approximately 5 percent of the cases petitioned to it. Approximately 7,000 cases are passed on in the course of a term. In addition, some 1,200 applications of various kinds are filed each year that can be acted on by a single justice. The justices choose to hear only those cases that involve important issues or that are appropriate for the Court.

Some have argued that the court decisions have less influence today than in the past. The argument is made on two levels. First, the court is playing a smaller role in the lives of Americans. Most key issues, such as affirmative action or the death penalty, have been around so long that any cases coming to the court are highly specific cases that affect few people. Second, the court is hearing fewer cases than in the past. In 2006, the court heard fewer cases than at any other time in the past half-century. 56

Over the years, the justices seated under different chief justices have listened to and made decisions in different ways. Some courts are more likely to follow a conservative perspective to criminal justice issues, while others follow the liberal approach. This has been evident in the most recent courts, including the Warren, Burger, and Rehnquist courts.

**The Warren Court (1953–1969)**

The Supreme Court under Chief Justice Earl Warren became known as the most liberal Supreme Court in American history. 57 It addressed many significant social problems of the time, such as race relations. The members of this Court decided the landmark case of *Brown v. Board of Education of Topeka, Kansas*, which wiped out the legal basis for discrimination in education. 58 The Warren court also protected free speech 59 by broadening citizens’ freedom to criticize public figures, by protecting freedom of the press, 60 and by an artists’ ability to express him- or herself in unconventional and even shocking ways. 61 It also upheld equal representation through a series of reapportionment cases.

In terms of criminal justice, the Warren court weakened the “hands-off” policy that had been accepted by the Court until then. The Warren court became active in expanding the rights of persons accused of a crime. It wrote what amounted to a new constitutional code of criminal justice that put restraints on law enforcement, from investigation through arrest and trial, and applied the new code to state and local activities formerly outside federal standards. 62 As a result, “the police must obey the law while enforcing the law.” 63

The Warren court decided many landmark cases that still affect the criminal justice system today. It decided cases concerning stop and frisk, the right to counsel in a criminal proceeding, the accused’s rights in a search and seizure, illegal confessions, interrogation, and confessions. These decisions have been called the “due process revolution” 64 because they expanded due process rights and applied them to the states for the first time. 65 The Warren court consistently upheld constitutional guarantees that were extended throughout the administration of criminal justice. 66

**The Burger Court (1969–1986)**

The Burger court was a court in political transition. 67 President Nixon replaced Chief Justice Warren with Warren Burger and also appointed three additional justices to the Court whom he expected to promote tough law-and-order policies. The Burger court was more conservative than the Warren court. 68 In fact, Burger had the second most conservative voting record on criminal justice issues by the time he retired from the bench. 69 The justices on the Burger court were seen as restrained by some because its decisions were generally less innovative and more conservative than those of the Warren court. 70 In the area of criminal procedure, the Court was less sympathetic to defendants than were previous Courts and less supportive of civil liberties. In *United States v. Ross* (1982), the Court expanded the power of police officers to search automobiles without warrants. In 1973, the Court gave the government more power to regulate obscene material in *Miller v. California*. 71

**The Rehnquist Court (1986 to 2005)**

The Supreme Court under Chief Justice William Rehnquist has tended to decide cases on a more conservative basis, especially with the appointment of Justice Antonin Scalia. The Rehnquist court is much more conservative than either the Warren or the Burger courts. 72 It has been active in narrowing or overturning many Warren and Burger court precedents. On the whole, the Rehnquist court has been more restrained in its treatment of prisoners’ religious freedom, due process protections, *habeas corpus*, and prison condition cases. 73 The Rehnquist court

restricted habeas corpus review, allowed greater scope for police or other agencies to search or to administer drug tests, allowed states to secure prosecutions by using evidence that it had previously excluded, tolerated state regulations of abortions, disallowed affirmative action when quotas are used, refused to protect intimate relationships that are not conventional and refused to protect those who possess child pornography or women who seek to dance naked in adult-only clubs. 74

**Roberts Court (2005–Present)**

Justice Roberts is the nation’s seventeenth chief justice. He holds impeccable legal credentials and has a reputation for being a conservative. Today’s court includes two women and an African-American. There are four conservative justices (Scalia, Thomas, Roberts, and Alito), two centrist justices (Breyer and Kennedy) and three who are considered to be liberal (Stevens, Sotomayer and Ginsburg). The justices currently serving on the Supreme Court are listed in Box 6.3.

It seems as if the Roberts court is continuing the recent traditions of limiting access to the nation’s highest court. It also seems to be rolling back the concept of “standing” when attempting to sue so that members of a class must have suffered a specific harm rather than have an abstract “public interest.” 75

Roberts was only fifty two when he became Chief justice, so he may serve on the Court for many years. This means that he has the potential for influencing the court for many years.

**Politics and the Supreme Court**

Politics is supposed to remain outside the activities of the Supreme Court, but it often shows its face in its operations. The other branches of government often get involved in the Court’s activities. Despite the image of being outside the political arena, judges are indeed a political organization. 76

**Box 6.3:** **Members of the Roberts Court, 2010**

| Justice  | Appointing President  | Year Confirmed  |
| --- | --- | --- |
| Roberts | G. W. Bush | 2005 |
| Scalia | Reagan | 1986 |
| Kennedy | Reagan | 1988 |
| Alito | G. W. Bush | 2006 |
| Thomas | G. H. W. Bush | 1991 |
| Ginsburg | Clinton | 1993 |
| Breyer | Clinton | 1994 |
| Sotomayor | Obama | 2009 |
| Kagan | Obama | 2010 |

Although justices must make decisions based on the law, the justices may interpret the laws differently, depending on their political views and political ideology. Studies show that Democratic and Republican judges do tend to vote differently on many important issues that come before the Court. Judges who come from the ranks of the Democratic Party have been more liberal than their colleagues from Republican ranks. Liberal justices tend to emphasize due process rights more than conservative justices, who tend to focus more on punishment. Democratic justices tend to favor the defense in criminal cases, whereas Republicans tend to favor the prosecution. Generally, Democratic judges tend to have more of an “underdog” orientation toward a variety of issues than do Republican judges.

Studies concerning judicial ideology and voting patterns show that the ideological stance of the justices does influence their voting behavior. In fact, “justice ideology is found to be a statistically significant determinant of justice voting in each of the policy areas examined.” 77 These findings support Segal and Spaeth. 78 Thus, the political party affiliation of justices does alter the way in which they exercise their policymaking discretion when the circumstances of a case give them room to maneuver.

Although judges strive to be as neutral as possible, 79 they are often influenced by their political orientation, either liberal or conservative. Judges may be unable to ignore all their political beliefs and ideas when they assume the bench, and so, to some extent, their behavior can be differentiated on the basis of their party affiliation. This is important because their values and preferences can affect their decisions. This means that the law is based on the preferences of the justices involved in the case. 80 Most federal judges belong to the party of the president who appointed them, and they remain faithful to their party while in office. In fact, party identification is the single best predictor of judicial voting behavior. 81

**Politics and the Court: Congress**

The relationship between Congress and the Supreme Court is not always friendly. Each branch acts as a check on the behavior of the other, which is another example of the separation of powers that was built into the government system.

First, Congress acts as a check on the behavior of the courts. When the Court makes a decision (thus making policy) that is opposed by the members of Congress, they may “go after” that decision and attempt to change it or alter it in some way. Congress can try to impact a decision in a number of ways. First, Congress may attempt to overturn a constitutional decision made by the Court by proposing and passing a constitutional amendment. A good example of this occurred in 1989, when the Supreme Court ruled 5 to 4 in *Texas v. Johnson* that flag burning was a form of political expression protected by the First Amendment. When it made that decision, the Court, in essence, made all existing state and federal laws banning the desecration of the flag invalid. President Bush immediately called on Congress to pass a constitutional amendment to prohibit flag burning, as did many other organizations and groups across the nation. But after congressional members and scholars recognized that such an amendment would entail amending the Bill of Rights, support for the amendment faded. The Senate voted on the proposed amendment, but the vote was not enough to pass the amendment. Another push to pass an amendment also failed in 1990. 82 It is generally not easy to get enough votes to pass an amendment and then to get ratification by states.

Alternatively, Congress can propose and pass new legislation that reverses, overrules, or modifies the Court’s interpretation. This can be accomplished quicker than passing a constitutional amendment. Congress has, in the past, effectively passed legislation that reversed some of the Court’s decisions that gave more rights to offenders charged with crimes. But since the legislation passed by Congress applied only to federal offenses and most crime is prosecuted on the state level, the congressional action had only limited effects and was seen as largely symbolic. 83

According to Gallup’s survey conducted in Sept 2007, 51 percent of Americans approve of the way the Supreme Court is doing the job; while 39 percent disapprove. It is related to their political party affiliation. 69 percent of Republicans approve of their job, while only 47 percent of independents and only 41 percent of Democrats approve. 84

An example of this has to do with a Supreme Court decision made in 1943 in *McNabb v. United States*. In this case, the Court ruled that a confession obtained by police during an “unnecessary delay” in a suspect’s arraignment could not be used as evidence in federal court even if the confession had been given voluntarily. A few years later, in 1957, the Supreme Court reaffirmed this decision in *Mallory v. United States*. In this case, the Court overturned the rape conviction of Andrew Mallory because police had not complied with the *McNabb* decision. In response, the House of Representatives in July 1958 passed what it termed “corrective” legislation that barred federal courts from disqualifying confessions that would otherwise be admissible as evidence in criminal cases simply because of a delay in arraigning a suspect. Although the Senate also passed a version of the bill, it died before final passage. 85

The congressional oversight of the Supreme Court continued. In the late 1960s, the Court made two decisions that outraged many people. First, the Court decided the landmark case of *Miranda v. Arizona* (1966), in which the Court expanded and formalized new procedures revolving around criminal confessions. After *Miranda*, confessions were inadmissible as evidence in state or federal criminal trials if the accused had not been informed of his or her right to remain silent, if he or she had not been warned that any statement made might be used against him or her, and if he or she had not been informed of his or her right to have an attorney present during the police interrogation. In 1967, the Supreme Court decided in *United States v. Wade* that the identification of a defendant based only on a police lineup that took place when the defendant’s attorney was not present was inadmissible evidence into court. These two decisions were very unpopular, and in 1968, Congress reacted, proposing a new law that made confessions admissible as evidence if given voluntarily, a clear attempt to overturn or modify the *Miranda* decision. The proposal also allowed that a confession made by a person in custody of law enforcement was admissible as evidence even if there was a delay in the defendant’s arraignment. This legislation modified the Court’s *Mallory* decision. Finally, the proposed law would modify the *Wade* decision by allowing the testimony of an eyewitness who could say that he or she saw the accused commit the crime for which he or she was being tried as admissible evidence in any federal criminal trial. Eventually, President Johnson signed the bill into law on June 19, 1968. 86

This happened after the Supreme Court ruled in 2010 that the government cannot put bans on political spending by corporations during elections. The decision handed down in *Citizens United v. Federal Election Commission* overruled previous decisions that limited campaign spending by corporations. Immediately after the controversial decision was announced, questions emerged about what policy options were available to Congress to limit the impact of the decision. Two possible choices were noted. First, Congress could provide candidates or parties with additional access to funds to allow them to combat corporate influence in elections. Second, Congress could restrict spending under certain conditions or require those who spend money to provide additional information to voters. Many members of Congress spoke out against the decision, and multiple bills were proposed in Congress that would reverse the Supreme Court’s decision. 87 But much of the response was symbolic, as any legislation banning political spending may, in the future, be deemed unconstitutional once again.

Of course, any action by Congress is reviewed by the Supreme Court to guarantee that it is legally fair and consistent with the rights guaranteed in the Constitution. This means that the judges act as a check on the behavior of Congress. This occurs when judges use their power of judicial review to reverse laws made by Congress. Of course, when the Court decides that a congressional act was unconstitutional, it is sometimes viewed as an illegitimate usurpation of congressional prerogatives. 88 In other words, it is taking away the power of Congress to make the laws and policies they deem necessary to better society in some way.

More and more, the policies enacted by elected representatives in Washington are challenged in the courts. Some people might argue that public policy is not fully legitimated until it has withstood judicial challenge. To become legitimate, policies often must await a decision by a federal court judge who decides that the action by Congress and the president does not conflict with the Constitution. 89

By declaring congressional actions acceptable under the laws and the Constitution, the Supreme Court can legitimate the actions of Congress or other government decision makers. 90 If (or when) the Court upholds a law or policy created in Congress, for example, it is demonstrating that the law is legally valid and acceptable. Conversely, if the Court, on appeal, decides that a law is unconstitutional or unfair, it is declaring that the bill is not acceptable and that the actions of that legislative body were inappropriate. In other words, the members of the policymaking agency overstepped their boundary, making a law that was not consistent with the Constitution.

Another method used by Congress to reverse a Court decision is to use its appropriation powers to aid or hinder compliance with the Court’s rulings. Congress can do this through its ability to authorize appropriations for salaries, law clerks, secretaries, and office technology. Although article III of the Constitution forbids reducing the salaries of justices, Congress can withhold salary increases.

Or the Senate may retaliate by trying to influence judicial appointments or may even impeach (or threaten to impeach) justices. If nothing else, this brings a lot of negative attention and media coverage to an individual judge or court. Congress can mount an attack on these judges with a series of verbal denouncements that allow congressional members to let off steam. If serious enough, federal judges can be removed from office by Congress.

**Politics and the Court: Presidents**

Like Congress, the executive branch also acts as a check on the behavior of the Supreme Court and vice versa. First and foremost, presidents will try to influence federal judicial policy by choosing nominees for the Court who share their party affiliation and political philosophy and will make decisions and policies that reflect that particular political ideology. Thus, the party affiliations of presidents influence their decisions about who to nominate for judicial seats. Republican presidents typically appoint conservative Republicans to judgeships, and Democratic presidents manifest a preference for moderate to liberal Democrats. 91 Once appointed, federal judges maintain their partisan views and make decisions that reflect those views. 92 Thus, the president’s ability to affect Court policy is demonstrated in his opportunity to appoint like-minded justices to the bench, assuming that his appointments successfully pass the confirmation process. 93 In fact, most studies of judicial nominees find that presidents have been successful in shaping Court policy through their appointments. 94

Once seated on the bench, most justices feel at least some degree of allegiance to the political actor (the president) who is responsible for their elevation to the Court. 95 Since justices tend to support their appointing presidents, the presidents can change the ideological composition of the Court through the power of appointment. 96

Presidents also try to influence the decisions made by the Court. The president’s ability to get his policy preferences implemented in certain policy areas is, to an extent, dependent on the degree to which the Supreme Court is willing to comply. 97 Presidents will sometimes reach out to other agencies and even to the public for support for his positions. One study by Yates shows that “presidents can use their tools of rhetoric, amicus activity, and popular prestige toward” influencing court policy: “In short, presidents can contemporaneously affect the voting decisions of Supreme Court justices by sending public signals of their policy preferences.” 98

A president can also influence judicial policymaking through the activities of the Justice Department. The attorney general (a presidential appointee) and the staff of the Justice Department can emphasize specific issues according to the overall policy goals of the president. This is especially true because of the close relationship between the attorney general and the Supreme Court. The solicitor general, also a presidential nominee, can affect policy. The solicitor general is responsible for representing the U.S. government in federal cases. The policy positions of the U.S. government are represented by the solicitor general’s office. The solicitor general may file amicus curiae briefs where the government has an interest in the outcome of a case. He or she can also determine which cases involving the federal government will be appealed to the Supreme Court. In this regard, the solicitor general can help the Supreme Court shape its docket. The views of the solicitor general are almost always consistent with the president’s position.

Once a decision is made, the president may be able to influence the impact of that decision. A president may encourage the bureaucracies or agencies responsible for the implementation of that policy or resist a new judicial policy. Since many judicial decisions are implemented by the various departments, agencies, and commissions in the executive branch, the president can reach out to those people whom he appointed for their support or opposition to a new program. Or the president can propose legislation aimed at retaliating against the courts. Of course, the president cannot vote on that legislation, but he can propose it to Congress, making a strong public statement about the court’s actions.

**Politics and the Court: Other Actors**

Other political influences affect the behavior of judges, including public opinion. Studies have shown that the Supreme Court does pay attention to public opinion and that this is reflected in the decisions they make. Mishler and Sheehan find that from 1956 to 1981, there was a reciprocal relationship between the public mood and the decisions made by the Court, with an approximate five-year lag. This means that it takes about five years for the public’s opinion to register with the Court. This is also the amount of time it takes for the justices to perceive, interpret, and react to the changes. However, since 1981, the decisions were in the opposite direction from the public’s opinion. At this time, the Court was more conservative despite a liberal resurgence in the public mood. This only served to widen a gap between public opinion and the Court’s decisions. 99

The public’s opinion of the court changes over time. In June 2005, when Thomas became Chief Justice, 8 percent had a very favorable opinion of the Court. That poll showed that 49 percent said their opinion of the court was mostly favorable; 22 percent reported mostly unfavorable; 8 percent was very unfavorable, and 13 percent was unable to rate the Court. By 2007, those ratings had changed. The new poll reported that 18 percent had a very favorable opinion of the Supreme Court; 54 percent had a mostly favorable opinion of the Court. 14 percent had a mostly unfavorable opinion; 3 percent had a very unfavorable opinion, and 9 percent were unable to rate the Court. 100 More information about the public’s confidence with the Court is found in Table 6.1.

Table 6.1 Reported Confidence in the U.S. Supreme Court, 2009 (%)

| Question: I am going to read you a list of institutions in American Society. Please tell me how much confidence you, yourself, have in each one—a great deal, some, very little, or none: The U.S. Supreme Court?  |
| --- |
|   | Great Deal  | Some  | Very Little  | None  |
| National | 39 | 41 | 17 | 1 |
| **Sex**  |   |   |   |   |
| Male | 41 | 38 | 18 | 1 |
| Female | 35 | 44 | 16 | 1 |
| **Race**  |   |   |   |   |
| White | 39 | 43 | 15 | 1 |
| Nonwhite | 37 | 35 | 22 | .5 |
| Black | 35 | 38 | 24 | 0 |
| **Age**  |   |   |   |   |
| 18 to 29 years | 35 | 43 | 18 | .5 |
| 30 to 49 years | 41 | 41 | 16 | .5 |
| 50 to 64 years | 38 | 42 | 16 | 2 |
| 50 years and older | 37 | 40 | 17 | 2 |
| 65 years and older | 36 | 38 | 18 | 2 |
| **Education**  |   |   |   |   |
| College postgraduate | 53 | 37 | 8 | 1 |
| College graduate | 49 | 40 | 10 | 1 |
| Some college | 37 | 41 | 18 | 1 |
| High school graduate or less | 30 | 42 | 24 | 1 |
| **Income**  |   |   |   |   |
| $75,000 and over | 51 | 39 | 10 | .5 |
| $50,000 to $74,999 | 41 | 42 | 15 | 1 |
| $30,000 to $49,999 | 37 | 40 | 17 | 2 |
| $20,000 to $29,999 | 29 | 45 | 22 | 1 |
| Under $20,000 | 27 | 43 | 27 | 1 |
| **Ideology**  |   |   |   |   |
| Conservative | 31 | 45 | 22 | 2 |
| Moderate | 48 | 37 | 12 | .5 |
| Liberal | 38 | 45 | 14 | 1 |
| **Region**  |   |   |   |   |
| East | 40 | 38 | 19 | 1 |
| Midwest | 38 | 43 | 16 | 1 |
| South | 37 | 42 | 17 | 1 |
| West | 39 | 40 | 15 | 1 |
| **Politics**  |   |   |   |   |
| Republican | 35 | 44 | 18 | 1 |
| Democrat | 44 | 40 | 12 | .5 |
| Independent | 36 | 40 | 20 | 2 |

*Source: Sourcebook of Criminal Justice Statistics*, available online at [www.albany.edu/sourcebook/pdf/t215.pdf](http://www.albany.edu/sourcebook/pdf/t215.pdf).

The justices also rely on social science research when they are making their decisions. This can include books, government documents, and law reviews. Although justices vary as to how often they will do this, it appears that justices are more frequently relying on published information than before. It is more available than before, and it is used in the briefs of parties and amici. 101

**Lower Federal Courts**

Article III, section 1, of the Constitution declares that the judicial power of the United States shall be invested in one Supreme Court and in “such inferior Courts as the Congress may from time to time ordain and establish.” Congress has created many lower federal courts with differing jurisdiction, including Courts of Appeals, District Courts, and other courts with specific jurisdiction. These courts each deal with offenses against federal law rather than violations of state law. 102

**U.S. Courts of Appeal**

The U.S. courts of appeal are called intermediate appellate courts or the U.S. Circuit Court of Appeals. They were created in 1891 to reduce the number of appeals that had to be considered by the Supreme Court and to relieve the Court of considering all appeals in cases originally decided by the federal trial courts. They have the power to review all final decisions of district courts and to review and enforce orders of federal administrative bodies, such as the Food and Drug Administration, the National Labor Relations Board, and the Securities and Exchange Commission.

There are thirteen courts of appeal, each of which has jurisdiction over part of the country. Each circuit is identified by a number. (See Figure 6.2.) Eleven of the circuits are made up of three or more states, one is for the District of Columbia, and one is for the federal circuit. Circuit court offices are generally located in larger metropolitan areas, and the appellant must travel to that location to have his or her case heard. Each circuit has at least six permanent judges, but larger circuits have as many as twenty-eight. Each court of appeals normally hears cases in panels consisting of three judges, but in important cases, the judges may sit *en banc*. This means that the full membership of the court participates.

Figure 6.2 Geographic Boundaries of U.S. Courts of Appeals and U.S. District Courts.



The U.S. courts of appeal have appellate jurisdiction and review records only from the federal district courts (not state courts) or from federal administrative agencies. They do not retry cases or make a ruling on the guilt or innocence of a defendant, nor will they determine issues of fact that might or might not support a conviction or dismissal (if a defendant was provided with legal counsel). The judges only analyze judicial interpretations of the law (both statutory and constitutional), such as the charge (or instructions) to the jury, and consider constitutional issues involved in the cases they hear to determine if the decisions of the trial court are legally correct.

If the court of appeals determines that there are no errors of law in the district court, then the court upholds (or affirms) the decision of the lower court. However, if the court of appeals finds an error, it usually returns the case to the trial court. The trial court can either retry the case or dismiss the case.

The court of appeals generally receives far less media coverage than the Supreme Court, in part because its activities are not as dramatic and its decisions not as far-reaching. But this does not mean that the court of appeals is any less important. Its role in the legal system has increased significantly in recent years. In the 12-month period ending September 30, 2008, there were 61,104 appeals filed with the courts, representing a 3.8 percent increase from the previous year. About 22 percent of those appeals were made by criminals appealing their conviction, sentence, or both. 103

**U.S. Court of Appeals for the Federal Circuit**

The Appeals Court for the Federal Circuit (or the Thirteenth Circuit Court) was created when President Reagan signed the Federal Courts Improvement Act of 1982. This created a thirteenth circuit court, which became the U.S. Court of Appeals for the Federal Circuit. The U.S. Court of Appeals for the Federal Circuit was developed to help sort out and develop cases that are significant enough to be heard by the Supreme Court. This court has national jurisdiction and is required to hear all cases appealed to it. 104 It also hears appeals from the district courts in patent cases, contract cases, and other civil actions in which the United States is a defendant. It also hears appeals from final decisions of other courts, including the U.S. Court of International Trade, the U.S. Court of Federal Claims, and the U.S. Court of Veterans Appeals. The jurisdiction of the court also includes the review of administrative rulings of different agencies, such as the Patent and Trademark Office, the U.S. International Trade Commission, the secretary of commerce, and the Merit Systems Protection Board.

The U.S. Court of Appeals for the Federal Circuit consists of twelve circuit judges. It sits in panels of three or more on each case and may also hear or rehear a case *en banc*. The court sits principally in Washington, D.C., but may hold court wherever any court of appeals sits.

**U.S. District Courts**

The U.S. district courts were created by Congress in the Judiciary Act of 1789 to lessen the demands on the Supreme Court. Presently, there are ninety-four district courts in the United States, divided into twelve geographic circuits. Each state has at least one district court, and some of the larger states (such as New York and California) have as many as four federal district courts, with the number of federal district judges ranging from two to twenty-eight, depending on the amount of work within its territory. These courts are the general trial courts for the federal system. They are courts of original jurisdiction, where federal cases are first heard. Usually, only one judge is required to hear and decide a case in a district court, but in some limited cases it is required that three judges be called together to make up the court. A defendant can request a jury trial in some cases. The justices are appointed by the president and approved by the Senate for a term of good behavior.

These courts are the basic point of entry for the federal judicial system. If a person is accused of a federal offense, this is the court that would determine guilt. These are the only federal courts in which attorneys examine and cross-examine witnesses. They are sometimes called the “workhorses” for the federal judiciary, as they have original jurisdiction over virtually all federal cases.

These are courts of general jurisdiction, so they have both civil and criminal jurisdiction. The courts preside over cases that involve civil actions arising under the Constitution, certain civil actions between citizens of different states, civil actions within the maritime jurisdiction of the United States, criminal prosecutions brought by the federal government, and civil actions in which the United States is a party. The civil jurisdiction of the district courts is limited to suits exceeding $10,000 in which a federal question is raised. The civil jurisdiction also includes questions involving citizenship rights suits between citizens who reside in different states, one state’s suing another state or a citizen who lives in another state, or the federal government’s being a party to the suit.

The criminal jurisdiction of the courts includes all cases where a federal criminal statute has been violated, such as civil rights abuse, kidnapping, assassination or attempted assassination of the president, postal violations, violations of federal fish and game laws, and cases involving interstate transportation of stolen vehicles or goods as well as interstate flight to avoid prosecution. Citizenship and rights of aliens are also included in the jurisdiction of the courts.

District courts may also serve as appellate courts for those matters tried before a U.S. magistrate. They also have appellate functions in dealing with certain writs of *habeas corpus*.

Many cases go through the federal district court each year. During the twelve months period ending in September 2008, criminal cases were commenced against 349,969 defendants in U.S. district court, a 4.3 percent increase over the previous year. Most of the defendants (81%) were charged with civil offenses, while the remainder were charged with criminal offenses. 105

One case that appeared in a federal district court was *United States v. Microsoft*, based on a set of civil actions filed against Microsoft Corporation by the United States Department of Justice and twenty states. The plaintiffs alleged that Microsoft violated the Sherman Antirust Act by bundling its Internet Explorer web browser software with its Microsoft Windows operating system. In doing so, it was alleged that Microsoft unfairly restricted the market for competing web browsers. The case was heard in the D.C. District Court in 2000 (US v. Microsoft Corp. 87 F. Supp 2d 30 (D.D.C. 2000). 85 In 2001, the Department of Justice and Microsoft reached an agreement to settle the case.

**Federal Magistrates/U.S. Magistrate Judges**

Federal magistrates, formerly called U.S. commissioners, were created by Congress in the Federal Magistrates Act of 1968 to help federal district judges deal with increased workloads. They have trial jurisdiction over minor federal misdemeanor offenses; they also issue arrest warrants or search warrants to federal law enforcement officers (such as agents of the FBI and the Drug Enforcement Administration), conduct preliminary hearings, and set bail. In 1976, the magistrates were given the authority to review civil rights and *habeas corpus* petitions and make recommendations regarding them to the district court judges.

In December 1990, the title of “federal magistrate” was changed to “U.S. magistrate judge” as part of the Judicial Improvements Act. Now, full-time magistrate judges are appointed by district court judges for eight-year terms but can be removed for “good cause.” There are currently 452 federal magistrates. There are also part-time magistrates who serve four-year terms. To be appointed, a judge must be a lawyer and a member of the state bar association. Since magistrate judges do not have the same qualifications as article III judges (i.e., presidential appointment, Senate confirmation, and protected tenure), magistrate judges are considered “adjuncts” of the federal courts who perform tasks delegated by the district judge. 106 Since magistrate judges were intended to be used according to the needs of each district court, the exact role they have differs from district to district. The judges in each district court establish the specific responsibilities of their magistrates. Generally, however, they serve three roles. First, they can be an additional judge who might oversee civil cases and share caseload responsibilities. For example, they can conduct a trial of a person accused of misdemeanor charges. Second, they can act as a “team player” who handles legal motion hearings, conferences, and other tasks to prepare cases for trial. They can hear and determine certain kinds of pretrial matters or conduct proceedings in a civil matter. Third, federal magistrates may act as a specialist who processes Social Security disability appeals or prisoner petitions for the district judges. 107

**Other Federal Courts**

There are other federal courts that have jurisdiction over special areas. For example, the U.S. Claims Court hears cases in which the U.S. government has been sued for damages. They may also hear cases that concern disputes over federal contracts, unlawful “takings’ of private property by the federal government, and other claims against the United States. The U.S. Court of International Trade handles cases involving cases of international trade and customs issues, appeals of U.S. Customs Office rulings. The U.S. Court of Military Appeals hears appeals of military courts-martial. There is also a Court of Appeals for the Armed Forces and the U.S. Tax Court.

**State Courts**

Even though state courts may not receive as much attention as do federal ones, they remain an important power in the policy process. State courts do not receive as much attention as do governors and legislatures, but they make rulings and decisions on a wide range of important issues. Some of their decisions are reviewed by the Supreme Court.

Each individual state has established its own court system in their state constitutions. To that end, there is some variation in the court systems from one state to the next. Each state has its own unique court structure, but there are also many similarities between them. On the whole, these courts interpret state constitutions, statutes, and administrative regulations. Like federal courts, state courts hear both criminal and civil cases. Most states created a three-tiered system that includes courts of limited jurisdiction and general jurisdiction and appellate courts. But states call the courts different names. For example, the major trial courts in California are called superior courts but in Texas are called district courts.

Six states, Idaho, Illinois, Iowa, Massachusetts, Missouri, and South Dakota, have only one level of trial courts, so these courts hear all kinds of cases. Twelve states did not develop intermediate-level appellate courts. In these states, appeals are heard by the court of last resort. These states are Delaware, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. Other states, Arkansas, Texas, and Oklahoma, have two courts of last resort: one for civil and one for criminal.

State courts hear cases concerning violations of state laws rather than federal statutes. Since most crimes are state offenses, the state-level courts (rather than federal courts) deal with most of the cases and offenders. These would include cases concerning murder, drug offenses, rape, assault, and theft, among other things. If federal and state laws conflict, the general rule is that the federal law prevails. In some cases, the decision surrounding who can try an offender becomes very political. Both federal and state agencies may feel entitled to convict an offender. This happened in the case of the D.C. sniper, where many states and the federal government wanted to prosecute him.

State courts are, like federal courts, political entities. Because they are responsible for arbitrating disputes about consequential matters, state courts have increasingly been drawn into the political arena. State supreme courts must rule on key legal issues within a larger arena or environment of politics and policymaking. “Their interpretations of law are influenced by other institutions in government and politics. And their interpretations spur reactions by the same institutions: a supreme court decision is not necessarily the final word on a legal issue.” 108

For the most part, state courts can include the state supreme court, state appellate courts (which are organized by district), county or municipal courts (also called common pleas courts, which may include family courts, teen courts, juvenile courts, drug courts [for possession charges], or domestic courts), circuit courts, and trial courts for felony charges. State courts can include those at municipal and county levels and have jurisdiction over “traffic violations, divorces, wills, most contracts, crimes against persons and property, and the decisions and processes of state and local government institutions. Litigation in state courts includes, in other words, the areas that affect the daily lives of most people.” 109

Table 6.2 shows that, in 2000, state courts convicted about 924,700 adults of a felony offense. 110 Most were convicted for some type of drug offense. Table 6.3 indicates that the mean length of felony offenses ranges from 275 months for murder, and 59 months for fraud and drug possession charges.

Table 6.2 Felony Convictions in State Courts, 2000 and 2006

| Offense  | Number  | Percentage  |
| --- | --- | --- |
| Drug Trafficking 2000 | 203,400 | 22.0 |
| 2006 | 212,490 | 18.8 |
| Violent Offenses 2000 |   |   |
| 2006 | 165,360 | 18.2 |
| Drug Possession 2000 | 116,300 | 12.6 |
| 2006 | 165,360 | 14.6 |
| Larceny 2000 | 100,000 | 10.8 |
| 2006 | 125,390 | 11.1 |
| Fraud/Forgery 2000 | 82,700 | 8.9 |
| 2006 | 96,260 | 8.5 |
| Aggravated Assault 2000 | 79,400 | 8.6 |
| 2006 | 100,560 | 8.9 |
| Burglary 2000 | 79,300 | 8.6 |
| 2006 | 99,910 | 8.8 |
| Robbery 2000 | 36,800 | 4.0 |
| 2006 | 9,660 | .9 |
| Sexual Assault 2000 | 31,500 | 3.4 |
| 2006 | 32,200 | 2.9 |
| Weapons Offenses 2000 | 28,200 | 3.1 |
| 2006 | 38,010 | 3.4 |
| Other Violent Offense 2000 | 17,000 | 1.8 |
| 2006 | 21,980 | 1.9 |
| Murder 2000 | 8,600 | 0.9 |
| 2006 | 8,670 | 0.8 |

*Source:* Bureau of Justice Statistics, “Felony Sentences in State Courts, 2000,” *Bureau of Justice Statistics Bulletin* (Washington, D.C.: Bureau of Justice Statistics, 2003); “Felony Sentences in State Courts, 2006,” *Bureau of Justice Statistics Bulletin* (Washington, D.C.: Bureau of Justice Statistics, 2009).

Table 6.3 Mean Length of Felony Sentences Imposed in State Courts After Trial, 2006

|   | Prison  | Jail  | Probation  |
| --- | --- | --- | --- |
| Violent Offenses | 149 months | 6 months | 40 months |
| Murder | 275 | 9 | 42 |
| Sexual Assault | 172 | 6 | 42 |
| Robbery | 161 | 7 | 61 |
| Aggravated Assault | 98 | 6 | 39 |
| Burglary | 83 | 6 | 46 |
| Fraud | 59 | 6 | 36 |
| Drug Possession | 59 | 4 | 21 |
| Drug Trafficking | 85 | 7 | 40 |
| All offenses | 100 | 6 | 39 |

*Source:* “Felony Sentences in State Courts, 2006,” Bureau of Justice Statistics Bulletin (Washington, D.C.: Bureau of Justice Statistics, 2009).

**State Supreme Courts**

Usually called supreme courts, these courts are also called state judicial courts or supreme courts of appeal. In most cases, it is the court of last resort in the state because very few state cases ever reach the Supreme Court. Like the Supreme Court, state supreme courts also have discretion over the types of cases they choose to hear. In some states, death penalty cases are automatically reviewed by the state supreme court. If there is a question concerning the interpretation of state statute or the state constitution, the state supreme court can make a ruling.

State supreme courts have many functions. There are three general types of supreme court action. One is the interpretation of state statutes. By doing this, the court is shaping the meaning of the statute and at the same time its impact. Second, the state supreme courts are responsible for the development and interpretation of “common law” through which the basic legal rules are established almost entirely through state court decision rather than by legislatures. Third, the state supreme courts are responsible for interpreting federal and state constitutions. Their interpretations of the federal Constitution are subject to review by the Supreme Court. 111

In most states, the supreme court is composed of between three and nine judges (most courts have either five or seven justices) who hear primarily civil cases and review cases on their record by reviewing the transcript. They typically hear cases as a group. The justices receive appellate briefs, hear oral arguments, discuss the cases, and issue written opinions to explain their decisions. They may have other powers, such as issuing judicial assignments, confirming the nomination of judges, and reviewing cases of alleged judicial misconduct. 112

For the most part, state supreme courts hear primarily cases on appeals from the lower state courts. However, they can also have original jurisdiction in matters such as granting of certain writs, cases in which the state is a party, and disputes between counties within the state.

In some states, the supreme courts are called courts of last resort. In Oklahoma and Texas, there are two supreme courts—one having jurisdiction in civil cases and one having jurisdiction over criminal cases. State supreme courts usually have seven members, but some states have three and others nine. 113

Regardless of their makeup, state supreme courts tend to operate in relative obscurity, and public knowledge about the courts is at best rudimentary. Despite this, the courts exert great influence. It is estimated that state supreme courts decide over 10,000 cases each year. In most of these cases, the litigants do not seek to appeal the decisions. This means that their decision is the final say. If the litigants do wish to appeal the decision, the Supreme Court either lacks the jurisdiction to hear it or declines to hear the appeal. 114 Again, this means that the decision of the state supreme court is the final one.

When deciding a case, members of a state supreme court typically turn first to the legal environment of the state, including the state’s constitution, statutes, and/or legal precedents. A court may turn to decisions made by other state supreme courts in similar circumstances. 115

The legal environment of the state can affect the decisions made by the state supreme court. The state laws affect the roles a state supreme court plays by defining the types of cases that can be adjudicated in state courts and thus brought to the state supreme court on appeal. The state laws also determine the authority of the state supreme court to regulate its workload and focus on important cases. Finally, the state laws provide most of the legal requirements the state high court is to apply and enforce. 116 Despite these legal constraints, the state supreme courts still maintain considerable discretion in defining the policy role they will play. 117

**Other State Appellate Courts**

There are other, lower state appellate courts, most often called intermediate appellate courts. These courts are typically organized on a regional or even multicounty basis, and the structure of the appellate courts differs from state to state. Each state’s appellate courts have little contact with those of the other states. 118 These are used in 36 states in the nation, especially in larger, more populated states, to relieve the caseloads of the state supreme court. They do not try cases but have appellate jurisdiction to review cases based on trial records. In other words, they do not conduct new trials or hear testimony to determine a defendant’s guilt or innocence. Instead, they consider specific questions concerning alleged mistakes in the trial court. To do this, the justices consider detailed written arguments called appellate briefs that the lawyers for each side submit to argue the question at issue. In some cases, the lawyers involved in the case might be allowed to present oral arguments, and the justices will then discuss the case and vote to determine the outcome. One judge in the majority will write an opinion explaining the court’s decision, and other judges may write opinions explaining why they applied different reasoning or arrived at different outcomes.

There are usually no juries in the lower appellate courts. Instead, judges, who usually sit on panels of three to nine judges, hear and decide appeals from trial courts. Thus, if a defendant believes that the procedures used in his or her case were in violation of his or her constitutional rights, he or she may appeal the outcome of his or her case. The courts will review cases to determine if a defendant’s due process rights were granted and all procedures followed. They consider only the record of trial, the appellate briefs submitted by each side, and arguments made by counsel. In some jurisdictions, they are limited by law to hearing cases arising from specific lower courts or cases involving less than a specified dollar value. Most cases heard here are civil rather than criminal. 119

**Trial Courts of General Jurisdiction**

Trial courts of general jurisdiction, which are sometimes called major trial courts or felony courts, have the power to process a wide variety of legal issues. They can hear all criminal cases, serious civil cases (in which the monetary amount in question is not limited), and some appeals cases, in some jurisdictions, from lower courts. They usually have exclusive jurisdiction over felony offenses, so they are the only court that has the authority to try felony cases. In these courts, the trials generally last a few days or even weeks or months. They sometimes oversee plea bargains made between the prosecution and the defense.

These courts are more formal in their proceedings than lower courts, and they employ full-time court personnel and record-keeping systems; they use juries, and they put more emphasis on formality and the protection of rights. In most states, a single judge presides over the trial court and is responsible for ruling on lawyers’ motions concerning the admissibility of evidence and legal objections. The judge also instructs the jury on the law pertaining to a case before jury deliberation. If an offender is found guilty, a judge will also determine the most appropriate sentence for that person. Because trial courts keep a record of the proceedings, they are referred to as courts of record.

**Trial Courts of Lower (or Limited) Jurisdiction**

Limited jurisdiction courts are those courts where the judge can hear only certain, narrowly defined types of cases. These would be courts that deal with traffic offenses, juvenile crime, and minor criminal cases (misdemeanors). These courts are also called municipal and special courts (also called county or misdemeanor courts) and are at the bottom of the court hierarchy in the state court system. These courts usually hear cases of a minor nature, such as assault or shoplifting. They can be small-claims courts, which hear disputes involving less than $1,000 or $500 (depending on the state), traffic violations, parking tickets, or other minor offenses. These courts also hear civil cases, usually limited to cases where the damages in question are relatively small (usually under $10,000). There is usually a less severe punishment involved, either a fine of $1,000 or less and/or incarceration for a year or less in a local jail. 120

There are judges present in the municipal courts, but in some cases they may try the cases in a more informal manner. Despite this, defendants appearing in these courts still have the same rights as they do in the major trial courts. There is often an emphasis on speed and routinization rather than constitutional procedures. Defendants can enter a plea and pay a fine in a matter of minutes. These are not courts of record, so there is no formal account kept of the proceedings.

Some states have created special courts with limited jurisdiction (thus called limited jurisdiction courts or sometimes specialty courts), that focus on a specific category of offense. These can include police courts, family court (child custody), juvenile court, probate court (divorce and estate issues), or drug court. They were developed to reduce the caseloads of the lower courts. They handle a large number of cases quickly and sometimes informally. Some examples of these specialty courts are shown in Box 6.4.

These courts are found in both rural and urban areas, but most exist in urban areas. They do not exist in every state or jurisdiction. Most common pleas courts have a single judge presiding, and no jury is present. Some areas may use a magistrate, referee, or justice of the peace in place of a judge. Decisions made by the judge can be appealed to a general jurisdiction court. 121

**Box 6.4:** **Examples of Specialty Courts**

**Teen Courts**

Teen courts, also known as youth courts, have become a popular intervention for young, usually first-time offenders who are charged with offenses such as theft, misdemeanor assault, disorderly conduct, and possession of alcohol. In many of the teen courts, there is an adult judge who serves as the judge and rules on legal terminology and courtroom procedure, but there is a youth judge who acts as the real judge. Other youth serve as attorneys, jurors, clerks, bailiffs, and other court personnel. The youth attorneys will present the case to the youth judge (or in some cases a panel of three youth judges), who decides the appropriate disposition for the defendant. In some cases, the teen courts do not use youth attorneys. Rather, the case is presented to a youth jury by a youth or adult. The youth jury then questions the defendant directly.

Most teen courts do not determine the guilt or innocence of a youth offender. Rather, they serve as a diversion alternative for young offenders. In many cases, the offenders must admit to the charges against them in order to qualify for teen court. Community service was the most common disposition used in teen court cases. Dispositions may also include victim apology letters, apology essays, teen court jury duty, drug/alcohol classes, and monetary restitution.

The number of teen courts nationwide grew from an estimated fifty programs in 1991 to between 400 and 500 programs in 1998, but most had been in existence for less than five years. Since they are so new and primarily experimental, most teen courts have relatively small caseloads.

**Drug Courts**

Since the mid-1980s, many state and local court dockets have become overloaded with drug cases, leaving fewer resources available to adjudicate serious, violent offenders. It became clear that incarceration did not help addicts break their addictions and that drug offenders sentenced to an institution were returning to the institution at high rates. It also became clear that drug treatment programs seemed to be effective in reducing both drug addiction and drug-related crime if participants remained in treatment for an adequate period of time.

Drug courts first began in 1980 as an experiment by the Dade County, Florida, Circuit Court. 48 states now have some type of drug court, as does the District of Columbia, Puerto Rico, Guam, a number of Native American Tribal Courts, and one federal district court. Defendants referred to drug courts are usually nonviolent offenders whose crimes were due to addiction, and those eligible for the drug court are identified soon after arrest. The program consists of weekly (or daily) counseling or therapy sessions, education programs, at least weekly urinalysis, frequent appearances before the drug court judge (biweekly or more often at first) for status updates, vocational programs, or medical services. After the participants become “clean,” many programs require that they obtain a high school or GED certificate, maintain employment, be current in all financial obligations (including court fees and child support payments), and have a sponsor in the community. Many programs also require participants to perform community service hours in the community that is supporting them through the drug court program.

It is argued that drug courts provide more effective supervision of offenders in the community, more credibility to the law enforcement function (arrests of drug offenders are taken seriously), greater coordination of public services, and a more efficient court system.

The success of drug courts is becoming clear. Most participants tend to stay in the drug programs. The retention rates for drug courts show that more than 70 percent of participants are either still enrolled or have graduated. Traditional drug treatment programs have much lower retention rates. Drug courts have also been shown to have reduced recidivism rates. Recidivism among all drug court participants has ranged between 5 and 28 percent and less than 4 percent for graduates. Additionally, drug courts are generally less expensive than traditional punishments. The average cost for the treatment component of a drug court program ranges between $1,200 and $3,000 per participant, depending on the services provided. Savings in jail bed days alone have been estimated to be at least $5,000 per defendant. Drug courts can also reduce police overtime and other witness costs as well as grand jury expenses. In addition, hundreds of families have been reunited as parents regain custody of their children. Many participants have received education and vocational training and have obtained employment.

**Juvenile and Family Drug Courts**

Family drug courts deal with cases that arise out of the substance abuse of a parent or child. These can include custody and visitation disputes; abuse, neglect, and dependency matters; petitions to terminate parental rights; guardianship proceedings; and other loss, restriction, or limitation of parental rights. Family drug courts provide immediate intervention in the lives of children and parents using drugs. Their goals include helping the parent to become emotionally, financially, and personally self-sufficient and to develop parenting and “coping” skills adequate for serving as an effective parent on a day-to-day basis.

Juvenile and family drug courts are being started in many cities across the country. Since 1995, when the first juvenile and family drug courts were developed in Alabama, California, Florida, Nevada, and Utah, family drug court activity is under way in at least 35 states and the District of Columbia. The rapidly increasing popularity of these courts is reinforced by their success in reducing court backlogs and preventing substance abuse by juveniles and family members.

**Local Courts**

Some states have county courts or mayors’ courts as the lowest level of general jurisdiction court. In some places, these are also called justice of the peace courts. Most have either a city or a county as their geographic area of jurisdiction. Local courts handle minor offenses, such as local ordinances (curfews). They may also perform marriage ceremonies. They have one judge presiding, but litigants can request a jury trial. 122 These courts are located primarily in small rural towns and villages. Some states have chosen to eliminate the justice of the peace officers. 123

**Court Bureaucracies**

Over the years, many bureaucracies have evolved that exist to help the courts be more efficient and effective in performing their duties. Today, there are many bureaucracies that assist the courts in some fashion. They are located on all levels—federal, state, and local—and have different responsibilities.

One bureaucracy that assists court personnel is the Judicial Conference of the United States. This body is composed of the chief justice of the Supreme Court as the presiding member, the chief judges of each of the judicial circuits, one district judge from each of the twelve regional circuits, and the chief judge of the U.S. Court of International Trade. They meet twice a year to review and establish policy that revises the rules of procedure that may affect courts across the nation. They also make recommendations to Congress for approval of the changes. 124

The Administrative Office of the U.S. Courts, created in 1939, helps oversee the administration of the federal judicial system. It gathers information and data on cases in the federal courts, such as case flow statistics. Once the information is gathered, the office acts as a clearinghouse for information as well as a liaison for the federal judicial system and the Judicial Conference in its dealings with Congress, the executive branch, individual judges, professional groups, and the general public. The Office also provides technology services to the federal courts. 125

The Federal Judicial Center was created in 1967 as the research-and-development arm of the federal judiciary. It engages in research concerning the federal courts and makes recommendations that are intended to improve the administration and management of the federal courts. It is also responsible for developing educational and training programs for federal personnel who are employed with the federal judicial branch. Today, it is authorized to convene sentencing institutes that address major policy questions. It also partners with other organizations to develop research strategies that lead to new policies regarding sentencing. 126

A final example of court-related bureaucracies is the Circuit Judicial Councils. These consist of all the judges of the circuit’s court of appeals and other district judges. They come together and work to see that the district courts operate as effectively as possible. They monitor the caseloads of the district courts, oversee judicial assignments, and monitor the conduct of district judges. They also oversee the use of federal jurors, the assignment of magistrates, and the use of court reporters.

**Conclusion**

The courts on the federal, state, and local levels are a vital component in the criminal justice system and are responsible for interpreting the law and meting out justice. Many courtroom personnel work in these courts to help the judicial branch function smoothly. Politics plays an ever-present role despite the fact that the courts are, in theory, supposed to be insulated from political influence. Politics affects who serves on the bench (how they are chosen) and the decisions that come out of the courts. The makeup of the court is determined by politicians through a process of nomination and approval or through the political process of campaigns and elections. Their decision making, as often noted, is not always guided by neutral principles of law but rather by external political influences and the courts’ political attributes. 127 In reality, there is little that the courts, including the Supreme Court, do that is entirely free of politics. 128 Despite this, the courts play an important role in the policy process. They affect each stage, from setting the agenda through review of the policy and the implementation of that policy.

**Notes**

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Chapter 6: Judiciary

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