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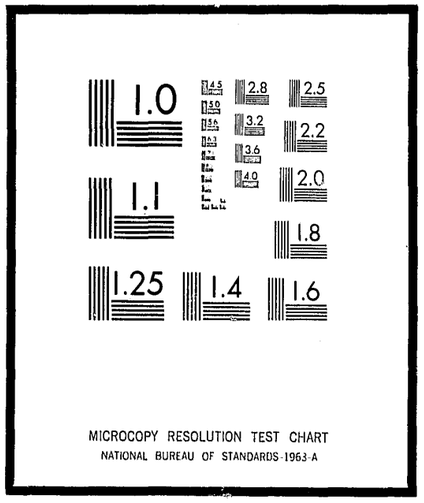

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ANNOTATION:
THE MAJOR FINDINGS OF A TWO-YEAR STUDY OF THE POWERS, DUTIES, AND OPERATIONS OF THE U.S. ATTORNEY GENERAL.

ABSTRACT:
THE MOST STRIKING CHARACTERISTIC TO EMERGE FROM A STUDY OF THE OFFICE OF ATTORNEY GENERAL IN THE FIFTY-FOUR JURISDICTIONS CONSIDERED IN THIS STUDY IS THE GREAT DIVERSITY OF ITS POWERS, DUTIES AND OPERATIONS. THIS VARIES FROM AN EXTREMELY POWERFUL OFFICE IN SOME JURISDICTIONS, EXERCISING BROAD AUTHORITY OVER STATE LEGAL SERVICES AND LOCAL PROSECUTIONS, TO A VERY WEAK ONE IN OTHERS, LACKING CONTROL OVER MOST OF THE STATE'S LEGAL STAFF OR OVER LOCAL PROSECUTIONS. ALMOST EVERY ASPECT OF THIS STUDY ILLUSTRATES THIS DIVERSITY AND FLEXIBILITY. DESPITE THESE DIFFERENCES, ATTORNEYS GENERAL SHARE A COMMON CORE OF AUTHORITY AND ACTIVITIES. THESE DERIVE IN LARGE PART FROM THE HISTORICAL DEVELOPMENT OF THE OFFICE AND ITS ROOTS IN THE COMMON LAW OF ENGLAND. THEY ALSO DERIVE FROM THE OFFICE'S UNUSUAL STATUS IN STATE GOVERNMENT, AS A PART OF THE EXECUTIVE BRANCH THAT HAS STRONG TIES TO THE LEGISLATIVE AND JUDICIAL BRANCHES. (AUTHOR ABSTRACT)

National Association of Attorneys General

Committee on the Office of Attorney General

REPORT ON
THE OFFICE OF ATTORNEY GENERAL

February, 1971

This study was conducted under Grants No. N. I. -005 and N. I. -70-026 from the National Institute of Law Enforcement and Criminal Justice of the United States Department of Justice. The fact that the Institute furnished financial support does not necessarily indicate its concurrence in the statements or conclusions herein.

FOREWORD

This Report embodies all the major findings of a two-year study of the powers, duties and operations of the office of Attorney General in the states and territories. In a broader sense, it is the outcome of a study that began over a decade ago.

While campaigning for election as Attorney General of Kentucky in 1959 and developing a platform, it became apparent that nowhere was there an adequate statement of the organization and functions of the office, in Kentucky or elsewhere. It was equally apparent that the administration of justice in Kentucky was the result of legislative happenstance and the unplanned layering of duties and agencies over the decades.

To facilitate a better understanding of the situation on the part of the public, the bench, and the bar, the State Bar Association created a Committee on the Administration of Justice in the Commonwealth of Kentucky, to be staffed by the Attorney General's office. It was anticipated that the Committee's work would result in the study of three broad areas: (1) the office of Attorney General; (2) law enforcement; (3) the judicial system, thus giving a comprehensive overview of the administration of justice in one state. Such studies could provide the framework and lay the predicate for constitutional and legislative reform. Limitations of time and funds permitted the completion of only the first two areas of the proposed triad. These were published in 1963 as Special Issues of the *Kentucky Law Journal.*

A by-product of the Kentucky experience was a decision on the part of the National Association of Attorneys General (N.A.A.G.) to conduct a similar self-study. In June, 1961, the Association adopted a Resolution creating a Committee on the Office of Attorney General (C.O.A.G.) to undertake a comparative analysis of the powers, duties and operation of the office, building on a tabular questionnaire previously circulated by the Council of State Governments. The undersigned was named Chairman of the Committee. Again, limitations imposed upon staff by time and a lack of funds precluded publication of a report and the Committee became inactive in 1964.

At the 1968 Midwinter Meeting, the National Association of Attorneys General reactivated the Committee. Funding was secured to make possible the employment of a professional staff and the conduct of a comprehensive analysis of the office of Attorney General.

To ensure that the study resulted in a valid and viable report, it was carried out as an essentially cooperative effort. Each Attorney General was asked to name a staff member to serve as liaison with C.O.A.G.; all did so, or undertook to perform this function themselves. Requests for information were directed to the liaison officers. Drafts of most chapters were then prepared, and published

in a preliminary form for review and comment. They were then revised for inclusion into this final Report.

The scope of the study was similarly subject to continuing review. A series of drafts of the table of contents was circulated and revised periodically, so that the whole Association joined in defining the areas to be covered. Subjects such as organized crime control and collective disorders were not part of the proposed study, but were incorporated to reflect emergent issues.

Seldom has a study involved so many contributors or elicited so much primary data. In addition to the usual scholarly and legal sources, extensive use was made of questionnaires. A series of eight detailed questionnaires were circulated to Attorney General's offices. All returned at least one, and half the states answered all. About one hundred and twenty former Attorneys General and thirty-six incumbents completed a questionnaire eliciting their views on all aspects of the office. The first nationwide, comprehensive survey of prosecutors resulted in the return of about eight hundred lengthy questionnaires. Questionnaires were sent to Adjutants General and to state Bar Association secretaries. Additional data were derived from intensive study by staff on visits to six offices, plus visits to other offices by individual staff members, and continuing correspondence and contact with most jurisdictions over a two-year period.

In addition to the factual Report, this volume contains a series of recommendations on strengthening the office of Attorney General. The Committee asked the staff, on the basis of research and without regard to practical or political limitations, to draft recommendations. The Committee on the Office of Attorney General and the Executive Committee of N.A.A.G. held a special meeting in Denver, Colorado, on December 16, 1970. Each recommendation was discussed and debated; virtually all were adopted, with some modification. At the February, 1971 Winter Meeting, N.A.A.G. resolved itself into a Committee of the Whole to receive the Committee recommendations, then discuss and adopt them. Thus, the recommendations reflect both the two-year study and the collective judgment of the Association.

The C.O.A.G. experience has confirmed the desirability and established as a matter of fact the possibility of conducting basic research on a cooperative basis, through a professional staff, by a significant segment of politically-oriented public administrators. This experience has persuaded all participants of the absolute imperative of the continuation of at least a minimum staff for the following purposes:

(1) The maintenance of the Report on a current basis, in order that there may be a continuing body of definitive literature on the organization, powers and duties of the offices of Attorney General, for use by their respective staffs;

(2) The provision of the necessary centralized staff action to facilitate the implementation of the forty-nine recommendations adopted by the National Association of Attorneys General, sitting as a Committee of the Whole at the annual Winter Conference held in February, 1971, including the drafting of suggested legislation and the provision of clearinghouse and resource services;

(3) The provision of an "in-house" research expertise, capable of both the independent conduct of research and writing and the direction of research projects by the responsible Assistants of the fifty-four Attorneys General's staffs; and

(4) The extension and maintenance of those external relationships with related organizations which have proved so mutually beneficial.

It would be improper to close this phase of the C.O.A.G. activity without acknowledgments recognizing contributions far beyond those usually realized in undertakings such as this. This has been a truly cooperative project, representing the cumulative contributions of hundreds of people in furnishing data, reviewing drafts, and helping plan and evaluate as the work progressed. Many are acknowledged by citation to a letter or interview in the footnotes. A few should be specifically mentioned here.

The Presidents of the National Association of Attorneys General during the life of this study gave it their active and enthusiastic support: Attorney General Frank J. Kelley of Michigan, Allan G. Shepard of Idaho, Arthur J. Sills of New Jersey, Douglas Head of Minnesota, and Francis B. Burch of Maryland. The Committee on the Office of Attorney General's Vice-Chairmen and membership, through meetings and correspondence, shaped the policies that guided this effort: the contribution of Attorney General Robert B. Morgan of North Carolina and Robert M. Robson of Idaho as co-Vice Chairmen should be particularly recognized. The National Institute of Law Enforcement and Criminal Justice, under the leadership of Dr. Henry J. Ruth and, subsequently, Mr. Irving Slott, gave C.O.A.G. the essential fiscal support. Mr. Herbert Edelhertz of the Institute was of immeasurable assistance to the staff. Mrs. Patricia Collins, liaison officer for the U.S. Department of Justice, continued to assist the project in its current phase, as she had in 1963. Mr. Herbert L. Wiltsee, while serving as Secretary of the National Association of Attorneys General, laid the groundwork for much of the present study, while his successor, Mr. John C. Doyle, has continued to cooperate with C.O.A.G. Mr. Glenn Winters, Executive Director of the American Judicature Society, has given the project his support since its inception in 1961. Dr. David B. Walker and Dr. Carl W. Stenberg of the Advisory Commission on Intergovernmental Relations staff have contributed both ideas and information. Mr. Patrick F. Healy, Executive Director of the National District Attorneys Association; has worked with C.O.A.G. to develop factual data and to establish constructive liaison between the two Associations. The contributions of individual staff members whose talents and energies contributed to this Report are gratefully acknowledged; their participation in the project should be a source of great satisfaction to them. The Committee was fortunate in securing the services of Professor Samuel Dash as consultant; many parts of the Report, as well as his consultant's paper, reflect his knowledge and abilities.

Finally, it would be improper to close this commentary without acknowledging the dedicated determination of C.O.A.G.'s Project Director, Mrs. Patton G. Wheeler. Mrs. Wheeler had primary responsibility for the Kentucky report described previously, and has had the responsibility of directing the C.O.A.G. study throughout. The high quality of her work is evident in the pages that follow.

It has been my privilege and pleasure to be associated in this project with so unusual and helpful a body of men and women, and to be part of so satisfying an experience. I wish to herein register my appreciation to all who have been involved in the efforts that culminate with this Report.

John B. Breckinridge
Chairman, Committee
on the Office of Attorney General

Office of the Attorney General
Washington, D. C.

Honorable John B. Breckinridge
Attorney General
State of Kentucky
Frankfort, Kentucky 40601

Dear Mr. Attorney General:

The National Association of Attorneys General is to be commended on the action it has taken in setting goals for the office of Attorney General in the states and territories. Precedents are rare in which a group of high officials have undertaken a self-study of similar scope, and then set standards for the exercise of their powers and the conduct of their operations. This realistic evaluation should help assure that Attorneys General will accelerate their role in our mutual efforts to fight crime and to strengthen the criminal justice system.

Historically, the Attorney General has been the chief law officer of his state and has exercised effective leadership in improving the administration of justice. More recently, he has exercised leadership in such critical areas as organized crime control and consumer protection. The current evaluation of their own effectiveness coupled with the adoption of recommendations reflects a strong indication that Attorneys General are meeting the unprecedented challenges facing their offices in the present period of transition. The Department of Justice is gratified that grants from an agency within the Department, the National Institute of Law Enforcement and Criminal Justice, have helped make this action possible.

Sincerely yours,

Attorney General

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Recommendations Adopted By The Committee on the Office of Attorney General and Adopted by The National Association of Attorneys General At Its Meeting on February 1, 1971

1. **N.A.A.G. should develop and maintain effective liaison with agencies and organizations which have related interests.**

In the course of the C.O.A.G. study, active interchange of information and ideas has been developed with numerous organizations, such as the Advisory Commission on Intergovernmental Relations, the American Bar Association, the National Conference of Commissioners on Uniform State Laws, The National District Attorneys Association, etc. Contact in the past has been sporadic, although many groups have interests closely related to N.A.A.G. Close and continuing contact should be maintained with appropriate groups, through a N.A.A.G. staff.

2. **A permanent research service, directly responsible to N.A.A.G., should be established to prepare reports, serve as a clearing-house, and develop programs for meetings. Attorneys General, both individually and as an Association, should conduct continuing research into their powers, duties and operations.**

N.A.A.G. should have its own staff to prepare reports on subjects of emergent interest as identified by N.A.A.G., to expedite exchange of information among the states, to keep the C.O.A.G. report continually updated and otherwise to furnish needed information and services. The staff should be solely responsible to N.A.A.G., so that it represents Attorneys General's specific interests and point of view. It should coordinate the efforts of their 2,700 professional staff members in contributing their efforts and expertise toward meeting common problems.

1. THE OFFICE OF ATTORNEY GENERAL

3. **The Attorney General should be elected or appointed for a minimum term of four years and should be allowed to succeed himself.**

Nine states still elect the Attorney General every two years and two still prohibit him from succeeding himself. This does not allow him enough time to develop and execute programs, build a staff, or otherwise function effectively. It has the further disadvantage of requiring him to spend a great deal of time campaigning in those states where he is elected.

4. **Attorneys General should carefully review case law, as well as statutes, to determine the extent of their common law powers.**

Only a very few jurisdictions definitely deny common law powers to the Attorney General. The authority of the Attorney General at common law was very substantial and may offer present Attorneys General a means of expanding their statutory power; they should be cognizant of the relevant case law of their own and other jurisdictions.

5. **The Attorney General should work closely with the bar to involve the profession in public service and to monitor standards of performance.**

In some jurisdictions, the Attorney General has a formal relationship to the bar, through participation in admission or disciplinary proceedings. In all, he participates at least informally in bar activities. The Attorney General should initiate closer ties between the state and the bar, by working with bar association activities, programs of continuing legal education, legal aide and intern programs, and otherwise enlisting bar support for improving the administration of justice.

2. THE PROSECUTION FUNCTION

6. **Local prosecutorial services should be organized in districts sufficiently large to require full-time prosecutors, with adequate staff.**

Prosecutors in the majority of states serve only a single county and serve only part-time. A district system should be adopted to assure full-time prosecutors. Pay should be adequate to attract and retain qualified persons and to allow prohibition of private practice. Prosecutors should serve for a minimum of four years.

7. **The method of selecting local prosecutors should depend on conditions in the particular jurisdiction.**

In most jurisdictions, the local prosecutor is independently elected; in a few, he is appointed by the Attorney General, the Governor, or a judge. There is no single best method: what is appropriate for Delaware would not necessarily be so for California, although both have good prosecution services.

8. **The Attorney General should be able to institute removal proceedings against a local prosecutor or local law enforcement officer for misfeasance, malfeasance or nonfeasance, as defined by law.**

Where evidence indicates that a local official has conducted himself and the affairs of his office improperly, the Attorney General should have the authority to bring a removal action against that official. The law should provide adequate procedures to prevent possible misuse of such power.

9. **The Attorney General should call periodic conferences of prosecutors and should issue regular bulletins concerning developments in the criminal law and other matter of interest.**

Coordination between the Attorney General and other prosecutors in the state is essential, to assure interchange of ideas and information and to maintain continuity of policy. The Attorney General should take the initiative in calling conferences and otherwise keeping prosecutors informed of developments in statute and case law. He should also assume leadership in developing and implementing statewide standards.

10. **The Attorney General should develop and retain a staff of specialists who would be available to other criminal justice agencies on request.**

The Attorney General should have a "lending library" of men and material that other state or local officers could draw on as needed. This would include specialists in various areas of investigation and prosecution, administration, accounting, and special equipment needed in the detection or prosecution of crime.

11. **The Attorney General should be empowered to initiate local prosecutions when he considers it in the best interests of the state.**

At common law, the Attorney General had full authority over local prosecutions. The office of county or district attorney represented a division of the Attorney General's powers. In those states where the local prosecutor is independently selected, the Attorney General should retain power to initiate prosecutions when, in his opinion, the interests of the state so require. Experience demonstrates that such authority, when granted, is used only infrequently.

12. **The Attorney General should be empowered to intervene or supersede in local prosecutions.**

In those rare instances where local prosecutors are unable or unwilling to prosecute a case properly, the Attorney General should be able to enter the case and to assist or direct the prosecutor. Where such power presently exists, it is rarely exercised, but it should be available to the Attorney General.

13. **The Attorney General should appear for the state in all criminal appeals.**

In the great majority of jurisdictions, the Attorney General handles all criminal appeals. In others, he assists the local prosecutor. The Attorney General should take all criminal cases on appeal, to assure uniform quality of appeals, provide the necessary expertise in complex cases, and to assure a thorough review of the record by someone who was not previously involved. The prosecutor should work with the Attorney General when appropriate to assure that he is adequately informed about the case.

14. **The Attorney General should have broad subpoena power.**

Eighteen Attorneys General have no subpoena power; twenty-four have such power only in connection with certain statutes, such as consumer protection. Only eleven report that they have broad subpoena powers,

yet this is an essential tool if the Attorney General is to conduct investigations, succeed in litigation, and otherwise to act as the state's chief law officer. Many states which deny broad subpoena power to the Attorney General give it to less important officers and agencies.

15. **The Attorney General should have power to call a statewide investigatory grand jury.**

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

3. ORGANIZATION, ADMINISTRATION AND PERSONNEL

16. **Branches of the Attorney General's office should be established in large cities where other state agencies have branch offices.**

In all but one jurisdiction, the Attorney General's office is located at the capitol. Many Attorneys General also have branch offices in major cities, enabling them to serve individuals and agencies more directly and expeditiously.

17. **Generally, the Department of Justice or Attorney General's office should have responsibility only for those functions which involve law enforcement, legal services or appropriate related services, such as investigation.**

The Attorney General's traditional duties as the state's chief law officer are sufficiently broad to demand his full attention. The extent to which other operational or administrative functions, such as corrections or highway patrol, are assigned to him depends on the total pattern of state organization; generally, however, his responsibility should be restricted to furnishing legal services, investigation and identification, special programs (such as consumer protection and pollution control) that are primarily legal, and related educational efforts.

18. **Most staff should be located in the Attorney General's main or branch offices, with a few possible exceptions.**

Attorneys should be assigned to a common location, to foster a sense of professionalism, interchange of ideas and information, and efficiency in maintaining supporting staff and equipment. Where present facilities preclude centralization, planning for such offices should be initiated.

19. **The Attorney General should have full authority to reorganize his office and reassign staff.**

An incoming Attorney General should be able to utilize the resources of the office as he sees best, to accomplish what he considers desirable changes in program and policy. He should not be hindered by statutory or administrative controls on internal administration.

20. **Salaries of the Attorney General and his staff should be comparable to those paid in private practice and should be high enough to attract and retain qualified attorneys.**

Salaries of Attorneys General now range from $6,000 to $42,500 per year. In twenty-four jurisdictions, the salary is below $20,000. It is not reasonable to expect the state's chief law officer to serve at this salary, particularly if private practice is proscribed. Salaries should be realistic and should be adjusted periodically to reflect changes in the cost of living.

21. **The private practice of law by the Attorney General or members of his staff, if permitted, should be subject to strict controls.**

Almost half the jurisdictions allow the Attorney General to continue private practice. The nature and amount of practice by both the Attorney General and his staff should be restricted.

22. **Administrative functions should be clearly identified and should be be performed by persons with appropriate qualifications.**

An increasing number of Attorneys General recognize that administrative functions are vital to an effective office and are conducting studies of administration. Many have employed non-legal professional personnel, with training in management or public administration, to handle administrative and fiscal matters.

23. **Internal communications and controls should be constantly reviewed. Staff meetings, reports and other administrative procedures should be employed as appropriate.**

Half the Attorneys General's offices now report that they hold regular staff meetings. Many require routine written reports from some or all staff members. Internal reporting and meeting procedures can help any size office assure communication of policy matters and improve performance and coordination. Meetings and reports should concern matters of policy, current and emergent problems, and other general concerns.

24. **Procedures manuals should be developed for both professional and clerical staff and should be revised periodically.**

Routine procedures and forms should be defined by a manual, to assure uniformity and minimize conflicts. The high rate of staff turnover in most offices makes it especially important to provide ready reference. Responsibility for continuing review and revision of the manual should be definitely assigned. Form letters should be developed for routine correspondence.

25. **Provision should be made for an orderly transition when a new Attorney General is elected.**

Many states now provide Governors-elect with office space, staff, and access to budget and policy matters prior to their taking office. Similar provisions should be made for Attorneys General-elect, who need to be informed about pending litigation, opinion requests, investigations, and budget

preparation. A staff member should be specifically assigned to work as liaison between the outgoing and incoming Attorneys General.

26. **Public information programs should be conducted and appropriate staff provided for this purpose.**

Attorneys General's offices should employ a public information specialist to develop and conduct information and education programs. Many offices have begun to publish educational brochures concerning consumer protection. Publications should be developed in other areas, and multi-media programs conducted to inform the public about current legal issues. Such activities require specialized personnel, with expertise in communications.

27. **Each Attorney General should consider the possible application of automatic data processing to his office.**

Computer services can be used to index, record and retrieve virtually the entire data base involved in Attorneys General's work: statutes, opinions, briefs, and even correspondence and memoranda. A growing number of offices are now using data processing for some or all of these services; those which are not should consider possible computer applications.

4. ADVISORY OPINIONS

28. **Formal/official opinions should be restricted to subjects of statewide interest or major importance.**

The number of official opinions issued annually ranges from none to over two thousand. The advisory function is one of the most important and Attorneys General should exercise it carefully, issuing formal opinions on major questions, but not dissipating the importance of opinions by designating routine advice as opinions. Conversely, major policy questions should be answered with a formal opinion.

29. **All formal opinions should be reviewed by other persons as well as by the author and by the Attorney General or his designee before release.**

In most states, opinions are reviewed before release by other assistants or by a deputy or review officer. Consideration should be given to setting up a review board, composed of several assistants, to meet and discuss opinions. The importance of opinions makes it imperative that they be carefully reviewed for both legal and policy implications. In addition to substantive review, some states have one person review all opinions for style.

30. **Formal opinions should be published at least annually. Copies of single opinions should be available to the public when issued.**

About half the jurisdictions publish Attorney General's opinions at least annually; a few even publish them quarterly. Opinions should be published for distribution to appropriate offices and agencies, because of their importance in establishing policy.

31. **Officials should be immunized from liability for actions taken pursuant to opinions or advice of the Attorney General of their jurisdictions.**

Four states now have statutes immunizing officials from liability for actions taken when following an Attorney General's opinion in good faith. Other states should adopt similar statutes to strengthen the status of such advice.

32. **Formal opinions of the Attorney General should be binding as law on all public officials unless and until overturned or clearly inconsistent with subsequent law, official opinion, or decision of a court of record.**

A few states have statutes which make Attorney General's opinions binding upon recipients. Others do so by case law. In some, however, opinions are not binding on the recipient, or their legal effect has not been settled. The importance of official opinions in defining policy makes it desirable that their effect be defined by law.

5. THE STRUCTURE OF STATE LEGAL SERVICES

33. **All state legal staff should be under the Attorney General's supervision; he should determine their salaries and increments, classifications and otherwise control personnel.**

The Attorney General cannot effectively control legal staff if salaries and promotions are determined by the agency to which they are assigned. The Attorney General should consult with the agencies, but should exercise final authority over legal staff for all boards, commissions, departments and agencies of state government.

34. **The Attorney General should have sole authority to employ counsel and to represent the state in litigation.**

In about twenty jurisdictions, all counsel are under the Attorney General. In others, up to forty-eight agencies have house counsel. Considerations of economy, efficiency and consistency of policy and services indicate that the Attorney General should provide all legal services.

35. **The use of special or part-time counsel should be restricted to unusual circumstances.**

All but two Attorneys General report that they employ special or part-time counsel; sixteen Attorneys General employ such counsel often. Such counsel may be desirable when unusual expertise is required, when state agencies are adversaries in litigation, or when distance or other factors make it impractical for the regular staff to render service. Special counsel, however, tend to be an inefficient method of providing service and prevent unified services and consistent legal policy.

36. **The employment and compensation of special counsel should be a matter of readily accessible record.**

The potential abuse of such employment makes special safeguards desirable. Employment and payment records of special and temporary counsel should be available to the general public, on a case or individual basis.

37. **The Attorney General should work to assure establishment of a defender system.**

As the state's chief prosecutor, the Attorney General should have an interest in effective defense, to reduce the volume of post-conviction proceedings. He should work for the establishment of a state public defender or assigned counsel system where one does not exist. He should maintain active liaison with defenders, and include them in his conferences and bulletins for prosecutors.

6. SPECIAL DUTIES AND FUNCTIONS

38. **The Attorney General should review legislation prior to its signing by the Governor when timely requested, and should review administrative rules prior to their promulgation whenever practical.**

The Attorney General no longer plays a major role in bill-drafting, as most legislatures now have their own staff. When legislation comes before the Executive, it should be reviewed by the Attorney General, as counsel for that branch, as to form and constitutionality before it is signed. The Attorney General should also review administrative rules before they take effect. In both cases, he will be responsible for upholding the rules or laws, if they are challenged in courts, so he should have a chance to review them.

39. **Attorneys General, both individually and through N.A.A.G., should take an active part in the review and revision of state constitutions.**

Effective state action is often handicapped by archaic constitutional provisions, which limit the states' leadership in the federal system. Constitutional review and revision should be a standing staff responsibility of Attorneys General's offices, and a continuing commitment for N.A.A.G.

40. **The Attorney General should play an active role in interstate cooperation.**

The Attorney General should take the initiative in developing interstate agreements in appropriate areas and in reviewing drafts and working for passage of uniform and model laws where desirable for his jurisdiction.

41. **The Attorney General should have primary responsibility for enforcement of anti-pollution laws and should create a special section or division of his office to handle environmental matters.**

The current concern with environment facilitates securing enactment of strong anti-pollution laws and enforcing them actively. Attorneys General should assume leadership in pollution control, giving this special emphasis in their own office as well as working through the agencies they represent. The Attorney General should stand ready to utilize common law remedies where state statutes are inadequate to fight polluters effectively.

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

Successful action against organized crime requires specialized legal, investigative and accounting skills. Many offices have created such a capability; the concept of a "strike force," utilizing inter-agency expertise, is applicable anywhere. In some jurisdictions, the unit would be limited to assisting local officials; in others, it would initiate investigations and prosecutions.

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

43. **The state's consumer protection agency should be located in the Attorney General's office and should be adequately staffed and funded.**

The primary thrust of consumer protection is legal action and advice. The state's consumer office should be under the Attorney General, rather than a separate agency, or fragmented among several agencies. Experience shows that consumer protection offices more than pay for themselves in recoveries, so they should be well funded. They should have adequate statutory authority, including subpoena power.

44. **The Attorney General should, when appropriate, appear before regulatory boards to represent the public.**

In addition to his role as counsel for state boards and commissions, the Attorney General should represent the public before such groups when this appears necessary to ensure a proper presentation of the facts and issues involved; but, in these instances, such boards should be represented by its staff or special counsel if legal services are necessary.

45. **The Attorney General should be empowered to file any action he deems necessary to protect the public interest, as a class action if necessary, and, subject to approval of the court after due notice and hearing, to effectuate settlements binding upon the parties and the class.**

The Attorney General's standing to bring class actions should be clarified to enable him properly to protect the public interest.

46. **The Attorney General should actively enforce securities laws or should assist in their enforcement.**

Only a few jurisdictions make the Attorney General responsible for Blue Sky law enforcement, but in most he provides legal services to the enforcement agency. Under any arrangement, he should work for active enforcement of such laws.

7. RELATIONSHIP TO OTHER AGENCIES

47. The Attorney General's membership on boards and commissions should be restricted to those few in which his participation as a policy-maker is essential.

In some states, the Attorney General is a member of over thirty separate boards and commissions; he cannot keep informed about or participate in so many without adversely affecting his primary duties. His role should be restricted to rendering legal advice, rather than serving on a board. Exceptions should be made for those few boards which set policy for broad areas of the criminal justice system. When the Attorney General is a member, he should be authorized to designate a staff member to serve in his stead.

48. The Attorney General or a member of his staff should serve either as a member or as chairman of the state criminal justice planning agency and should work to assure effective planning and evaluation of programs and use of funds.

State planning agencies can improve and upgrade the criminal justice system through carefully-considered distribution of federal funds; they can also serve as a coordinating mechanism for related agencies. The Attorney General, as the state's chief law officer, should serve on the planning agency. He should play an active role in assuring its effective operation.

49. The Attorney General should have full access to services of a state bureau of investigation, and should have directly assigned to him those services that are necessary to fulfill the responsibilities of his office.

As the state's chief legal officer the Attorney General should have access not only to all information available from the state bureau of investigation but, upon his request, should have assigned to his office the necessary services of state investigative and law enforcement personnel as are required to fulfill his responsibilities.

1. THE OFFICE OF ATTORNEY GENERAL

The most striking characteristic to emerge from a study of the office of Attorney General in the fifty-four jurisdictions considered in this study is the great diversity of its powers, duties and operations. This varies from an extremely powerful office in some jurisdictions, exercising broad authority over state legal services and local prosecutions, to a very weak one in others, lacking control over most of the state's legal staff or over local prosecutions. Almost every aspect of this study illustrates this diversity and flexibility.

Despite these differences, Attorneys General share a common core of authority and activities. These derive in large part from the historical development of the office and its roots in the common law of England. They also derive from the office's unusual status in state government, as a part of the executive branch that has strong ties to the legislative and judicial branches.

This chapter examines the development of the office of Attorney General, from its origin in English history to the present, its status in today's governments, and its common law powers. It also describes how the office is established in the different jurisdictions, how Attorneys General are selected, and how long they serve. The Attorney General's relationship to the bar in general is also discussed.

1.1 Development of the Office

The origins of the office of Attorney General are found centuries ago, in the development of English jurisprudence. The evolution of the office in both England and America over a period of six hundred years has helped shape its contemporary character. Some of the issues involved in that evolution, such as the Attorney General's relationship to the state and his role in prosecutions, remain viable.

1.11 Development in England

In the Middle Ages, the King had attorneys, serjeants and solicitors to perform some of the functions of the modern Attorney General. Prior to the 13th Century, the King appointed special attorneys to prosecute criminal cases.[1] These counsels had only limited authority and were empowered to represent the Crown in a specified court, or for a specified period of time.[2]

The general term *attornatus* was used in official documents in England in the Middle Ages for anyone who appeared for another as pleader, attorney, or essoiner.[3] In Normandy, at the time of the Conquest, either of the parties in a civil case could appear before a justice and nominate someone to represent them in their absence. In England, the King or an individual authorized by a special writ could receive an attorney in the absence of the party involved if the case were in the King's Court, since it was a court of record. During the 13th and 14th Centuries there are numerous records of

1. Allen Harding, SOCIAL HISTORY OF ENGLISH LAW, Penguin Books, Baltimore (1966).

2. Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies.* 2 AM. J. LEGAL HISTORY, 304, 306 (1958).

3. Hugh C. Bellot, *The Origin of the Attorney General,* 25 LAW Q. REV. 400 (1909).

attorneys being so assigned; however, these attorneys had to be received by the justice, or someone authorized by the King.[4]

The earliest use of the term "Attorney General" appears to have been in 1398, when Parliament authorized both the Duke of Norfolk and the Duke of Hereford to appoint attorneys to take possession of any inheritance which might come to them during their banishment from England. However, the King later revoked this power in order to seize Hereford's estate.[5] Shakespeare refers to this incident in Richard II:

> If you do wrongfully seize Hereford's rights,
> Call in the letters patent that he hath
> By his Attorneys-General to sue
> His livery, and deny his offer'd homage,
> You pluck a thousand dangers on your head[6]

Professor J. Ll. J. Edwards, in his authoritative study of *The Law Officers of the Crown*, explains the development of the King's legal representatives in medieval times as follows:

> Although the Sovereign is in theory the fountain of justice and supreme, the Year Books (official records) are replete with cases in which the King was concerned as a litigant in his own courts and, presumably, abided by the decisions reached by the royal justices. For the King to appear in person as plaintiff or defendant in such suit was inconceivable. The right of any person to come forward in court and to sue on behalf of the King in any matter affecting the King's interests was repeatedly recognized by the courts. . . . As a method of protecting the King's rights, however, this unlimited right of audience could only be regarded, at best, as somewhat unreliable.[7]

The first mention of the title of *attornatus regis* is in the statute 38 Henry III, but such an office had probably been in existence for some time. Dr. Hugh Bellot gives 1254 as the earliest date when Lawrence del Brok appeared for the Crown; he was designated in many cases by the phrase *sequitur pro rege* and seems to be the first attorney designated by the King to act as his permanent attorney in the King's Bench.[8] Bellot enumerates other individuals who appeared for the King. For example, he notes that in 1278 an *attorney regis* appeared for the Crown at Cornish Assizes. Another King's attorney appeared for the Crown in 1280 in *King v. The Borough of Sandwich* and in the same year another person was described as *attornatus regis*.[9] Professor Edwards, however, cites studies to show that del Brok was conducting the King's business as early as 1247.[10]

Apparently, numerous *Attornati Regis* were employed at the same time. Some were appointed *ad hoc* to represent the Crown locally. All appear to have been appointed by a King's writ in much the same way as a "general attorney" for an individual. In addition to these individuals, there were the King's serjeants-at-law in every county to prosecute pleas in the Crown's name before the common law courts.

Authorities differ as to when the office of Attorney General actually came into being. Bellot says that finally, in 1472, William Husse was appointed Attorney General of England with the power to appoint deputies to act for him in any court of record. For the first time, the office was held singly; it has remained so since. As George W. Keeton points out,

> The fixing of dates is often an idle pursuit where the progress of historical development is concerned. This is particularly true of English History. There is no need, therefore to pronounce with certainty that so-and-so was the first Attorney-General, or that the office was instituted in such a year, even if this were possible. Historically, the office has no statutory basis. The Attorney-General and the Solicitor-General are the products of royal need. These offices emanate from the magnitude of the royal business in the Courts. For this the King, like everyone else, must have his representatives, to match the proctor in the ecclesiastical courts. Little by little the Law Officers are drawn into the great constitutional struggles of Tudor and Stuart times, and when these are at last ended, the Law Officers emerge, firmly attached to the King's Cabinet Council, whose development has made possible our modern Parliamentary system.[11]

4. *Id.* at 402-403.
5. *Id.* at 405.
6. *Richard II*, Act 2, Scene 1.
7. J. Ll. J. Edwards, THE LAW OFFICERS OF THE CROWN, 15 (1964).
8. Bellot, *supra* note 3 at 406.
9. *Id.* at 407.
10. Edwards, *supra* note 7, citing later studies of Professor Sayles.

The *attornatus regis* in the period from the reign of Edward II to the reign of Edward III were granted limited patents in respect to the courts in which they could practice, the area over which they had authority, or the business with which they were entrusted.[12] As the office evolved, the several attorneys who had limited power were replaced by a single attorney who had much wider powers and could appoint deputies. This process was complete by the end of the 15th Century; as a result, the King's attorney had become, by the 16th Century, the most important person in the legal department of the state and the chief representative of the Crown and the Courts.[13] An indication of the growth in importance of the King's attorneys occurred also in 1461 when Edward IV, as Duke of York, laid claim to the throne. The Parliamentary Rolls record that the judges, the King's Serjeants and the King's Attorneys were asked by the Lords for their advice.[14]

During this period, the King employed several attorneys, who acted with the serjeants for the King. Gradually the King's attorney grew in significance while the other members of the King's legal staff, such as the serjeants, decreased in importance.[15] By the reign of Henry VIII, the King's attorney had become almost indispensable, in particular, to the House of Lords. He was the individual who took the bills from the Lords to Commons and in so doing amended them and put them in workable shape. Consequently, a great deal of the legislation was the work of such oustanding Attorneys General as Edward Coke and Francis Bacon.[16] During the Tudor Period, the King's attorney was the person consulted by the government on the law and the one who prepared and conducted the important state trials.

The office of Attorney General began to assume political overtones and, when it did, the role of the King's serjeants began to diminish. The King's serjeants could proceed only under specific instructions from the Crown and could appear only in the Court of Common Pleas. The King's attorney, on the other hand, could represent the Crown in all tribunals.[17]

The conflict in legal authority reflected a division which existed in English law from ancient times to the 17th Century.[18] One system, the common law, had grown in uncodified form from custom and usage, statutes, judicial decisions, and other sources. The practitioners of the common law were the barristers and sergeants, who learned law in the Inns of Court. The other system was the Roman civil law, which was taught at the universities, and practiced by the attorneys. The common law advocated the supremacy

11. George W. Keeton, *The Office of Attorney General*, 58 JURID. REV., 107, 217 (1946).
12. William S. Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 H.L. L. REV., 602 (1919). He goes into some detail on the matter of limitation and sets out a number of examples.
13. *Id.* at 606.
14. *Id. See* also Keeton, *supra* note 11 at 108-109.
15. Holdsworth, *supra* note 12 at 606-607.
16. Keeton, *supra* note 11 at 109.
17. Cooley, *supra* note 2 at 306.
18. *See, e.g.* Catherine D. Bowen, FRANCIS BACON - THE TEMPER OF A MAN (1963).

of the law over the sovereign; the Roman law held that *Rex est lex loquens*: the King is the law. Those who practiced in the common law courts had a narrow educational background, but could rise through successful practice to become serjeants and, ultimately, the King's sergeants.

The King required lawyers who were conversant with the political problems of the day. This was especially true as the contest of jurisdiction between the rival courts grew and as the constitutional differences between the King and Parliament became more bitter.[19] The King found it necessary to choose judges who would take his view on constitutional questions and legal advisers who were committed to them politically. The serjeants were read in the common law and, as a consequence, were unwilling to accept the King's position on many constitutional questions. They were gradually replaced by officers who were geared to a more modern concept of government and politics and the Attorney General emerged as the pre-eminent figure.

As the Attorney General began to play a larger political role, particularly in legislation, pressures developed for him to occupy a seat in the House of Commons. The first Attorney General to hold such a position was probably Sir William Hobart in 1606. Although some question of his disqualification was raised it was not done so formally. When Francis Bacon was appointed Attorney General in 1613, he was already a member of the House of Commons, but was allowed to sit with the understanding that his successors would be barred. This disqualification lasted for approximately a half century until Francis North became Attorney General and apparently the first to sit in Commons without objection and as a matter of right.[20]

19. Holdsworth, *supra* note 12 at 617.

The earlier hostility to the Attorney General in Commons was probably due to his special position as the King's servant. However, with the triumph of the Royalists in 1673, the precedent was established. In fact, between the Revolution of 1688 and the Reform Bill of 1832, it was an established practice for the Treasury to purchase a seat for the Attorney General.[21]

During the constitutional struggles that followed the Revolution, the Attorney General emerged as the legal adviser for the government, not just as the single servant of the King. He appeared on behalf of the Crown in the courts, gave legal advice to all the departments of government and appeared for them in courts whenever they wished to act. He became an adviser to the government as a whole: the Attorney General for the Crown.

1.12 Colonial Period

Colonization of America brought with it the office of Attorney General, through either executive or legislative action. Regardless, however, of the manner in which the office was instituted, the colonies made little attempt to define or enumerate the duties of Attorney General in America. It was accepted generally that he possessed the common law powers of the English Attorney General except where they were changed by the constitution or statute. "He was in a sense a delegate of the Attorney General of England."[23]

A few examples of the office's development are given here. In most of the colonies, the office probably existed for some time before it was mentioned officially. Maryland was first settled in 1634, but 1658 was the first year in which a printed record referred

20. Keeton, *supra* note 11 at 111.

21. *Id.*

22. Cooley, *supra* note 2 at 307.

23. Oliver W. Hammonds, *The Attorney General in the American Colonies*, ANGLO-AMERICAN LEGAL HISTORY Series V. I, no. 3 (1939).

to an Attorney General. We know something of his duties from a commission by the Lord Proprietor to the Attorney General in 1660, which said that he should act:

> in all Causes as well Criminall as Civill to sue poursue prosecute and Implead and in our name on Suites against vs Comenced to answere as fully and amply as any Attorney Generall may doe.[24]

The Colonial archives reveal that he was engaged in activities ranging from preparing indictments on charges of murder, theft, mutiny, sedition, and piracy, to appearing before the grand jury, and to acting against individuals for disturbing a minister in a divine service. He worked closely with the courts and made recommendations to the Council, even suggesting the creation of new courts and appointing attorneys for the county courts.

The first Attorney General of Massachusetts was appointed in 1680. He had no formal legal training, and apparently was appointed for the particular purpose of prosecuting an alleged witch. The first Attorney General to be vested with broad powers was not appointed until 1686. A Solicitor General was also appointed after 1767, and the Constitution of 1780 recognized both officers. They were appointed by the Governor, with the consent of the Senate. In 1832, the office of Solicitor General was abolished. The offices of District and County Attorney were created in 1817, under the Attorney General. In 1843, however, the office of Attorney General was abolished as an economy measure, and its functions transferred to the local prosecutors. The Attorney General was reestablished in 1849 and made constitutional in 1855.[25] Powers during the Colonial period apparently rested primarily upon the common law, which caused an Attorney General to lament, in 1701, that he "never Could know what was my duty, - What I Should doe. . . . All other officers know their power duty & does by the law, but Relating to the King's Atturney the law is Silent."[26]

New York was settled by the Dutch and did not come under permanent control of the English until 1674. The first subsequent mention of an Attorney General seems to have occurred in 1684, as the result of a royal order to the Governor to appoint an Attorney General. The appointee apparently was not satisfactory; the Governor complained to the Council of Trade and Plantations that the Attorney General had been "bred to a trade," not to "learning of the law" and as a consequence, many of the seizures of ships and lawful goods were lost by the "lameness of the informations he draws up."[27]

The Colonial Attorney General in New York fulfilled a broader function than his English counterpart. For example, he handled land transactions and prepared letters patent for corporations, duties which were performed by a different officer in England. As questions of independence began to arise, authority to appoint the Attorney General was transferred back to England; his salary, however, was still paid by the Colonial legislature.[28]

Some Colonial Governors of New York failed to consult their Attorneys General, particularly in land grants, and insisted that the opinion of the Attorney General could be disregarded.[29] The New York Assembly, in 1727, attempted to curb the Attorney General's authority to institute prosecutions ex-

24. *Id.* at 3-4.

25. Elliott L. Richardson, *The Office of Attorney General: Continuity and Change*, MASS. L. Q. 6-7 (March, 1968).

26. Hammonds, *supra* note 23 at 6-7.

27. *Id.* at 8. *See also* Cooley, *supra* note 2 at 311.

28. Robert H. Gordon, *The Relationship Between the Attorney General and Agency Counsels in New York State*. Unpublished Ph.D. Dissertation. Department of Political Sciences, Syracuse U. (1966).

29. Hammonds, *supra* note 23 at 9. *See* also Cooley, *supra* note 2 at 310.

cept on the order of the Governor and the council. The English Attorney General denounced the action as "High Encroachment" and "Inconsistent with the King's prerogative."[30]

An Attorney General was appointed in 1697 for the whole of Carolina, and subsequent Attorneys General served both until the two states divided in 1710. An Act in the North Carolina Council in 1732 provided for payment of fees to the Attorney General for indictments and informations in the general courts. Other duties can be implied from a table of fees, which included the supervision of "all details of the King's cases from beginning to end."[31] In 1667, the North Carolina Colonial records reveal that the Attorney General of the colony had "all the powers, authority, and trust that the Attorney and Solicitor of England in that Kingdom."[32] Further, he provided opinions when requested by either the Governor, the Council, or the judges of the courts. In turn, the Council gave him instructions concerning prosecutions of individuals as well as public officials. The North Carolina Attorney General seems to have been busy riding circuit. There are, understandably, substantial records of complaints about inadequate compensation and the hardships of traveling the circuits.

Rhode Island was granted a Royal patent in 1644 and six years later the General Court ordered the appointment of an Attorney General who should have full power in the courts "to impleade any transgression of the laws of this State."[33] The office, however, seems not to have been filled after 1696. In 1701, the Attorney General of New York was commissioned Advocate General of Rhode Island. By 1723, however, Rhode Island again had its own Attorney General. A 1740 act directed that there should be a King's attorney for each county and repealed the act providing for the election of an Attorney General. This act, in turn, was repealed in September, 1742, and the colony returned to one Attorney General. With independence, Rhode Island continued under the original charter of 1663 which made no mention of the office of Attorney General. Consequently, the office continued as it had during the Colonial period.[34]

Some of the most specific instructions to come out of the Colonial period are those by the Lord Proprietors to their appointees as Attorney General of South Carolina. In 1708, the duties of an Attorney General were thus specified:

> . . . to Act, Plead, Implead, Sue and Prosecute all and every Person & Persons whatsoever, for all Debts, Fines, Amerciaments, Forfeitures, Escheats Claims and Demands whatsoever which now is or may or Shall be Due and in Arrears to Us upon any Account whatsoever whither Rents, Revenues or otherwise howsoever, And to Prosecute all Matters Criminall as well as Civill Giving and hereby Granting unto You full Power and Authority and the Premises therein to Deal Doe Execute and Performe in as large and Ample manner to all Intents and Purposes as to the Said office of Attorney Generall doth in any way Appertaine & bellong, ...[35]

In addition to these responsibilities, the Attorney General kept the proprietors informed on the general welfare of the colony, the conduct of public officials, and matters relating to disposition of land titles.

In Virginia, the first recorded appointment of an Attorney General was in 1643. The appointments were generally made by the Council and General Court, sometimes with a confirming grant from the King. The later appointments were made by the Governor and Council or simply by the Governor. Generally, the duties of the Attorney General were to prosecute criminal actions, handle bonds and disputed land claims, and to represent the Commonwealth. However, in Virginia, he also seemed to exercise a substantial degree of control and supervision over the collection of public monies. The Attorney General of Virginia occasionally assisted the House of Burgesses in drafting bills and, even though he was not a member, was given a seat in the House. The office carried special privileges; for example, he was exempt from military service, permitted to practice law without the license required of other attorneys, and he and his wife were eighth in social position after the Governor.[36]

These examples, taken primarily from Oliver Hammonds' study of the Attorney General in the American Colonies, show that considerable differences existed in Attorneys General's duties, methods of selection, and relationship to the rest of the government. The office was far from stable, as the Crown or legislatures kept changing it, and often had a far from satisfactory relationship with the Governor.

The Confederate Government

The Attorney General played a prominent role in the Confederate Government. The Confederate States of America's Cabinet consisted of six department heads. The Attorney General headed a Department of Justice, a department that the United States Government did not establish until some years later. The Constitution, a nearly exact transcript of that of the United States, provided for "one Supreme Court." The Confederate Congress, however, never passed legislation to implement this provision. In the absence of a court at this level, the Attorney General's opinions represented the only legal authority entitled to nationwide consideration.[1]

Opinions issued by the Department of Justice covered subjects which, as Judge Harold Sebring writes:

> ranged from commonplace discussions of such mundane subjects as the dutiability of lemons, oranges and walnuts, and the responsibility of the central government to its officers and employees for moneys expended in removing their household furniture from Montgomery to Richmond when the seat of government was moved, to erudite dissertations of weighty constitutional questions involving the fundamental power of the new nation attempting to erect a permanent government and at the same time maintain an army in the field capable of waging a successful war.[2]

Attorneys General apparently did not want this unusual degree of power; they did, however, render opinions declaring some state laws unconstitutional. They declined to pass upon the constitutionality of national acts. They would advise the President as to the constitutionality of acts before he signed them. Once he had signed, the Attorney General, as a member of his Cabinet, would not counter his decision. The Attorneys General thus attempted to reconcile the conflict inherent in their executive and judicial roles. It should be noted that there was a rapid turnover in the office, with four Attorneys General in five years.

1.13 Development in State Governments

An overwhelming majority of states, thirty-four of the fifty, either created or continued the office of Attorney General with the first state constitution. Eight other states established the office

30. Cooley, *supra* note 2 at 311.
31. Hammonds, *supra* note 23 at 11.
32. N. C. COLONIAL RECORDS, Vol. 7, 1765-1768, at 486.
33. The full charge can be found in Hammonds, *supra* note 23 at 15.
34. Hammonds, *supra* note 23 at 17.
35. *Id.* at 18.
36. *Id.* at 20-21.

1. William M. Robinson, Jr., *Justice in Grey: A History of the Judicial System of the C.S.A.* (1941).
2. Foreword, in Rembert W. Patrick, ed., *Opinions of the Confederate Attorneys General 1861-5* (1950).

by law at the time of statehood. Though it would be inconceivable that a state could operate without an Attorney General today, several states did so during some period of time following their admission to the Union. Eight states did not have Attorneys General at the time they became states. Much of the following information on the history of the office is derived from a study of Attorneys General's publications printed in 1937.[1]

Some states initially divided the functions among several officers. Arkansas' first constitution provided for Attorneys General in each judicial district. The office was unified in 1843 by legislative act and made constitutional in 1912. In Georgia, a judicial act passed pursuant to the first state constitution placed the law officer functions in the hands of two Attorneys General and one Solicitor General. Later, legal business was conducted by two Solicitors General and one Attorney General. It was not until the Constitution of 1868 that the single office of Attorney General, as it had existed in Colonial days, was recreated.

Iowa statutes created the office in 1853, seven years after statehood. It became a constitutional office in 1857. In Oregon, the office was not created until 1889, twenty years after statehood, and was then established by law. Ohio's legislature created the office in 1846, forty-three years after statehood. The office was made constitutional in 1851. Tennessee first provided for an Attorney General in its statutes of 1831, thirty-five years after statehood. The office gained constitutional status in 1834.

Connecticut did not authorize the office until 1897; it still has no criminal powers. Vermont joined the Union in 1791. Its Constitution of 1793 mentioned the office of Attorney General but actual creation of a functioning office awaited legislative action of 1904, an interval of one hundred and thirteen years without an Attorney General.

When the office was once established in a state it was not always permanent. Nebraska's second constitutional convention, meeting only nine years after statehood, had "violent opposition to the continuance of the Office of Attorney General."[2] Although that opposition was defeated, the Attorney General was denied authority to employ assistants. There are indications that the office was discontinued in a few states, to be reestablished at a later time. Indiana statutes provided for the office in 1821, five years after statehood, but the office was soon abolished. There was no Attorney General from 1826 to 1855 when the office was recreated. The Maryland Attorney General's office was made constitutional in 1777, abolished by the Constitution of 1851, then reestablished by the Constitution of 1864. Justice Craig's dissent in *Fergus v. Russel*[3] indicates that Illinois did not have an Attorney General between 1848 and 1867.

Biographical information pertaining to Sion Rogers, Attorney General of North Carolina from 1862-1865, indicates that he was deposed by federal authorities after the Civil War.[4] No one served as Attorney General from 1865 until after a new constitution was adopted in 1868. Though such historical information is not now available on all states, it could be reasonably assumed that the North Carolina experience was repeated even if temporarily in other states of the Confederacy.

Specific developments in the office are discussed throughout the Report.

1. Lewis Morse, *Historical Outline and Bibliography of Attorneys General Reports and Opinions*, 30 LAW LIBRARY J. 39-247 (1937).

2. *Id.* at 145.

3. *Fergus v. Russel*, 270 ILL. 304, 110 N.E. 130 (1915).

4. Samuel Ashe, 8 BIBLIOGRAPHICAL HISTORY OF NORTH CAROLINA 438 (1917).

These include a general tendency to transfer some of its common law powers to local prosecutors, and, in many states, to diffuse responsibility for state legal services. On the other hand, most offices have grown from their original size, that of a single officer, to large agencies and have acquired many more powers and duties. The pragmatic nature of state governments indicates that the office will continue to change as new conditions arise.

1.14 Development in U.S. Government

The United States government, unlike that of the states, was not the natural successor of another government. The office of Attorney General was created solely by statute[1] and has no common law authority. The Constitution (Art. 2, Sec. 2), requires that he give the President his opinion in writing upon any subject relating to the duties of his department, but does not otherwise define his responsibilities.

According to Oliver Hammonds' study of the Attorney General in American Colonies, a committee recommended to the Continental Congress in 1781 that a United States Attorney General be appointed "to prosecute all suits in behalf of the United States. To give his advice on all such matters as shall be referred to him by Congrefs."[2] The report, however, was not adopted. Senate Bill 1 of the First United States Congress provided that the Supreme Court should appoint an Attorney General; the bill was passed, but with the important change that appointment was to be by the President. This law, the Judiciary Act of 1787, also provided for Presidential appointment of district attorneys. It was not until 1861 that the Attorney General was given power over these officers and power to appear in inferior courts.

The Constitution mentioned "heads of departments" and the departments of State, War and Treasury were created in 1789. The Attorney General, although one of the first offices created, did not head a department until 1870. He was required to be "a meet person, learned in the law." The Cabinet evolved through custom with the Attorney General as a member, along with the three secretaries and the Vice President. One study of the Cabinet said that the Attorney General was soon considered a member of the group, "though not in pursuance of any policy other than convenience and expediency." Developing legal problems, plus personal friendship, combined to foster this role.[3] Although all Attorneys General served as Cabinet members, it was not until 1853 that his salary was made the same as other secretaries.[4]

The Attorney General's duties have evolved over almost two centuries, from a single official to head of a major federal department with a myriad of responsibilities. He is required to: supervise and direct the administration and operation of the Department of Justice, including the offices of United States Attorneys and Marshals; represent the United States in legal matters generally; furnish advice and opinions, formal and informal, on legal matters to the President and the Cabinet and to the heads of the executive departments and agencies of the government, and other duties.[5]

In many respects, his role is unlike that of a state Attorney General. He is exclusively a member of the executive branch, while his counterparts at the state level may have strong ties to the

1. Judiciary Act of September 24, 1789, Stat. 93.

2. Oliver Hammonds, *Attorney General in American Colonies*, ANGLO-AMERICAN LEGAL HISTORY SERIES, 22 (1939).

3. Richard F. Fenno, THE PRESIDENT'S CABINET, 17 (1959).

4. *Id.* at 20.

5. 28 C.F.R., Sec. 0.5-0.11.

judicial and legislative branches. He has control over United States Attorneys, while the state Attorney General may have none over district attorneys. His jurisdiction over attorneys is not complete, as other departments and agencies employ permanent counsel.

The 1969 *Annual Report* of the Department of Justice listed three priorities: the protection of society from street criminals and organized criminals; the protection of minority rights, and the protection of free competition.[6] These priorities show the ability of this office to adapt to contemporary needs, and the viability of its development.

1.15 Development in Other Countries

Comparison of the powers and duties of Attorneys General in American states to those of other governments gives perspective to an analysis of the American system. While legal systems differ, they all involve certain components, and all have an Attorney General or equivalent officers.

The office of Attorney General in England has evolved from the same historical background as our state Attorneys General. In some areas of responsibility this development has followed a common course, and in others it has led to very different results. Professor J. Ll. J. Edwards of the University of Toronto points out one basic difference between the English system and that of most other countries:

> It is still questionable whether society appreciates the importance of this country's firm adherence to a system in which the enforcement of law and order remains in the hands of the ordinary citizen, acting either in his own capacity or through the medium of the local Watch Committee or Standing Joint Committee of which he is a member. Few people recognize that the police when instituting criminal prosecutions possess no special duties, powers, or immunities in the exercise of this function.[1]

The office of the Director of Public Prosecutions was established by Parliament in 1879 and placed under the Attorney General. The Director has almost absolute power to intervene in prosecutions as he sees fit, and the Attorney General has the right to enter a *nolle prosequi* at his discretion. Because of the basic attitudes toward prosecutions, however, these powers are used with restraint.

The Attorney General normally represents the government in cases before the International Court of Justice. He prosecutes criminal cases of outstanding importance, and serious cases involving official secrets or treasonable acts. He usually prosecutes in cases involving constitutional considerations or major matters of public policy. Sir Elwyn Jones, Attorney General of England, writes that: "The very rarity of the appearance of a law officer in criminal prosecutions might make his appearance in any given case seem oppressive to the defendant."[2] The Attorney General nominates private counsel to conduct prosecutions brought by the Director of Public Prosecutions and may consult with them about cases.

Sir Elwyn Jones points out that the Attorney General's primary duties are ministerial:

> Now the outstanding function and the main duty of the Attorney General is to be the legal adviser of the Government as a whole, and of the various government departments. . . . The routine legal problems of a government department are dealt with by the department's own legal staff. The advice of the law officers is normally sought where some problem arises which is of special difficulty or importance, either because of the complexity of the legal problems in question . . . or because of the political, international or financial importance of the decision which turns upon the advice.[3]

6. 1969 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITES STATES, 1.

1. J. Ll. J. Edwards, THE LAW OFFICERS OF THE CROWN, 336 (1964).

2. Sir Elwyn Jones, *The Office of Attorney-General*, 27 CAMB. L. J. 48 (1969).

The Attorney General is not a member of the Cabinet, although he has been so at times in the past. As G. W. Keeton notes, "It has always been considered constitutionally inconvenient for the principal legal adviser of the Government to advise the Cabinet as a colleague rather than purely and simply as legal adviser."[4] The rationale for exclusion is that he should render impartial advice and not be involved in the making of policy. The Attorney General's advice, unlike that of his American counterparts, is always confidential.

The Attorney General's numerous other functions include serving as the titular head of the Bar of England and Wales. He is the protector of charities, acting for the Crown's interest as *parens patriae*. He advises on the granting of charters. Professor Edwards distinguishes between two distinct functions of the Attorney General:

> First, there is the Attorney-General's position as the Crown's principal agent for enforcing public legal *rights* . . . Generally referred to as realtor actions, proceedings are brought in the name of the Attorney-General with the object, for example, of obtaining a declaration or an injunction (1) in cases of public nuisance, (2) with a view to restraining a corporation from exceeding the legal powers conferred upon it by statute . . . or (3) to prevent the repeated commission of a statutory offense by any person . . . Quite distinct is the modern participation by successful holders of the office of Attorney-General who have deemed it their duty . . . to represent the public *interest* before public tribunals.[5]

The development of departments of justice on the Continent and elsewhere does not have the same relevance to the American system as does the development of the English Attorney General. All nations, however, have some prosecutional system, and some brief description of other systems gives perspective to a review of the Anglo-American pattern.

In France, the Minister of Justice heads the *ministere public*, a body of officials attached to the courts. Like their British counterparts, they evolved from attorneys attached to the Crown. Under the Minister of Justice is a *Procureur General*, who heads officials attached to the highest courts. Also under the Minister are the *procureur generals* in each of the twenty-seven intermediate courts. Each of these officials has his own staff, and also supervises the *ministere public* for the court of original jurisdiction. One study of the French system describes their relationship to the courts, which is very close:

> Since the work of the members of the *ministere public* is so closely connected with that of the courts, they and the judges are often given a common designation, that of *magistrats*. Many (but not all) rules concerning appointment, promotion, discipline, and professional responsibility are the same for all *magistrats*. Both groups of public servants are considered equal, so that the judges have no power to discipline or control the members of the *ministere public*.[6]

The *ministere public* handles both civil and criminal matters.

Brian Grosman's study of the prosecutor's function notes similarities between the French *procureur* at the court of primary jurisdiction and the American local prosecutor: "Both act not only to control the conduct of the trial as professional prosecutors, but also to initiate prosecutions and to supervise police investigation." Their career patterns, however, differ: "the one is a public official in a rigidly structured civil service hierarchy, the other acts as an elected political figure

3. *Id.* at 46.

4. George W. Keeton, *The Office of Attorney General*, 58 JURID. REV. 221 (1946).

5. Edwards, *supra* note 1 at 286.

6. Peter Herzog and Martha Weser, CIVIL PROCEDURE IN FRANCE, 121 (1967).

with wide discretion and freedom of action."[7]

Italy has a state agency called the *Avvocatura dello Stato* which represents the state in court and gives it legal advice. Provincial and local administrations, as well as state offices, may use the services of the *Avvocatura dello Stato*. The state may also retain private practitioners, but seldom does so. One authority says that "The professional state's attorney is an able career civil servant whose legal status and independence approach those of a judge."[8] Italy also has a *pubblico ministero* whose chief function is to serve as prosecutor in criminal cases.

Sweden has an Attorney General and a Chief Crown Prosecutor. The Attorney General (*justitiehanslern*) is head of an administrative office which is loosely attached to the Ministry of Justice. His main duty is to represent the state in civil cases which affect the rights of the Crown and to supervise the administration of justice, which may involve prosecutions for offenses committed by judges and officials. He also advises the cabinet on legal matters; in 1961, he received two hundred and sixteen such requests. Enforcement of the penal code is the responsibility of the Chief Crown Prosecutor, who also supervises local prosecutors.[9]

The Soviet Union has a centralized system of prosecutors, headed by a Prosecutor General. He is in charge of all subordinate prosecutors, and handles both civil and criminal cases. He performs an unusual function in that he "conducts supreme audit over the precise execution of laws by all ministries, the officers subordinate to them, enterprises and officials and also by citizens of the U.S.S.R."[10]

7. Brian A. Grosman, THE PROSECUTOR, 16 (1969).
8. Mauro Cappelletti and Joseph Perillo, CIVIL PROCEDURE IN ITALY, 65 (1965).
9. Ruth Ginsburg and Anders Bruzelius, CIVIL PROCEDURE IN SWEDEN, 67-70 (1965).
10. John Hazard and Isaac Shapiro, THE SOVIET LEGAL SYSTEM, 49 (1962).

1.2 Status in State Government

The office of Attorney General must be viewed in the context of the government of which it is a part. Its powers, duties and operations will be influenced by whether the office is constitutional or statutory, and by the relationship to the executive, legislative and judicial branches.

1.21 Constitutional or Statutory Basis

The office of Attorney General is constitutional in forty-four states and in Puerto Rico. It is based only on statute in six states (Alaska, Connecticut, Hawaii, Indiana, Oregon, and Wyoming) and three territories (Guam, Samoa and the Virgin Islands). While the Attorney General is named in Connecticut's Constitution, he is mentioned only in connection with election returns, so the office is not generally considered constitutional in that state.[1] Table 1.21 shows the primary constitutional or statutory basis for the office in each jurisdiction.

There is disagreement as to whether the office should be constitutional and, if so, what provisions should be contained in the constitution. Former Attorney General Eugene Cook of Georgia expressed one point of view:

> If you are not a constitutional officer, I hasten to suggest that you proceed at once to protect yourself by having your people amend their constitution by placing the Attorney General's office in the basic law and therein define your general powers and duties . . . I ignored the statutory requirement as to the legislature and relied upon the general authority vested in me in the constitution and implementing statutes giving me exclusive jurisdiction in legal matters relating to the Executive Department. It was not an easy decision to make. Fortunately, impeachment charges were not brought against me by the legislature and no effective effort was made to repeal my statutory authority relating to the Executive Department. This was due almost entirely to the fact that I was an elective constitutional officer with general powers, well defined in the constitution itself, . . .[2]

Most experts on the state constitution, however, urge that the basic documents display brevity. Professor David Fellman, for example, wrote that:

> Certainly, the first requisite of a good constitution is brevity. It is a very great mistake for the authors of a constitution to attempt to say too much. A constitution is no place for legal codes or the appeasement of temporary interests. It should do no more than set down fundamental and enduring first principles. It must describe the basic framework of government, assign the institutions their powers, spell out the fundamental rights of man, and make provision for peaceful change. But it should do all of these things in general rather than in overly detailed language, and should attempt no more.[3]

Professor Paul G. Kauper comments that:

> The state constitution is by definition the state's fundamental law. It is judicially enforceable as the supreme law of the state, subject of course, to federal limitations, and takes precedence over ordinary laws and administrative acts. The purpose of a constitution as historically conceived is to establish the basic order of government. The constitution loses much of its distinctive significance as the basic and enduring instrument of government when the process

1. CONNECTICUT CONSTITUTION, Art. 4, Sec. 4: ". . . In the election of governor, lieutenant governor, secretary, treasurer, comptroller and attorney general, the person found upon the count by the treasurer, secretary and comptroller in the manner herein provided, to be made and announced before December fifteenth of the year of the election, to have received the greatest number of votes for each of such offices, respectively, shall be elected thereto . . ."
2. National Association of Attorneys General, 1953 PROCEEDINGS, 108-9.
3. David Fellman, *What Should a State Constitution Contain?*, in W. B. Graves (ed.). STATE CONSTITUTIONAL REVISION, 156 (1960).
4. Paul Kauper, THE STATE CONSTITUTION, ITS NATURE AND PURPOSE (1961).

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Alabama.....Constitution—Article V Sec. 112 (1901)
Alaska.....Statute—AS 44.23.010 et. seq.
Arizona.....Constitution—Article V Sec. 1 (1912)
Arkansas.....Constitution—Amendment 37, Sec. 1 (1874) Article VI Sec. 1 (1874)
California.....Constitution—Article V, Sec. 17 (1879)

Colorado.....Constitution—Article IV Sec 1 (1876)
Connecticut.....Statute—Sec. 3-124 (1897)
Delaware.....Constitution—Article III Sec. 21 (1897)
Florida.....Constitution—Const. Article IV Sec. 4 (1968)
Georgia.....Constitution—Const. Article V Sec. 11 Article VI Sec. X (1945)

Guam.....Statute—Title VIII, Gov. Code of Guam
Hawaii.....Statute—Sec. 26-7 H.R.S.
Idaho.....Constitution—Article IV Sec. 1 (1890)
Illinois.....Constitution—Article V Sec. 1 (1870)
Indiana.....Statute—49-1920 B.I.S. 1951 Acts 1941, Ch. 109, Sec. 2, p. 272; Burns 49-1920

Iowa.....Constitution—Article V Sec. 12 (1857)
Kansas.....Constitution—Article I Sec. 1 (1861)
Kentucky.....Constitution—Sec. 91 (1891)
Louisiana.....Constitution—Article VII Sec. 55 (1921)
Maine.....Constitution—Article IX Sec. 11 (1820)

Maryland.....Constitution—Article V Sec. 1 (1867)
Massachusetts.....Constitution—Pt. II, Ch. II, Sec. I, Art. IV (1780); Mass. G.L.L. 12
Michigan.....Constitution—Article V Sec. 21 (1963)
Minnesota.....Constitution—Article V Sec. 1 (1857)
Mississippi.....Constitution—Article 6 Sec. 173 (1890); Ch. 1, Title 17, Miss. Code of 1942

Missouri.....Constitution—Article IV Sec. 12 (1945)
Montana.....Constitution—Article VII Sec. 1 (1899)
Nebraska.....Constitution—Article IV Sec. 1 (1875)
Nevada.....Constitution—Article 5 Sec. 19 (1864)
New Hampshire.....Constitution—Article 46 (1784)

New Jersey.....Constitution—Article V Sec. IV para. 3 (1947); N.J.S.A. 52: 17A-2
New Mexico.....Constitution—Article V Sec. 1 (1912)
New York.....Constitution—Article V Sec. 1 (1895)
North Carolina.....Constitution—Article III Sec. 1 (1868)
North Dakota.....Constitution—Article III Sec. 82 (1889)

Ohio.....Constitution—Article III Sec. 1 (1851)
Oklahoma.....Constitution—Article VI Sec. 1 (1907)
Oregon.....Statute—ORS 180.010
Pennsylvania.....Constitution—Article IV Sec 1 (1874); Stat. -71 P.S. 811 (1857)
Puerto Rico.....Constitution—Article IV Sec. 6 (1952)

Rhode Island.....Constitution—Article VII Sec. 12 (1843)
Samoa.....Statute
South Carolina.....Constitution—Article V Sec. 28 (1895)
South Dakota.....Constitution—Article IV - 12 (1889)
Tennessee.....Constitution—Article VI Sec. 5 (1870)

Texas.....Constitution—Article IV Sec. 1 (1876)
Utah.....Constitution—Article 7 Sec. 1 (1896)
Vermont.....Statute—Title III, Ch. 7, Sec. 151 (1793)
Virgin Islands.....Statute—P. L. 86-289 73 Stat. 569; V.I. Act No. 855, 1962
Virginia.....Constitution—Article VI Sec. 107 (1902)

Washington.....Constitution—Article III Sec. 1 (1889)
West Virginia.....Constitution—Article VII Sec. 1 (1872)
Wisconsin.....Constitution—Article VI Sec. 1 (1848)
Wyoming.....Statute—9-121, W.S. (1957)
United States.....Statute—Judiciary Act of 1789, 1 Stat. 73

of constitutional amendment or revision is used as a substitute for legislation.[4]

Over one third of the states have recently undertaken the process of constitutional revision,[5] and this process has been aimed at streamlining these documents. Conventions have been held (or were started) during the past decade in twelve states. Connecticut, Michigan, Hawaii, and Pennsylvania have been able to secure essentially new constitutions as a result. Rhode Island, New York, Maryland, and New Mexico were unsuccessful in their attempts to gain ratification of new documents. Florida voters accepted a 1968 constitution which represented the culmination of a joint effort of a revision.

Whether successful or not, almost all these efforts have been directed toward a reduction in the size of the state constitution. Maryland's proposed constitution contained about 14,000 words, compared to an existing 40,000. New York's rejected document was under 23,000 words in length compared to the 60,000 words in its current constitution.

There is a clear trend toward shorter constitutions. Constitutions were not noticeably lengthy until the mid-19th Century. Eleven states have constitutions which were written prior to the Civil War. The average length of these documents is 11,368 words. Thirteen state constitutions in effect in the 1960's were written between 1860 and 1890. Their average length is 24,727 words. Thirteen constitutions written between 1890 and 1920 average 30,608 words. Two constitutions written during World War II years contain 30,000 and 40,000 words respectively. The five documents written and adopted after the Second World War, not including the recent Pennsylvania, Florida and Hawaii charters, contain an average of 13,020 words. The longest of these is Michigan with 19,203 words.[6]

The office of Attorney General is affected by this trend toward shorter constitutions. There is still no unanimity of thought, however, as to what provisions relating to the office should be incorporated into the constitution. The answers to this question must be sought within the context of each state's political and administrative system, with consideration accorded other states' experience and the recommendations of authorities.

The Model State Constitution of the National Municipal League does not mention the Attorney General. It does say that the Governor "shall commission all officers of the state," and "may at any time require information, in writing or otherwise, from the officers of any administrative department, office or agency upon any subject relating to their respective offices." It also says that "There shall be such administrative departments, not to exceed twenty in number, as may be established by law, with such powers and duties as may be prescribed by law . . . The heads of all administrative departments shall be appointed by and may be removed by the Governor."[7]

Provisions of present state constitutions relating to the office of Attorney General are categorized under twenty-four headings on the attached chart. A designation of a category does not indicate the extent of its discussion in the state constitution. Therefore the fact that twelve items might be indicated for one state and six for another is only a very rough means of estimating that the former gives twice the

5. This information was made available by Attorney General Arthur K. Bolton of Georgia, Chairman of the N.A.A.G. Committee on Constitutions. General Bolton conducted a survey of all the Attorneys General.

6. The Council of State Governments, THE BOOK OF THE STATES 10 (1966-7).

7. National Municipal League, MODEL STATE CONSTITUTION (6th ed.).

treatment to the office as the latter. Aside from actual counting of words, however, this is the only available measure.

1.212 CONSTITUTIONAL PROVISIONS RELATING TO THE OFFICE OF ATTORNEY GENERAL

Method of Selection
Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands,* Virginia, Washington, West Virginia, Wisconsin.

Term of Office
Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin.

Limits on Succession
Alabama, Kentucky, New Mexico.

Beginning Date of Term
Alabama, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Montana, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, Utah, Virginia, Washington.

Holds Office Until Successor is Qualified
Alabama, Arkansas, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Montana, Nebraska, North Dakota, Ohio, Rhode Island, South Carolina, Texas, Washington.

In Line of Succession to Governorship
Alabama, Arizona, California, Delaware, Kentucky, Massachusetts, Michigan, Washington

Removal from Office
Arizona, Arkansas, California, Florida, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, North Dakota, Tennessee, Virgin Islands,* Virginia, Washington, West Virginia.

Filling Vacancies
Alabama, Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oregon, Rhode Island, Utah, Vermont, West Virginia.

Duties (C: Some listed in Constitution, L: prescribed by Law, CL: Constitution lists some duties, says others will be prescribed by Law.)
Alabama (L), Arkansas (L), California (C), Colorado (L), Delaware (C), Georgia (L), Illinois (C), Indiana (C), Iowa (C), Kansas (C), Kentucky (CL), Louisiana (C), Maryland (C), Massachusetts (C), Minnesota (C), Montana (CL), Nebraska (L), Nevada (C), New Mexico (C), New York (C), North Carolina (CL), North Dakota (L), Oklahoma (C), Puerto Rico (C), Rhode Island (L), South Carolina (CL), South Dakota (L), Texas (C), Utah (CL), Vermont (C), Virgin Islands* (C), Washington (CL), West Virginia (L), Wisconsin (L).

Salary Set by Constitution (L: unless changed by Law.)
Arizona (L), Arkansas (L), California (L), Idaho (L), Montana (L), Nevada (L), Oklahoma (L), Puerto Rico.

Salary Set by Law
Colorado, Georgia, Illinois, Michigan, Mississippi, Missouri, Nebraska, North Carolina, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin.

Salary Cannot be Altered (L: Cannot be lowered.)
Arkansas (L), Colorado (L), Idaho (L), Illinois (L), Kansas, North Carolina, South Carolina, West Virginia.

May Receive no Fees
Alabama, Arkansas, Georgia, Kentucky, Missouri, Nebraska, North Carolina, Utah, Vermont, West Virginia.

Serves on specific Boards
Alabama, Colorado, Idaho, Kansas, Louisiana, Minnesota, Mississippi, Montana, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Dakota, Texas, Wisconsin.

Oath of Office
Maryland, Rhode Island.

Office and/or records at State Capital
Arizona, Arkansas, Colorado, Idaho, Illinois, Kansas, Michigan, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington.

May not Engage in Private Practice
California.

May not Hold Other Offices
Arkansas, Delaware, Florida, Illinois, Maine, Massachusetts, Montana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, Tennessee, Texas, West Virginia.

Resident of State for Minimum Time
Alabama, Arizona, Colorado, Georgia.

U. S. Citizenship
Alabama, Arizona, Colorado, Georgia, Montana, New Mexico, New York, Oklahoma.

State Citizenship
Arizona, Kentucky, Maryland, Mississippi, West Virginia.

Must be an Attorney
Colorado, Florida, Kentucky, Louisiana, Maryland, Mississippi, Montana, New Mexico, Utah.

Minimum Age
Alabama, Arizona, Colorado, Georgia, Kentucky.

Other Qualifications
Maryland, Mississippi, Virgin Islands,* West Virginia.

*References to the Virgin Islands pertain to the ORGANIC ACT.

The median jurisdiction mentions the office of Attorney General in the context of seven different subjects in its constitution. Montana showed fourteen categories, while Alabama, Colorado and West Virginia each had thirteen categories. Six jurisdictions, mentioned above, did not cite the office in their constitutions. The office is mentioned in reference to only one topic in New Jersey, and two in New Hampshire and Pennsylvania; Puerto Rico mentions the office in reference to only three of the twenty-four categories. The seven most recent constitutions average fewer than four items referring to the office of Attorney General. However, some very old constitutions also make few references to the office. The nine jurisdictions which appoint the Attorney General mention the office in reference to an average of under three items each in their constitutions.

The item most frequently included in the constitutions is the method of selection, which is specified by forty-three. The length of term is included in forty documents, some duties of the office in thirty-four, and the means of filling vacancies in twenty-three constitutions. Twenty-two constitutions fix the beginning date of the term in office. Specific qualifications for office are not frequently recorded in the charters. The most prevalent qualifications mentioned are minimum age in thirteen jurisdictions and state residency in twelve jurisdictions. Fifteen constitutions prohibit the Attorney General from holding other offices.

1.22 The Attorney General's Relationship to State Government

The Attorney General holds a peculiar position in state government. Professors Henry Abraham and Robert Benedetti call the Attorney General "the quasi-judicial officer in the administration whose job it is to bridge the gap between law and state practice" and point out that:

> The attorney general does not fit neatly within the framework described by the doctrine of separation of powers, since he exercises both executive and judicial functions. As an executive he gives legal advice to the governor and to the rest of the administration; he conducts investigations into state practices; and in many states he has some role in the administrating of justice at the local level.[1]

Another student of the office, Professor Arlen Christenson, concurs that the Attorney General "occupies a unique position. A part of neither the executive nor the legislative branch, he is legal adviser to both."[2]

A number of courts have commented on the Attorney General's relationship to the branches of state government. The Supreme Court of Florida, for example, said that, while the office of Attorney General is "in many respects judicial in its character", he is "intimately associated with the other departments of the Government, being as well the proper legal adviser of the Executive as the Legislative department."[3]

1.23 Relationship to the Executive

The Attorney General is generally considered primarily an executive officer. Many constitutions so classify him. Utah's Constitutions, for example, says that "the Executive Department shall consist of a Governor . . . [and] Attorney General."[1] In addition to advising state officers and agencies, he may exercise various executive junctions, such as approving contracts and bond issues. He may serve on various boards or commissions that direct administrative programs. In several jurisdictions, he is appointed by the Governor and

1. Henry J. Abraham and Robert R. Benedetti, *The State Attorney General, A Friend of the Court?* 117 U. of Pa. 6 REV. 797 (April, 1969).
2. Arlen C. Christenson, *The State Attorney General*, WISC. L. REV. 300 (1970).
3. *State ex rel. Landis v. S. H. Kress Co.* 115 Fla. 189, 155 So. 823 (1934).
1. UTAH CONST. art. 7, § 1.

may be removed by him.

Information reported by Attorneys General's offices to C.O.A.G. showed that twenty-six jurisdictions have a Governor's cabinet or similar body, while twenty-five do not. Of the twenty-six that do have a cabinet, only sixteen include the Attorney General as a member. These are: Alaska, Connecticut, Florida, Guam, Hawaii, Kansas, Kentucky, Maryland, Michigan, Minnesota, Montana, New Jersey, North Carolina, Puerto Rico, Utah, and the Virgin Islands. Connecticut and Hawaii specify that he is a member by invitation, not statute. New York reports that the Attorney General attends cabinet meetings, although he is not a member. This C.O.A.G. data corresponds generally to a Council of State Governments survey which found that twenty-four jurisdictions have a cabinet, and the Attorney General is a member in seventeen of these.[2]

C.O.A.G. surveys indicate that Attorneys General view themselves as executive officers. Of thirty-eight incumbent Attorneys General, twenty-three said that their most important function was representing the agencies of state government, five that it was serving as the people's attorney, and ten gave other replies or said the question could not be answered. None indicated that serving as an officer of the court was most important. Of former Attorneys General, forty-six said that their most important function was representing state agencies, eighteen that it was serving as the people's attorney, and six that it was serving as an officer of the court. Another indication of identification with the executive branch was shown in replies to a question asking who should appoint a new Attorney General when the office becomes vacant. Of thirty-six Attorneys General, thirty said the Governor, one the legislature, one the Supreme Court, and four gave other responses. Similarly, 79 percent of former Attorneys General thought the Governor should fill vacancies in the office.[3]

1.24 Relationship to the Judiciary

Authorities generally agree that the Attorney General is an executive and not a judicial officer, although the rendering of advisory opinions is "quasi-judicial" in nature. Attorneys General themselves apparently regard the judiciary as a separate branch of government. As is discussed in Section 4 of this Report, few Attorneys General will render opinions on matters before a court, or allegations of error committed in court. A C.O.A.G. survey of incumbent Attorneys General found that, of thirty-eight responding, none thought opinions should be given on matters pending before a court and only thirteen thought that opinions should be given to judges.

It should be noted that the Attorney General of Tennessee bears a unique relationship to the judiciary. He is titled the "Attorney General and Reporter for the State" and is selected by the Judges of the Supreme Court.[1] He is required by law to give legal advice to the Governor and other state officials, but has never sat with the cabinet. His salary is defined by law as being the same as that of an Associate Justice of the Supreme Court, and his office is in the Supreme Court Building. He is a member of the Judicial Council. No other Attorney General has such close ties to the courts, although he is not the only one who serves as court reporter.

Section 1.6 discusses the Attorney General's relationship to the legal profession and notes that he plays a role in bar discipline in some states, and that

2. The Council of State Governments, CABINETS IN STATE GOVERNMENT, RM-436 (October, 1969).
3. Committee on the Office of Attorney General, FORMER ATTORNEYS GENERAL ANALYZE THE OFFICE, 5 (1970).
1. TENN. CONST. art. VI, § 5.

this role has been upheld by the courts. It has also been held that a state court can discipline the Attorney General for misconduct as an attorney, notwithstanding the doctrine of separation of powers and the fact that he is an executive officer.[2]

The Attorney General may have specific statutory responsibilities regarding the judiciary. In California, for example, the Constitution provides that the Governor shall appoint persons to fill vacancies in the higher judicial offices. Such appointments, however, are not effective unless confirmed by the Commission on Judicial Appointments, which consists of the Attorney General, the Chief Justice of the Supreme Court, and other specified judicial officers.[3] He is also a member of the Committee of Official Reporter of Courts, which contracts for publication of judicial opinions.[4] Such duties recognize that, although the Attorney General is an executive officer, he has a special relationship to the courts.

The Attorney General's "quasi-judicial" status in rendering opinions is supported by the fact that justices of some states highest courts give advisory opinions on questions of law submitted by the legislature or chief executive. A 1956 study reported that seven states give such authority by constitution, two by statute, and that justices in one state render such opinions without specific authorization.[5]

In all but one of the states, such opinions are rendered by the justice, not by the court, so this function is characterized as "extra-judicial". To further complicate definitions of relationships between branches, the study noted that:

Some state courts have held statutes providing for advisory opinions unconstitutional on the ground that giving such opinions violates the principle of separation of powers by facilitating abdication by the legislature of its duty to make a judgment on the constitutionality of a pending statute independent of that made by the justices.[6]

1.25 Relationship to the Legislature

The Attorney General's relationship to the legislature consists primarily of rendering advice when requested. As discussed in Section 6.1 of this Report, most legislatures now have their own staffs, and the Attorney General's bill-drafting activities are largely confined to those involved in his role as counsel for state agencies. Chapter 4 of this Report concerns advisory opinions and notes that nearly all Attorneys General give opinions to legislatures and will render opinions to individual legislators. Most will render opinions on the constitutionality of legislative bills.

A few states give the Attorney General additional roles in relation to the legislature. The Attorney General of Colorado is the only non-legislative member of a Committee on Legal Services which supervises and directs the operation of the Legislative Drafting Office and the Revisor of Statutes.[1] The Attorney General of Louisiana is a member of the Law Institute, which is the official advisory law revision commission, law reform agency, and legal research agency.[2] The statutes also specify that he may be called on by the legislative council to assist it in programs of law reform[3] and shall give aid and advice in the arrangement of legislative acts and documents when required by the legislature.[4] Such specific statutory duties are uncommon, however.

2. *See* Note, *Court may Discipline State Attorney General for Professional Misconduct*, 73 HARV. L. REV. 779 (1960).
3. CAL. CONST. art. VI, § 7.
4. CAL. GOV'T CODE, § 68903.
5. Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV., 1302 (1956).
6. *Id.* at 1305.
1. COLO. REV. STAT. ANN. art. 3, § 63-3-2 (1963).
2. LA. REV. STAT. 24:201.
3. LA. REV. STAT. 24:405.
4. LA. REV. STAT. 49:253.

Section 1.3 of this Report discusses the Attorney General's common law powers and notes that courts generally have conceded the legislature's authority to change these. In some jurisdictions, the Attorney General is strictly a statutory office and his authority determined wholly by the legislature.

1.3 Common Law Powers

Attorneys General derive their powers from constitutional, statutory and common law.[1] There is no clear division between the three sources of authority, for each supplements the others. Many statutes, for example, are merely declaratory of the common law. Common law powers are the most difficult to establish; even if their existence is recognized by statute, their definition rests with the courts. No court has ever attempted a complete listing of the Attorney General's powers at common law.

This chapter examines particular powers that courts have attributed to the Attorney General under common law. It also describes the status of the Attorney General's common law powers in the fifty-four jurisdictions. The common law is different in each state, as it depends on definition by that state's courts; however, such definitions usually cite case law of other jurisdictions, so are interrelated. Cases are identified in the text by name and by jurisdiction only. A list of cases, by jurisdiction, appears at the end of this chapter and gives citations.

1.31 Introduction

The preceding chapter of this Report, on development of the office of Attorney General shows that it was an outgrowth of the Colonial Attorney General. Legal historians agree that:

> . . . little attempt was made to define or enumerate duties, for the American Attorney General became possessed of the common law powers of the English Attorney General, except as changed by constitution or statute. . . . The English office was assuming its modern form as the American colonies were being settled. By the seventeenth century the powers exercised by the Attorney General at common law were quite numerous.[2]

Common law powers are a matter of much more than historical interest. Courts have upheld the Attorney General's common law powers, without specific statutory authority: to intervene in a rate case as representative of the public; to proceed to enjoin a nuisance in the form of stream pollution; to appear before a grand jury; to *nolle prosequi* a criminal case; and otherwise to act effectively as the state's chief law officer. These examples show that common law powers can be brought to bear on contemporary problems and used to supplement or to substitute for statutory authority.

Former Attorney General Arthur Sills of New Jersey summarized the application of the common law of England to the current role of the American Attorneys General:

> As guardian of royal prerogative, the Attorney General of England possessed a broad range of powers. . . . Unlike after the Colonial Period when state governments were organized and recognized in this country, there was no monarch in whom the governmental prerogatives were vested. Since the essential power of government resided and emanated from the people, the prerogatives had to be exercised on their behalf. Just as the Attorney General safeguarded royal prerogatives at common law, similarly, the official authority, an obligation to protect public rights and enforce public duties on behalf of the general public, became vested by the states in the Attorney General. And it is this obligation inherited from the common law to represent the public interest which has shaped and colored the role which the Attorney General fulfills today.[3]

1.32 Definition of Common Law Power

As one authority, Earl DeLong, has noted, there is no accepted delineation of common law powers:

> Although many courts in the United States have agreed that the Attorney General of the contemporary American state is endowed with the common law powers of his English forbearer . . . the application from one jurisdiction to another of this seemingly simple principle has produced an astonishing array of mutations which make it altogether impossible to reach any sweeping generalization on the matter.[4]

The first American court to rule on the Attorney General's common law powers was the Supreme Judicial Court of Massachusetts. In the 1850 case of *Parker v. May* it held that the Attorney General might exercise powers that had belonged to the English Attorney General under common law.

Judicial Definition of Powers

Two subjects are involved in considering Attorneys General's common law powers: the content of these powers, and the extent to which they are retained by the Attorney General. Neither is susceptible to a clear answer.

The most frequently-cited listing of the Attorney General's common law powers is found in *People v. Miner*, a case decided more than a century ago. The court found that:

> The attorney-general had the power, and it was his duty:
>
> 1st. To prosecute all actions, necessary for the protection and defence of the property and revenues of the crown.
>
> 2d. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.
>
> 3d. By '*scire facias*,' to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof.
>
> 4th. By information, to recover money or other chattels, or damages for wrongs committed on the land, or other possessions of the crown.
>
> 5th. By writ of *quo warranto*, to determine the right of him who claims or usurps any office, franchise or liberty, and to vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.
>
> 6th. By writ of *mandamus*, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.
>
> 7th. By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.
>
> 8th. By proceedings *in rem*, to recover property to which the crown may be entitled, by forfeiture for treason, and property, for which there is no other legal owner, such as wrecks, treasure trove, &c. (3 Black. Com., 256 7, 260 to 266; id., 427 and 428; 4 id., 308, 312.)
>
> 9th. And in certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are under the protection of the crown. (Mitford's P., 24-36, Adams' Equity, 301-2.)

The court noted, however, that "this enumeration, probably does not embrace all the powers of the attorney-general at common law. . . ." Although some of the language used is archaic, this early decision established basic powers in criminal prosecutions, ouster

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1. The prevailing position is substantially stated in an oft-quoted remark from RULING CASE LAW 916 concerning the common law powers of the Attorney General:

   > Although in a few jurisdictions the attorney-general has only such powers as are expressly conferred upon him by law, it is generally held that he is clothed and charged with all the common law powers and duties pertaining to his office, as well, except in so far as they have been limited by statute. . Accordingly, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time, require; and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.

   A similar statement appearing at 6 CORPUS JURIS 809-810 also has been quoted in a substantial number of cases.

   > The office of Attorney General has existed from an early period, both in England and this country, and is vested by common law with a great variety of duties in the administration of the government. The duties are so numerous and various that it has not been the policy of the legislature of the states of this country to attempt specifically to enumerate them; and where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law.

2. Rita Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304 (1958).

3. Arthur Sills, PROCEEDINGS OF THE CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 102 (1967).

4. Earl Delong, *Powers and Duties of the State Attorney General in Criminal Prosecutions*, 25 J. CRIM. L. 392 (1934).

actions, protection of trusts, and other actions.[5]

A 1953 decision by the Pennsylvania court in *Commonwealth ex rel. Minerd v. Margiotti* enumerated additional powers:

> The Attorney General of Pennsylvania is clothed with the powers and attributes which envelops Attorneys General at common law, including the right to investigate criminal acts, to institute proceedings in the several counties of the Commonwealth, to sign indictments, to appear before the grand jury and submit testimony, to appear in court and to try criminal cases on the Commonwealth's behalf, and, in any and all of these activities to supersede and set aside the district attorney when in the Attorney General's judgment such action may be necessary.

The Minnesota court, in the 1960 case *Slezak v. Ousdigian*, gave a succinct summary of such powers:

> The Attorney General is the chief law officer of the state. His powers are not limited to those granted by statute, but include extensive common law powers inherent in his office. He may institute, conduct and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.

Courts may refer to other authorities; Blackstone is frequently quoted to the effect that the Attorney General "represents the sovereign . . . and his power to prosecute all criminal offenses is unquestioned at common law."[6] *Holdsworth's History of English Law*[7] has been cited to note that "it is he (the Attorney General) who conducts important state trials, not only in court, but also in the preliminary stages." Few authorities, however, describe the early Attorneys General's powers.

The term "common law" is variously spoken of by American courts as including "the common jurisprudence of the people of the United States . . . [which was] brought with them as colonists from England, and established here so far as it was adapted to our institutions and circumstances;"[8] "the unwritten law as distinguished from the written or statute law;"[9] or "a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy;"[10] and as being "not confined to the ancient unwritten law of England,"[11] and "not a static but a dynamic and growing thing . . . [with rules] arising from application of reason to the changing conditions of society."[12]

Most states hold that the working common law includes not only the *lex non scripta*, or unwritten law based on custom, usage, and general public consent, but English statutes amendatory of the common law which were of a general nature and suitable to use in American institutions.[13] A few states,[14] however, hold that the common law does not include any English statutes, except as specifically adopted.

Constitutional or Statutory Recognition of Common Law

Many states, probably the majority, have a constitutional or statutory provision confirming the force of common law. This would appear to presume the existence of common law powers. Differences arise, however, in the effective date of such provisions and the courts' subsequent interpretations. In some states, the provision was carried over from Colonial legislatures. In others, it was adopted when one state broke away from another. In others, it was incorporated into the code when a territory achieved statehood.

Some states specifically acknowledge by statute the Attorney General's common law powers. Maine laws defining his powers and duties, for example, specify that:

> The authority given under this section shall not be construed to deny or limit the duty and authority of the Attorney General as heretofore authorized, either by statute or under the common law.[15]

New Jersey statutes speak of "the powers and duties now or hereafter conferred upon or required of the Attorney General, either by the Constitution or by the common and statutory law . . ."[16]

The existence of a statute adopting the common law may affect the Attorney General's power. The Missouri Court in *State ex rel. McKittrick v. Public Service Commission* noted that:

> The Constitution . . . provides generally that the Attorney General 'shall perform such duties as may be prescribed by law' . . . we have long had a statute . . . adopting the common law of England. . . . This section evidently has been construed as adopting not only the common law rights and remedies of litigants, but also such common law powers of public affairs as were possessed by similar officers in England.

Statutory recognition of common law powers can resolve conflicts in case law. For example, the Mississippi Supreme Court held that the Attorney General had common law power to prosecute an appeal in a habeas corpus case. In a later case, the court held that the Attorney General had no common law powers and did not refer to the earlier opinion. A statute was enacted conferring common law powers on the Attorney General and the court noted that it was therefore unnecessary to

5. The holding of the case is less often cited: the Attorney General could not restrain town commissioners from issuing bonds, even if certain requisite preliminary steps had not been taken. The judge commented that:

> I am utterly opposed to the adoption of a rule that will permit a State officer to intermeddle in the affairs of every corporation in the State. It can only lead to abuse, and to relieving persons directly in interest in them, from the duty and responsibility of seeing that abuses are corrected by those immediately concerned.

6. Volume IV of BLACKSTONE'S COMMENTARIES gives the following description of the Attorney General's powers in criminal prosecutions:

> The objects of the king's own prosecutions, filed *ex officio* by his own attorney general, are properly such enormous misdemesnors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. . . . The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemesnors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deserve the most public animadversion. . . .
>
> There can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the king's attorney general, or by his coroner or master of the crown-office in the court of king's bench, is as antient as the common law itself. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemesnor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a suggestion on record, and to carry on the prosecution in his majesty's name. But these informations (of every kind) are confined by the constitutional law to mere misdemesnors only; for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. IV BLACKSTONE'S COMMENTARIES 304-305 (1769).

7. 6 HOLDSWORTH'S HISTORY OF ENGLISH LAW, 462 (1924).

8. *Clark v. Allaman*, 71 Kan. 206, 216, 80 P. 571, 575, 70 L.R.A. 971, 977 (1905), citing I KENT'S COMMENTARIES 342 (1826).

9. *In re Davis' Estate*, 131 N.J.L. 161, 35 A. 2d 880, 885 (1944).

10. *Edgerly v. Barker*, 66 N.H. 434, 453, 31 A. 900, 905, 23 L.R.A. 328, 332-333 (1891).

11. *Missouri-Kansas Pipe Line Co. v Warrick*, 25 Del. Ch. 388, 394, 22 A. 2d 865, 868 (1941).

12. *Barnes Coal Corp. v. Retail Coal Merchants Ass'n.*, 128 F. 2d 645, 648 (C.C.A. Va. 1942).

13. *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 286, 231 P. 2d 832 (1951) is a representative exposition of this view.

14. *Brooks v. Kimball County*, 255 N. W. 501, 127 Neb. 645 (1934).

15. ME. REV. STAT. ANN. tit. 5, § 199 (1964).

16. N. J. REV. STAT., § 52:17A-4.

decide which case correctly described his power.[17]

The question of whether or not the Attorney General of Vermont has common law powers was resolved by the last legislature, which amended the statutes to read as follows: "The Attorney General may represent this state in all civil and criminal matters as at common law and as allowed by statute. The Attorney General shall also have the same authority throughout the state as a state's attorney."[18]

Applicable Date of Common Law

Another factor to be considered is the time of existence of the applicable common law. In some states, only those common law rules which were in force prior to the fourth year (1607) of the reign of James I were adopted or applied, [19] that year being the year Virginia was first successfully colonized. Other states adopted the common law as developed up to the approximate time of the Revolution,[20] while still others adopted that common law in force prior to the adoption of the state constitution.[21] Other states adopted that body of law which was in force in the state of which they were a part as of the date of separation.[22]

Since common law powers are not static, this date may be important. Kentucky, for example, specified by statute that the Attorney General:

> shall exercise all common law duties and authority pertaining to the office of the Attorney-General under the common law, except when modified by statutory enactment.[23]

The court has said, however, that:

> To declare that the common law and statutes enacted prior to that time should be in force was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and enforced here . . . [W]hen it is sought to enforce in this state any rule of English common law, as such, independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date. [March 24, 1607][24]

The Kentucky court invoked this rule in *Commonwealth ex rel. Ferguson v. Gardner* and denied the Attorney General authority to intervene in a will contest, because he "failed to show that there was any established and recognized law of England to that effect prior to 1607."

Effect of Statutory Enumeration of Powers

In all jurisdictions, at least some duties and powers of the Attorney General are prescribed by statute. Many constitutions specify that his powers shall be "prescribed by law." Courts in many jurisdictions have considered the relation of the powers enumerated by statute to those existing under common law. Most courts follow the rationale expressed by the New York court in *People v. Miner:*

> As the powers of the attorney-general, were not conferred by statute, a grant by statute of the same or other powers, would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intendment, forbade the exercise of powers not thus expressly conferred.

Florida's court, in *State ex rel. Landis v. S. H. Kress & Co.*, upheld the argument that:

> . . . the duties of such an office are so numerous and varied that it has not been the policy of the Legislatures of the states to specifically enumerate them; that a grant to the office of some powers by statute does not deprive the Attorney General of those belonging to the office under the common law.

In *State ex rel. Barrett v. Boeckeler Lumber Co.*, the Missouri court concurred:

> A grant by statute of the same or other powers does not operate to deprive him [the Attorney General] of those belonging to the office under the common law, unless the statute, either expressly or by reasonable intendment, forbids the exercise of powers not thus expressly conferred. (6 C.J. 816.) This view has been tacitly accepted, and acted upon, in this state for many years.

In states recognizing common law powers, codification does not affect them except as expressly stated. Some states obviate the problem by enacting provisions specifically declaring that the authority conferred upon the Attorney General by statute shall not be construed to limit his authority or duty under common law.

Continuity of Office

If the common law powers of the office derive from its origins, the question arises whether a break in the office's status affects such powers. Section 1.21 of this Report notes that eight states did not have Attorneys General at the time they became states, while others functioned for various periods without such an official. Vermont, for example, was without an Attorney General for more than a century.

There are indications the office did exist in some jurisdictions, although without a formal basis. A study of Pennsylvania's Attorney General's office notes that it was provided for in the first constitution, but not the next two. Under what authority, then, did it function?: "The only authority under which he could function would be that of the common law."[25] The office of Attorney General in Massachusetts was abolished in 1843 and restored in 1849, but with more restricted authority. The court held in *Parker v. May* that, although this broke the continuous flow of the common law, and although the new statute restricted powers without mentioning common law, the legislature's action did not preclude the exercise of common law powers.

The Pennsylvania court has recognized the Attorney General's common law powers, including that of conducting grand jury investigations. In 1938, the legislature codified this power; a year later, it repealed the statute. Subsequently, in *Appeal of Margiotti*, the court recognized the continued existence of this power even though a dissenting opinion argued that repeal of the statute abolished the power it codified.

1.33 Status of the Attorney General's Powers

The office of Attorney General is constitutional in forty-four states and Puerto Rico. Most of these constitutions say that his duties shall be prescribed by law. A Kentucky case, *Johnson v. Commonwealth ex rel. Meredith*, noted three prevailing views in courts' construction of such provisions:

(1) the legislature may not only add duties but may lessen or limit common law duties . . .

(2) the term 'as prescribed by law' has been held . . . in effect, to negative the existence of any common law duties, so that the Attorney General has none, and the legislature may deal with the office at will . . .

(3) the term has been construed . . . to mean that the legislatures may add to the common law duties of the office, but they are inviolable and cannot be diminished . . .

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17. *Capitol Stages v. State*, 157 Miss. 576, 128 So. 759 (1930) said that the court in *State v. Key*, 93 Miss. 115, 46 So. 75, held that the Attorney General had common law power, but in *Board of Supervisors of Lauderdale County v. Bank*, 117 Miss. 132, 77 So. 955, held that he did not:

> On March 27, 1918, [a law] . . . which conferred on the Attorney General common-law powers went into effect, and is now the law. It therefore becomes unnecessary to decide whether the Key Case or the Bank Case, referred to above, correctly interpreted . . . the powers of the Attorney General.

18. VT. STAT. ANN. tit. 3, § 152.

19. *Town of Cody v. Buffalo Bill Memorial Ass'n.*, 64 Wyo. 468, 196 P. 2d 369 (1948).

20. *Hannah v. State*, 212 Ga. 313, 92 S.E. 2d 89 (1956).

21. *Clawson v. Primrose*, 4 Del. Ch. 643 (1873).

22. *Howard v. State*, 143 Tenn. 539, 227 S. W. 36 (1921).

23. KY. REV. STAT., § 15.020.

24. *Aetna Ins. Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624 (1879).

25. M. Louise Rutherford, *Pennsylvania's Attorney General*, PA. BAR ASS'N. Q., 56-7 (Oct. 1942).

The court in that instance adopted the first view.

Most courts have recognized the Attorney General's common law powers, but have also recognized the legislature's power to amend or restrict them. Courts in a few states have denied the Attorney General any common law powers. Only one state court has held that the Attorney General's common law power is beyond legislative revision.

Tabular Summaries

Table 1.33 shows which jurisdictions recognize the Attorney General's common law powers, which do not, and which have not settled the question. This Table is based on Attorneys General's responses to C.O.A.G. questionnaires, with some changes or additions. In a few jurisdictions, recent court decisions have caused revisions in these data. In others, cases have been identified which were not reported by the jurisdiction, but which confer or deny powers. In still others, the questionnaire answers were indefinite, and the classification was then based on a review of relevant cases.

In most jurisdictions, courts have ruled on the Attorney General's common law powers. A list of cases is appended: Table 1.33, List of Cases. No relevant cases have been identified for Alaska, Connecticut, Guam, Maryland, Ohio, Puerto Rico, Samoa, Tennessee or the Virgin Islands. Vermont indicates that there is case law concerning common law powers, but no such cases have been identified.

In some jurisdictions, the relevant case law may consist only of dicta. In others, common law powers may be inferred from the court's recognition of a specific power. The North Carolina court, for example, has never expressly ruled on the Attorney General's common law power. In *Sternberger v. Tannenbaum*, however, the court stated that the Attorney General retains common law power concerning charitable trusts.

Status Subject to Change

The status of the Attorney General's common law powers is not static, but subject to judicial revision. Early Iowa Supreme Court cases, for example *Cosson v. Bradshaw*, held that the Attorney General had no common law power; however, a 1970 decision by a lower court, *State ex rel. Turner v. State Highway Commission* expressly recognized the existence of such powers. The court noted that: "On June 20, 1969, the Supreme Court of Utah joined the list of the many state appellate courts recognizing and supporting the common law powers of the Attorney General . . .[in *Hansen v. Barlow*]. It seems appropriate in this case that this court should join that list and does."

New York courts recognized broad common law powers in *People v. Miner* and other early cases, but have restricted this power in more recent decisions. Oregon offers another example of changing case law. The Oregon Supreme Court had, in various cases, indicated that the Attorney General had common law powers. *State v. Lord* held that the Attorney General could bring suit to protect the state's interest in land; *Gibson v. Kay* recognized his common law authority to bring mandamus proceedings; *Wemme v. First Church of Christ, Scientist* declared that he had a common law duty to oversee charitable trusts; and other cases further defined his common law powers. In a 1959 case, *State ex rel. Thornton v. Williams,* the court restricted such powers, saying that the common law power to initiate criminal proceedings reposed in the district attorney, not the Attorney General. In view of this case, Oregon reports that there is "some question as to common law powers."

Powers Not Determined

As indicated in Table 1.33, the status of the Attorney General's common law

1.331 COMMON LAW POWERS OF THE ATTORNEY GENERAL

	Has Such Powers	Not Decided	No Such Powers	Comments
Alabama	X			Where not limited by statute or constitution
Alaska	X			Where not limited by statute or constitution
Arizona			X	Case law denies powers
Arkansas	X			Where not limited by statute
California	X			Most powers now defined by statute
Colorado	X			Limited case law
Connecticut	X			Where not limited by statute, constitution, or court
Delaware	X			Case law does not specify powers
Florida	X			Where not limited by statute
Georgia		X		Insufficient case law
Guam		X		No statutes or case law
Hawaii	X			Statutes give Attorney General common law power
Idaho	X			Has power to institute certain actions
Illinois	X			Has extensive powers, through case law
Indiana			X	Courts limit Attorney General to statutory power
Iowa	X			1970 case affirmed power
Kansas	X			Case law
Kentucky	X			Where not limited or modified by statute
Louisiana			X	Common law not recognized in state
Maine	X			By statute and case law
Maryland		X		Not developed by legislature or courts
Massachusetts	X			Wide range of powers, through case law
Michigan	X			Wide range of powers, through case law
Minnesota	X			By case law, not statute
Mississippi		X		Not fully established by statute or case law
Missouri	X			By case law, not statute
Montana	X			By case law
Nebraska	X			Where not limited by statute
Nevada	X			By case law, has all common law power
New Hampshire	X			Case law
New Jersey	X			Reaffirmed by statute and constitution
New Mexico			X	Courts deny Attorney General common law power
New York		X		Case law in conflict
North Carolina	X			Implied from statute and case law
North Dakota		X		Insufficient case law
Ohio			X	No case law, but a code state
Oklahoma	X			By case law
Oregon		X		Case law divided, but powers essentially statutory
Pennsylvania	X			Extensive case law
Puerto Rico			X	No case law
Rhode Island	X			By case law
Samoa		X		No case law
South Carolina	X			Certain powers exercised
South Dakota			X	Courts limit Attorney General to statutory power
Tennessee		X		No statutes or case law
Texas		X		No statutory basis; case law divided
Utah	X			1969 case affirmed power
Vermont	X			By statute
Virgin Islands	X			In the absence of laws to the contrary
Virginia	X			Has powers, by virtue of constitutional status
Washington	X			Where not limited by statute
West Virginia	X			Case law
Wisconsin			X	*Dicta* only in recent cases
Wyoming		X		Insufficient case law
United States			X	

power is not determined in many states. Maryland's statement on a C.O.A.G. questionnaire is typical of such jurisdictions: "Neither the legislature nor the courts have developed the common law powers of the Attorney General. The only powers exercised by him are those prescribed by the Constitution or by statute." Georgia reports that: "There are no judicial decisions specifically restricting the Attorney General's power to those actions authorized by Constitution or statute." In some jurisdictions, the Attorney General has considered his written powers to be adequate and recourse to the common law has not been sought.

In some other jurisdictions, a considerable body of case law on the question has developed, but there is no clear determination of powers. Texas, for example, has a number of cases relating to the Attorney General's common law powers, but case law is divided, and the most recent case reported to C.O.A.G. held against such powers. A 1955 study by John Ben Shepperd, then Attorney General, reviewed Texas decisions and concluded that:

> . . . it would appear that the Attorney General of Texas does have extra-statutory powers derived from the common law. Just which of the powers the courts of Texas are willing to recognize is largely a matter for speculation. . . . A survey of the opinions from other jurisdictions may be partially enlightening on this matter, but the number and diversity of enacted statutes on the subject in this State, when coupled with the unique features of our Constitution and heritage, render the future trend of the Texas law extremely difficult to predict.[26]

No Common Law Powers

Only a few jurisdictions have denied the Attorney General any common law powers. In some other jurisdictions, the common law is not recognized.

A 1929 New Mexico case, *State v. Davidson*, held that:

> . . . this doctrine of implied common-law powers in the Attorney General . . . is based entirely upon the initial premise that the Attorney General was recognized as being vested with common-law powers before any attempt was made to enumerate or define his powers by statute.

In New Mexico, the duties were defined by statute before the office was made constitutional and so, in the court's view, the constitution could not confirm common law powers in the office. A 1967 case, *State v. Reese*, upheld this position, despite the Attorney General's contention that the "case stands alone in this country in its conclusion that common law powers and duties are not vested in the office."

The Arizona court, in *Arizona State Land Department v. McFate*, a 1960 case, said that "the Attorney General has no common law powers".

Wisconsin, in *State v. Snyder*, held that the constitutional provision that the duties of the office were to be prescribed by law meant that they could only be derived from statute. *Dicta* in recent cases have reaffirmed this view. South Dakota reports that "since the 1961 decision in *State ex rel. Maloney v. Wells* any questions of the Attorney General's common law powers has been dissipated." As in Wisconsin, the constitutional provision is interpreted to mean that his powers derive only from statutory law.

The Indiana court held in *State ex rel. Bingham v. Home Brewing Co.* that the Attorney General did not have the common law powers which attached to the office in those jurisdictions where he was a constitutional officer, since the office was created by statute in that state. This distinction is not universally accepted. Courts in other states, where the Attorney General is not a constitutional officer, such as Connecticut and Oregon, have recognized at least some common law powers.

Ohio reports on its C.O.A.G. questionnaire that it is "strictly a code state" and, therefore, the Attorney General has no common law powers. No pertinent cases have been identified and Ohio is classified here as having no common law powers. However, the courts might still recognize some such powers. North Dakota statutes, for example, say that "there is no common law in any case where the law is declared by the Code."[27] The court, however, upheld the Attorney General's authority to go before a grand jury, even without statutory authorization in the case of *State ex rel. Miller v. District Court*.

Louisiana has never adopted the common law, due to its predominately French-Spanish origins. The Louisiana Supreme Court, in *Saint v. Allen*, rejected the Attorney General's attempt to exercise common law powers, as they do not exist in that state.

The status of the Attorney General's common law powers in the Commonwealth of Puerto Rico and the Territories of Guam, American Samoa and the Virgin Islands is unclear. There is no relevant case law in these jurisdictions. The Virgin Islands reported in response to a C.O.A.G. questionnaire that the Attorney General did have common law powers, Puerto Rico that he did not, and Guam and Samoa that such powers were undecided. The Attorney General is appointed by the Governor in the territories; the Governor, in turn, is federally appointed.

As the United States government retains no common law powers, it might be difficult to establish their applicability to territories, particularly when the territories were not English in origin. An 1889 Hawaii case, *The King v. Robertson*, noted that: ". . . The common law is not in force in this Kingdom. This is not an English colony which has brought out the law of England to be in force here. . . ." Hawaii resolved such problems by enacting a statute conferring common law powers on the Attorney General. A study of Guam and American Samoa, however, notes that "American precepts of common law, modified as necessary to accommodate the various cultures, are applied . . . through an appointed judiciary."[28]

Powers Cannot be Limited

Illinois' Constitution provides for an Attorney General who "shall perform such duties as may be prescribed by law."[29] The Illinois court has gone beyond that of other states to declare not only that the Attorney General has common law power, but that such power cannot be limited. This position has been sustained in a series of cases. In *People v. Finnegan*, the court held that:

> In this State the constitution, by creating the office of Attorney General under its well-known common law designation and providing that he shall perform such duties as may be prescribed by the law, ingrafted upon the office all the powers and duties of an Attorney General as known at the common law and gave the General Assembly power to confer additional powers and impose additional duties upon him. The legislature cannot, however, strip him of any of his common law powers and duties as the legal representative of the State.[30]

Fergus v. Russel is among the Illinois cases which affirmed that "under the common law the Attorney-General had well-known and well-defined powers, and it was incumbent upon him to perform well-known and clearly prescribed duties." The court has

26. John Ben Shepperd, *Common Law Powers and Duties of the Attorney General*, VIII BAYLOR L. REV. 17 (Winter, 1955).

27. N.D. CENT. CODE, § 1-0106, NDRC-43.

28. N. Meller, *American Pacific Outposts*, STATE GOV'T. 210 (1968).

29. ILL. CONST., art. V, § 1, (1870).

30. *See also: People v. McCullough; People v. Barrett; Hunt v. Chicago Horse & Dummy Ry. Co.*

never attempted to enumerate these, except to note that "the attorney general was the law officer of the crown, and its only legal representative in the courts;" as it did in *Hunt v. Chicago Horse & Dummy Railway Co.*

Has Powers Except as Modified by Statute

The vast majority of jurisdictions recognize the Attorney General's common law powers, but consider them subject to constitutional or statutory modification. The existence of common law power is thus recognized, but it must be considered in the context of that jurisdiction's statute law. Where statute law and common law conflict, the legislative act will prevail in most cases. Where the statutes are silent, the Attorney General's power at common law will be acknowledged.

Most states hold that the term "prescribed by law" includes the common law, or hold that the institution of the office of Attorney General brought with it common law powers that cannot be abrogated. Supporting cases are too numerous to be listed, but a few examples are cited here.

The Montana court said in *State ex rel. Ford v. Young* that:

> . . . the office of attorney general, as it existed in England, was adopted as a part of the governmental machinery, and that in the absence of express restrictions, the common law duties attach themselves to the office so far as they are applicable and in harmony with our system of government.

Mississippi, in *State ex rel. Patterson for Use and Benefit of Adams Co. v. Warren*, likewise held that "the attorney general is clothed with all the common law powers of the office, except insofar as they have been expressly restricted or modified. . . ."

The Maine court reached a similar conclusion in *In re Maine Central Railroad*:

> The Attorney General represents the whole body politic, or all the citizens and every member of the state. Only a few of the duties of the Attorney General are specified by this and the following sections. [referring to the statute] . . . The Attorney General is however, clothed with common law powers. It is for him to protect and defend the interests of the public.

An Illinois case, *Hunt v. Chicago Horse and Dummy Railway Co.*, is frequently quoted to show that statutes merely specify a few duties, and the rest are authorized by common law:

> In England, the office of attorney general has existed from a very early period, and has been vested by the common law with a great variety of duties in the administration of the government. . . . Upon the organization of governments in this country, most, if not all, of the commonwealths which derive their system of jurisprudence from England adopted the office of attorney general as it existed in England as a part of the machinery of their respective governments. The prerogatives which pertain to the crown of England are here vested in the people, and the necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties, by proper proceedings in the courts of justice, is just as imperative here as there. The duties of such an office are so numerous and varied that it has not been the policy of legislatures to attempt the difficult task of enumerating them exhaustively, but they have ordinarily been content, after expressly defining such as they have deemed the most important, to leave the residue as they exist at common law, so far as applicable to our jurisprudence and system of government.

The Supreme Court of New Hampshire, in *Fletcher v. Merrimack County*, held that the Attorney General had all of the powers of common law in criminal actions. In Michigan, the court declared in *Mundy v. McDonald* that the Attorney General has a wide range of common law powers in addition to his statutory powers. The Minnesota Supreme Court said in *State ex rel. Young v. Robinson* and in *Dunn v. Schmid*, that the Attorney General "is possessed of extensive common law powers which are inherent in his office." In *State v. Jones* the Alabama court affirmed "that the attorney general's powers are as broad as the common law unless restricted or modified by statute."

The legislature's right to modify common law powers is not absolute, at least in those jurisdictions where the Attorney General is a constitutional officer. As Kentucky's Court of Appeals said in *Johnson v. Commonwealth ex rel. Meredith*:

> . . . The office may not be stripped of all duties and rights so as to leave it an empty shell, for obviously, as the legislature cannot abolish the office entirely, it cannot do so indirectly by depriving the incumbent of all his substantial prerogatives or by practically preventing him from discharging the substantial things appertaining to the office.

In those states where the Attorney General's common law power is recognized, the court may reject a particular power as not belonging to the office at common law. Thus, the Nevada court held in *State ex rel. Fowler v. Moore* that, although the Attorney General had full common law powers, these did not include the power to set aside a divorce decree.

1.34 Specific Common Law Powers

The following pages classify topically cases concerning the Attorney General's common law powers. Obviously, any such classification involves arbitrary decisions, both in the subjects selected and assignment of cases. No attempt has been made to include every case relating to the Attorney General's common law power. Some cases, on the other hand, are discussed under more than one heading. Approximately one hundred cases are discussed in this chapter.

Institution of Civil Suits

Courts have held that the Attorney General has broad power to act to protect the public interest. *Howard v. Cook*, an Idaho case, held that:

> It is virtually conceded that the attorney general is empowered to institute civil actions for and on behalf of the state for the protection of the state's rights and interests, as was apparently the universal rule at common law; that is, at common law, the attorney general had the right to institute civil suits on his own initiative and at his own discretion for such purpose.

California's court upheld the Attorney General's action to purge fraudulent voter registration lists on similar grounds in *Pierce v. Superior Court in and for Los Angeles County*:

> The right of the state to proceed by an action in equity . . . to purge [voting registers] . . . may not seriously be questioned. . . . If, as we hold, the state may maintain such an action, the right of the Attorney General to institute it may not be attacked. The Attorney General, as the chief law officer of the state, has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests.

Many actions by the Attorney General have been upheld on the basis of his common law duty to protect the public. In an 1887 Illinois case, *Hunt v. Chicago Horse & Dummy Railway Co.*, the court allowed the Attorney General to restrain the defendent from constructing a railroad without undertaking certain procedures. The court quoted the lower court reference to:

> . . . the principles of the common law, which make the attorney general the proper representative of the people of the state in all courts of justice, and charge him with the official duty of interposing for the protection and preservation of the rights of the public, whenever those rights are invaded and there is no other adequate or available means of redress.

The Michigan court, in *Mundy v. McDonald*, said that "a broad discretion is vested in this officer in determining what matters may, or may not be, of interest to the people generally."

In a Texas case, *State v. Goodnight*,

the Attorney General petitioned for an injunction to restrain fencing in of public lands. The Texas Supreme Court held that these enclosures injured the public as an aggregate body, and, therefore, it was the Attorney General's duty to proceed to remove them. The decision did not specifically mention common law powers; however, this apparently was the authority involved, as no statutory or constitutional provisions were cited.

Arizona is one of the few jurisdictions to deny the Attorney General such authority, saying in *Arizona State Land Department v. McFate* that:

> . . . the initiation of litigation by the attorney general in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department is not a concomitant function of this role.

As a law journal article pointed out:

> the attorney general in Arizona is thus greatly restricted in his ability to institute actions which he may deem to be in the public interest. . . . The decision to oppose the official determination of a state agency would, then, rest only in the Governor.[31]

Challenging the Constitutionality of Legislative or Administrative Actions

The Attorney General's standing to attack the constitutionality of state legislation has been recognized as a common law power. In *Wilentz v. Hendrickson* and *Van Riper v. Jenkins*, the New Jersey court allowed the Attorney General to intervene in private suits challenging the constitutionality of legislation. A recent Utah case, *Hansen v. Barlow*, said that the Attorney General had the duty as well as the power to question legislation. A study of the Attorney General's standing before the Supreme Court to attack legislation which he thought unconstitutional pointed out that:

> . . . the basic constitutional principle that the judiciary is to serve as a check on the legislature would be avoided unless the attorney general is granted standing to present the constitutional question concerning legislation which seriously jeopardizes the interests of the government as a whole.[32]

Courts have also recognized the Attorney General's standing to challenge action by administrative agencies which he considers injurious to the public interest. In *State v. State Board of Equalization*, the Nebraska court upheld the Attorney General's common law authority to petition for a writ of error from a decision of the State Board of Equalization. The board had reduced tax assessments. The court said:

> In equity, as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interest of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment . . .

Intervention in Rate Cases

New Jersey's court upheld the Attorney General's power to intervene in a public utility rate case, saying in *Petition of Public Services Coordinated Transport* that

> The Attorney General has traditionally been recognized as the defender of the public interest. This power is an attribute of his office, bestowed by the common law, which has not been taken away by legislative enactment.

31. Note, *State Officers—Attorney General's Right to Institute Action Against a State Agency*, 2 ARIZ. L. REV. 293 (1960).

32. *Attorney General's Standing Before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. CHI. L. REV. 631 (1959).

The Missouri court reached a similar conclusion in *State v. Missouri Public Service Commission*, upholding the Attorney General's authority to appear as a litigant before the Public Service Commission. Another Missouri case, *State ex rel. McKittrick v. Missouri Public Service Commission*, limited this authority by holding that the Attorney General is not entitled to appear as representative of the public in a rate hearing affecting only one city.

The Attorney General's role in rate cases was examined by the Montana court in *State ex rel. Olsen v. Public Service Commission*. It held that "the action taken by the attorney general questioning the reasonableness and lawfulness of the [telephone] rates is a proceeding affecting public interests and properly maintainable by him." This was identified as a common law power: "public interest being affected, the state is a party in interest and the attorney general under broad powers given him by the common law may represent the state in the litigation." Earlier cases had clearly established the Attorney General's authority to take action questioning a public service commission's decision, even though he served as the commission's attorney.[33]

Proceedings Against Public Officers

The courts of several states have ruled on the Attorney General's power to institute *quo warranto* actions to recover public offices from wrongful occupants thereof. This is one of the common law powers enumerated in *People v. Miner*.

In *State ex rel. Young v. Robinson*, the Minnesota Attorney General was allowed to bring *quo warranto* proceedings against a city official who had failed to report violations of liquor laws. The Attorney General's authority was attributed to his common law powers and he was further allowed to sue for a penalty. *State ex rel. Glenn v. Stein* recognized the Nebraska Attorney General's common law power to bring *quo warranto* proceedings to oust a county treasurer for malfeasance. California held in *Lamb v. Webb* that it is within the discretion of the Attorney General whether to bring a *quo warranto* proceeding in a contested election case. Recently, the Kansas court sustained in *State v. City of Kansas City* the Attorney General's standing to institute *quo warranto* proceedings to test the validity of a city annexation ordinance. On the other hand, a 1944 Kentucky decision, *Commonwealth ex rel. Attorney General v. Howard*, held that the Attorney General did not retain power to bring *quo warranto* proceedings.

The Attorney General may also proceed through *mandamus* or injunction against public officers. A Massachusetts case, *Attorney General v. Trustees of Boston Elevated Railroad*, held that:

> The Attorney General represents the public interest, and as an incident to his office he has the power to proceed against public officers to require them to perform the duties that they owe to the public in general, to have set aside such action as shall be determined to be in excess of their authority, and to have them compelled to execute their authority in accordance with law.

A Texas court restated the common law power of the Attorney General to bring *mandamus* proceedings in a case denying that right to a private citizen. In *Yett v. Cook* the court denied to the private litigant the right to file a *mandamus* to require city officers to call an election for councilmen, saying that:

> . . . under the ancient and modern rules of the common law, the state has the power and duty to supervise the conduct of municipalities. . . . Since the state can bring a mandamus suit similar in purpose to the one before us, it is elementary that the Attorney General has the power to institute such action.

33. See *State v. State Board of Equalization*, 50 Mont. 413.

The Mississippi court said in *State ex rel. Patterson v. Warren* that the Attorney General was the proper officer to sue county officials for discrepancies in their financial records, as part of his common law duties. A New York court had held in an 1872 case, *People v. Tweed*, that the Attorney General had common law authority to seek to recover money that city officers had raised unlawfully and had converted to their own use.

A 1970 Iowa case, *Turner v. Iowa State Highway Commission*, upheld the Attorney General's action in enjoining state officers from taking certain action which, in his opinion, was unconstitutional. The court cited statutes specifying the Attorney General's duties and said that:

> These statutes clearly negate the sophistry of those who suggest that the Attorney General was powerless to act in this case or that it was incumbent upon him to stand idly by and watch public officials violate what he believed to be the laws he swore to uphold and enforce. Our society could not long afford or tolerate the helplessness of its chief law officer in such situations.

A 1963 Massachusetts decision, *Jacobsen v. Parks and Recreation Commission of Boston*, said that the Attorney General was the proper officer to enjoin the commission from selling certain public lands.

Revocation of Corporate Charters

The common law also gives the Attorney General the power to bring *quo warranto* proceedings against corporations and other associations which hold state charters or franchises to challenge their right to operate. An information in the nature of *quo warranto* may also be filed by the Attorney General to test the claim to office of an officer of a corporation organized for private gain, since the corporation is exercising a public franchise, and the title to its offices is a matter of public concern. The Attorney General may not, however, seek a remedy for the redress of mere private grievances, unaccompanied by an injury to the public.[34]

A Florida case, *State ex rel. Landis v. S. H. Kress & Co.*, is frequently cited. The 1930's witnessed rapid growth by large chain-stores, one of which obtained a license to operate in Florida. Protests were received by the Attorney General from small stores and, as a result, he filed a writ of *quo warranto* to revoke the company's license. The court upheld the Attorney General's authority to file the writ, but held that the question of the social desirability of certain types of business was one for the legislature to determine, not the courts.

A Massachusetts case, *Attorney General v. Sullivan*, held that the Attorney General could institute *quo warranto* proceedings without consent of the court, whereas a district attorney might need such consent.

Some state courts have rejected the Attorney General's common law power to bring *quo warranto* actions. In *State ex rel. Bingham v. Home Brewing Co.*, a *quo warranto* action was brought to revoke the charter of the defendant company. The Indiana Supreme Court decided that, even though the common law was adopted by statute, the statutes had since vested *quo warranto* powers in the local prosecutor and only he could file such a proceeding. A Washington case, *State ex rel. Winston v. Seattle Gas & Electric Co.*, is similar in its significant features. The Attorney General tried, on his own motion, to enjoin the acts of the defendant as a public utility, through a *quo warranto* proceeding. He was denied the right to do this on the theory that this power was vested by statute in the local prosecutor and thereby removed from the Attorney General. The Oklahoma Court, in *State ex rel. Haskell v. Huston*, refused to allow the Attorney General to act on his own motion to vacate a corporate charter, because such power had been given to local prosecutors.

34. *Brooks v. State*, 3 Boyce (Del.) 1, 79 Atl. 70.

Enforcement of Antitrust Laws

In the Missouri case *State ex rel. Barrett v. Boeckeler Lumber Company*, the question of the Attorney General's power to serve as the enforcing officer for the state's antitrust laws came before the court. The statute placing responsibility for enforcing the antitrust laws with the Attorney General was challenged on the ground that the Attorney General was not the officer to enforce such a statute, since it was not a part of his authority at common law. In responding to this, the court said:

> . . . The Attorney General of this state is therefore invested with all the powers and duties pertaining to his office at common law . . . If the power and duty which the anti-trust statute purports to confer on the Attorney General are not identical with powers and duties which he already possesses at common law, they are at least of the same general character, and therefore fall within the scope of the services which 'may be prescribed by law.'

Prevention of Air and Water Pollution

One of the common law powers enumerated in *People v. Miner* is the power to prevent or abate public nuisances. Five years before the Miner case, the New York Supreme Court had recognized the authority of the Attorney General to bring an action to enjoin a public nuisance in the case *People v. Vanderbilt*. The court did not specify the source of this authority, but it might be assumed that it was the common law.

The common law power to enjoin nuisances in the form of air or water pollution has been invoked for almost a century. In an 1884 case, *People v. Gold Run Ditch and Mining Co.*, the California court upheld the Attorney General's authority to abate a public nuisance. A mining company was discharging debris into a stream which then polluted and impaired navigation on a river. The court held that the Attorney General was the proper party to bring an action to abate this nuisance. A few years later, in *People v. Truckee Lumber Company*, the court recognized the Attorney General's authority to enjoin a lumber company from dumping waste and refuse in a river. The court observed that at common law the Crown had the duty to protect the public from nuisances and that pollution was such a nuisance. These cases establish the Attorney General's power to sue to stop pollution, without statutory authorization.

In *State v. Excelsior Powder Manufacturing Corporation*, the Missouri court recognized the power of the Attorney General to act for the public in abating a nuisance created by a powder manufacturing concern. The Maine Attorney General's common law power to abate a nuisance consisting of offensive odors coming from a fish processing concern was recognized in *Withee v. Lane and Libby Fisheries Company*. A Pennsylvania case, *Commonwealth ex rel. Shumaker v. New York & Pennsylvania Co.*, held that the district attorney could not appoint counsel to handle a river pollution case, since this was a matter exclusively within the common law power of the Attorney General. Idaho's court, in *Howard v. Cook*, held that the Attorney General had authority to sue to protect water rights of the state, on his own initiative.

Abatement of Offenses Against Morality

The Montana court in *State ex rel. Ford v. Young* recognized the common law power of an Attorney General to abate a nuisance in the form of a bawdy house, even though statutory power for abatement was vested in the county attorney. The court held that the Attorney General retained his common law powers and the statute served merely to add additional parties who could exercise the particular power.

The 1909 Kentucky case, *Repass v. Commonwealth ex rel. Attorney General*, recognized the latter's authority to abate nuisances through common law power. This case involved three defendants against whom the Attorney General had brought an action to enjoin gambling. The court found that:

> The unlawful and criminal business conducted by the defendants attract to the place and its vicinity . . . a large number of criminals, gamblers, low and dissolute characters, sporting men, dissolute women, and disorderly and idle persons without lawful means of support. The presence of these persons in the streets of Covington has a demoralizing effect on the good order and moral welfare of the community, constituting a public nuisance, and an ever-present menace to the morality and well-being of the community. The nuisance has continued in the place for many years despite the processes of the criminal court.

The Attorney General's authority to initiate such proceedings had been challenged on the ground that he did not have standing to move against public nuisances, but the court upheld his common law power so to do. The case has been cited by other jurisdictions; the Arkansas court held similarly in *State ex rel. Williams v. Karston*.

In a West Virginia case, *State v. Erlich*, the defendant was a gambler, who claimed that the district attorney's action to enjoin his activities was improper, because such action would properly be part of the Attorney General's common law powers. The court dismissed the injunction on the ground that no injury had been caused.

Enforcement of Charitable Trusts

In the first case to discuss the Attorney General's common law power, *Parker v. May*, the Massachusetts court held that he had common law authority to file an information to establish and effectuate a charitable donation. In so doing, the court said:

> The power to institute and prosecute a suit of this nature, in order to establish and carry into effect an important branch of the public interest, is understood to be a common-law power, incident to the office of attorney-general or public prosecutor for the government.

People v. Miner, the 1868 New York case, pointed out that the statutes conferred no power to enforce charitable trusts on the Attorney General, but it surely was not the legislature's intention to place such trusts beyond the law, so the Attorney General must retain common law power to proceed against them.

In the Illinois case, *Newberry v. Blanchford*, the power of the Attorney General to interpose to prevent misappropriation of a fund held in trust for charity was recognized. The court said:

> It must be admitted that there is no statute imposing upon the attorney general the duty of instituting or becoming a party to any legal proceedings for the protection or preservation of funds held in trust for a public charity. Whence, then, arises such duty? Manifestly from the principles of the common law, which make the attorney the proper representative of the people of the state in all courts of justice, and charge him with the official duty of interposing for the protection and preservation of the rights of the public whenever those rights are invaded, and there is no other adequate or available means of redress.

The common law power of the Attorney General to protect charitable trusts was recognized by the Oregon court in *Wemme v. First Church of Christ, Scientist*. The court said that the Attorney General was responsible for protecting the public interest in such trusts, although he could not accept a separate fee for such action. A Wyoming case, *Town of Cody v. Buffalo Bill Memorial Association*, recognized that the Attorney General was an indispensable party in a proceeding to terminate a charitable trust. This is significant since no Wyoming case has explicitly held that the Attorney General possesses any common law powers; but this requirement for participation seems to imply such powers.

A 1961 Washington case, *State v. Taylor*, involved an action by the Attorney General for an accounting of a charitable trust in the absence of allegations of mismanagement. The court held that, since at common law a court of equity could compel an accounting by the trustees of a private trust, the Attorney General could compel an accounting as representative of the beneficiaries of a charitable trust. The court, however, dismissed his demand for information to which the beneficiaries of a private trust would not have been entitled.

Intervention in Will Contests

In *State v. Rector*, the Kansas court held that the Attorney General had the common law power and duty, as well as statutory authority, to intervene in an action contesting the existence of a valid will. The property would escheat to the state if the decedent died intestate. The Kentucky court, however, held in *Commonwealth ex rel. Ferguson v. Gardner* that the Attorney General had neither statutory nor common law authority to intervene in will contests in which a charitable trust might be involved.

Representation of State Agencies

At common law the Attorney General had the exclusive power and duty to render legal counsel to the government. Following this common law practice several courts have held that agencies of state government may not hire private counsel, but must rely on the Attorney General's office.

The question arose in Illinois when the state insurance superintendent, with appropriations provided for legal services, employed an attorney. The Attorney General challenged such employment on the ground that he was the legal representative for the state and the person charged with rendering such services. The state Supreme Court in *Fergus v. Russel* declared that the appropriation to the superintendent was invalid, saying that:

> By our Constitution we created this office by the common-law designation of Attorney General and thus impressed it with all its common-law powers and duties. As the office of Attorney General is the only office at common law which is thus created by our Constitution the Attorney General is the chief law officer of the state, and the only officer empowered to represent the people in any suit or proceeding in which the state is the real party in interest, except where the Constitution or a constitutional statute may provide otherwise. With this exception, only he is the sole official adviser of the executive officers, and of all boards, commissions, and departments of the state government, and it is his duty to conduct the law business of the state, both in and out of the courts.

This position was reiterated recently in Illinois in *Department of Mental Health v. Coty*.

In Oregon, when the corporation commissioner hired an attorney to assist him, the State Treasurer refused to pay counsel's salary on the ground that the hiring was unauthorized. The court, in *Gibson v. Kay*, stated that the Attorney General and the district attorneys share those duties which at common law were exclusively the Attorney General's, including the power of providing counsel for state agencies. The court said:

> So far as the appointment involved counsel and legal advice to the commissioner, it may be said that, if that officer was not well enough versed in the law governing his position to perform its requirements, he cannot expect the state to incur the expense of educating him thereto further than may be implied from the functions of its regular law officers. If he desires independent legal advice, he may, at his own cost, secure it. He cannot supersede the regular law officers of the state.

In *Darling Apartment Co. v. Springer*, the Delaware court sought to determine whether a statute granting the State Liquor Commission the right to ". . . engage the services of experts and

of persons engaged in the practice of a profession" allowed the Commission to appoint its own counsel. The court said it did not, ruling that the language of the act must be read with reference to the office of Attorney General as it existed at common law.

> In the absence of express legislative restriction, the Attorney General, as the chief law officer of the State, may exercise all of the powers and authority incident to the office at common law, it is manifest that there is nothing in the Act as a whole, nor in the particular language relied on, which, either expressly or by any reasonable intendment, indicates the legislative purpose to impower the Commission to appoint its own law officer to represent the State in judicial proceedings. The right of a mere administrative agency of the State to appoint its own law officer to conduct litigation in supersession of the Attorney General, and to charge the public with the incidental expense, must rest on a plain and unambiguous grant of authority. It necessarily follows that the Attorney General has the power, and it is his duty, to represent the Commission in all judicial proceedings.

This is, however, one area in which the common law duties have been substantially changed in many states. Statutes of many states have been utilized to allow agencies to retain counsel and have been upheld by courts. For instance, *Board of Public Utilities Commissioners v. Lehigh Valley Railway Co.* concerned the New Jersey Board of Public Utilities Commissioners' appointment of an attorney, who sued a railroad company at the Board's request. Upon protest by the Attorney General, the New Jersey court pointed to the statute allowing the Board to appoint its own counsel, noting:

> The important question is that of control of the litigation, whether by the board and its counsel as state agents, or by the Attorney General as the usual accredited legal adviser of the state itself. On this branch of the case we conclude that the powers and privileges of the Attorney General as they existed at common law, and particularly as conferred by statute, are subject to change and modification by legislative enactment; and that in the matter of the board of public utilities the Legislature has conferred upon that board, and upon counsel appointed by it pursuant to the statute, the power of commencing and conducting litigation in which the board in exercise of the power vested in it, is seeking to enforce its mandates.

The court upheld the legislative modification of the Attorney General's powers.

The Colorado court, in *State Board of Pharmacy v. Hallett*, followed the same reasoning, holding that the legislature had the authority to authorize an agency to retain counsel, even though this was a common law power of the Attorney General. The New Mexico case which denied the Attorney General any common law power, *State v. Davidson*, involved employment of counsel by a state agency; the court rejected the Attorney General's claim that only he could represent agencies. The Kentucky court also upheld the legislature's right to assign the Attorney General's common law powers to agency counsel in *Johnson v. Commonwealth ex rel. Meredith*. In *Padgett v. Williams*, the Idaho Supreme Court upheld payment of an attorney for the Board of Highway Directors. The court found that the statutes gave the Highway Department control over its employees, and that its statutory duties implied the need for counsel. By implication, the department was entitled to employ counsel.

A different issue arose in the Montana case of *State ex rel. Pew v. Porter*. The legislature had established a commission to investigate the financial policies of the state. The commission hired an attorney to conduct investigations, but the state auditor refused to pay him on the ground he was performing duties required of the Attorney General. The court compelled the auditor to pay, saying that the attorney's duties were investigative and not part of the Attorney General's duties:

> The duties of the attorney general are defined by the Constitution, by the statutes, and by the common law in so far as it is in force in this state, but nowhere, either by express declaration or by fair intendment, is the attorney general required to perform services of the character indicated. The duties defined by the Constitution attach themselves to the attorney general only by virtue of his membership on particular boards.

A 1970 Montana case, *Woodahl v. State Highway Commission*, upheld the highway commission's action in hiring attorneys of its own and refusing to employ counsel designated by the Attorney General. The court said that "however broad the power of the attorney general, it is not exclusive," but depends on whether the legislature has authorized others to have counsel; the court found that the commission had such authority, although it was not specifically empowered to hire counsel.

Relationship to Local Prosecutors

While the office of Attorney General existed at common law, the office of local prosecutor did not. As the Kansas Supreme Court said in *State v. Finch*:

> The office of prosecuting attorney has been carved out of that of attorney-general and virtually made an independent office. In the exercise of his common-law powers the attorney-general undoubtedly may advise the prosecuting attorney as he does other officers, since he is regarded as the chief law officer of the state; but in practically all jurisdictions, either the constitution or laws of the state make the two offices separate and distinct, and vest in the prosecuting attorney certain powers, and impose upon him certain duties, which can be neither increased nor decreased by the attorney-general. The sense in which the local officer is subordinate to the general one seems to be that they are engaged in the same branch or department of the public business, which of course makes the relation theoretical rather than practical. . . . Where the attorney-general is empowered, either generally or specially, to conduct a criminal prosecution, he may do any act which the prosecuting attorney might do in the premises; that is, he can do each and every thing essential to prosecute in accordance with the law of the land, and this includes appearing in proceedings before the grand jury.

There is a considerable body of case law defining the Attorney General's powers in prosecutions in those jurisdictions which have created an office of local prosecutor or district attorney. Chapter 2 of this Report describes the office of local prosecutor in the different jurisdictions; the different bases for this office, and the differences in its relationship to the office of Attorney General, obviously affect courts' rulings as to its powers. Earl H. DeLong reached the following conclusions in his study of the powers of Attorneys General in criminal prosecutions:

> (1) It is difficult to determine with certainty what were the powers of the attorney general at common law but it seems probable that they included the power to conduct any criminal prosecution properly instituted by information, indictment, or otherwise as prescribed by law.
>
> (2) The language of constitutional provisions seems to have had little bearing on the decisions of the courts upon the common law powers of the attorney general.
>
> (3) There is wide disagreement among the courts as to the extent of the common law powers now possessed by the attorney general. In many states it is held that he has none. In others he has all common law powers except such as have been granted by statute to the prosecuting attorneys. In a few it is held that under the common law, without any reference to statutory or criminal provisions, the attorney general has full power to prosecute any criminal proceeding. . . .
>
> (4) Only in Illinois is there any indication that the legislature cannot deprive the attorney general of common law powers.
>
> (5) There is no indication that the existence of this power in any state has led to any substantial participation by the attorney general in the process of criminal prosecution.[35]

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35. DeLong, *supra* note 4 at 371, 372.

Some courts have said that legislative delegation of a power to a local prosecutor deprives the Attorney General of that power. A Washington case, *State ex rel. Attorney General v. Seattle Gas & Electric Co.*, for example, held that the Attorney General could not file an action to enjoin a public nuisance where this had been made the duty of the prosecuting attorney.

Even on rehearing, the State Supreme Court said:

> . . . in this class of cases the attorney general has no common-law powers, because the legislature has seen fit to confer the power or duty ordinarily exercised at common law by the attorney general upon the prosecuting attorney of the county where the wrong is alleged to have been committed.[36]

Oklahoma reached a similar conclusion in *State v. Huston* and Indiana in *State ex rel. Bingham v. Home Brewing Co.*

The West Virginia case of *State v. Ehrlick* discussed in detail the relationship of the two offices and said that the Attorney General "has neither power of removal nor control over [the prosecutor] within his own province, so far as it is defined by statute." The court argued that "there would be no individual responsibility if the powers of the attorney general and prosecuting attorney were co-extensive and concurrent. . . . Concurrence would produce interference, conflict and friction in many instances, delaying the disposition of business to the detriment of the state."

Mississippi, in *Kennington-Soenger Theatres Inc. v. State*, noted that, when the framers of the constitution of Mississippi created the office of district attorney, it was manifestly not their intention "that such powers should be conferred by the legislature upon this officer as would enable him to usurp the common-law duties and functions of the Attorney General." The court noted that the district attorney's functions were confined to one locality, while the Attorney General's were statewide. The New Mexico Court, which has denied the Attorney General common law power, has said in the recent case of *State v. Reese* that:

> There is nothing in our laws making the attorney general the superior of the district attorneys. To the contrary, the two offices are separate and, except as the legislature had directed joint authority as it has done in a limited number of situations, there is no duplication of duties.

Other courts have taken a contrary position and said that the Attorney General retains common law powers, even if the legislature has assigned them to another officer. The Montana court, in *State ex rel. Ford v. Young*, upheld the Attorney General's authority to enjoin a nuisance, although the statutes gave the county attorney such power. The court said that the Attorney General's power came from common law, and the only change made by statute was to add additional parties.

A 1900 New York case, *People v. Kramer*, held that:

> The district attorney had no common-law powers. . . . His office is derived from that of the attorney general, and at its inception he was designated as his assistant. . . .The district attorney, by statute and by a long-continued practice, has succeeded to some of the powers of the attorney general within the respective counties, but he has not supplanted him.

The Texas court, which has not consistently upheld the Attorney General's common law powers, offered an unusual rationale for holding that he retains some power in local prosecutions. The court asked in *Brady v. Brooks*:

> . . . Is it reasonable to suppose that it was the purpose to intrust absolutely the important function of representing the state as an attorney in all cases in which the state should be a party to the numerous county[or district] attorneys. . . . We cannot lose sight of the fact that the voters, especially in restricted localities, not infrequently are influenced by some improper motive, some sympathy for the candidate or some popular caprice which leads them to put incompetent men into office; a result by no means so probable in the case of an important office like that of Attorney General, in whose election all the voters of the state have a right to participate.

36. 28 Wash. 511, 70 Pac. 114 (1902).

Intervention and Supersession

Some states have, by statute, given the Attorney General authority to intervene in proceedings initiated by the local prosecutor or, in certain circumstances, to supersede him entirely. A few cases have upheld the Attorney General's right to intervene or supersede as a common law power.

A series of Pennsylvania cases examined at length the Attorney General's relationship to local prosecutors and upheld his power to supersede. These cases have been cited by many other jurisdictions, and have been the subject of considerable scholarly attention.[37] This summary is derived primarily from remarks by former Attorney General William C. Sennett of Pennsylvania to the February 5, 1970, meeting of the Committee on the Office of Attorney General.[38]

The office of district attorney was created by statute in Pennsylvania in 1850. *Commonwealth v. Lehman* held in 1932 that, despite the statute, the Attorney General retained supervisory powers over district attorneys. In the 1936 case of *Commonwealth ex rel. Minerd v. Margiotti* the court upheld the earlier decision. Two state policemen had been charged with murder; the judge determined that the district attorney might be implicated, and requested the Attorney General to appoint counsel for the case. The statute authorizing such a request authorized the Attorney General to retain a special attorney upon request of the judge; such attorney then "shall supersede the district attorney . . . and shall investigate, prepare, and bring to trial the case or cases to which he may be assigned."[39] The Attorney General appointed himself special attorney, appeared before the grand jury, and proceeded to prosecute the case.

The defendants appealed on the ground that the Attorney General had no legal authority to supersede the district attorney. The court held that:

> We conclude from the review of decided cases and historical and other authorities that the attorney general of Pennsylvania is clothed with the powers and attributes which enveloped attorneys general at common law, including the right to investigate criminal acts, to institute proceedings in the several counties of the Commonwealth, to sign indictments, to appear before the grand jury and submit testimony, to appear in court and to try criminal cases on the Commonwealth's behalf, and, in any and all of these activities to supersede and set aside the district attorney when in the attorney general's judgment such action may be necessary.

The Pennsylvania Supreme Court held in 1938 that the Attorney General could supersede a district attorney in a case involving alleged irregularities in his office, in *Dauphin County Grand Jury Investigation*. In a separate proceeding the same year,[40] the court held that the Attorney General did not abuse his discretion by such superses-

37. *See:* Note, *Appointed Attorney General's Powers to Supersede an Elected District Attorney*, 33 TEMP. L. Q. 78 (1959); *Attorney General versus District Attorney*, 99 U. PA. L. REV. 826 (1951); Note, *Common Law Power of State Attorney General to Supersede Local Prosecutors*, 60 YALE L. J. 559 (1951); *Common Law Right of Attorney General to Supersede District Attorney*, 85 U. PA. L. REV. 538 (1937); Note, *Power of the Attorney General to Supersede a District Attorney*, 24 TEMP. L. Q. 445 (1951).

38. National Association of Attorneys General Committee on the Office of Attorney General, REMARKS TO COMMITTEE MEETING FEBRUARY 5, 1970, 6 (1970).

39. Act of April 9, 1929 Pub. L. No. 177; Art. IX, § 907, 71 P.S. § 297.

40. *Dauphin County Grand Jury Investigation* (No. 1), 332 Pa. 342, 2 Atl. 2d 783 (1938); *Dauphin County Grand Jury Proceedings* (No. 3), 332 Pa. 358, 2 Atl. 2d 809 (1938).

sion. The same year, the legislature enacted a law giving the Attorney General "absolute discretion" to supersede. *In re Shelley* held that the court could still review such actions for abuse, despite the statute. The statute was repealed the following year; the question then remained as to whether such action revoked the common law power, as well as that conferred by statute.

In the 1950 case, *Appeal of Margiotti*, the court held that the *Minerd* case was still controlling and that the Attorney General could supersede on the basis of his common law powers. The court held, however, that this was not an absolute right, but was a discretionary power dependent upon the circumstances in each case. Acts of supersession could be reviewed to determine if they had been exercised arbitrarily or unreasonably. A later case, *Commonwealth v. Fudeman*, held that it was the Attorney General's duty to supersede "if he believes the government is to be hindered in the lawful conduct of its affairs to the detriment of the security, peace and good order of the state."

Appearance Before a Grand Jury

There has been extensive litigation concerning the Attorney General's power to appear before a grand jury. A series of New York cases show how one state's courts have ruled on both sides of this question.

In *People v. Tru-Sport Publishing Co.*, a New York Court upheld the Attorney General's common law power to appear before a grand jury, although this power was assigned by statute to the district attorney. The court said that:

> [T]he Attorney General at common law could appear . . . in any matter or proceeding, civil or criminal, wherein the sovereign was interested. Thus he could and did attend the sittings of the grand jury and assist in the presentment of criminal charges. . . . [These powers are retained by the Attorney General and still exist except where] . . . expressly abrogated by statutory enactment or by a reasonable intendment so to do necessarily implied from such enactment. . . . No express shearing away of any of his ancient powers can be found.

This 1936 holding was consistent with earlier rulings of New York courts. *People v. Kramer*, for example, had upheld the right of the Attorney General or his deputy to appear before the grand jury or to attend its sessions. However, in 1941 the Queens County Court ruled that a 1925 constitutional amendment eliminated common law powers of the Attorney General by establishing a system of state departments, including a law department. This case, *People v. Dorsey*, held that the Attorney General had no common law power to appear before a grand jury and present evidence since this power was vested by statute in the local prosecutor. In 1944, the Court of General Sessions of New York County reached the same conclusion in *People v. Hopkins*. In 1954, the Supreme Court of King's County reiterated this rule, but found statutory authority for the Attorney General to appear before a grand jury.[41]

One summary of case law concludes that:

> Since a grand jury investigation is deemed to be part of a criminal proceeding as much as an actual trial, . . . the Attorney General has power to supersede the district attorney in a grand jury investigation when his reason for so doing is well founded.[42]

North Dakota, in *State ex rel. Miller v. District Court* recognized the Attorney General's power to go before the grand jury at any time and present any matter, irrespective of statutes vesting such authority in another officer. The Massachusetts court reached a similar conclusion in *Commonwealth v. Kozlowsky*. Pennsylvania upheld the Attorney General's power to appear before the grand jury in *Commonwealth ex rel. Minerd v. Margiotti*, discussed in the preceding section. Iowa, on the other hand, ruled in *Cosson v. Bradshaw* that the Attorney General lacked power under common law to appear before a grand jury, although he was found to have such power by statute.

41. *Speigel v. County Court of King's County*, 129 N.Y.S. 2d 109 (1954).

42. Note, *Attorney General's Exercise of Discretion to Supersede Local District Attorney in Grand Jury Investigations Held Reasonable*, 37 VA. L. REV. 131 (1951).

Subpoena and Investigative Powers

No cases have been identified which hold subpoena power to be a common law power; rather, at least one court holds to the contrary. The Pennsylvania court, in *Commonwealth ex rel. Margiotti*, held that: "Neither an Attorney General, nor a district attorney who he supersedes, has any common law power of subpoena. . . . The power of a subpoena, except by a court, is purely statutory." As one comment points out, however:

> The Attorney General may still obtain any necessary information by presenting the matter to a grand jury, thus acquiring the necessary subpoena power [citing cases]. . . . In grand jury proceedings proper safeguards are imposed for the protection of the accused . . . the investigation by the Attorney General, on the other hand, is not surrounded by the same safeguards.[43]

The New Hampshire case *Wyman v. Danais* recognized the common law power of the Attorney General to compel, through mandamus, a county attorney to turn over to him files of an investigation relating to a prosecution which the Attorney General had taken over. The court noted that the narrow issue was the Attorney General's power to compel the county attorney to turn over these papers, but that the broader issue was the respective duties of an Attorney General and the county attorney in criminal prosecutions. The court stated that the Attorney General is the chief law officer of the state, with power to direct and supervise the county attorney when he deemed it in the public interest to do so, and was entitled to these papers. The court said that the common law supported this conclusion.

Control of Litigation

The courts have recognized the Attorney General's authority to dispose of litigation instituted by him or, in some cases, by another officer. In *People ex rel. Stead v. Spring Lake Drainage and Levee District*, the Illinois Attorney General had moved to dismiss a local prosecutor's action to enjoin a company from building embankments. The court ruled that the Attorney General, as the state's chief law officer, had common law power to dispose of a case in whatever manner he thought would best serve the state's interest.

In *State ex rel. Carmichael v. Jones*, the Attorney General of Alabama's power to enter into a good faith settlement was upheld, despite a constitutional provision forbidding compromise or release of an obligation owed the state. The court held that:

> The attorney general is a constitutional officer, the chief law officer of the state, and on him are conferred various authorities and duties in connection with instituting and prosecuting, in the name of the state, suits and other proceedings at law and in equity for the preservation and protection of the rights and interests of the state. . . . If section 139 were to so abridge his general authority over lawsuits instituted by him by subjecting his decisions in such matters to another executive head, not necessarily learned in the law, we think it should have said so by more specific language. . . . The stronger current of opinion affirms that the attorney general's powers are as broad as the common law unless restricted or modified by statute.

Citing 5 *Am. Jur.* 240 the court noted:

> 'ordinarily the attorney general, both under the common law and by statute, is empowered to make any disposition of the state's

43. Note, *Subpoena Power—No Statutory Authority to Compel Witnesses to Testify at Investigation*, 100 U. PA. L. REV. 567 (1952).

litigation which he deems for its best interest. His power effectively to control litigation involves the power to discontinue if and when in his opinion, this should be done. . . . Therefore, the attorney general has authority to direct the dismissal of proceedings instituted in behalf of the state.

In *Cooley v. S. C. Tax Commission*, a South Carolina court held that the Attorney General, as attorney for the tax commission, had the power to make a compromise agreement with the executor of the decedent's estate for payment of less than the full amount due the state. In the absence of any statutory sanction, this can be construed as an implied recognition of common law power.

The Michigan court, in *Mundy v. McDonald*, held that the Attorney General had a wide range of common law powers, including a broad discretion as to his official conduct. The Attorney General supplied to a state judge certain facts which ultimately were used by the judge in a manner that was alleged to constitute libel against an individual. When this individual sued the judge for libel, the Attorney General was allowed to act as defense attorney for the judge, although he had provided the information in question.

State v. Swift concerned the Attorney General of New Hampshire's defense of a state trooper who had apprehended a party for speeding and was then, in turn, charged by the said party with speeding. The Attorney General elected not to *nolle prosequi* the case against the trooper; rather, he had the case brought to trial and represented the officer in court. The court upheld this exercise of discretion by the Attorney General, stating:

> Where the Attorney General has concluded in his discretion that exoneration of an official by public trial rather than by entry of *nolle prosequi* is in the public interest there can be no reason to question his authority to appear for the official.

A 1964 Rhode Island case, *Suitor v. Nugent*, dismissed an action in trespass for malicious use of process against the Attorney General. The court said:

> With the office [of Attorney General] came the common law powers and duties thereof to the extent that they were not abridged by constitutional provision . . . among these common-law powers was the control of and participation in criminal prosecutions. . . . It is clear then that in the instant circumstances the attorney general may exercise validly such powers as were possessed by the occupant of that office at the time of the adoption of the constitution. It is clear also that most of these powers involved in the administration of the criminal law required an exercise of discretion on the part of the attorney general and therefore were in the nature of a judicial act.

The Pennsylvania courts have held in *In re Shelley* that the discretionary powers of the Attorney General are subject to abuse. *In re Margiotti's Appeal* added that any finding of an abuse of his discretionary powers by the Attorney General is a judgment to be made only by a court, since the Attorney General is a quasi-judicial officer. An Illinois court went even further, saying in *People ex rel. Elliott v. Covelli* that the Attorney General's discretionary authority is absolute, except for the continuous, repetitive use of the *nolle prosequi* to excess. Nor can the Attorney General be compelled by mandamus to proceed with an action such as *quo warranto*, since his common law powers include quasi-judicial discretion in these matters, according to the Illinois court in *People v. Healy*.

Entering a Nolle Prosequi

Courts in a number of states recognize the Attorney General's power to enter a *nolle prosequi*. A New York case, *People v. McLeod*, held in 1841 that at common law only the Attorney General had such power. The court said, however, that the power probably had been passed on by statute to the district attorney, as the Attorney General's representative. A Rhode Island case, *Rogers v. Hill*, recognized the Attorney General's common law authority to discontinue an action at any time before a verdict was reached. This case was cited favorably in the 1964 Rhode Island case of *Suitor v. Nugent*.

The Kansas court held in *State v. Finch* that "At common law the attorney-general . . . alone could discontinue a criminal prosecution by entering a *nolle prosequi* therein," and upheld his power to do so, despite objections of the local prosecutor. The Illinois court supported this view in *People ex rel. Castle v. Daniels*, where the Attorney General intervened in a case at the request of the local prosecutor, then asked the trial court to vacate its order denying a motion of *nolle prosequi*. A West Virginia case, *Denham v. Robinson*, denied the power of the Attorney General to *nolle prosequi* without consent of the court, holding that, where the Attorney General exercises the prosecutor's powers and duties, he is bound by the same rules that control the prosecutor.[44] The Attorney General's common law power to enter a *nolle prosequi* was recognized by North Carolina in *State v. Thompson* and by Wyoming in *State ex rel. Wilson v. Young*.

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44. *See* Note, *Common Law Powers—Power to Nolle Prosequi Criminal Proceedings*, 33 N.D. L. REV. 110 (1957).

1,332 CASES CONCERNING THE COMMON LAW POWERS OF THE ATTORNEY GENERAL

Alabama ..... *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 41 So. 2d 280 (1949).

Alaska ..... None

Arizona ..... *Smith v. Superior Court in and for Cochise County*, 101 Ariz. 559, 442 P. 2d 123 (1967).
Arizona State Land Department v. McFate, 87 Ariz. 139, 348 P. 2d 912 (1960).
State ex. rel. Morrison v. Thomas, 80 Ariz. 327, 297 P. 2d 624 (1956).
State ex rel. Frohmiller v. Hendrix, 59 Ariz. 184, 124 P. 2d 768 (1942).
Shute v. Frohmiller, 53 Ariz. 483, 90 P. 2d 998 (1939).

Arkansas ..... *State ex rel. Williams v. Karstan*, 208 Ark. 703, 187 S.W. 2d 327 (1945).

California ..... *California Securities Co. v. State*, 111 Cal. App. 258, 295 Pac. 583 (1951).
People v. Centr-O-Mart, 34 Cal. 2d 702, 214 P. 2d 378 (1950).
Warner v. Kenny, 27 Cal. 2d 627, 65 P. 2d 889 (1946).
Evans v. Superior Court, 14 Cal. 2d 563, 96 P. 2d 107 (1939).
Pierce v. Superior Court in and for Los Angeles County, 1 Cal. 2d 759, 37 P. 2d 460 (1934).
People v. City of Los Angeles, 62 Cal. App. 781, 218 Pac. 63 (1923).
People v. Milk Producers Association, 60 Cal. App. 439, 212 Pac. 757 (1923).
Deseret Water, Oil & Inv. Co. v. State, 202 F. 498 (1913).
Lamb v. Webb, 151 Cal. 451, 91 Pac. 102 (1907).
People v. Oakland Waterfront Co., 118 Cal. 234, 50 Pac. 305 (1897).
People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374 (1896).
People's Home Savings Bank v. Superior Court, 103 Cal. 27, 283 Pac. 974 (1894).
State Investment & Insurance Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549 (1894).
People v. Beaudry, 91 Cal. 213, 27 Pac. 610 (1891).
People v. Holladay, 68 Cal. 439, 9 Pac. 655 (1886).
People v. Gold Run Ditch and Mining Co., 66 Cal. 138, 4 Pac. 1152 (1884).
Harpending v. Haight, 39 Cal. 189 (1870).
People v. San Francisco, 36 Cal. 595 (1869).
People v. Pacheco, 29 Cal. 210 (1865).
People v. Stratton, 25 Cal. 242 (1864).

Colorado ..... *State Board of Pharmacy v. Hallett*, 88 Colo. 396, 296 P. 540 (1931).
People v. Casias, 73 Colo. 420, 216 Pac. 513 (1923).

Connecticut ..... None

Delaware ..... *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A. 2d 397 (1941).
Brooks v. State, 3 Boyce 1, 79 Atl. 790 (1911).

Florida ..... *State ex rel. Landis v. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823 (1934).

Georgia ..... *Walker v. Georgia Railway & Power Co.*, 146 Ga. 655, 92 S.E. 57 (1917).
Hart v. Atlanta Terminal Co., 128 Ga. 754, 58 S.E. 452 (1907).

Guam ..... None

Hawaii ..... *The King v. Robertson*, 6 Haw. 718 (1889).

Idaho ..... *Padgett v. Williams*, 82 Idaho 28, 348 P. 2d 944 (1960).
Howard v. Cook, 59 Idaho 391, 83 P. 2d 208 (1938).

Illinois ..... *Department of Mental Health v. Coty*, 38 Ill. 2d 602, 232 N.E. 2d 686 (1967).
People ex rel. Castle v. Daniels, 8 Ill. 2d 43, 132 N.E. 2d 107 (1956).
People ex rel. Elliott v. Covelli, 415 Ill. 79, 112 N.E. 2d 156 (1953).
State ex rel. Board of Trustees of University of Illinois v. Barrett, 382 Ill. 321, 46 N.E. 2d 951 (1943).
People v. Finnegan, 378 Ill. 387, 38 N.E. 2d 715 (1941).
People v. Marquette National Fire Insurance Co., 351 Ill. 516, 184 N.E. 800 (1933).
People v. Continental Beneficial Association, 204 Ill. App. 501 (1917).
Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915).
People ex rel. Stead v. Spring Lake Drainage and Levee District, 253 Ill. 479, 97 N.E. 1042 (1912).
People v. McCullough, 254 Ill. 9, 98 N.E. 157 (1912).
People v. Healy, 230 Ill. 280, 82 N.E. 599 (1907).

Hunt v. Chicago Horse & Dummy Railway Co., 121 Ill. 638, 13 N.E. 176 (1887).
Attorney General v. Chicago & Evanston Railroad Co., 112 Ill. 520 (1884).
Newberry v. Blanchford, 106 Ill. 584 (1872).
People v. Barrett, 382 Ill. 321 (1943).

Indiana ..... *State ex rel. Neeriemer v. Daviess Circuit Court of Daviess County*, 142 N.E. 2d 626, 236 Ind. 624 (1957).
State ex rel. Powers v. Vigo Circuit Court, 236 Ind. 408, 140 N.E. 2d 497 (1956).
State ex rel. Steers v. Holovachka, 236 Ind. 565, 142 N.E. 2d 593 (1956).
State ex rel. Public Service Commission v. Johnson Circuit Court, 232 Ind. 501, 112 N.E. 2d 429 (1953).
State ex rel. Steers v. Criminal Court of Lake County, 232 Ind. 443, 112 N.E. 2d 445 (1953).
State ex rel. Young v. Niblack, 279 Ind. 599, 99 N.E. 2d 839 (1951).
State ex rel. Bingham v. Home Brewing Co., 182 Ind. 75, 105 N.E. 909 (1914).
Julian v. State, 122 Ind. 68, 23 N.E. 691 (1890).

Iowa ..... *State ex rel. Turner v. State Highway Commission*, District Court for Polk County, Equity No. 73960 (12 January, 1970).
In re Owens Estate, 244 Iowa 533, 57 N.W. 2d 193 (1953).
State v. Executive Council, 207 Iowa 923, 223 N. W. 737 (1929).
Cosson v. Bradshaw, 160 Iowa 296, 141 N. W. 1062 (1913).

Kansas ..... *State v. City of Kansas City*, 186 Kan. 190, 350 P. 2d 37 (1960).
State v. Rector, 134 Kan. 685, 8 P. 2d 323 (1932).
State v. Finch, 128 Kan. 665, 280 P. 910 (1929).

Kentucky ..... *Commonwealth ex rel. Attorney General v. The Monroe Co.*, 378 S. W. 2d 809 (1964).
Commonwealth ex rel. Ferguson v. Gardner, 327 S. W. 2d 947 (1959).
Commonwealth v. Howard, 297 Ky. 488, 187 S.W. 2d 415 (1944).
Johnson v. Com. ex rel. Meredith, 291 Ky. 829, 165 S. W. 2d 820 (1942).
McClendon v. Hamilton, 277 Ky. 734, 127 S. W. 2d 605 (1939).
Repass v. Commonwealth ex rel. Attorney General, 131 Ky. 807, 115 S. W. 1131 (1909).

Louisiana ..... *Saint v. Allen*, 177 La. 350, 134 So. 246 (1931).
Noel Bros. v. Texas & Pacific Railway Co., 16 La. App. 622, 133 So. 830 (1931).

Maine ..... *Watts Detective Agency v. Sagadahoc*, 137 Me. 233, 18 A. 2d 316 (1941).
In re Maine Central Railroad, 134 Me. 217, 183 Atl. 844 (1936).
Withee v. Lane and Libby Fisheries Co., 120 Me. 121, 113 A. 22 (1921).

Maryland ..... None

Massachusetts ..... *Jacobson v. Parks and Recreation Commission of Boston*, 345 Mass. 641, 189 N. E. 2d 199 (1963).
Attorney General v. Trustees of Boston Elevated Railroad Co., 319 Mass. 642, 67 N. E. 2d 676 (1946).
Commonwealth v. Kozlowsky, 238 Mass. 379, 131 N. E. 207 (1921).
Attorney General v. Suffolk County Apportionment Commissioners, 224 Mass. 598, 113 N. E. 581 (1916).
Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843 (1895).
Attorney General v. Old Colony Railroad Co., 160 Mass. 62, 35 N. E. 252 (1893).
Commonwealth v. Allen, 128 Mass. 308 (1880).
Goddard v. Amithett, 69 Mass. 116, 3 Gray 116 (1854).
Parker v. May, 59 Mass. (Cush.) 336 (1850).

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Attorney General v. City of Grand Rapids, 175 Mich. 503, 141 N. W. 890 (1913).
Attorney General v. Board of Auditors, 73 Mich. 53, 40 N. W. 852 (1888).
Attorney General v. Detroit, 26 Mich. 263 (1872).

Minnesota ..... *Slezak v. Ousdigian*, 260 Minn. 303, 110 N. W. 2d (1960).
Dunn v. Schmid, 239 Minn. 559, 60 N. W. 2d 14 (1955).
In re Quinlan's Estate, 233 Minn. 35, 45 N. W. 2d 809 (1951).

Schaeffer v. Newberry, 227 Minn. 259, 35 N. W. 2d 278 (1948).
State ex rel. Young v. Robinson, 101 Minn. 277, 112 N. W. 269 (1907).

Mississippi ..... *State ex rel. Patterson for Use and Benefit of Adams County v. Warren*, 180 So. 2d 298 (1965).
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State ex rel. Rice v. Stewart, 184 So. 44, 184 Miss. 202 (1939).
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Missouri ..... *State ex rel. Taylor v. Wade*, 360 Mo. 895, 231 S. W. 2d 179 (1950).
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State ex rel. Barrett v. Boeckeler Lumber Co., 302 Mo. 187, 257 S. W. 453 (1924).
State v. Excelsior Powder Manufacturing Corp., 259 Mo. 254, 169 S. W. 267 (1914).

Montana ..... *Woodahl v. State Highway Commission*, 465 P. 2d 818 (1970).
State ex rel. Olsen v. Public Service Commission, 129 Mont. 106, 283 P. 2d 594 (1955).
State ex rel. Pew v. Porter, 57 Mont. 535, 189 Pac. 618 (1920).
State ex rel. Ford v. Young, 54 Mont. 401, 170 Pac. 947 (1918).
State ex rel. Nolan v. District Court, 22 Mont. 25, 55 Pac. 916 (1899).

Nebraska ..... *State v. State Board of Equalization*, 123 Neb. 259, 242 N. W. 609 (1932).
State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619 (1908).
State ex rel. Glenn v. Stein, 13 Neb. 529, 14 N. W. 481 (1882).

Nevada ..... *State ex rel. Fowler v. Moore*, 46 Nev. 65, 207 P. 75 (1922).

New Hampshire .. *State v. Knowlton*, 102 N. H. 221, 152 A. 2d 624 (1959).
State v. Swift, 101 N. H. 340, 143 A. 2d 114 (1958).
Wyman v. Danais, 101 N. H. 487, 147 A. 2d 166 (1958).
Fletcher v. Merrimack County, 71 N. H. 96, 51 A. 271 (1901).

New Jersey ..... *Petition of Public Services Coordinated Transportation*, 5 N. J. 196, 74 A. 2d 80 (1950).
O'Regan v. Schermerhorn, 25 N. J. Misc. 1, 50 A. 2d 10 (1946).
Van Riper v. Jenkins, 140 N. J. Eq. 99, 45 A. 2d 844 (1946).
Wilentz v. Hendrickson, 133 N. J. Eq. 447, 33 A. 2d 366 (1943), affirmed 135 N. J. Eq. 244, 38 A. 2d 199 (1944).
Board of Public Utilities Commissioners v. Lehigh Valley Railway Co., 106 N. J. L. 411, 149 Atl. 263 (1930).

New Mexico ..... *State v. Reese*, 78 N. M. 241, 430 Pac. 399 (1967).
State v. Davidson, 33 N. M. 664, 275 Pac. 373 (1929).

New York ..... *People v. Hopkins*, 47 N. Y. S. 2d 222 (1944).
People v. Dorsey, 29 N. Y. S. 2d 637 (1941).
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People v. Finch, Proyno Co., 202 N. Y. S. 582 (1924).
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People v. Miner, 2 Lans. 396 (1868).
People v. Vanderbilt, 26 N. Y. 287 (1863).
People v. McLeod, 25 Wend. 483 (1841).

North Carolina ..... *Sternberger v. Tannenbaum*, 272 N. C. 658, 161 S. E. 2d 116 (1968).
State v. Thompson, 10 N. C. (3 Hawks) 613 (1825).

North Dakota ..... *State ex rel. Miller v. District Court*, 19 N. D. 818, 124 N. W. 417 (1910).

Ohio ..... None

Oklahoma ..... *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 Pac. 982 (1908).
Trapp v. Cook Construction Co., 24 Okla. 850, 105 Pac. 667 (1909).

Oregon ..... *State ex rel. Thornton v. Williams*, 215 Or. 639, 336 P. 2d 68 (1959).
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State ex rel. v. Metscham, 23 Or. 372, 46 Pac. 791 (1886).

Pennsylvania ..... *Commonwealth v. Bardascino*, 210 Pa. Super. 202, 232 A. 2d 236 (1967).
Commonwealth v. Fudeman, 396 Pa. 236, 152 A. 2d 428 (1959).
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Commonwealth v. Wilson, 158 Pa. Super. 198, 44 A. 2d 520 (1945).
In re Shelley, 332 Pa. 358, 2 A. 2d 809 (1938).
Commonwealth v. Ryan, 126 P. Super. 306, 188 Atl. 764 (1937).
Commonwealth ex rel. Minerd v. Margiotti, 325 Pa. 17, 188 A. 524 (1936).
Commonwealth v. Lehman, 309 Pa. 486, 164 Atl. 526 (1932).

Puerto Rico ..... None

Rhode Island ..... *Suitor v. Nugent*, 98 R. I. 56, 199 A. 2d 722 (1964).
Rogers v. Hill, 22 R. I. 496, 48 Atl. 670 (1901).

Samoa ..... None

South Carolina ..... *Cooley v. S. C. Tax Commission*, 204 S. C. 10, 28 S. E. 2d 445 (1943).
State v. Southern Railroad Co., 82 S. C. 12, 62 S. E. 1116 (1908).

South Dakota ..... *State ex rel. Maloney v. Wells*, 79 S. D. 389, 112 N. W. 2d 601 (1961).
Johnson v. Jones, 49 S. D. 549, 207 N. W. 550 (1926).

Tennessee ..... None

Texas ..... *Garcia v. Laughlin*, 155 Tex. 261, 285 S. W. 2d 191 (1956).
State v. Reagen County Purchasing Co., 186 S. W. 2d 128 (1944).
State v. Harnery, 164 S. W. 2d 55 (1942).
Yett v. Cook, 115 Tex. 205, 281 S. W. 837 (1926).
Charles Scribner's Sons v. Marrs, 114 Tex. 11, 262 S. W. 722 (1924).
Brady v. Brooks, 99 Tex. 366, 89 S. W. 1053 (1905).
Queens Insurance Co. v. State ex rel. Attorney General, 22 S. W. 1048 (1892), rev. 86 Tex. 250, 24 S. W. 397 (1893).
State v. Farmers Loan & Trust Co., 81 Tex. 530, 17 S. W. 60 (1891).
State v. Goodnight, 70 Tex. 682, 11 S. W. 119 (1888).

Utah ..... *Hansen v. Barlow*, 23 Utah 2d 47, 456 P. 2d 177 (1969).
Hansen v. Legal Services Committee of Utah State Legislatures, 19 Utah 2d 231, 429 P. 2d 979 (1968).

Vermont ..... None

Virgin Islands ..... None

Virginia ..... *James v. Almond*, 170 F. Supp. 331 (1959).
Blair v. Mayre, 80 Va. 485 (1885).

Washington ..... *State v. Taylor*, 58 Wash. 2d 252, 362 P. 2d 247 (1961).
State ex rel. Winston v. Seattle Gas & Electric Co., 28 Wash. 488, 68 Pac. 946 (1902).

West Virginia ..... *Denham v. Robinson*, 72 W. Va. 243, 77 S. E. 970 (1913).
State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935 (1909).

Wisconsin ..... *State ex rel. Reynolds v. Smith*, 19 Wis. 2d 577, 120 N. W. 2d 664 (1963).
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State v. Snyder, 172 Wis. 415, 179 N. W. 579 (1920).
Attorney General v. Chicago & Milwaukee Railway, 35 Wis. 425 (1874).

Wyoming ..... *Town of Cody v. Buffalo Bill Memorial Association*, 64 Wyo. 468, 196 P. 2d 369 (1948).
State ex rel. Wilson v. Young, 44 Wyo. 6, 7 P. 2d 216 (1932).
Bentley v. Whitney Benefits, 41 Wyo. 11, 281 Pac. 188 (1929).

1.4 Selection and Term

This chapter examines the important issues of how the Attorney General is selected, how long he serves, how he can be removed, and how a vacancy in the office can be filled. Some of these issues, particularly that of election or appointment, have been subject to controversy since the first state constitutions were formulated and will continue to be debated. This Report discusses existing practice and presents the arguments on both sides of these issues.

1.41 Method of Selection

Table 1.41 shows methods of selecting the Attorney General. He is popularly elected in forty-two states. He is appointed by the Governor in six states (Alaska, Hawaii, New Hampshire, New Jersey, Pennsylvania, and Wyoming), the three territories (Guam, Samoa and the Virgin Islands), and the Commonwealth of Puerto Rico. In Maine, he is selected by the Legislature and in Tennessee, by the Supreme Court.

Present Selection Methods

The Attorney General is the most prevalent elective official in state government, with the exception of the Governor, who is elected in all states. The Treasurer is elected in forty states, the Secretary of State in thirty-nine, the Lieutenant Governor in thirty-eight, the Auditor in twenty-nine and the Superintendent of Public Instruction in twenty-four.[1] If the trend continues toward team election of the Governor and Lieutenant Governor on a single ballot as now occurs in nine states, the Attorney General will soon be the most common single elective official. Where very few, but more than one, state executive officials are elected, the Attorney General is usually included among these few. He is: among the three executives elected in Maryland, Michigan and New York; among the five in Rhode Island; and among the six elected in Wisconsin, Oregon and Connecticut. However, he is not one of the two elected officers in Alaska, the four in Pennsylvania, nor the five in Wyoming.

Historic Development

Historically, the Attorney General has been an appointive, rather than elective, official. In England, he was appointed by the Crown and only incidentally acquired elective status through a seat in Parliament. In Colonial America, the Attorney General was usually appointed by the Governor. The Attorney General of the United States still serves at the pleasure of the President.

Most of the first state constitutions specified that the legislature would choose the Attorney General. Some of the constitutions in effect during the revolutionary era even stipulated that the Governor would be so elected. The concept of universal suffrage had not yet taken hold, nor had the idea of direct election of many officials. Alexis de Tocqueville reflected the political theory prevalent in the 1830's in commenting on selection of officials by state legislatures, rather than by popular election:

> This transmission of the popular authority through an assembly of chosen men operates an important change in it by refining its discretion and improving its choice. Men who are chosen in this manner . . . represent only the elevated thoughts that are current in the community.[2]

Andrew Jackson's administration brought a new political ethic to American government. The common man was

1. See: The Council of State Governments, THE BOOK OF THE STATES, 1969, and Joseph Schlesinger, *The Politics of the Executive* in Jacob and Vines, POLITICS IN THE AMERICAN STATES, (Boston: Little, Brown, 1965) 214.

2. Alexis de Tocqueville, DEMOCRACY IN AMERICA (Knopf ed., 1946) 205.

	Elected	Appointed by	With Consent of	Length of Term (Years)	May Succeed Himself
Alabama	X			4	No
Alaska		Governor	Legislature	Indefinite	Yes
Arizona	X			4	Yes
Arkansas	X			2	Yes
California	X			4	Yes
Colorado	X			4	Yes
Connecticutt	X			4	Yes
Delaware	X			4	Yes
Florida	X			4	Yes
Georgia	X			4	Yes
Guam		Governor	Legislature	Indefinite	Yes
Hawaii		Governor	Senate	4	Yes
Idaho	X			4	Yes
Illinois	X			4	Yes
Indiana	X			4	Yes
Iowa	X			2	Yes
Kansas	X			2	Yes
Kentucky	X			4	No
Louisiana	X			4	Yes
Maine		Legislature		2	Yes
Maryland	X			4	Yes
Massachusetts	X			4	Yes
Michigan	X			4	Yes
Minnesota	X			4	Yes
Mississippi	X			4	Yes
Missouri	X			4	Yes
Montana	X			4	Yes
Nebraska	X			4	Yes
Nevada	X			4	Yes
New Hampshire		Governor	Council	5	Yes
New Jersey		Governor	Senate	4	Yes
New Mexico	X			2	Yes
New York	X			4	Yes
North Carolina	X			4	Yes
North Dakota	X			4	Yes
Ohio	X			4	Yes
Oklahoma	X			4	Yes
Oregon	X			4	Yes
Pennsylvania		Governor	Senate	4	Yes
Puerto Rico		Governor	Senate	Indefinite	Yes
Rhode Island	X			2	Yes
Samoa		Governor		2 yr. min.	Yes
South Carolina	X			4	Yes
South Dakota	X			2	Yes
Tennessee		Supreme Ct.		8	Yes
Texas	X			2	Yes
Utah	X			4	Yes
Vermont	X			2	Yes
Virgin Islands		Governor	Legislature	Indefinite	Yes
Virginia	X			4	Yes
Washington	X			4	Yes
West Virginia	X			4	Yes
Wisconsin	X			4	Yes
Wyoming		Governor	Senate	4	Yes
United States		President	Senate	Indefinite	Yes

deemed competent enough to vote and to hold office. Short terms of office ensured popular control of government, and direct election of officials became the rule.[3] State constitutions provided for election of numerous officials, including the Attorney General in most instances.

A study in the *Law Library Journal*[4] showed development of methods of selecting Attorneys General in nineteen states; of these, eight provided for legislative selection prior to 1843, but none finally retained this method. Prior to 1845, twelve states provided by constitution or legislation for the appointment of an Attorney General by the Governor, the legislature, or other authority. Some examples of the trends in selection in the older jurisdictions are given below:

North Carolina's 1776 Constitution provided for appointment by the legislature; its 1868 Constitution provided for election.

Louisiana's 1812 Constitution provided for appointment by the Governor; its 1852 Constitution provided for election.

Tennessee provided by 1831 legislation and by 1834 Constitution that the legislature would select the Attorney General; this appointive power was given to the Supreme Court by the 1870 Constitution.

Michigan's 1835 Constitution provided for appointment by the Governor; the 1850 Constitution provided for election.

Virginia's 1776 Constitution provided for selection by the legislature; its 1902 Constitution provided for election.

Kentucky's 1792 Constitution provided that the Governor would appoint the Attorney General, with the consent of the Senate; the 1850 Constitution made the office elective.

New York's 1777 constitutional convention appointed an Attorney General, then provided for selection by a Council of Appointment; the 1821 Constitution provided for selection by the legislature; and the 1846 Constitution provided for popular election.

Although the Jacksonian tradition is still basic to state government, other trends have manifested themselves and of those principles no longer command the nearly unanimous support they once held. The late 19th Century saw the introduction of such innovations as civil service, open primaries, executive budgets, and the short ballot for state officials. Wyoming, in 1899, became the first "new" state to provide for appointment of the Attorney General, thereby ending the trend toward popular election. Alaska's 1959 Constitution and Hawaii's of 1960 provided for Gubernatorial appointment, as did their territorial conventions in 1956 and 1950.

Recommendations for an appointive Attorney General were submitted to New York constitutional conventions in 1867, 1894, 1914, 1938, and 1967, but were not adopted. The New Jersey Constitutional Convention of 1947 continued the practice of Gubernatorial appointment, as did the Pennsylvania Constitution of 1968. The 1961-62 Michigan Constitutional Convention extensively debated the issue of election versus appointment. An alliance between two of three convention factions led to the acceptance of elective status for the Attorney General and Secretary of State and appointive status for the State Treasurer, Auditor, and Highway Commission. The Maryland Constitutional Convention of 1967 also retained elective status for the Attorney General.

Strong arguments can be advanced for either system of selection. There is not necessarily a correlation between the selection process and the Attorney General's actual powers. For example, the Attorney General is elected in Delaware and appointed in Alaska, but in both jurisdictions he has control over all legal and prosecutorial functions. In some states, the Attorney General is independently elected, but he exercises

3. Richards, *The Traditions of Government in the States*, in THE FORTY-EIGHT STATES: THEIR TASKS AS POLICY MAKERS, 45 (1965).

4. Lewis Morse, *Historical Outline and Bibliography of Attorneys General Reports and Opinions*, 30 LAW LIBRARY JOURNAL 39-245 (1937).

little power at either the state or local level. Thus, a "strong" department of justice can be developed under either system of selection, but is not guaranteed by either.

The Case for Appointment

Proponents of an appointive Attorney General usually base their arguments primarily on the need to strengthen the executive. The commentary on the Model State Constitution developed by the National Municipal League says that:

> All authorities on executive organization agree with the position embraced by the Model State Constitution for more than 40 years that administrative power and responsibility should be concentrated in a single popularly elected chief executive. There is growing recognition that the governor, as the representative of all the people, should be equipped with the constitutional status necessary to exercise constructive leadership as the chief lawmaker and political head of his state.
> . . . Are the voters capable, or should they even be asked, to pass upon the abilities and performances of a large number of elected administrative officials? Would it not be better to give broad appointive and administrative powers to one individual, to enhance his position of leadership—making him master in his own house—and then hold him responsible through democratic electoral processes?[5]

Mr. Richard S. Childs, Honorary Chairman of the National Municipal League, adds that:

> Our objection to election of attorneys general applies to all the jobs on the tail of the state tickets and rests on the conviction that the attempt to have the people scrutinize the candidates for these secondary and undramatic jobs has failed completely for 100 years. The failure is called apathy . . . . Scrutiny by the people cannot be ordained or cajoled. It is a pervasive habit and fact and furthermore, it is a reasonable result of the attempt to impose on busy voters the duty of investigating and scrutinizing candidates for a technical non-representative office.[6]

The Model Executive Article for state constitutions recommended by the Committee on Suggested State Legislation of the Council of State Governments limits statewide elective officials to the Governor and Lieutenant Governor, who are elected jointly. This article was developed by the Committee on Constitutional Revision of the National Governor's Conference,[7] and corresponds to that recommended by the Advisory Committee on Intergovernmental Relations.[8]

In 1949, when a major reorganization of the federal government was underway, state reorganization was being discussed at the annual meeting of the National Association of Attorneys General. Attorney General Theodore D. Parsons of New Jersey noted that reorganization would require certain constitutional conditions:

> Most important of these conditions I would submit is a short ballot with the Governor being the only constitutional officer in the executive branch who is elected by the people, if possible; secondly, a reasonably secure term of office for the governor, the accepted term being four years, within which he may carry out a program and develop administration confidence; thirdly, a reasonable assurance in the constitution against invasion by either the legislature or the executive branches upon the proper providence of the other.[9]

This is the position of those experts who favor integrating administrative activities and concentrating their control over them in the hands of a responsible chief executive; most of the studies which have occurred since about 1910 on administrative reorganization have so

5. National Municipal League, MODEL STATE CONSTITUTION (6th ed.) 65-66 (1963).

6. Letter from Richard S. Childs to Patton G. Wheeler, November 18, 1970.

7. The Council of State Governments, 1970 SUGGESTED LEGISLATION, 3-4.

8. Advisory Commission on Intergovernmental Relations, A.C.I.R. STATE LEGISLATIVE PROGRAM, 14-11-00 (1969).

9. National Association of Attorneys General, 1949 PROCEEDINGS, 40-41

argued. They hold that fragmentation leads to irresponsibility, but a single chief executive can be held accountable through the electoral system and, as a consequence, can make the administration more responsive.[10] Proponents of an appointive Attorney General argue that his function is to advise the Governor and the Governor should be permitted to choose his advisors. They believe that the two officials are more likely to maintain the close and harmonious relationship that is necessary for effective liaison if the Attorney General is appointed. His office is one through which the Governor is expected to discharge his responsibilities, and the Governor should therefore exercise some control over it.

Advocates of appointment also contend that the elective process may not assure professional competence. The pressures of politics and the time involved in campaigning limit an Attorney General's abilities to serve effectively, and many highly competent people would not be willing to undergo the election process. They also hold that the Attorney General's primary function is to interpret the law; this is a technical task and should not involve the electoral process.

The Case for Election

The arguments for an elective Attorney General were eloquently summarized by Attorney General Louis J. Lefkowitz in a position paper submitted to the New York Constitutional Convention in 1967. General Lefkowitz reviewed the Attorney General's duties in some detail, pointing out they were predicated upon his role as an independent official, and concluded that:

> To sum it up—an elected Attorney General has a measure of independence and a sense of personal and direct responsibility to the public. The elected official has a natural and impelling desire to be creative and to exercise broader initiative in the service of the public. He is free of the fear of dismissal by any superior official if he should exercise contrary independent judgment. He is in the best position to render maximum service to the People and *impartial* advice to the Governor, the Legislature and State departments and agencies. He can appear in Court *without fear or favor*—an attorney in the fullest and finest sense of the word.[11]

An equally strong position in favor of election was taken by Attorney General William J. Scott before the recent Illinois Constitutional Convention; he stressed the Attorney General's roles of "government watchdog" and "attorney for the people" as requiring independence from the Governor. General Scott's two predecessors concurred in this position.[12]

The primary argument for an elective Attorney General is that he is an attorney for all of the people, and should be chosen by them. He is the Governor's advisor, but not exclusively; the Governor is merely one among many clients. By making the Attorney General directly responsible to the electorate, he remains subject to the ultimate source of power and will be more responsive to public needs. It is further argued that the Attorney General has important administrative and legal functions, such as programs in consumer protection and environmental control. In executing these functions, an Attorney General is acting as an advocate for the people, not as agent of the executive branch. His duties usually include prosecution of election violations, collection of debts, and bringing of suits in the name of the people; these responsibilities are outside the scope of the Governor's duties.

Another argument against the concept of the Attorney General as counsel to the Governor is that the legislative branch may also rely on him for advice. In some states, he also has responsibilities toward the judiciary branch, such as serving as court reporter. Thus, he should not be responsible to any single branch of government, but can serve to strengthen checks and balances within the system.

The fear of loss of office should not deter the Attorney General from issuing an opinion. Since his duties are of the highest order, as high as any judicial officer, he should enjoy the same independence as a member of the judiciary. He should not be a creature of the Governor, but should render opinions solely on the basis of law. He should not be the advocate for a particular administration, but should be free to oppose policies which he considers inconsistent with the law and to investigate apparent wrongdoing.[13]

In reference to the argument that harmony must exist between the Governor and the Attorney General, it is noted that the Attorney General in over one-third of the jurisdictions is of a different political party than the Governor. While conflicts undoubtedly result from such partisan differences, effective working relationships apparently are maintained in most states. In reference to the argument that an appointed Attorney General is a nonpolitical technician, it is noted that a recent appointed Attorney General resigned to serve as chairman of a Senatorial campaign committee, while another was prominently mentioned as a Gubernatorial candidate. Appointment does not necessarily remove the office from politics.

Attorney General Clarence Meyer of Nebraska, in response to the argument that the Governor should be able to appoint his Attorney General, says that: "The president of a large corporation *does not* name the general counsel. This is done by the board of directors and in some cases their action must be confirmed by a vote of the stockholders." Because of this, "the same general counsel sees a good many presidents come and go."[14]

In his remarks to a legislative committee which was considering a constitutional amendment to make the office appointive, General Meyer mentioned several arguments in addition to those usually advanced by proponents of election. These included the following points: the Governor can appoint men with legal training to his staff if he feels he needs lawyers of his own choosing; much of the Attorney General's work is in areas in which the Governor has little or no interest, such as advising county attorneys and handling routine criminal appeals; the Governor is only one of many state officials whom the Attorney General advises; a Governor can make mistakes in appointing someone to the office of Attorney General; in most states, the Governor has control over law enforcement officers. General Meyer quotes in conclusion from the remarks of a delegate to the 1920 Constitutional Convention in Nebraska:

> If there is any man who holds office in this state and who should be elected by, and responsible to the people of the state, it should be the Attorney General. The head of the state may have good judgment in his appointment, he may be able, from his experience, to appoint an excellent man to act as Attorney General, but I do not believe, under ordinary circumstances, that the judgment of one man is better than the combined judgment of the electors of the State of Nebraska on that proposition, and an Attorney General should be a check upon all the officers in the state, and he

10. See, e. g., Duane Lockard, THE POLITICS OF STATE AND LOCAL GOVERNMENT, 1969, p. 328.

11. Attorney General Louis J. Lefkowitz, *Position Paper of Louis J. Lefkowitz, Attorney General, to Constitutional Convention, Committee on the Executive Branch*. June 1, 1967, Albany, N. Y.

12. *News from William J. Scott, Attorney General, State of Illinois*, Feb. 16, 1970.

13. *See* summary of arguments presented to New York's constitutional conventions in Robert H. Gordon, *The Relationship between the Attorney General and Agency Counsels in New York State*, (Unpublished Ph.D. Dissertation, Syracuse U.), Ch. I, (1966).

14. Letter from Attorney General Clarence A. H. Meyer to Patton G. Wheeler, November 24, 1970.

should be free, if necessary, to proceed against any department or against any officer in the state. I do not want his hands tied; I do not want him to be responsible to any individual or to any particular department. I want him free in the discharge of his duties.[15]

No recent or current arguments defend the proposition that either the legislature or the courts should appoint the Attorney General; appointment is viewed as an executive function. It is assumed that the Attorney General is logically a member of the administrative branch of government, not the legislative or judicial. Furthermore, his impartiality in rendering opinions on legislation could be impaired if he remained responsible to the legislative body. The Attorney General represents many facets of the state before the court of the state; such being the case, there are obvious arguments against permitting the judges to select one of the advocates in a case.

Confirmation of Appointment

In all six states where the Governor appoints the Attorney General on a regular basis, the appointment is confirmed by either the Senate (Hawaii, New Jersey, Pennsylvania, Wyoming) both houses of the Legislature (Alaska) or by the Council (New Hampshire). Confirmation in Pennsylvania requires a two-thirds vote of all the members of the Senate.

In Puerto Rico and the Virgin Islands confirmation is also by the Senate. The C.O.A.G. questionnaire from Guam indicated appointments are made with "advice and consent" of the legislature, whereas Samoa mentions that appointment is by the Governor, without indicating any mechanism for confirmation.

The Advisory Commission on Intergovernmental Relations, suggested constitutional provision for a short ballot for state officials provides for Senatorial confirmation. The Model State Constitution of the National Municipal League does not mention confirmation. There is no extensive literature, and presumably no vigorous arguments to be made, on the precise manner in which appointments are to be confirmed. Although all Pennsylvania Attorneys General of recent years have been in the same political party as the Governor, the requirement of approval of two-thirds of all elected members of the Senate for confirmation of the Attorney General gives the minority party considerable leverage over appointments. We cannot now ascertain whether this has caused problems.

15. Remarks of Mr. Spillman, PROCEEDINGS, 1920 CONSTITUTIONAL CONVENTION, STATE OF NEBRASKA, 1346.

1.42 Length of Term and Succession

Thirty-eight states provide a four-year term for the Attorney General and nine provide a two-year term. Tennessee sets the term at eight years and New Hampshire at five. In Alaska, Guam, Puerto Rico, and the Virgin Islands, the Attorney General is appointed for an indefinite term. Samoa stipulates that he is appointed for a minimum of two years. Table 1.41 shows the length of term and succession.

Trend Toward Longer Terms

The trend is clearly toward longer terms. Most states initially limited terms of officials to one or two years, on the theory that frequent elections kept government closer to the people and prevented the accretion of power by elected officials. Many states prohibited successive terms on the theory that official power must be limited and there was no particular virtue in continuity of office-holding. These arguments may have been cogent at a time when Attorneys General had relatively few duties to perform, as the temporary abolition of the office in some jurisdictions indicates was the case, and those duties were relatively well defined. Present Attorneys General, however, cannot effectively operate with a two-year term, which does not allow time to master the duties and responsibilities of the office. Neither should they be subjected to the continuing campaign requirements imposed by an election every two years.

The number of Attorneys General serving two-year terms declined from twenty-one in 1937, to eighteen in 1950, to the present nine.[1] Arizona went from two to four years in 1970, and Wisconsin did so in 1971. Apparently only one jurisdiction has even gone from a four-year to a two-year term; this occurred under Missouri's 1865 Constitution, which was adopted during Reconstruction. Its 1875 Constitution restored the four-year term.

Michigan's 1963 Constitution lengthened the Attorney General's term from two to four years, as did North Dakota in 1964. Minnesota's first four-year Attorney General was elected in 1958, Nebraska's in 1966. New Mexico's proposed Constitution of 1969 included a provision for four-year terms, but was defeated at the polls.

Arguments for Longer Terms

Comments by members of Attorneys General's staffs in states with the two-year term in 1963 to the Committee on the Office of Attorney General were uniformly critical, as the following excerpts show:

> The Attorney General's two-year term does create many problems, namely lack of continuity of office procedure when a new Attorney General is elected, rapid turnover of personnel, and a great amount of money required for each political campaign.[2]

> The most obvious problem created by the two-year term is the frequency of campaign requirements.[3]

Maine said, in 1963, that there were no problems concerning the two-year term.[4]

In 1969, however, the Attorney General's office said that:

> The increase in work required of the Department of Attorney General has reached the point where a full-time Attorney General is needed . . . . A properly qualified attorney cannot afford to accept the position on a full-time basis for a two-year term.[5]

Efforts for a four-year term are regularly defeated in South Dakota, where the Attorney General reported to C.O.A.G. that:

> The two-year term for the Attorney General does create serious problems. Perhaps most seriously, it has the effect of forcing the Attorney General into an almost continuous political campaign. That makes it imperative that the Attorney General be out of his office a great deal, attending functions which are strictly political in nature or consequences, rather than giving his time to the operations and efficiency of his office. The time limits of the term do not allow the Attorney General sufficient opportunity to develop programs, particularly when they are controversial, because they cannot be evaluated properly before the next election is at hand. Several attempts have been made to amend the Constitution to provide a four-year term for the Attorney General as well as for other constitutional officers. There has always been considerable support for the proposals from both the news media and the legislators, but for some reason it has never succeeded in passing.[6]

1.43 Succession to Office

There are few restrictions on Attorneys General serving successive terms. There are more on the Governor, who may not succeed himself in eleven states, and in twelve others may serve only two terms.[7] However,

1. The Council of State Governments, THE BOOK OF THE STATES, 1937, 1950.
2. Letter from Assistant Attorney General David M. Lurie of Arizona to Attorney General John B. Breckinridge, May 17, 1963.
3. Letter from Solicitor General Wilbur M. Bump of Iowa to Attorney General John B. Breckinridge, May 21, 1963.
4. Letter from Deputy Attorney General George C. West to Attorney General John B. Breckinridge, September 25, 1963.
5. Letter from Deputy Attorney General George C. West to Attorney General John B. Breckinridge, August 5, 1969.
6. N.A.A.G., Supplementary Questionnaire for South Dakota, October 8, 1969.
7. The Council of State Governments, THE BOOK OF THE STATES, 125 (1968-69).

there are such restrictions on Attorneys General in only three states: Kentucky, New Mexico and Alabama. Only Kentucky prohibits immediate succession. New Mexico restricts the Attorney General to two successive two-year terms and Alabama to two successive four-year terms. Alabama formerly provided for only one term, but a 1968 amendment permitted the limited succession.

Historical data on past restrictions are lacking, but good sense has led toward their elimination. The Model State Constitution permits succession in the office of Governor because:

> The main argument favoring restriction in the term of the governor is fear of bossism or perpetuation through use of the powers of the office. This is always a possibility but the better argument seems against any form of restriction. Limitations of this kind restrict the right of the people to pass judgment upon the quality of the gubernatorial service performed for them and thus eliminates from the field the one candidate about whom the voters usually know the most. From a program policy point of view, a restriction on service in office affects the governor's ability to develop and implement a long-range plan.[8]

These arguments apply with equal validity to the office of Attorney General.

N.A.A.G. recommends that the Attorney General should serve for a minimum term of four years and should be allowed to succeed himself. A shorter term makes it difficult for him to develop and execute programs, build a staff, or otherwise function effectively.

1.44 Removal from Office

There are several mechanisms for removing Attorneys General: impeachment, recall, or removal by the Governor, the legislature, or the courts.

Impeachment

Of the fifty-four jurisdictions, thirty-six provide for impeachment. It is the only method of removal provided in twenty-one of these jurisdictions. Impeachment processes vary. Professor Clyde F. Snider of the University of Illinois describes the typical process:

> Impeachment proceedings are instituted in the lower house of the legislature by the introduction of a resolution of impeachment. Such a resolution may be introduced by any house member, whereupon the matter is referred to a committee for investigation and report. On the basis of the committee's findings and recommendations, the house decides whether or not to vote charges in the form of 'articles of impeachment.' In most states a simple majority vote in the house is sufficient to impeach, although a few states require a two-thirds vote. If the house votes in favor of impeachment, it transmits a copy of the charges to the senate, which resolves itself into an impeachment court to try the case. A 'board of managers' is constituted by the house from among its members to prosecute the proceedings before the senate. The accused official is entitled to be represented by counsel, and the entire proceedings are conducted in a manner similar to procedure before the regular courts. When the taking of testimony and the presentation of evidence have been concluded, the senate votes upon the question of conviction or acquittal. A two-thirds vote—in some states of all members and in others merely of those present—is ordinarily necessary to convict . . . . the consequences of impeachment may also vary.

Professor Snider adds that:

> In a few states the judgment is limited to removal from office, but more commonly it may also include disqualifications from holding any state office in the future. Most constitutions expressly except impeachment cases from the governor's pardoning power. Moreover, a person who has been impeached may, whether or not he is convicted on the impeachment charges, be prosecuted in the ordinary courts for any criminal act which he may have committed.[1]

In New York, the judges of the Court of Appeals, the state's highest court, sit with the members of the Senate as a court of impeachment. In Nebraska, impeachment charges are preferred by the unicameral Legislature and tried before the State Supreme Court. In Missouri, impeachments are tried before the Supreme Court after charges are filed by the House of Representatives.

An impeachment proceeding is rare, and is used only under the most extraordinary circumstances. Apparently, the last impeachment trial of an Attorney General was in Kansas in 1934. That action resulted in an acquittal.[2] Whatever are the prescribed grounds for impeachment, the method is not a common means of removing officials. It can be utilized only when the legislature is in session and is quite time-consuming.

Alternative Removal Processes

Fifteen states which provide for impeachment also provide alternative removal processes. In the ten jurisdictions where the Governor appoints the Attorney General, he may also remove him. In Hawaii, the Senate must consent to such removal. In New Jersey, the Attorney General can be removed by the Governor for cause only after an opportunity to be heard has been granted. In New Hampshire, the Governor and the Council may remove the Attorney General on address of both branches of the legislature. Five other states provide for Gubernatorial removal of the Attorney General. In Maine, the Governor and Council may remove on address of both branches of the legislature. In New York, removal is by the Governor and the Senate. The Governor of Arkansas, upon address of two-thirds of the members of each house of the legislature, may for good cause remove the Attorney General. In Michigan and West Virginia, the Governor may remove him without the consent of another authority.

The legislature stands alone as a removing authority in proceedings other than impeachment in eight states. Recall may be used to remove the Attorney General in Arizona, Colorado, Louisiana, North Dakota, Oregon, Washington, and Wisconsin; he is an elective officer in all of these states.

Professor Snider evaluates the recall procedure as follows:

> Recall provisions where they exist have been used but sparingly . . . . The recall is sometimes criticized on the grounds that it involves a further lengthening of the ballot. On the other hand, it has been contended that, without the recall as a means of holding to account officials vested with wide appointing powers, the short ballot would not be practical. Provision for the recall may make it possible to lengthen official terms without impairing popular control, but may also be used by factions defeated in an election to continue the election fight or to harass the winners while in office.[3]

Louisiana reports that the district court may remove the Attorney General, and Maryland indicates that removal is attendant to any conviction in a court of law.

As a result of a court decision, an Arizona Attorney General was removed from office in 1947, having been adjudged guilty of conspiring to violate the gambling laws of the state. The Governor considered the office vacant and appointed a new Attorney General. The former Attorney General, however, refused to vacate his office. Subsequent court action affirmed the validity of an act which provided that an office would be vacant if its incumbent was convicted of a felony. The court reasoned that the powers of impeachment were an added protection for the public, not the sole protection.[4] Section 1.6 discusses the Attorney General's relationship to the bar, and points out that disbarment proceedings may be brought against an Attorney General.

8. National Municipal League, MODEL STATE CONSTITUTION, (6th ed.) 1963, 66.

1. Clyde F. Snider, AMERICAN STATE AND LOCAL GOVERNMENT, 215-6 (1965).

2. *New York Times*, February 7, 1942, at 17.

3. Snider, *supra* note. 1 at 167-8.

4. *State ex rel. De Concini v. Sullivan*, 66 Ariz. 348, 188 P. 2d 592 (1948).

1.45 Filling Vacancies

There are four methods of filling vacancies in the office of Attorney General: by appointment of the Governor, the legislature, or the supreme court, or by promotion of a deputy to the position of Attorney General.

Authority to Fill Vacancies

An overwhelming majority of the jurisdictions indicate that the Governor fills vacancies as soon as they occur. In Maine, Massachusetts, New York and Virginia, the legislature fills vacancies; however, if it is not in session, the Governor makes the appointment. In Maine, he must have the approval of the Council. Tennessee provides that the Supreme Court will fill vacancies, since it normally appoints the Attorney General. In two states, Louisiana and New Jersey, the first assistant or deputy becomes Attorney General until a successor is elected or appointed.

Where the Attorney General is appointed, it would seem proper that the appointing agent also fill vacancies, as is the case in all such jurisdictions. The rationale for filling vacancies when the office is elective is less clear. All but four of the states which have an elective Attorney General permit the Governor to make appointments. Three permit the legislature to name an Attorney General, and in one the deputy is promoted. Allowing the Governor to fill vacancies in an elective office seems contrary to the chief arguments for election, those concerning independence from the executive. It is also questionable whether a Governor of one party should be allowed to fill a vacancy in an office which was held by a member of the opposite party.

If the Deputy Attorney General is promoted to fill a vacancy, the chances of continuity in office programs are greater; however, the Attorney General may select his chief Deputy according to different criteria from those he would use in selecting his own replacement.

Length of Vacancy Appointment

Vacancy appointments for elective offices usually are valid only until the next general or next biennial election. At that time, if the original term has not elapsed, a short-term Attorney General is elected. This point was litigated in Oregon.[1] The statute creating the Oregon office in 1891 provided that the Attorney General would be elected for a full four-year term in 1894. Further, it mentioned that vacancies would be filled by Gubernatorial appointment until the next general election, when an Attorney General would be chosen to fill out the term or commence a new term. The Governor appointed an Attorney General in 1891. The question of the case was simply, was there to be an election to fill out the first "quasi-term" in the general election of 1892? The court ruled that there was to be such an election.

The Supreme Court of Georgia reached the opposite conclusion in a 1939 case.[2] The office of Attorney General was created under the judicial article, hence the rule that provisions for elections to fill vacancies in executive positions did not apply to the office of Attorney General. The Gubernatorial appointee to fill a vacancy created by a resignation was to serve out the full four-year term of office without standing for election. The Attorney General was to stay in office until his successor's election had been declared by the General Assembly. The provision for the special vacancy election made no provision for such declarations; hence, the elections were deemed not to apply to the Attorney General.

1. *State ex rel. Baker v. Payne, County Clerk*, 22 Ore. 335, 29 Pac. 757 (1892).
2. *Wood v. Arnall*, 189 Ga. 362, 6 S.E. 2d 722 (1939).

1.5 Qualifications and Experience

The effectiveness of the office of Attorney General depends on the qualifications of the incumbent more than on any single factor. Statutory requirements can do little other than establish certain minimum standards. It is equally difficult to equate past experience of incumbents with their performance as Attorney General.

1.51 Qualifications Required

Table 1.51 gives the qualifications required for holding the office of Attorney General. Some states add other requirements, such as prohibition from holding other offices, to these qualifications. Only Pennsylvania and Guam indicate that no qualifications are required.

There was no minimum age requirement in seventeen jurisdictions. There were either implicit or explicit requirements in thirty-three jurisdictions. The minimum age was 21 in twelve jurisdictions, 25 in nine, 26 in two, 30 in six, and 31 in one. California, Connecticut and Maryland reported no minimum ages, but the requirement of five years bar membership in California and ten years in Maryland and Connecticut indicate a practical minimum age of 26 to 31 years, depending on state bar requirements.

Residence and citizenship are required by most jurisdictions. Citizenship is an express requirement in thirty-two jurisdictions and can be inferred in another eight from the provision that the Attorney General must be a qualified elector. Ten jurisdictions indicate that there is no citizenship requirement. Citizenship might be inferred elsewhere from requirements that the Attorney General be an elector. The Maryland court, for example, has said that the constitutional provision that the Attorney General be a qualified voter necessarily implies that he be a U. S. citizen.[1] Nineteen of forty-five states have residency requirements for the office. These range from six months in Michigan to ten years in Maryland and to ten years as an elector in Oklahoma. Ten states have requirements of two years or under, seven of from three to six years and two above six years.

Admission to the bar is a practical necessity for an Attorney General, but is not required in all jurisdictions. Although during Colonial times there were occasional non-lawyer Attorneys General, there is no evidence of a layman so serving after statehood. Formal requirements appear moot as the electorate probably would not choose a non-attorney to be its chief law officer. However, the question arose in the Canadian province of Alberta in 1937 when Premier William Aberhart, a layman, designated himself to be the provincial Attorney General. W. Kent Power examined the implications of Aberhart's tenure and concluded that both tradition and practicality required that the Attorney General should be a lawyer. He pointed out that the Legal Profession Act provided that no person "who is not enrolled as a barrister and solicitor in the books of the Law Society of Alberta shall commence, prosecute, carry on or defend any person in any Court . . ." Power added, "It is his duty to function as such, and under said . . . provision he cannot legally do so." Power concluded that:

> The history of the office, its duties and responsibilities, and especially the successful operation of our federal system, afford weighty support for the view that the relationship of the attorney general to the Lieutenant Governor is in the nature of a personal one. The name "King's attorney" crystallizes that idea. The Lieutenant-Governor has, therefore, at least as much

1. *Grosse v. Board of Supervision of Elections of Baltimore City*, 243 MD. 555, 221 A. 2d 431, (1966).

1.51 QUALIFICATIONS FOR ATTORNEY GENERAL

	Age	Residence and Citizenship	Admission to Bar
Alabama	25	U.S. citizen—5 years in state	No
Alaska	None	U.S. citizen	No
Arizona	25	10 years U.S.—5 years in state	Yes
Arkansas	21	1 year in state	No
California	None	U.S. and state citizen	Yes—5 years (statutory)
Colorado	25	U.S. citizen—2 years in state	Yes
Connecticut	None	Elector	Yes—10 years
Delaware	None	U.S. citizen—elector	Yes
Florida	30	U.S. citizen—elector	Yes—5 years
Georgia	25	U.S. citizen—elector	Yes
Guam	None	No requirements	No
Hawaii	None	Elector—1 year in state	Not required
Idaho	30	U.S. citizen—2 years in state	Yes
Illinois	None	U.S. citizen	Yes
Indiana	21	Elector	Yes
Iowa	None	Elector	No
Kansas			Yes—(case law)
Kentucky	30	U.S. citizen—2 years in state	Yes—8 years
Louisiana	None		Yes—5 years
Maine			Yes
Maryland	None	U.S. citizen—10 years in state	Yes—10 years
Massachusetts	None	None	Yes
Michigan	21	Elector—6 months in state	Yes
Minnesota	21	U.S. citizen for 3 months	Not statutory
Mississippi	26	U.S. citizen—elector	Yes—5 years
Missouri	None	U.S. citizen—1 year in state	Not required
Montana	30	U.S. citizen—2 years in state	Yes
Nebraska	None	No requirements	No
Nevada	25	U.S. citizen—2 years in state	No
New Hampshire	None	No requirements	Yes
New Jersey			No
New Mexico	30	U.S. citizen—5 years in state	Yes
New York	30	Elector	Not required
North Carolina	21	Elector	No
North Dakota	25		No—(but implied)
Ohio	21	U.S. citizen—elector	Yes
Oklahoma	31	U.S. citizen—10 years elector	No
Oregon	None		Yes
Pennsylvania	None	(No requirement for office)	No
Puerto Rico	21	U.S. citizen—elector	Yes
Rhode Island	21	U.S. citizen—elector	Yes
Samoa	None	U.S. citizen	No
South Carolina	None	U.S. citizen—elector	Not statutory
South Dakota	25	—1 year in state	Yes (case law)
Tennessee	None	None	Yes—(implied only)
Texas	None		No
Utah	25	U.S. citizen—elector	Yes
Vermont	21	U.S. citizen—elector	No
Virgin Islands	None	U.S. citizen	Yes
Virginia	21	U.S. citizen—elector	No
Washington	21	Elector—1 year in state	Yes
West Virginia	25	U.S. citizen—5 years in state	No
Wisconsin	None	U.S. citizen—elector	Yes
Wyoming	21	U.S. citizen—elector	Yes
United States	None	Required by general law	No

right to receive the personal, not the inversely delegated, opinion of his attorney as any private client has to expect the personal opinion of his solicitor rather than the transmitted opinion of one or more of the solicitor's partners or employees, even though that opinion may be the result or the amalgam of their research and points of view. Moreover it is the right and, in many instances, the duty of the attorney general to appear in Court on behalf of the Crown. No layman can fulfill that duty with competence.[2]

Many jurisdictions report specific statutory or constitutional requirements of bar membership. In addition, Kansas reports a case which implies this requirement.[3] The court defined the duties of the Attorney General so as to remove any doubt but that they required a person licensed to practice law and added:

> One who is admitted to practice as an attorney at law is an officer of the courts and both by virtue of his oath of office and the customs and traditions of the legal profession, he owes to the courts the highest duty of fidelity . . . . The attorney general by his motion to intervene and supersede the county attorney exercised his powers and duties under the constitution and appropriate statutes; this was as far as he could go as an executive officer and as an attorney and officer of this court. Since he is an officer of the judicial branch, under the separation of powers of the three branches of government, he was limited and restricted in his conduct before this court by the code of professional ethics to the same extent any other lawyer would be.

In at least six additional states the requirement can be implied from other statutory or constitutional duties of the Attorney General. In Minnesota, for example, the statutes make it unlawful for anyone except a member of the bar to appear in court as an attorney and, since the Attorney General's statutory duties require such appearances, his bar membership is necessarily implied. New Jersey statutes prohibit the Attorney General from engaging in the private practice of law during his term of office, thereby implying that he be admitted to practice.

Seven states provide a minimum period of time that one must be admitted to the bar before being eligible to serve as Attorney General. This period ranges from five years in California, Florida, Louisiana, and Mississippi to ten years in Maryland and Connecticut.

Several states have constitutional requirements providing that the Attorney General keep his office and his official records in the state capitol. A West Virginia court decision of 1943 rejected the contention that such requirements affected the eligibility of those seeking to become Attorney General. The provision took effect only after election.[4]

Though only tangentially a requirement for office, several states prohibit multiple office holding. For example, in Maine and Massachusetts the acceptance of a seat in Congress by the Attorney General automatically renders his office vacant.[5] Eight states provide that the Attorney General is constitutionally ineligible to sit in the state legislature. Other states stipulate that he may not hold any other office. In West Virginia, such a provision caused a dispute over the rightful claim to office. Lyell Clay describes the action:

> The state was set for the dispute when Clarence W. Meadows resigned from the office on May 15th, 1942. On May 26th, 1942, Wysong was appointed by Governor Matthew M. Neely to serve until the next general election and until his successor was elected and qualified. On November 3d, 1942, James Kay Thomas, who had been the Democratic nominee for Attorney General in the primary election held on August 4th, 1942, and who had entered the United States

2. W. Kent Power, *The Office of Attorney General*, XVII, CAN. BAR REV. 416-29 (1939)
3. *State of Kansas ex rel. Foster v. City of Kansas City*, 186 Kan, 190, 350 P. 2d 37 (1960).
4. *State ex rel. Thomas v. Wysong*, 125 W. Va. 369, 24 S.E. 2d 463 (1943).
5. ME. CONST., art. I, § 2 (1820); MASS. CONST., art. VIII (1780).

Army on October 1st, 1942, received the majority of the votes cast for such office at the General election. Certificates of result were transmitted to the Governor and Secretary of State by the several counties, and, in turn, were delivered by the Secretary of State to the Speaker of the House of Delegates on January 13th, 1943, which body declared Thomas, who personally appeared before it on that day, elected to the office of Attorney General for the unexpired term. Thomas took the oath of office, and then made demand upon Wysong for possession of the property and records pertaining to the office. Wysong refused, and Thomas thereupon brought a proceeding in mandamus before the Supreme Court of Appeals seeking induction into the office. The Supreme Court held that notwithstanding the fact that Thomas was then in the military service, he was eligible under the law for election to the office of Attorney General.[6]

A Nevada case in 1867 also involved dual office holding.[7] The Nevada Constitution provided that no person holding any lucrative office under the government of the United States or any other power would be eligible for any civil office of profit in state government. Robert Clarke was elected Attorney General in 1866. After he took office, the previous Attorney General, George Nourse, claimed possession of the office because Clarke was, prior to his election, the U. S. District Attorney for Nevada. Clarke replied that he had tendered a conditional resignation from the office of District Attorney effective in January, 1867. One day prior to the election, Clarke wrote a preemptory resignation to take effect immediately. The court ruled that Clarke would have had to resign unconditionally prior to the election day to be eligible for office. However, the court accepted his action the day prior to the election as an effective resignation and allowed him to remain in office.

6. Lyell Clay. THE OFFICE OF ATTORNEY GENERAL OF WEST VIRGINIA, 78 (1957).

7. *State of Nevada ex rel. Nourse v. Clark*, 3 Nev. 566 (1867).

1.52 Experience and Tenure

Much as the office itself varies widely, persons serving as Attorneys General between the years 1963 and 1968 exhibit a wide range of backgrounds and personal characteristics.[1] An analysis of such factors as education, age at assumption of office, occupation, public service, political affiliation, and tenure reveals a group solidly legalistic in character but as different in certain other respects as the jurisdictions they serve. Due to the professional and political aspects of the office, striking similarities appear in such areas as education and past public service.

Age at assumption of office, ranged between 29 and 63 years of age. In spite of the wide distribution, nearly 60 percent took office while in their 40's, following a career of public service spanning at least a decade. This modular characteristic is again seen in the fact that the average age of assuming the office of Attorney General is approximately 45 years.

By profession, all are attorneys at law, although very few moved directly into the position from private practice. More than one-half can be occupationally classified as public servants, due to their long period of employment in municipal, state, or federal government. Approximately 10 percent have occupational backgrounds as teachers, bankers, or businessmen. About one-fourth hold A.B. and LL.B degrees, with a scattering of B.S., LL.D., and M.A.'s.

The vast majority of the Attorneys General possess impressive records of past public service. Approximately 40 percent have served as municipal or county attorneys, while several served as mayors. Municipal, state, or federal

1. All data on 1963-68 are from the Council of State Governments, THE ATTORNEYS GENERAL OF THE STATES AND OTHER JURISDICTIONS (published annually).

judgeships were held by 20 percent. Two-fifths of the Attorneys General have served in the legislature, with a ratio of three times as many in the House as in the Senate. Several were elected Floor Leader. In the executive branch, one served as both Governor and Lieutenant-Governor, and others have held such positions as Secretary of State, agency director, and Executive Assistant. In the federal sphere, nearly 10 percent of the Attorneys General have served as United States Attorneys, and several others were employed by agencies, boards, and commissions. One-quarter of the Attorneys General served as Deputy or Assistant Attorney General.

In 1963, twenty-eight Attorneys General were Democrats, twenty were Republicans, and one was a Popular Democrat. In 1966, there were thirty-nine Democrats, thirteen Republicans, and the single Popular Democrat. By 1968 the ratio stood at thirty-three Democrats, nineteen Republicans, and the Popular Democrat.

Almost one-half of the Attorneys General for any given year between 1963 and 1968 had served one or more prior terms in that office. The period indicates a trend of increasing numbers of Attorneys General possessing tenure of eight or more years. While only 10 percent were so characterized in 1963, the number reached 20 percent in 1967 and 30 percent in 1968.

As with every aspect of the American political system, the past decade has subjected the office of the Attorney General to an overall evolutionary process. Needless to say, the changing demand structure of the position requires the services of highly educated individuals, with a background of public service and legal experience. The following tables, briefly summarized above, provide a survey of those who have held the office of Attorney General during the past six years.

One hundred and fifteen former Attorneys General responded to a C.O.A.G. survey in 1970.[2] This group included sixty-two Democrats, fifty-one Republicans and two from other parties. They had served an average of 4.61 years, taking office at an average age of 43 years. Prior to becoming Attorney General, fifty-two served as local government attorneys; twenty-four served as legislators; and thirty-four served on the Attorney General's staff. After serving as Attorney General, ten became Governors; two became United States Senators, and two became members of the House of Representatives. Nineteen became state Supreme Court justices and twelve became judges of other courts.

2. Committee on the office of Attorney General, FORMER ATTORNEYS GENERAL ANALYZE THE OFFICE, September, 1970.

1.521 THE ATTORNEYS GENERAL: EDUCATIONAL BACKGROUND

Degree Held	Number of Attorneys General Holding Degree					
	1963	1964	1965	1966	1967	1968
LL.B.	53	50	52	51	50	50
A.B. and LL.B.	26	22	19	21	24	25
B.S. and LL.B.	6	8	12	9	5	5
J.D.	1	1	0	0	1	1
B.S.L. and LL.B.	0	0	1	1	1	0
A.A. and LL.B.	0	0	0	0	1	1
Ph.B. and LL.B.	0	2	1	1	1	1
B.B.A. and LL.B.	0	0	1	0	1	1

1.522 AGE AT ASSUMPTION OF OFFICE

Year	Age at Assumption of Office		
	Range	Arithmetic Mean	Mode
1963	32-63 years	47.2 years	49 years (freq. of 6)
1964	32-63 years	45.0 years	49 years (freq. of 7)
1965	29-63 years	46.4 years	49 years (freq. of 9)
1966	29-63 years	40.4 years	49 years (freq. of)
1967	29-63 years	44.1 years	41 years (freq. of 7)
1968	29-63 years	44.8 years	none discernible

1.523 PUBLIC OFFICES HELD PRIOR TO TAKING OFFICE

Office	Number of Attorneys General Having Held Position						
	1963	1964	1965	1966	1967	1968	1969
City or County Attorney	16	22	22	22	20	22	
Municipal Judge	2	2	5	4	4	4	
State Judge	3	4	4	4	4	4	
Federal Judge	0	0	1	1	1	1	
State Agency Head	3	2	4	3	5	5	
Governor	1	1	1	1	1	1	
State Senator	5	4	2	3	6	6	
State Representative	16	14	13	13	13	14	
Floor Leader	3	2	2	4	4	4	
Asst. or Dep. A.G.	14	11	13	13	15	13	
U.S. Attorney	6	7	7	7	6	6	
Assistant to Governor	1	0	2	2	2	1	
City Elected Official	2	1	1	1	2	2	
Lieutenant Governor	1	1	1	1	1	1	

1.524 TENURE OF OFFICE

Years of Tenure	Number of Attorneys General Holding Given Tenure						
	1963	1964	1965	1966	1967	1968	1969
One or less	16	7	4	4	0	0	
Two	14	10	15	5	14	4	
Three	5	7	3	15	3	12	
Four	5	10	10	7	15	3	
Five	5	6	5	4	1	13	
Six	2	4	5	4	4	4	
Seven	1	2	2	5	5	1	
Eight	1	0	2	2	4	5	
Nine	0	3	1	2	1	4	
Ten-Fourteen	3	4	5	4	5	5	
Fifteen-Twenty	1	1	1	1	1	1	

1.6 Relationship to the Legal Profession

The Attorney General's relationship to the bar in the states is not strongly defined, although he is potentially in a position to exercise leadership. In England and Canada, the Attorney General is the titular head of the bar. No such formal role devolves upon the office in America.

State Attorneys General have varying degrees of involvement with the bar. Some have formal duties in reviewing petitions for bar membership and in initiating proceedings for disbarment. Generally, however, the extent of their professional activities depends on their individual interests. Most take an active part in bar association meetings and some have published articles in the state bar journal. In some states, Attorney General's advisory opinions are published or briefed in the bar magazine. The Attorney General's role in recruiting lawyers for community service in times of emergency has been demonstrated. He may be active in projects of the American Bar Association, such as promoting that group's standards for the administration of justice[1]

1.61 The Attorney General and the Bar

Table 1.6, based on data submitted to C.O.A.G. by Attorneys General's offices, shows his relationship to the bar. Attorneys General serve on the state bar's board of delegates in Colorado, Connecticut *(ex-officio)* and Pennsylvania *(ex-officio)*. Minnesota's Attorney General serves on the bar association's unauthorized practice committee and Wisconsin's Attorney General does legal work for the state bar. The Attorney General of South Carolina serves on the committees on criminal law of both the integrated state bar and the private bar association.

C.O.A.G. inquiries to a few state bar associations showed that there is some interest in involving the Attorney General in bar activities. For instance, the director of the Missouri bar indicated that while the various Attorneys General in the past have been repeatedly urged to participate in bar activities, his participation often has been limited because of a busy schedule. However, the director commented that:

> Since Attorney General John Danforth has been in office, we have had a closer relationship than in the past. He has expressed a very definite interest in promoting projects in which The Missouri Bar is interested, and because of that we have had several private conversations with him that have been very helpful and very resourceful to us. We would like to expand and continue to involve the Attorney General's Office in Bar activities.[2]

The director of Maine's Bar Association pointed out that, though the relationship of the Attorney General and the bar was informal, it was nonetheless close. Five of Maine's Attorneys General have served as president of the bar association and one served as bar president while he was Attorney General. The bar association's director commented that relations between the association and the Attorney General were already very good:

> The Attorney General himself has been most helpful in many ways and so have his staff. They have contributed material to our Bar Bulletin and have never failed to give suggestions and advice when called upon.[3]

Former Attorneys General responding to C.O.A.G. questionnaires

1. *See* Section 1.75 of this study.

2. Letter from Wade F. Baker, Executive Director, the Missouri Bar, to Attorney General John B. Breckinridge, April 29, 1970.

3. Letter from Chauncey Robbins, Executive Director, Maine Bar Association, to Attorney General John B. Breckinridge, April 29, 1970.

	Serves On Judicial Council	Reviews Petitions For Entrance To Bar	Institutes Disbarment Proceedings	Other
Alabama	No	No	No	
Alaska				
Arizona	No	No	No	None
Arkansas				
California	No	No	No	Member of Comm'n on Jud'l Appts.
Colorado	No	No	Yes	Member, Bd. of Delegates to State Bar
Connecticut	No	No	No	Serves on Board of Delegates
Delaware	No	No	No	None
Florida		No	No	None
Georgia	No	No	No	
Guam	Yes	Yes	Yes	Chairman, Board of Bar Examiners
Hawaii		No		
Idaho	No	No	No	None
Illinois				
Indiana	No	No	Yes	
Iowa		Yes	Yes	Chmn., Bd. of Law Examiners
Kansas				
Kentucky	No	No	No	
Louisiana	No	No	No	
Maine	Yes	No	May	May prepare memos of law for Justices
Maryland	No	No	No	May institute action for unauthorized practice
Massachusetts	No	No	No	None
Michigan	No	No	No	Mbr., Probate Judges Retire Bd.
Minnesota	No	No	No	AG is rep. on Bar Assn's Unauthorized Practice Committee
Mississippi	No	No	No	
Missouri				
Montana	No	Yes	Yes	
Nebraska			Yes	
Nevada	No	No	No	None
New Hampshire	Yes		Yes	
New Jersey	No	No	No	None
New Mexico	Yes	No	No	
New York	No	No	No	
North Carolina	Yes	No	No	None
North Dakota	Yes			
Ohio	No	No	No	None
Oklahoma	No	No	No	
Oregon	Yes	No	No	
Pennsylvania	No	No	No	Mbr. State Bar House of Delegates
Puerto Rico	Yes	No	May	Mbr. Committee on Judic. Appts.
Rhode Island				
Samoa				
South Carolina	Yes		Yes, May	
South Dakota	Yes	No	May	
Tennessee	Yes	No	No	None
Texas				
Utah	No	No	No	
Vermont	No	No	Yes	
Virgin Islands	Yes	No	No	
Virginia	No	No	Rep. Bar	AG may employ counsel to prosecute persons practicing illegally
Washington	Yes	No	No	None
West Virginia	No	No	No	None
Wisconsin	Yes	No	No	Legal work done for state bar
Wyoming	No	No	No	None

did not generally favor an official position for the Attorney General with the bar association. Seventy-nine stated that the Attorney General's should not serve as an *ex-officio* member of the executive board of the state bar association, while twenty-seven favored this kind of participation. Of thirty-eight incumbent Attorneys General, twenty-four felt he should not serve on the board.

Commenting upon the proposition of formal office holding in the bar association by the Attorney General, General Vernon B. Romney of Utah indicated that it was important for the bar to be non-partisan. For this reason, public officials should not have official bar positions.[4] Attorney General Romney did indicate that his office cooperated and worked closely with the bar in holding legal seminars and other activities.

Attorney General Robert Morgan of North Carolina instituted a program, Youth and the Law, which recruited volunteer attorneys through the state bar to work with his staff preparing talks on aspects of the law which were of interest to youth. The program now uses attorneys from all sections of the bar, and is fully operative in over forty of the state's one hundred counties. The C.O.A.G. report on collective disorders describes Attorney General A. F. Summer of Mississippi's work in successfully recruiting attorneys for volunteer service in the aftermath of hurricane Camille.

1.62 Development of the American Bar

Attorneys have always occupied a preeminent position in American public and political life. Alexis de Tocqueville's classic study of *Democracy in America*, written in the 1830's, said that:

> As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution.[5]

The leadership of lawyers has remained a strong force in American government.

In Colonial America, the organization of the legal profession was as flexible and amateurish as was the administration of the law itself. Many Colonial lawyers had little if any legal training and, without an organization to impose ethical standards, lawyers frequently practiced with a lack of respect for considerations other than fee collections.[6]

Judicial decisions were seldom written in the Colonial courts. The few opinions that were recorded rarely included the reasons for the decision. Thomas Jefferson observed, in 1767, that the then-Attorney General of Virginia, John Randolph, owned three manuscript volumes of cases reported for Virginia's highest court between 1730 and 1740. Jefferson commented that these reports were of little use because the judges of that court were chosen for their wealth and social standing rather than their knowledge of law. Generally, the Royal Governors of the Colonies controlled judicial administration. They frequently chose judges on the basis of friendship and interfered in the judicial process in many instances.[7]

As commerce expanded in the Colonies, the practice of law began to show signs of discipline and organization and educated men of the Colonies began to take up the profession. Legal education was offered at a few colleges. The custom of Colonial lawyers studying at English Inns of Court also contributed toward raising the pro-

4. Interview with Attorney General Vernon Romney, in Salt Lake City, Utah, October 19, 1970.

5. Alexis de Tocqueville, DEMOCRACY IN AMERICA, 279 (Knopf ed., Vol. I, 1945).

6. Anton-Hermann Chroust, 1 THE RISE OF THE LEGAL PROFESSION IN AMERICA, 26-28 (1965).

7. *Id.* at 21-23.

fession from one of low repute in the early Colonial period to one of high regard at the time of the Revolution.[8] Bar associations began as early as 1745, when New York established one.

Colonial Governors usually controlled the licensing of lawyers. In the 1770's, Governors and legislatures began to exact fixed requirements of law office study prior to bar admission. This, in turn, encouraged the establishment of law schools. The early bar or law clubs also encouraged the higher educational standards for admission to the practice of law. They also set standards of legal etiquette and other provisions for those who were already practicing lawyers. For instance, the Suffolk County, Massachusetts Bar voted in 1784 that:

> No gentlemen of the Bar ought to get out of his office to put himself in the way of applications for drawing of writs nor to employ any other persons to do business for him out of his office.[9]

During the post-Revolutionary period, the legal profession suffered a severe decline in prestige because of a growing hostility toward lawyers. Economic conditions contributed to this hostility, but chiefly it was due to what the public saw as a rising elitism among lawyers as a result of increased educational requirements. One New York newspaper declared that "of all aristocracies, that of the lawyers is the worst."[10] This period of "demoralization" and "deprofessionalization" culminated in the period of 1840's and 1850's with the state legislatures scaling down educational requirements for bar admissions. New Hampshire, Wisconsin and Indiana even eliminated educational requirements entirely. In this same period, legislatures made judges' offices elective rather than appointive and placed limits on judges commenting on evidence during trials and assisting juries to reach verdicts.[11] After 1875, the deplorable condition of the standards of the legal profession compelled the bar leaders to take a firm stand in leading the profession back to its earlier position of high education and ethical standards.[12]

In 1849, the American Legal Association was formed "for the purpose of ensuring safety and facility in the collection of claims and transactions of legal business throughout the United States." The Association was also a referral service and membership merely required a five dollar fee. It existed only five years. Twenty-four years later, in 1878, the American Bar Association had its beginning.[13]

The decline in legal standards and education requirements in the post-Revolutionary period alluded to above saw a decline in the organized state bar associations. The states, rather than the bar associations, took over the task of defining bar entrance standards. But, during the late 19th Century, a period of general political corruption, state bar associations were again organized to improve ethical standards.[14] These associations were the moving forces behind the establishment of codes of professional ethics. The first such code was promulgated by the Alabama State Bar Association in 1887, and by 1908 most states had set standards for ethics, either as a direct result of bar association or legislative action.[15]

The American Bar Association began its effort to develop a Code of Ethics in 1905. In 1908, it adopted thirty-two Canons of Ethics which have served as a guide to the legal profession until the present time. The A.B.A. Code became a guide for state codes. By 1914, thirty-one state bar associations had adopted the Code with little or no change and five additional states had substituted the A.B.A. Code for their own codes. The A.B.A. House of Delegates adopted a new Code of

8. Charles Warren, A HISTORY OF THE AMERICAN BAR, 17-18 (1966).
9. Chroust, *supra* note 6 at 184-185.
10. *Id.* at 196-201.

Professional Responsibility in August, 1969 which became effective in January, 1970.[16] The principal change in the 1970 Code is the division of Canons into two parts: ethical standards which are aspirational in effect, and disciplinary rules, which define minimum levels of acceptable conduct. The Code stresses some of the old standards and clarifies others, but does not strike out into radical new grounds.

In 1914, the A.B.A. established a Standing Committee on Professional Ethics. It was charged with overseeing state and local bar associations' members. The A.B.A. does not handle complaints about lawyers directly, but refers them to the appropriate local bar association. Many of these associations issue written reports of their actions and, since 1924, the A.B.A. has been publishing samples of its opinions which are issued when requested by members or officials of state or local bar associations. These bar associations' actions are interrelated with state statutory provisions dealing with professional discipline.[17]

The American Bar Association has had a strong influence on the standards for legal education. One of its most significant decisions was made in 1921, when its Section on Legal Education and Admissions rejected a set of suggested reforms, which were the culmination of a study of legal education made at the behest of the A.B.A. and the Carnegie Foundation. Dr. Alfred Reed, a professional educator, directed a study of legal education which began in 1913 and took twenty-two years to complete. One proposal was that, since lawyers performed a variety of tasks, legal education and law schools should be divided into two categories: scholarly law schools aimed at producing a highly-educated judiciary and practitioner schools associated with bar examiners which would train lawyers for practice. Bar examinations would be keyed to the type of education received. The setting of legal standards and responsibility for the improvement of the law would be assumed by selective "inner" bar associations, somewhat like the English systems of Inns of Court.[18]

Legal education has become continually more uniform and bar entrance examinations have encouraged this uniformity. Recently, however, there have been new proposals to revise this system. The profession is often reminded that the public views lawyers as persons who complicate, rather than clarify, matters and that legal education should be aimed at service to the public.[19] One proposal for revision is a plan developed at Stanford University Law School for a Master of Jurisprudence, a two-year non-professional degree. This program is aimed at those trained in fields such as public and business administration, journalism, or economics. The student would have the option of continuing for a third year to gain a Juris Doctor degree.[20]

Wisconsin offers an example of an innovation in bar admissions. Rather than giving the standard two or three day written examination, the Wisconsin bar requires graduates of Wisconsin law schools to successfully complete a

11. Chroust, *supra* note 6 at 16-18.
12. Maxwell Bloomfield, *Law v. Politics: The Self-Image of the American Bar 1830-1860*, 12 AM.J. LEGAL HIST. 306 (1968).
13. *Id.* at 321.
14. Chroust, *supra* note 6 at 169-172.
15. Henry Drinker, LEGAL ETHICS, 23 (1953).
16. John Sutton, *The American Bar Association Code of Professional Responsibility*, 48 TEX. L. REV. 255 (1970).
17. *Id.* at 23-25, 30-35.
18. Carl Selinger, *The Functional Division of the American Legal Profession: An Historical Prologue*, 21 J. LEGAL ED. 523 (1969).
19. William Pincus, *Reforming Legal Education*, 53 A.B.A. J. 436 (1967).
20. Thomas Ehrlich and Thomas Headrick, *The Changing Structure of Education at Stanford Law School*, 22 J. LEGAL ED. 452 (1970); *See also* David Haber and J. Cohen, THE LAW SCHOOL OF TOMORROW (1968).

ten-week course in practical legal procedure given by the Wisconsin University Law School. The faculty of private-practice lawyers who are specialists in various fields teach courses in conveyancing, the drafting of deeds, guardianship, enforcement of judgments, and other areas. The courses are geared to practice rather than theory.[21]

The Role of the Attorney General

In nearly every state, bar admissions are keyed to the examination of legal knowledge and character investigations. Answers to C.O.A.G. questionnaires show that the Attorneys General of Guam, Iowa and Montana review petitions of candidates for bar admission. In Guam and Iowa, the Attorney General serves as Chairman of the Board of Examiners of Law Examiners. A recent C.O.A.G. questionnaire asked former Attorneys General whether or not they thought the Attorney General should review petitions for entrance to the bar. Ninety-four former Attorneys General did not favor reviewing the petitions, and only twelve favored the involvement of the Attorney General in this part of the bar entrance process.

The Attorney General's participation in education and bar entrance requirements is minimum, even though he is in a position to influence legal standards. He could help assess the professional needs of his state and help coordinate state and private law schools. He could also help develop liaison between law schools and bar examiners and admissions committees. In most states, there is a wide gap between the bar and law schools. The Attorney General in his own state and the National Association of Attorneys General are in an excellent position to influence efforts which may be made to develop nationwide bar entrance standards and qualifications.

21. Eugene Wright, *Progress Toward Legal Internship*, 53 JUDICATURE 184, 186-187 (1970).

1.63 The Integrated Bar

The integrated or unified bar has been defined as "a form of professional organization to which all lawyers are required to belong and pay reasonable dues in order to practice in the particular state."[22] The movement favoring the unified bar began in 1912 when Herbert Harley, a co-founder of the American Judicature Society, studied the structure of the Law Society of Upper Canada. Because of his persuasion, in 1921 the American Bar Association's Committee on State Bar Organization recommended that unified state bars be established. The first was established that same year in North Dakota. Most states have a unified bar by statute. In others, it is established by court rule, the courts basing their authority to do so on the theory that the court has the inherent power to require unification and the requirement is a legitimate use of the judicial power to regulate the profession.[23]

A recent challenge to the right of a state to require bar membership was presented by a Georgia attorney who argued *inter alia* that the requirement of membership violated the state's "right-to-work" law. The court rejected the argument and upheld the constitutionality of the unified bar, commenting that the state has a vital interest in the administration of justice and could create a state bar to maintain professional standards.[24]

Thirty-two jurisdictions now have a unified bar system:

Alabama	California
Alaska	Florida
Arizona	Georgia
Arkansas	Idaho

22. Campbell Thornal, *The United Bar—Integration or Disintegration*, 52 JUDICATURE 360 (1969).
23. *Id.* at 360-366.
24. *Sams v. Olah*, 225 Ga. 497, 169 S.E. 2d 790 (1969); *see also Lathrop v. Donohue*, 367 U.S. 820 (1960).

Kentucky	Oregon
Louisiana	Puerto Rico
Michigan	South Carolina
Mississippi	South Dakota
Missouri	Texas
Nebraska	Utah
Nevada	Virgin Islands
New Hampshire	Virginia
New Mexico	Washington
North Carolina	West Virginia
North Dakota	Wisconsin
Oklahoma	Wyoming

Of the above jurisdictions, twelve have a unified bar set by statute, four by court rule and fourteen by a combination of both statutes and court rule. In Arkansas, the unified bar was established by constitutional amendment. Of the twenty states without unified bars, at least seven are moving toward instituting them.[25] The American Judicature Society prepared in 1961 an annotated bibliography on the unified bar, with citations for each state.[26] In most states which have the integrated bar, its constitutionality has been tested, and it has been consistently upheld.

Justice Campbell Thornal of Florida, in discussing the unified bar, pointed out that since recent Supreme Court decisions have increasingly emphasized a defendant's right to a lawyer as a part of due process the legal profession has reached the status of a professional public utility, "a service essential to public welfare." He also commented that the governing board of a unified bar can serve as a spokesman for the entire profession, but the governing board should be equally apportioned among the various circuits to assure its representative nature.[27]

25. Glenn Winters, *Officers of the Court in Name and in Fact*, 52 JUDICATURE 358-359 (1969); *see also* Glenn Winters, *The Unified Bar*, 23 ARK. L. REV. 526 (1969).
26. American Judicature Society, CITATIONS AND BIBLIOGRAPHY ON THE INTEGRATED BAR IN THE UNITED STATES (1961).
27. Thornal, *supra* note 22 at 361.

1.64 Bar Discipline

There are generally three sanctions which are imposed in disciplining attorneys: disbarment, suspension, and reprimand.[28] Early cases confirmed the inherent right of state courts to impose these sanctions; as courts have the right to admit attorneys, they also have the right to suspend or disbar.[29] The disbarment proceedings are usually considered to be quasi-judicial, civil proceedings. However, a recent Supreme Court decision has equated the penalties involved with those of criminal cases and has decided that the lawyer in a disbarment action may invoke the privilege against self-incrimination.[30]

Lawyers are governed by rules drawn from statutes, common law, the canons and the customs and practices of the bar. While the legal weight of the Canons of Ethics in court cases is uncertain, their effect is persuasive in defining conduct expected by lawyers. They are usually cited as indicating established usages and customs of the bar rather than strict legal precedent.[31] Unlike the British bar, discipline for American lawyers is not handled solely by the profession. Any person may file a complaint against an attorney; usually it is directed to a state bar association grievance committee whose preliminary findings will be referred to a court if action is warranted. The court, which may or may not hear additional evidence on the case, has the power to impose sanctions. The proceedings are instituted

28. Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 Colo. L. REV. 1039 (1952).
29. *E.g.*, *Wilson v. Popham*, 91 KY. 327, 15 S.W. 859 (1891); *State ex rel. Walker v. Mullins*, 129 Mo. 231, 31 S.W. 744 (1895).
30. *Spivack v. Klein*, 385 U.S. 511 (1967); and *see* Jack Chilingirian, *State Disbarment Proceedings and the Privilege Against Self-Incrimination*, 18 BUFF. L. REV. 489 (1969); note, *The Right to a Jury Trial in Disbarment Proceedings*, 68 MICH. L. REV. 604 (1970).
31. Drinker, *supra* note 15 at 22-27.

and conducted by the Attorney General, the county attorney, or by a court appointed lawyer. In Georgia, North Carolina and Texas the lawyer may elect to have a jury trial.[32] It has been held that the Attorney General is a proper party to institute disbarment proceedings, even in the absence of statute.[33]

The Attorney General's Role in Disbarment

Available C.O.A.G. questionnaire information indicates that the Attorney General institutes the disbarment procedures of ten jurisdictions and that such participation takes various forms. In Colorado, the Attorney General institutes proceedings at the direction of the Supreme Court. Indiana's Attorney General may file disciplinary proceedings before the Supreme Court with or without leave of court, and he may also file a brief and present oral arguments. In Guam, the Attorney General institutes proceedings. In Iowa, he investigates and tries the case before the court after the trial is directed by the Chief Justice. In Montana and New Hampshire, the Attorney General investigates complaints and, if there is cause, he files a complaint before the Supreme Court. Nebraska's Attorney General is one of several officials empowered to file a formal complaint and may appear before the court if he so chooses. In South Dakota, the Attorney General or the state bar grievance committee may investigate cases and file them before the court. In Vermont, the Attorney General prepares a presentment and files it before the Supreme Court. In Virginia, he represents the state bar in these proceedings.[34]

Although the Kansas C.O.A.G. questionnaire does not highlight the Attorney General's role in disbarment, an interview with former Attorney General Clarence Beck suggests that he may play an informal role.[35] Upon being notified of a complaint against a member of the bar, General Beck investigated the charges. When he uncovered sufficient information to suggest that a disbarment hearing was in order, he confronted the attorney with the evidence and prevailed upon him to voluntarily withdraw from the bar. However, former Attorneys General who answered a C.O.A.G. questionnaire do not favor an active role in disbarment proceedings. Forty believed that the Attorney General should institute such proceedings but sixty-six dissented.

The Attorney General's role in bar discipline could properly go beyond the functions he performs in the disbarment procedures of the few states mentioned. As the chief lawyer of the state he must assure its citizens that its lawyers are officers of the court and performance of their duty is beyond reproach. He should also participate in efforts to see that the grievance procedures are more open to the public and that clients know where they can present complaints with the assurance that they will be heard.

In a recent book that is very critical of the legal profession, Morris Bloom favorably discussed bar association client security funds in the United States and abroad.[36] The funds are derived from contributions from lawyers and are available to clients who have been unprofessionally represented by attorneys. While disbarment procedures are effective in upholding the standards and ethics of the profession, the procedures are of no use to the client who has been financially abused

32. *Id.* at 34.

33. *State ex rel. Walker v. Mullins*, supra note 29.

34. Charles Potts, *Disbarment Procedure*, 24 TEX. L. REV. 161, 179-180 (1945-46), and C.O.A.G. Questionnaires.

35. Interview with Clarence Beck, former Kansas Attorney General, in Raleigh, North Carolina, July 20, 1970.

36. Murray Bloom, THE TROUBLE WITH LAWYERS (1969).

by an attorney. Client security funds fill such a void. Today nineteen foreign countries have such funds. In 1957, Vermont initiated a fund and twenty-six other states and six counties have since instituted funds. The American funds, however, are not as effectively utilized as are funds elsewhere. Since their inception, all thirty-three funds have dispersed only a total of $125,000, as contrasted with an average $456,000 paid annually from the English fund.[37] Each suggestion has merits as well as drawbacks. Whereas a particular plan may not be appropriate, debate concerning the general topic of how to help the aggrieved client clearly is, and the Attorney General can foster such discussion.

As in England, the American Attorney General is subject to the discipline of the bar and court in the same manner as are his professional colleagues. Bar admission is a requirement for office in a majority of jurisdictions, so disbarment could be tantamount to removal from office. In all jurisdictions where bar admission is not a requirement for office, an Attorney General would be very restricted in performances of his duties if he were not an attorney in highest standing.

Available historical accounts reveal no case of attempts to disbar an Attorney General. However, Attorney General Miles Lord of Minnesota was disciplined by the State Supreme Court in 1959 for his activity during a daylight savings time "crisis." The legislature first passed a law giving counties the option of going on daylight-time and then passed a law permitting the Governor to set clocks statewide. The Attorney General then issued an opinion denying the counties the right to set time. The courts issued a writ forbidding future county action in the time debate and the Attorney General then seemingly reversed himself by publicly urging non-compliance with the writ, maintaining that it could not be used to restrain a non-judicial act of a legislative body. He announced that he would urge the court to quash the writ and sent telegrams to justices requesting an early hearing on the matter.

The court initiated an original disciplinary hearing against the Attorney General regarding his professional indiscretion in the matter. Under counsel from the Governor, the Attorney General refused to appear before the court at the hearing. The court held the Attorney General "severely censored." The court retained jurisdiction over General Lord for three years to prevent a recurrence of his conduct. The court stated:

> To hold that the Attorney General, when he appears in court in a legal matter is immune from the ethical standards prescribed for other attorneys and that the court is impotent to discipline him for misconduct would reduce the court to a tool of the executive. The power of a court to exact of an attorney who represents the state the same standards of fidelity and honesty as one required of attorneys who represent private clients furnishes the main distinction between independent courts in a free society and courts that are subservient to the executive in a dictatorial form of government.
>
> The unethical or contumacious conduct of an attorney—whoever he may be—in a legal matter pending in court, involves something resting entirely with the judicial branch of the government. While the Attorney General is a part of the executive branch of government, as an attorney he is also an officer of the court. When he appears in court in a legal matter, he is acting as an attorney.
>
> It is elementary that one who is admitted to practice as an attorney at law is an officer of the courts, and both by virtue of his oath of office and the customs and traditions of the legal profession, he owes to the courts the highest duty of fidelity.[38]

In a concurring opinion, Justice Murphy of the Minnesota court sug-

37. *Id.* at 30.

38. *In re Lord*, 97 N.W. 2d 287 at 289 (1959).

gested that the regular bar disciplinary procedure should have been utilized in the episode rather than having the matter come originally to the court.

1.65 Continuing Legal Education

In 1959, the American Bar Association held its first conference on continuing education. The American Law Institute and the A.B.A. established a Joint Committee on Continuing Legal Education in 1947, with the primary purpose of demonstrating the need for such education. The idea developed from the efforts made to retrain returning World War II veterans. The Committee works in conjunction with state and local bar associations, to keep professional skills current and to upgrade these skills.[39] Thirty-one states now have full-time state administrators for continuing legal education, some with large staffs. These are usually sponsored by the state bar association, and may be assisted by University extension services and law schools.[40]

Courses may cover many different areas of legal practice such as trial and appellate advocacy and new rules of evidence. The Illinois Bar Association, for example, ran programs in 1969 on such topics as handling criminal cases, workmen's compensation, trial evidence, estate planning and speed reading. Over eight thousand attorneys attended the course in 1969, which included a handbook, "Civil Practice before Trial."[41]

1.66 Judicial Councils

Judicial councils have been established by statute in many states to promote judicial reform, collect statistical and other data, and to recommend procedural changes that will improve uniformity and expedite court business. While the composition of the council varies, the state's chief justice is usually chairman, and membership includes judges of both superior and lower courts and representatives of the bar.

The Attorney General serves on judicial councils of fourteen jurisdictions, as shown in Table 1.6. Former Attorneys General responding to a C.O.A.G. questionnaire were about evenly divided on the question of judicial council membership; fifty thought the Attorney General should serve on the council and fifty-four thought he should not. However, twenty-two incumbent Attorneys General thought he should be on the judicial council and only fourteen that he should not.

The state Attorney General is often required to participate in some stages of judicial discipline, usually the impeachment process. Lesser disciplinary measures, such as reprimands, are usually carried out on an informal basis. In four states, the Attorney General participates in court disciplinary proceedings. In Alabama, he brings charges before the court; in Indiana, the Attorney General files information before the supreme court; Iowa's Attorney General presents the removal petition to the supreme court; Missouri's Attorney General commences removal proceedings before the supreme court; and in Oklahoma, the Attorney General is one of several officials who may bring removal charges.[42]

In New Jersey, the Attorney General participates in the judicial discipline proceedings on a more informal basis. After a complaint has been substantiated, the Chief Justice of the Supreme Court may call the offending judge to an informal sitting of the Supreme Court which can include the calling of witnesses. In this type of proceeding, the Attorney General may be called upon to act as a prosecutor.[43]

39. Paul Wolkin, *The Present Status of Continuing Legal Education in the United States*, 20 J. LEGAL ED. 614 (1968).

40. W. Edward Sell, *Roundtable on Continuing Legal Education*, 20 J. LEGAL ED. 612 (1968).

41. George Heroux, *The Lawyer's Responsibility: Continuing Education*, 51 CHI. BAR REC. 155 (1970).

42. William Winter, *Judging the Judges*, 41 MISS. L. J. 1, 16-21 (1969).

1.67 The English Bar

While the American bar traces its origins to the English bar, this heritage did not influence any state bar to copy the English system. The division of the English legal profession between barristers and solicitors can be traced to serjeants of the courts of Common Pleas and the clerical establishment of the courts of equity, the solicitors, pleadors and conveyances of the 13th and 14th Centuries. The law serjeants may be considered a vague ancestor of today's barrister and the various early court clerics may be considered to have survived as today's solicitors, who still do not have an oral role in the court system.

English barristers are members of one of the four Inns of Court which set both educational and disciplinary standards. The barristers have exclusive right to present cases before all but the very lowest English courts and the judiciary is drawn solely from their ranks. A barrister is not required to have a university education, but he often does. His particular Inn of Court merely requires that he attend a specific number of dinners at the Inn. This requirement is a relic of the time when a lawyer received his education at the Inn during after-dinner sessions of most courts. He is required to pass a professional examination before being called to the bar.[44]

Barristers are governed and indirectly disciplined by the General Council of Bar, formed in 1895. Previous to the institution of this Council and its predecessor, the Bar Committee, in 1883, the Attorney General had sole responsibility for "determining the limits of its professional etiquette." The Council is composed of four official members, the Attorney General, the Solicitor General, the Chairman and Vice Chairman of Council, and of sixty-five elected and nominated members from the Queen's Council and the bar. The English courts have recognized the bar Council's duty to regulate the profession. Its rules deal with etiquette rather than law and are only binding within the profession. Individual disciplinary cases are decided by the Inn of Court which admitted the barrister to the bar.[45]

Attorney General Sir Elwyn Jones, in commenting on his functions as titular head of the bar of England, indicated that, while questions of professional conduct are dealt with by the bar Council, the Attorney General and the Solicitor General are personally consulted in these matters.[46] Moreover, J. L. J. Edwards stated that "it would be unthinkable for the Bar Council to issue edicts governing the actions of the whole profession which has not previously been concurred in by the Attorney General."[47] As a bar member, the Attorney General is, himself, subject to disciplinary procedures as any other member would be. Edwards described a recent attempt to discipline an Attorney General for misconduct, which ended with the charges being dismissed as unfounded.

Solicitors, whose legal work is confined to matters outside of the court room or cases at the lowest county court level, are ten times as numerous

43. Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U. L. REV. 149, 193 (1966).

44. David Gilbert, *Lawyers in England—Present Position and Current Trends*, 52 JUDICATURE 248 (1969).

45. Sir George Coldstream, *Professional Standards, Ethics and Discipline of Advocates in England*, A.B.A. Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, TENTATIVE DRAFT 310-316 (1970).

46. Elwyn Jones, *The Office of the Attorney-General*, 27 CAMB. L. J. 51 (1969).

47. J. Ll. J. Edwards, THE LAW OFFICERS OF THE CROWN, 277-278 (1964).

as barristers. Their legal training is gained through apprenticeships of three to five years. Professional standards, discipline, and regulations are set by the Law Society which has quasi-official status defined by statutory law. Although solicitors are not required to be members of the Law Society, Parliament has granted it the exclusive right to issue practicing certificates to solicitors.

The division between barrister and solicitor has been often marked by mutual suspicion. The fact that they have different educational and social backgrounds has not eased the recent efforts to dissolve this division. Hostility is still evident if a recent report on legal reforms is typical of the present attitude toward solicitors. In referring to the recent expanded right of solicitors to appear in county courts, the author, a barrister, commented that it gave "an outlet to the frustrated craving for advocacy of certain members of that profession."[48] There may be many advantages to the English system of dividing the legal work between two segments of the profession; however, it seems that the American bar has done well in avoiding the antagonism of this kind of division.

48. C. A. Hopkins, *Recent Reforms of the Legal System*, 28 CAMB. L. J. 15-18 (1970).

1.7 Standards for the Criminal Justice System

This Report draws extensively on other studies of the criminal justice system, not only to use the information contained therein, but to bring relevant recommendations to bear on problems relating to the office of Attorney General. This section describes some of the committees and organizations that have made such recommendations, or that promulgate model legislation or suggest standard procedures. Their actual recommendations are described throughout the Report, in relation to specific topics.

1.71 Presidential and Congressional Commissions

Numerous studies of components of the criminal justice system have been undertaken at the federal level. There have been, however, only two broad-ranging studies, one completed in 1931 by the Wickersham Commission, and one in 1967 by the President's Commission on Law Enforcement and the Administration of Justice. The latter is cited throughout this Report.

President Hoover said in 1929 that: "What we are facing today . . . is the possibility that respect for law as law is fading from the sensibilities of our people."[1] To meet this crisis, precipitated largely by prohibition, he appointed a study commission, known popularly by the name of its Chairman, former Attorney General George W. Wickersham.

The Wickersham Commission's areas of study were similar to those of the 1965 Commission. Both spoke of the inertia of the criminal justice system and the inefficiency of the lower courts. Both Commissions called for increased authority in the state Attorney General over local law enforcement and prosecutions. Dr. Henry S. Ruth, Jr., has compared the two:

> The Wickersham Commission filed fourteen reports during 1930 and 1931: two on prohibition; one each on prosecution, criminal procedure, the federal courts (progress report only), lawlessness in law enforcement, police, criminal statistics, cost of crime, penal institutions-probation-parole, causes of crime, crime and the foreign born, enforcement of the deportation laws, and the child offender in the federal system of justice. In most cases, each report contained findings and the recommendations of the Commission itself, followed by findings and conclusions of advisory committees and individual consultants. There was no comprehensive general report such as that produced by the 1965 Commission. . . . The 1929 Commission concentrated to a much greater degree than the 1965 Commission on federal problems and procedures—prohibition enforcement and the eighteenth amendment, the federal court system, and children processed in the federal system.[2]

Crime hearings undertaken by a Senate committee under the leadership of Senator Estes Kefauver in 1950-51 placed emphasis on interstate problems of crime as well as on the role of organized crime. The Committee suggested that each state "institute a survey of its law enforcement agencies with a view toward bringing about greater cooperation between agencies, greater centralization of responsibility for enforcement of the criminal law, and greater efficiency."[3]

President's Commission

The President's Commission on Law Enforcement and Administration of Justice was created on July 23, 1965.[4] Then-Attorney General Nicholas de B. Katzenbach was named Chairman of the nineteen-member group, which

1. Quoted in Henry S. Ruth, Jr., *To Dust Shall Ye Return?* 43 NOTRE DAME LAWYER 816 (1968).

2. *Id.* at 819.

3. U. S. Senate Committee to Investigate Organized Crime in Interstate Commerce, 3RD INTERIM REPORT.

4. Executive Order 11236.

included representatives of most components of the criminal justice system. Professor James Vorenberg of Harvard University Law School was named Executive Director. Task forces of experts were set up to consider juvenile delinquency, organized crime, narcotics, drunkedness and assessment of crime. Extensive use was made of consultants and advisers.

The Commission was not staffed for the first six months of its two years and this fact shortened its effective working life. Its staff ultimately reached a total of forty persons, drawn from most relevant disciplines. Various studies were conducted, including a nationwide survey of police practices, field analyses of correctional facilities, conferences, and other research activities. Consultants were used to evaluate new ideas, proposed recommendations, and materials being developed for consideration by the Commission. The Commission also sought the advice of appropriate professional groups. The Commission itself actually met only seven times, for two or three days per meeting, primarily to review materials prepared by the staff.[5]

The final product was a detailed report, issued in February, 1967, and entitled *The Challenge of Crime in a Free Society*, and a series of task force reports. Numerous recommendations were made in all areas. The Deputy Director of the Commission explained the theme of these reports:

> What the Commission primarily concentrated upon was the measure of crime in our society today, the current responses thereto, and the formulation of directions for change. The reports had to be geared to serve divergent interests and levels of knowledge. Public education considerations required documents attractive to, and comprehensible by, the layman. Reform considerations required a presentation that would be persuasive to public officials and practitioners alike. The requirements of research in the future dictated goals of servicing the academic community and creating a useful educational tool for students. Integrity required that matters be presented as perceived despite what practical or political considerations might otherwise imply. An impossible task indeed, but one that required each person to concentrate upon this impossible possibility. No one could honestly claim in the end that compromises were not made.[6]

The Commission reached the "central conclusion" that in order to achieve significant reduction in crime in America, the following general objectives must be met:

> First, society must seek to prevent crime before it happens by assuring all Americans a stake in the benefits and responsibilities of American life, by strengthening law enforcement, and by reducing criminal opportunities.
>
> Second, society's aim of reducing crime would be better served if the system of criminal justice developed a far broader range of techniques with which to deal with individual offenders.
>
> Third, the system of criminal justice must eliminate existing injustices if it is to achieve its ideals and win the respect and cooperation of all citizens.
>
> Fourth, the system of criminal justice must attract more people and better people —police, prosecutors, judges, defense attorneys, probation and parole officers, and corrections officials with more knowledge, expertise, initiative, and integrity.
>
> Fifth, there must be much more operational and basic research into the problems of crime and criminal administration, by those both within and without the system of criminal justice.
>
> Sixth, the police, courts, and correctional agencies must be given substantially greater amounts of money if they are to improve their ability to control crime.
>
> Seventh, individual citizens, civic and business organizations, religious institutions, and all levels of government must take responsibility for planning and implementing the changes that must be made in the criminal justice if crime is to be reduced.[7]

5. President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 312 (1968).

6. Ruth, *supra* note 1 at 825.

7. President's Commission, *supra* note 5 at vi.

The Commission found that many problems resulted from reluctance to change. For example:

> Innovation and experimentation in all parts of the criminal justice system are clearly imperative. They are imperative with respect both to entire agencies and to specific procedures. Court systems need reorganization and case-docketing methods need improvement; police-community relations programs are needed and so are ways of relieving detectives from the duty of typing their own reports; community-based correctional programs must be organized and the pay of prison guards must be raised. Recruitment and training, organization and management, research and development all require reexamination and reform.[8]

It stated that the first step was for officials in all parts of the system to identify and face their problems. To do this, three steps were held essential:

> (1) social action must be instituted which will prevent crime;
>
> (2) adequate finances must be provided to do the job; and
>
> (3) the officials of the criminal justice system must cease to be bound by traditional concepts and be willing to try innovative procedures and take sides in order to make advances.[9]

The Commission proposed a major federal program against crime, which resulted in enactment of the Omnibus Crime Control and Safe Streets Act.

Most professional organizations have been involved in major studies of some components of the criminal justice system, bringing experts together to develop improved systems. In 1961, the American Bar Association initiated a Joint Committee for the Effective Administration of Justice, with members from appropriate conferences and associations joining in a "massive project" to coordinate efforts to improve judicial administration.[10] The American Law Institute prepared a Model Penal Code and related laws. Permanent committees of the Council of State Governments promulgated model and uniform laws affecting many aspects of the criminal justice system. The National Council on Crime and Delinquency developed model acts concerning probation, correction, and related studies, some in conjunction with the American Correctional Association.

The recommendations of these groups, and the research on which it was based, covered only partial aspects of crime problems. The President's Commission offered the first real overview of the subject. The Commission, among its many conclusions, held it:

> essential that some national body act as a focus for research efforts in the field of crime and its control, stimulating vitally needed projects, providing more effective communication between those doing research, and disseminating what is learned. . . . The need for stimulation, coordination, and dissemination is now met only in a limited, fragmentary and often haphazard way.[11]

1.72 The Advisory Commission on Intergovernmental Relations

The Advisory Commission on Intergovernmental Relations was established by the Congress to bring together representatives of all levels of government—state, federal and local—to consider mutual problems in a comprehensive manner. The Commission was established only recently, in 1959, but the need for such a group was first considered during President Harry S. Truman's administration, when the Commission on Organization of the Executive Branch of Government recommended that an agency be organized for the purpose of studying and guiding federal-state relations. A.C.I.R. is pres-

8. *Id.* at 14.

9. *Id.* at 14-15.

10. 45 JOURNAL OF THE AM. JUDICATURE SOCIETY 37 (July, 1961).

11. President's Commission, *supra* note 5 at 277.

1. Pub. L. No. 86-3901; Act of Sept. 24, 1959.

ently composed of representatives of the federal government: three from the Senate, three from the House of Representatives and three from the executive branch. State and local governments are represented by four Governors, three state legislators, three county officials, and four mayors. The Chairman and Vice-Chairman are designated by the President.

A.C.I.R.'s work is aimed at both federal-state and federal-local relations, and the relations between state and local government. It studies particular problems in order to make specific legislative or administrative recommendations which are channeled through cooperating organizations and governmental bodies to develop support. It has made recommendations on such areas as: state constitutional and statutory restrictions on local governments, apportionment of legislatures, transferability of public employee retirement credits, mass transportation, intergovernmental responsibilities for water resources planning, and similar areas that involve intergovernmental action.

A.C.I.R.'s recommendations are translated into the form of suggested legislation for consideration by state legislatures.[2] A cumulative legislative program is published periodically. Pertinent drafts are cited throughout this study.

The Commission carried out in 1970 a major study of state-local relations in the administration of criminal justice, to be published in 1971. One section, concerned with administration of the Omnibus Crime Control and Safe Streets Act, was published in 1970.[3] It is referred to in some detail elsewhere in this Report. Many of the A.C.I.R.'s reports and recommendations are of interest to Attorneys General and to others interested in the administration of criminal justice.

1.73 The Council of State Governments

The Council of State Governments "exists to serve the states in the areas of state-local relations, cooperation and liaison among the various states, and federal-state relations."[1] It is controlled by a Governing Board consisting of state delegate members, representatives of eleven organizations affiliated with the Council, its Honorary President, the past Executive Director, and ten members at large, who are elected by the board. An Executive Committee, composed primarily of Governors and legislators, exercises continuing supervision over Council operations.

The Council is involved in various interstate activities and organizations. Its publications include the biennial *Book of the States*, the quarterly magazine *State Government* and a monthly *State Government News*. It prepares and publishes occasional research reports on subjects of governmental interest.

The Council staff serves as secretariat to a number of organizations of state officials. These include: the National Governors' Conference; the National Legislative Conference; the Conference of Chief Justices; the National Conference of Lieutenant Governors; the National Association of State Budget Officers; the National Association of State Purchasing Officials; the National Conference of Court Administrative Officers; and the Council of State Planning Agencies. It maintains what it terms "continuing cooperative arrangements" with various other groups, such as the Adjutants General Association, the Parole and Probation Compact Administrators' Association, the Association of State Correctional Administrators, and similar groups. It also works with the National Conference of Commissioners on Uniform State Laws and the Committee of State Officials on Suggested State Legislation, which are discussed below.

The National Association of Attorneys General has been affiliated with C.O.S.G.O. since its inception. The Council furnishes secretariat service for N.A.A.G.'s regular national and regional meetings. It also publishes a newsletter every two months, which transmits items of general interest to Attorneys General, and summarizes opinions sent in by the states.

1.74 Suggested and Uniform State Legislation

Two types of model laws are described throughout this Report whenever such a model exists for the subject involved. Uniform State Laws are promulgated by the National Conference of Commissions on Uniform State Laws, and are intended for adoption without significant change. Model state laws are approved by the Committee of State Officials on Suggested State Legislation, and are offered as a guide to states considering legislative action on the subjects involved.

Uniform State Laws

The National Conference of Commissions on Uniform State Laws is affiliated with the American Bar Association. It consists of several commissioners from each state, usually appointed by the Governor, who draft laws on subjects where uniformity among the jurisdictions is considered desirable. Such laws range in scope from the Uniform Commercial Code, which required sweeping legislation in the adopting states, to relatively limited laws like that providing for voting by new residents in presidential elections.

The Book of the States[1] includes a table showing the passage of uniform acts by the states. The rate of adoption ranges from a narcotic drug control act, which has been enacted by fifty states, to various acts, including one promulgated in 1961, which have not been enacted by any jurisdictions. Many uniform acts concern areas of immediate interest to Attorneys General, such as criminal procedure and consumer protection. Some are discussed in this Report, but Attorneys General should at least be cognizant of the list of subjects on which uniform laws have been promulgated.

Suggested State Legislation

Each year, the Council of State Governments publishes a volume of suggested state legislation. This includes various proposals: draft legislation developed by the Committee on Suggested State Legislation; suggested interstate compacts; statements of policy in some areas where legislation has not been developed; legislation promulgated by the Commissioner on Uniform State Laws; and the Advisory Commission on Intergovernmental Relations' legislative program. An analytical index of all items published in previous volumes is also included.[2]

These drafts are developed by the Committee on Suggested State Legislation of the Council of State Governments, which consists of from one to three members from each state. In 1969, one Attorney General and two Assistant Attorneys General were members of the sixty-one member committee. The method of selecting members is left to the states. Proposals in *Suggested State Legislation* need not be enacted exactly as set forth, but may be al-

2. Advisory Commission on Intergovernmental Relations, A.C.I.R. STATE LEGISLATIVE PROGRAM, M-18, August, 1969.

3. Advisory Commission on Intergovernmental Relations, MAKING THE SAFE STREETS ACT WORK; AN INTERGOVERNMENTAL CHALLENGE, A-36, September, 1970.

1. The Council of State Governments, THE BOOK OF THE STATES, 1970-71, 235 (1970).

1. The Council of State Governments, THE BOOK OF THE STATES 1970-71, 103-108 (1970).

2. The Council of State Governments, SUGGESTED STATE LEGISLATION 1970.

tered to suit the particular state's needs, policies, and related statutes. It is recommended that "suggested legislation should be introduced only after careful consideration of local conditions,"[3] but it is a valuable source of guidance on both the substance and form of state law.

1.75 American Bar Association Standards for Criminal Justice

One of the most significant developments in the administration of criminal justice is the formulation of the American Bar Association's Standards Relating to the Administration of Criminal Justice. Originally designated the Minimum Standards for the Administration of Criminal Justice, the standards were retitled at the 1969 A.B.A. Annual Conference to omit the word "minimum" since the standards describe guidelines exceeding any true minimum level of acceptability.[1]

The need for a general reevaluation and improving of existing criminal law procedures was widely recognized in America by the early 1960's:

> [M]ost Americans were alarmed by the accelerating incident of crime of almost every kind and our apparent inability to cope with it by maintaining effective and lawful systems of law enforcement and of criminal justice—systems which accorded, to both the public and to the accused their full, lawful rights. Lawyers throughout the United States were not only aware of the problem but were actually conscious of its gravity and of many of its causes. Not the least of these causes was a growing judicial consciousness and ensuing decisions recognizing and according to individuals engaged in unlawful activities or those accused of the commission of crimes theretofore unrecognized rights at all stages of our criminal justice system.[2]

The A.B.A. has attempted to meet this need by developing standards covering all aspects of the judicial process, from pre-trial procedures to post-conviction proceedings. Some states have in effect practices substantially in compliance with those proposed[3] in some areas, but the standards represent the first consensus of recognized authorities as how to solve best the problems existing in each area.

Development of the Standards

In 1963, the Institute of Judicial Administration proposed to the A.B.A. that minimum standards for the administration of criminal justice be formulated. The Institute, located at New York University Law School, was conceived by Arthur T. Vanderbilt, former Chief Justice of the New Jersey Supreme Court, and operates with funds provided by the University and by private foundations and corporations. Its aims include: achieving judicial, procedural and administrative improvements in the courts by conducting studies; offering educational programs for judges and court administrators; and serving as a clearinghouse on court improvement.

A pilot study of the problems involved in the proposed project was undertaken by the Institute under the supervision of an A.B.A. committee headed by Judge J. Edward Lumbard of the United States Court of Appeals. On the basis of this committee's favorable report, the 1964 A.B.A. Convention authorized a three-year project budgeted at $750,000. Funds were raised through grants from the A.B.A. Endowment and from private foundations. The Institute of Judicial Administration served as secretariat.[4]

The project was designed "as an

3. Robert M. Rhodes, *Suggested State Legislation*, THE BOOK OF THE STATES 1970-71, 109 (1971).

1. Alan Kirshen, *Appellate Court Implementation of the Standards for the Administration of Criminal Justice*, 8 AMER. CRIM. L. Q. 105 (1970).

2. Robert Ervin, *A.B.A. Standards Give Accused Lawful Rights; Assure Public of Speedy Enforcement*, 44 FLA. B. J. — (1970).

3. Telephone interview with H. Lynn Edwards, Staff Director, A.B.A. Section on Criminal Law, May 26, 1970.

4. Judge Howard C. Bratton, *Standards for the Administration of Criminal Justice*, 10 NAT. RESOURCES J. 127, (1970).

action project—dealing with what should be done—not a project concerned primarily with research;" although it was recognized that "research must provide the basis" for much of the work of the project.[5] Originally scheduled to be completed in 1967, the project has been enlarged; several areas are still under consideration and not all proposed standards have been promulgated. It is contemplated that the formulation project will be completed during 1971.[6] As of December, 1970, fifteen of the total of seventeen standards have been formulated and thirteen of these have been approved by the A.B.A. House of Delegates. Two more presumably will be approved at the February, 1971, Mid-Year meeting, and the remaining two may be approved at A.B.A.'s July, 1971, meeting.

Seven advisory committees conducted the preliminary studies and drafted the resulting standards. Their titles indicate their areas of concern: Police Function, Pretrial Proceedings, Prosecution and Defense Functions, Criminal Trial, Sentencing and Review, Fair Trial and Free Press, and Judge's Function. Each of these committees, except those of Fair Trial and Free Press and the Judge's Function, prepared standards on more than one topic and reported on each topic separately.

Each of these Committees is composed of ten or eleven ABA members with experience and expertise in the administration of criminal justice, including appellate and trial judges, both state and federal; prosecuting attorneys, public defenders and other public officials; criminal law professors, and practicing lawyers, including defense attorneys. The Committees have been aided by reporters and consultants drawn from law faculties across the nation and by the resources of interested specialized organizations.[7]

Responsibility for overall supervision of the project is vested in a fifteen-member Special Committee on Standards for the Administration of Criminal Justice, which maintains liaison with the A.B.A. Sections of Criminal Law and Judicial Administration. The Special Committee recommends the standards to those Sections, and to the A.B.A. Board of Governors and House of Delegates for their consideration and endorsement.

Scope and Content

Standards covering the following areas were approved by the A.B.A. House of Delegates in 1968: post-conviction remedies, appellate review of sentences and sentencing alternatives and procedures, pleas of guilty, speedy trial, joinder and severance, trial by jury, defense services and pretrial release. Published in addition to these approved drafts are tentative drafts covering the areas of criminal appeals, electronic surveillance, discovery and procedure before trial, prosecution and defense functions and probation.

Close reading of individual standards is, of course, necessary to show how they propose to modify the existing machinery of criminal justice. The detailed handling of the problems confronted and the manner in which solutions have been proposed can be illustrated by a few examples.

The standards dealing with plea discussions and agreements "recognize the propriety and value of what has heretofore been a practice widely utilized but largely officially ignored. . . ."[8] They set up systematic controls for their use, including guidelines for prosecution, defense counsel and trial judge. The standards relating to speedy

5. J. Edward Lumbard, "Discussion of Work of A.B.A. Special Committee on Minimum Standards for the Administration of Criminal Justice," 1965 CONFERENCE OF ATTORNEYS GENERAL 118, 119.

6. A.B.A. Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO CRIMINAL APPEALS, TENTATIVE DRAFT (1969)

7. Letter from H. Lynn Edwards, to Patton G. Wheeler, December 28, 1970.

8. Bratton, *supra* note 4 at 131.

trial adopt the policies of the federal system and some states that criminal trials should take precedence over civil trials and that jailed defendants should be tried before those on bail. They recommend that states adopt a rule of statute specifying a time certain by which a defendant must be tried or discharged absolutely.[9]

Pretrial discovery procedures are proposed which present a marked departure from prevailing practices. The prosecution is required to furnish defense with information including lists of witnesses and their statements, statements of the accused or his co-defendant, relevant portions of grand jury minutes, reports of experts and real evidence. The defense is also required to make certain disclosures. The standards provide for an initial exploratory stage during which counsel investigate, confer, and perhaps enter into plea discussions without court supervision; a second stage in which the court conducts an omnibus hearing; and a third stage consisting of trial planning and including, where necessary, pretrial conferences. The standards, as finally approved, stress the theme that disclosures between the defense and the prosecution should be "full and free" as much as possible. The most innovative feature of this set of standards is the omnibus hearing provided. The date for this hearing is set by the court at the initial call for a plea or at the arraignment of a defendant who pleads not guilty.

> The Omnibus Hearing . . . is distinguished by the use of a check list designed to substitute for and orally handle in one hearing the usual variety of pretrial motions and other requests and to assist the court and counsel in discovering and considering those issues which, when ignored, form the basis for subsequent invalidation of convictions. Another distinctive feature of the Omnibus Hearing is that it makes possible the assertion and consideration of many claims without the filing of successive separate motions, briefs and responses.[10]

Provisions for defense services have also been promulgated.[11] Neither a public defender system nor a system of assigned counsel is advocated. Rather, the standards recommend that each jurisdiction, by statute, require its local subdivisions to adopt plans to provide defense services in a systematic manner. The choice of a system is left to local decision. They permit continuing use of available private practitioners for such services, if appropriate.

Evaluation and Implementation of the Standards

It is to be expected that every jurisdiction will closely examine the standards and consider adopting all or part of them. No critical evaluation of each and every provision exists, other than the extensive commentaries printed with the standards. Many provisions were adopted after careful consideration of alternate procedures; these alternatives are discussed in each published standard along with the final version. Each jurisdiction should compare the provisions of the standards to its present laws and rules, evaluating parallel provisions and identifying gaps where such exist.

Florida created a Committee for Implementation of A.B.A. Standards of Criminal Justice which compared individual sections of nine approved standards with Florida law. It prepared comments which varied from acknowledging variance or compliance to recommending feasibility studies on suggested changes. The Florida committee describes its work as follows:

> Accordingly, an initial 'must' is for each state to 'take inventory' by conducting a thorough comparative analysis. . . . This consists of setting down in the first column the verbatim 'black letter' Standards; immediately opposite, in the second parallel column appears a capsulized statement of the existing state statutory law, or court rule, or legal custom applicable to such Standard; and in the third column are set forth pertinent comments as to whether the state already equals, exceeds, or falls short of the Standard in question—and if the latter—what action is necessary (i.e. legislation, amendment of court rule or change in practice) to comply.[12]

The committee produced a detailed report. Similar comparative analyses are currently underway in Arizona, Arkansas, Illinois, Texas, and Wisconsin. Florida is now updating its analysis to include the three standards which have been approved since the initial analysis.

The procedures employed to implement the standards will vary in the different jurisdictions. In some states, legislative action will be necessary; in others, the standards may be incorporated as rules of court. A combination of these two approaches might be employed in many states.[13]

A.B.A. Implementation Efforts

In 1968, the A.B.A. made its Section on Criminal Law responsible for coordinating the implementation of all standards, except the one on Fair Trial and Free Press. This has been entrusted to a special committee. Implementation is a major undertaking which will involve many sections and committees of A.B.A., its entire membership, and many related groups. Extensive educational efforts, designed to publicize the existence and content of the standards, are a primary tool in implementation. Seminars are being conducted to acquaint the bar, the judiciary and laymen with the standards and the felt need for their incorporation into the law of the states.[14]

The Criminal Law Section set up a special Committee to Implement Standards, which has been headed throughout by former Supreme Court Justice Tom C. Clark. Former Section Chairman Louis B. Nichols has been designated Section Coordinator of the entire implementation effort because he pioneered much of the planning and has been involved continuously with implementation.[15]

The implementation committee is now working on pilot projects in Texas, Arizona and Florida. These three states offer a good cross-section: Arizona can implement the standards primarily through court rule, Texas requires legislation, and Florida combines the two methods. The Arizona Supreme Court appointed a committee with instructions to revise the rules of criminal procedure, giving due consideration to the provisions of the standards. It is anticipated that the committee's work will result in rules of court substantially in compliance with approximately 90 percent of the standards. Legislation will be necessary to incorporate the remaining 10 percent. Florida has established a committee to study rule revision and a joint legislative committee to consider proposed legislation. Texas held a Governor's conference on the Standards in 1970.[16]

The 1971 Annual Judicial Conferences of Wisconsin and Maryland will be devoted exclusively to the Standards.[17] A two-day series of workshops on implementing the standards will be held in conjunction with the Annual Meeting of the Arkansas Bar Association in 1971. The First Nation-

9 A.B.A. Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO SPEEDY TRIAL, Section 1.1 and commentary (1968).

10. Bratton, *supra* note 4 at 134.

11. A.B.A. Project on Minimum Standards for Criminal Justice, PROVIDING DEFENSE SERVICES (1968).

12. A.B.A. Section on Criminal Law, COMPARATIVE ANALYSIS OF NINE APPROVED AMERICAN BAR ASSOCIATION STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE WITH FLORIDA STATUTORY LAW, COURT RULES AND LEGAL PRACTICE 3 (1970).

13. Interview with Patrick J. Casey, Asst. Director, A.B.A. Section on Legal Practice and Education, April 20, 1970.

14. *Id.* Casey, *supra* note 13.

15. Edwards, *supra* note 7.

16. Telephone Conversation with H. Lynn Edwards, *supra* note 3.

17. Edwards, *supra* note 7.

al Conference on the Judiciary, which will be co-sponsored by N.A.A.G., will include a plenary session on the Standards, with emphasis on a few of the most pressing problems.

Numerous other activities, involving many groups are underway to encourage implementation. For example, the Criminal Law Section sponsored a National Institute on Prosecution and Defense roles, attended by two hundred representatives of the bench and bar, which concentrated on those standards. L.E.A.A. funds have been obtained in many states to help finance implementation programs. Educational materials have been developed, including reprints of articles. Conferences have involved legislative leaders, as well as the judiciary.[18]

Court Reaction

A 1970 article in the *American Criminal Law Quarterly* surveyed the incidence of appellate court citations to various provisions of the standards, noting that in the two years since the first standard was approved, standards have been cited in approximately one hundred reported cases.[19] The standard on guilty pleas is most often cited, and has been expressly adopted by the Wisconsin Supreme Court. In *State v. Reppin*,[20] the Wisconsin court held that the four factual situations designated by this standard as requiring the granting of defendant's motion to withdraw his guilty plea would be binding on Wisconsin courts, though not exhaustively. Many other courts have cited this standard, generally favorably,[21] although New York and Michigan courts did express critical reservation. The New York court stated:

> In some instances even the most vigorous standards . . . are hardly adequate; in others the Standards become an unnecessary formalism.[22]

The Michigan Court of Appeals has expressed exceptionally strong criticism of several presuppositions underlying the standards on pleas of guilty, including aspects of the negotiated plea system.[23]

Other standards cited in reported cases include those on post-conviction remedies, fair trial and free press, appellate review of sentences, sentencing alternatives and procedures, defense services, trial by jury, joinder and severance, pretrial release and discovery and procedure before trial. No citations are reported to the standards on electronic surveillance and criminal appeals.[24]

The article cited above observes that not only might courts adopt the principles of the standards with or without explicit citation, but that non-citation of a given provision "may, in fact, be an implicit *disapproval* of those principles" embodied in the non-cited standards. "Further, [he continues] once a major case explicitly adopting the Standards' principles has been handed down, other courts might well cite the appellate decision rather than the Standards themselves."[25]

The Role of the Attorney General

It is recognized by those working for implementation of the standards that, regardless of the extent of the Attorney General's direct contact with criminal justice, he is the chief law officer of the state and is a proper person to guide development of the better

18. A.B.A. Section on Criminal Law, *Annual Report of Chairman* (typewritten, 1970).
19. Kirshen, *supra* note 1 at 116.
20. 35 Wis. 2d 377, 382, 151 N.W. 2d 9, 14 (1967).
21. *See* Kirshen, *supra* note 1 at 106 *et seq.* for discussion of these cases.
22. *People v. Nixon*, 21 N.Y. 2d 338, 234 N.E. 2d 687, 287 N.Y.S. 2d 659 (1967).
23. *See* opinions by Judge Charles L. Levin, *People v. Byrd*, 12 Mich. App. 186, 162 N. W. 2d 777 (1968) (concurring); *People v. Earegood*, 12 Mich. App. 256, 162 N. W. 2d 802 (1968); and *People v. Hollman*, 12 Mich. App. 231, 162 N. W. 2d 817 (1968) (dissenting).
24. Kirshen, *supra* note 1.
25. *Id.* at 105.

administration of justice generally. At the June, 1970, Annual N.A.A.G. Conference, half a day was devoted to the presentation of the standards, including a survey of their scope, and commentaries by members of the judiciary, prosecution and the bar directed to individual standards.

Both Mr. Justice Clark and Judge Lumbard have pointed out that the Attorneys General of the states can be of material assistance. Mr. Justice Clark has suggested to the Attorneys General that they cite the proposed standards in briefs and encourage appellate judges to cite them in their opinions. This procedure, he pointed out, might obviate the necessity of having the proposed standards formally adopted.[26] As the chief law officer, the Attorney General should become actively involved in reviewing the standards and working for adoption of those he favors.

Judge Lumbard has pointed out to the Attorneys General the necessity to exercise the powers which they have to supervise criminal prosecutions to:

> . . . keep in touch with cases which are raising important issues of this nature to see that they are being handled on a sufficiently high level by experienced and expert counsel . . .
>
> What an enormous difference it makes if these cases are handled the right way in court to begin with, and then handled the right way in the appellate court afterwards. There are many of these cases where briefs *amicus* ought to be filed, perhaps by your Association. . . . The courts need to get a broad picture of what the problems are when they decide important criminal cases, when they pass upon the retroactivity of certain decisions, some of which may be in the constitutional area, when they are asked to determine whether the rule which they not lay down should be only prospective and should not be retroactive.[27]

Judge Lumbard has stressed that the states must act to establish their own standards for the administration of criminal justice and not leave this area to the courts to be decided on a piecemeal basis. He noted that the courts:

> . . . have the duty to decide whether laws and procedures are in accordance with the constitution . . . it was never contemplated, least of all by the courts themselves, that they would write the laws and spell out the procedures.[28]

It is incumbent upon the states to establish procedures. If the states fail to do this, they can expect that the courts will make rulings on an *ad hoc* basis that might have adverse affects on law enforcement generally. The proposed standards are designed to establish well-defined guidelines for the administration of justice that are "understandable, consistent and responsive both to the reasonable requirements of law enforcement and adequate protection of individual rights."[29]

Chief Justice Burger has gone on record as supporting implementation of the standards and has observed that they can be used to bring new levels in the administration of criminal justice that are "reasonable, and what is more important, fair."[30]

But, as Judge Lumbard points out:

> Our efforts will bear fruit only if we win public understanding and support. The leading citizens in each state and each community must become our partners in the essential business of explaining our proposals and persuading the people and their representatives that they should be enacted into law or adopted as court rules.[31]

Decision to or not to adopt any or all

26. From a speech by Mr. Justice Clark to the Southern Regional Conference of Attorneys General at Gatlinburg, Tenn., April 2, 1970.
27. Lumbard, *supra* note 5 at 126, 127.
28. J. Edward Lumbard, *New Standards for Criminal Justice*, 38 N.Y. STATE BAR J. 318, 320 (1966) [Also printed at 52 A.B.A.J. 431 (1966)].
29. *Id.*
30. From a speech presented by Chief Justice Warren E. Burger to the Midwinter Meeting of the National Association of Attorneys General, Washington, D.C., February 6, 1970.
31. Lumbard, *supra* note 27 at 326.

of the standards must be an individual state determination, made after considered evaluation of all pertinent factors. Such considered evaluation would seem indicated, for as has been observed:

> While the *Standards* do not purport to be the legal profession's complete solution to the problems which made the *Standards* necessary, or even to constitute a complete answer to the myriad of legal problems encountered in the administration of criminal justice, they do represent and purport to be a substantial contribution to these in the form of acceptable *Standards* applicable in almost all cases, and they constitute the composite judgments of the leadership in all phases of criminal justice and of the bar as a whole. They are an even-handed application of established criminal law principles which, while according to the accused his lawful rights as now established, equally accords to the American public its right to have law speedily and effectively enforced and the guilty dealt with accordingly.[32]

32. Ervin, *supra* note 2.

2. THE PROSECUTION FUNCTION

The American Bar Association characterizes the prosecution and defense functions as "advocacy within the framework of the adversary system," saying that:

> The adversary system which is central to our administration of criminal justice is not the result of abstract thinking about the best means to determine disputed questions of law and fact. It is the result, rather, or the slow evolution from trial by combat or by champions to a less violent form of testing by argument and evidence.[1]

2.1 Local Prosecutors: Characteristics of the Office

The prosecutor, the defense attorney, and the judge are indispensable elements of this system. The prosecutor exercises, additionally, the critical power of determining what cases will come before it:

> ...[T]he power of the prosecutor to institute criminal prosecutions vests in him an authority in the administration of criminal justice at least as sweeping as, and perhaps greater than, the authority of the judge who presides in criminal cases. . . . [T]he prosecutor is vested with virtually unreviewable power as to the persons to be prosecuted or not.[2]

The local prosecutor is a characteristically American office. England established the office of Director of Public Prosecutions in 1879, thus ending "traditional adherence to the doctrine that under English law the detection and prosecution of crime was basically the responsibility of private citizens."[3] This is a central office, under the superintendence of the Attorney General, and cases are actually argued by private counsel to whom they are assigned. In European systems, the entire process of criminal investigation and prosecution is under the central state authority.

America has long embraced the concept of public prosecutors, although some states permit private parties to bring criminal actions. Rather than retaining centralized prosecution functions, states generally have diffused them among county or district prosecutors, most of whom are locally-elected and not responsible to any central authority. As one state court said, "the office of prosecuting attorney has been carved out of that of Attorney-General and virtually made an independent office."[4] There is little probability that this basic pattern will be changed; there is every indication that it will be reassessed and strengthened.

The office of local prosecutor has developed differently in the different states and territories. Some jurisdictions have no local prosecutor; the Attorney General handles local as well as appellate prosecutions. Most have county attorneys. Some have attorneys serving a judicial district. A few have both county and district attorneys. Additionally, most jurisdictions have city attorneys or corporation counsel, who may handle some criminal as well as civil matters. This study excludes city attorneys from consideration, as their duties are less relevant to Attorneys General.

Even the titles of local prosecutors vary. They are known in various jurisdictions as county attorneys, district attorneys, state's attorneys, prosecuting attorneys, circuit attorneys, solicitors,

1. A.B.A. Project on Standards for Criminal Justice. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Tentative Draft, 2 (March, 1970).
2. *Id.* at 19.
3. J. Ll. J. Edwards, THE LAW OFFICERS OF THE CROWN, 9 (1964).
4. *State v. Finch*, 128 Kan. 665, 280 P. 910 (1929).

Commonwealth's attorneys, and other titles. These are not necessarily descriptive. District attorneys, for example, serve special districts in some states, but serve county units in others. This chapter concerns some characteristics of the office, such as selection, staff, salary, and types of activities. Some of these data are summarized in Table 2.1.

It would be impossible to conduct a valid study of Attorneys General without also studying local prosecutors. Some Attorneys General actually conduct local prosecutions; most have power to intervene in or initiate local actions under specified circumstances or on direction of another authority. Most take over cases when they reach the appellate level. Most issue formal and informal advice to local prosecutors. Many prepare bulletins, conduct seminars and otherwise work with local prosecutors. The Attorney General is commonly characterized as a state's chief law officer. He cannot serve effectively unless he has a constructive relationship with local prosecutors, who actually handle most of the public's legal business in a state.

2.12 Sources of Data on Prosecutors

Virtually no primary data on prosecutors are available from any source. No one can say with certainty how many prosecutors serve what percent of the time; how many employ assistants; what prosecutors' relationships to Attorneys General are, or what are their relationships to local law enforcement officers. Similarly, there have been few efforts to define prosecutors' attitudes toward state or local officials, or to determine what improvements they consider desirable in the criminal justice system. Recommendations are being made by many groups on the basis of data that are inadequate, obsolete, or simply not available.

To help fill this gap and to make available information on prosecutors, the Committee on the Office of Attorney General decided to conduct a nationwide survey. Cooperation of the National District Attorneys Association was sought. The N.D.A.A. Board of Directors voted to urge full cooperation in the study. The Executive Director, Mr. Patrick F. Healy, assisted in developing the questionnaire and wrote a cover letter for it, asking prosecutors to complete it as fully and accurately as possible. The questionnaires were mailed by N.D.A.A., to be returned directly to the C.O.A.G. Project Director.

The eight-page questionnaire comprised about forty questions. Responses were coded, put on punch cards, and tabulations made with automatic data processing equipment. These tabulations cover about seven hundred responses, and consist only of frequency counts. More complex analyses will be made eventually to determine possible correlations. Even in its present preliminary form, however, the survey is still the most important source of information on prosecutors available.

Of 676 responses tabulated, 228 were from county attorneys, 184 from district attorneys, 86 from state's attorneys, 134 from prosecuting attorneys, 13 from Commonwealth's attorneys, 6 from city attorneys, and the rest did not give their title or had other titles. Of these, 554 served a district consisting of only one county, and 15 more had only two counties in their district. Another 25 served three-county and 14 served four-county districts. Only 43 had districts consisting of five or more counties, while 39 did not reply to this question.

Almost half of the respondents, 320 of 676, were serving two-year terms. The next largest group, 253 prosecutors, were serving four-year terms, while 33 were serving terms of five or more years and the rest did not answer.

Other information about prosecutors was obtained through C.O.A.G. questionnaires to Attorneys General's offices. This included basic data on area, title and term, as shown in Table 2.1, and information on reporting requirements and source of salary. Attorneys General's offices also furnished information on their power to intervene, supersede, or to initiate criminal prosecutions and the frequency with which powers are exercised. Not all jurisdictions, of course, answered all questionnaires or provided complete information.

A questionnaire was mailed to former Attorneys General requesting their views on many subjects, including their relationship to local prosecutors. One hundred and fifteen replied. Their answers were analyzed and published by C.O.A.G.[5] A similar opinion questionnaire was sent to incumbent Attorneys General.

Other sources included state action grant plans and discretionary grant applications prepared for the Law Enforcement Assistance Administration, publications of the National District Attorneys Association, the American Bar Association Minimum Standards for the Defense Function, the reports of the President's Commission on Law Enforcement and the Administration of Justice, and the few existing law journal articles.

2.13 Selection, Term and Qualifications

In the vast majority of jurisdictions, local prosecutors are elected. All local prosecutors are elected in forty-three jurisdictions. In Arkansas, district prosecutors are elected, but lower court prosecutors are appointed. In Hawaii, the public prosecutor for the city and county of Honolulu is appointed by the mayor, but prosecutors for the other counties are elected. In Connecticut, prosecutors are appointed by the court. In New Jersey and Puerto Rico, the Governor appoints local prosecutors; he also appoints the Attorney General in these jurisdictions. In New Jersey, prosecutors are appointed for five-year terms; inasmuch as the Governor serves for four years, they have some degree of independence. In Alaska, Delaware, Guam, Rhode Island, and American Samoa, the Attorney General names or serves as local prosecutor. In California and Oregon, prosecutors are elected on a non-partisan ballot.

The question of election versus appointment of Attorneys General is discussed in Section 1.41 of this Report; many of the arguments for either method would apply with equal validity to prosecutors. Attorneys General are now appointed in twelve jurisdictions and elected in forty-two. C.O.A.G. surveys show that both past and present Attorneys General tend to favor the selection method that prevails in their jurisdiction. This tendency carries over to their attitudes about prosecutors. Of 108 former Attorneys General, only 26 thought that the Attorney General should be able to appoint prosecutors. Only 17 thought he should have complete removal powers, but 17 more thought he should be able to remove prosecutors for cause. Of incumbent Attorneys General, 13 out of forty responding thought they should appoint prosecutors.

The President's Commission recognized that either selection process has both advantages and disadvantages:

> Local election increases the likelihood that the prosecutor will be responsive to the dominant law enforcement views and demands of the community. Since he is not dependent on another official for reappointment, the prosecutor possesses a degree of political independence that is desirable . . . But many of these same factors interfere with the full development of the prosecutor's office. Political considerations make some

5. Committee on the office of Attorney General, FORMER ATTORNEYS GENERAL ANALYZE THE THE OFFICE (September, 1970).

2.13 LOCAL PROSECUTORS WITH CRIMINAL JURISDICTION

	Title	Area	Number of Units	How Selected	Term (Years)
Alabama	District Attorney	Judicial District	36	Elected	4
Alaska	(No Local Prosecutor)	(N.A.)	(N.A.)	(N.A.)	(N.A.)
Arizona	County Attorney	County	14	Elected	4
Arkansas	Deputy Prosecuting Attorney	County	75	District Prosecuting Attorney	2
	District Prosecuting Attorney	Judicial District	19	Elected	2
California	District Attorney	County	58	Elected	4
Colorado	District Attorney	Judicial District	22	Elected	4
Connecticut	States Attorney Chief Prosecutor	County	8°	Superior Court Circuit Court	
Delaware	(No Local Prosecutor)	(N.A.)	(N.A.)	(N.A.)	(N.A.)
Florida	State Attorney	Judicial District	20	Elected	4
	County Solicitor (criminal)			Elected	4
	County Attorney (civil)			Elected	4
Georgia	District Attorney	Judicial District	40	Elected	4
Guam	(No Local Prosecutor)	(N.A.)	(N.A.)	Elected	4
Hawaii	County or City Attorney	County	4	Elected or Appointed	
Idaho	Prosecuting Attorney	County	44	Elected	
Illinois	State's Attorney	County	102	Elected	4
Indiana	Prosecuting Attorney	Judicial District	84	Elected	4
Iowa	County Attorney	County	99	Elected	4
Kansas	County Attorney	County	105	Elected	2
Kentucky	County Attorney	County	120	Elected	4
	Commonwealth Attorney	District	43	Elected	6
Louisiana	District Attorney	Judicial District	33	Elected	6
Maine	County Attorney	County	16	Elected	2
Maryland	State's Attorney	County or City	23	Elected	4
Massachusetts	District Attorney	Judicial District	9	Elected	4
Michigan	Prosecuting Attorney	County	83	Elected	4
Minnesota	County Attorney	County	16	Elected	2
Mississippi	District Attorney	Judicial District	19	Elected	4
	County Prosecuting Attorney	County	61	Elected	4
Missouri	Prosecuting Attorney	County	114	Elected	2°°
	Circuit Attorney		115		4
Montana	County Attorney	County	56	Elected	4
Nebraska	County Attorney	County	93	Elected	4
Nevada	District Attorney	County	17	Elected	4
New Hampshire	County Attorney	County	10	Elected	2
New Jersey	County Prosecutor	County	21	Governor with consent of Senate	5
New Mexico	District Attorney	Judicial District	11	Elected	4
New York	District Attorney	County	62	Elected	4
North Carolina	Solicitors	Solicitorial District	30	Elected	4
North Dakota	State's Attorney	County	53	Elected	2
Ohio	Prosecuting Attorney	County	88	Elected	4
Oklahoma	District Attorney	District	25	Elected	4
Oregon	District Attorney	County	36	Elected	4
Pennsylvania	District Attorney	County	67	Elected	5
Puerto Rico	District Attorney	Judicial District		Governor	
Rhode Island	(No Local Prosecutor)	(N.A.)	(N.A.)	(N.A.)	(N.A.)
Samoa	(No Local Prosecutor)	(N.A.)	(N.A.)	(N.A.)	(N.A.)
South Carolina	Solicitor	Judicial District	16	Elected	4
South Dakota	State's Attorney	County	67	Elected	2
Tennessee	District Attorney General	Judicial District	25	Elected	8
Texas	State's Attorney	County	254	Elected	4
Utah	County Attorney	County	29	Elected	4
	District Attorney	District	7	Elected	4
Vermont	State's Attorney	County	14	Elected	2
Virgin Islands	Assistant Attorney General[1]	Virgin Islands		Attorney General	Indef.
Virginia	Commonwealth Attorney	County or City	123	Elected	4
Washington	Prosecuting Attorney	County	39	Elected	4
West Virginia	Prosecuting Attorney	County	55	Elected	4
Wisconsin	District Attorney	County	72	Elected	2
Wyoming	County and Prosecuting Attorney	County	23	Elected	4

° Connecticut: counties still exist as geographic areas but have been abolished as governmental units.
°° Prosecuting Attorney of St. Louis, 4 years.

(1) Assistant Attorneys General act as prosecutor in misdemeanor cases; U.S. attorney prosecutes felonies.

prosecutors overly sensitive to what is safe, expedient, and in conformity with law enforcement views that are popular rather than enlightened. Political ambition does not encourage a prosecutor to take the risks that frequently inhere in reasoned judgments.[6]

Rapid turnover among prosecutors is a problem which limits the development of expertise. C.O.A.G.'s survey found that, of 430 prosecutors reporting, 184 were serving their first term and 122 their second term. Only 30 percent of prosecutors had served three or more terms. Of these, 54 were serving a third term, 33 a fourth, and 37 five or more terms.

Other sources indicate that these data are typical. A Michigan report said that in August, 1969, about 60 of the state's 83 prosecutors had not yet served a full term in office.[7] The Maryland State's Attorneys' Association noted that the average seniority in the Baltimore state's attorney's office is thirteen months, and the whole staff

6. Task Force on Administration of Justice, the President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS, 73 (1967).

7. Prosecuting Attorneys Association of Michigan, Application for Grant, Discretionary Funds, to U.S. Dept. of Justice, L.E.A.A., May 13, 1970.

turns over every two years. It attributed this turnover to "a number of factors, prominent among which are relatively low salaries and unattractive office facilities."[8] A conference of sixteen metropolitan prosecutors showed that the average length of attorney personnel who left in the past 5 years was 2 years in five of the jurisdictions and under 4 in five more. More money was given as the chief reason for leaving by most of those reporting.[9]

Qualifications

Data on the qualifications of prosecutors are limited. Most states apparently set some minimum requirements of residence, admission to the bar, and sometimes age. New Jersey, for example, requires that he be a fit person, admitted to practice for five years, and take an oath as prescribed by the Constitution.

C.O.A.G.'s survey found that, of 439 prosecutors replying, 114 had served as city or county attorney prior to occupying their present position; 123 had served as an assistant prosecutor; 20 had served in the Attorney General's office; 8 had been with the U. S. Department of Justice; 19 had served as state legislators; 14 had worked as attorneys for some public authority; 40 had been a local judge; 9 had been public defenders; and the remainder had held some other local post, or had not previously held public office.

Age is indicated indirectly by responses to a question about what year the respondent received a law degree. The median year given was 1956, which would indicate that the typical prosecutor is in his late 30's or early 40's. If this is related to the above information on prior occupations and to information on the short length of service as prosecutor, it appears that persons typically hold another office before becoming prosecutor, then stay in that position only one or two terms.

2.14 Area Served and Time Spent on Office

The county is the most common prosecutorial district. Of the forty-eight jurisdictions which have local prosecutors, twenty-nine have county prosecutorial units, twelve have districts, and seven have both. The type of area does not, of course, necessarily relate to its size. Los Angeles County, for example, has a larger population than most judicial districts. The number of counties range from 5 in Hawaii to 254 in Texas, so the county unit may or may not imply a large number of prosecutors.

Counties are the traditional unit for prosecutor services in the United States, but there is an increasing trend toward a district system. Of 103 former Attorneys General responding to a C.O.A.G. questionnaire, 43 thought that prosecutorial functions should be organized on a county basis, 41 on a district basis, and 20 on a statewide basis. Of 38 incumbent Attorneys General answering the same question, 13 favored a county system, 15 a district, and 10 thought prosecutorial services should be on a statewide basis. The President's Commission on Law Enforcement and the Administration of Justice said that "in smaller jurisdictions, where the case load does not justify a full-time criminal prosecutor, consideration should be given to use of prosecutors representing larger districts."[10] The A.B.A. draft standards on the prosecution function argue that "Wherever possible, a unit of prosecution should be designed on the basis of

8. Maryland State's Attorneys' Association, Application for Grant, Discretionary Funds, to U.S. Dept. of Justice, L.E.A.A., April 23, 1970.

9. National District Attorney Association, METROPOLITAN PROSECUTORS CONFERENCE, (June, 1970).

10. The President's Commission on Law Enforcement and Administration of Justice. THE CHALLENGE OF CRIME IN A FREE SOCIETY, 148 (February, 1967).

population, case load and other relevant factors sufficient to warrant at least one full-time prosecutor and the supporting staff necessary to effective prosecution."[11]

The Advisory Commission on Intergovernmental Relations, at its meeting on September 11, 1970, recommended that states require prosecuting attorneys to be full-time officials and that their jurisdictions be redrawn so that each is large enough to require the full-time attention of such an official and to provide the financial resources to support his office. It also said that states should pay at least 50 percent of the costs of prosecutors' offices.

The chief problem with the county unit is that some are too small to provide adequate services. One Idaho county, for example, has no attorneys living there, although the law specifies that the county attorney must be a resident. Two of Idaho's counties have less than 6,000 population. Only two prosecutors in the state serve full-time.[12] Oklahoma adopted a district system in 1965, following an election in which there were no candidates for county attorney in a majority of counties.[13] Vermont has fourteen states attorneys, seven of whom are full-time. One prosecutor is not a member of the bar, and the state must contract with an attorney in his district to handle trial matters. The Attorney General's office favors full-time prosecutors "who would not leave the office due to financial pressure as soon as they gain experience as is presently the case," which would require larger districts.[14] These examples are typical.

11. A.B.A. Project, *supra* note 1.

12. N.A.A.G., C.O.A.G. REMARKS TO COMMITTEE MEETING FEBRUARY 5, 1970, 10 (1970).

13. C. Busby, *The County Attorney System*, 32 J. OKLA. B. ASS'N. 2317 (1961).

14. Letter from Deputy Attorney General Fred I. Parker, Vermont, to Attorney General John B. Breckinridge, April 30, 1969.

Full or Part-Time

Whether prosecutors are elected or appointed, and whether they serve a county or a district, there is increasing consensus that they should devote full-time to the position. Most prosecutors serve only part-time.[15] C.O.A.G.'s survey of prosecutors, however, found that 259 of 455 respondents said that they would be willing to serve full-time if their salary were increased. Present salaries would make it impossible for most prosecutors to forego private practice.

Private practice by Attorneys General and their staffs is discussed in Section 3.43 of this Report. While about half the states still permit some private practice, a decreasing number of Attorneys General actually do so, and such practice is subject to definite limitations. An overwhelming majority of former and incumbent Attorneys General believe private practice should be prohibited; the same arguments could apply with equal validity to local prosecutors. These are: the position is important enough to require full-time attention; there is continuing danger that conflicts of interest will develop; private activities may be detrimental to his prestige as a public officer; and it is difficult to draw a clear distinction between actions taken as a public and as a private attorney.

A study by the Idaho Attorney General's office recommended a district attorney system, with full-time prosecutors. It pointed out that 42 of the state's 44 prosecutors are part-time, and that most

> . . . use their office to supplement their income. All must consider the odds in determining whether or not to run for office. Each gambles that public service will not interfere with their private practice which

15. N.D.A.A. *The Prosecuting Attorneys of the United States—1965.* THE PROSECUTOR, 191, 195–217 (1966). This article contains survey data from 1116 prosecutors offices; data on age, salary, caseload, etc., were given on an office-by-office basis.

provides additional income. If the odds are poor and if the job as prosecutor apparently requires too much time, the prosecutor is forced to decide whether to let his private practice slide or cut down on his prosecuting duties. This ethical conflict faces each and every part-time prosecutor . . . . Further conflict arises in the small county where there is a sparsity of attorneys. In these counties, the case can and has arisen where the prosecutor finds himself faced with the problem of prosecuting an existing private client, or representing, in a civil matter, a person whom he has just prosecuted.[16]

Minnesota's Attorney General's office reported that only 6 of its 87 counties had a full-time prosecutor and some prosecutors were paid less than $5,000 per year. For this reason, they had to devote most of their time to private practice.[17]

The American Bar Association's Standards Relating to the Prosecution Function, as published in draft form, called for full-time prosecutors. Consultation with prosecutors led to a proposed revision that would say "wherever feasible, the offices of chief prosecutor and his staff should be full-time occupations."[18] This recognizes that restructuring of some prosecutorial units would be necessary to justify full-time personnel.

The President's Commission on Law Enforcement and Administration of Justice examined the prosecutor's role and recommended that:

> Localities should revise salary structures so that district attorneys and assistants devote full time to their office without outside practice. The effect should be to raise the quality of the office so that highly talented lawyers will seek it. In smaller jurisdictions, where the caseload does not justify a full-time criminal prosecutor, consideration should be given to use of prosecutors representing larger districts, in place of county or town attorneys. Assistants should be hired on a non-partisan basis.[19]

Recommendations for full-time prosecutors must consider methods of providing full-time salaries if they are to be realistic.

2.15 Training Programs

Observers agree that training is almost universally inadequate, although the situation has improved somewhat since the President's Commission Task Force said in 1967 that:

> There has been deplorable inattention to the development of curricula and training techniques in the investigative, administrative, and broader law enforcement policy roles played by the prosecutor. These matters have not been seen as suitable subjects for the attention of law schools and the legal scholarly community. . . . Large metropolitan prosecutors' offices should develop a formal training program for new assistants. . . . There is also a need for training programs on a State or regional level to reach prosecutors and assistants in small offices.[20]

A survey of eighteen metropolitan prosecutors' offices showed that only four offered formal training for new personnel. Six offices did not offer even on-the-job training. Only eight of the eighteen reported that they had special staff devoted to training, and three of these had less than 1 percent so assigned. The largest staff is 3 percent in Portland, followed by 2 percent in Miami. Only nine of these offices reported that they had procedures manuals. These are all large offices, yet many do not have adequate training services; obviously, the smaller offices would be even less able to furnish training.[21] A Metropolitan Prosecutors Conference was held to consider results of this survey of some of the larger

16. *County Prosecutors v. District Attorneys*, Paper prepared by Mack A. Redford, Deputy Attorney General of Idaho (no date).
17. State of Minnesota Judicial Council and Attorney General, Application for Grant, Discretionary Funds, to U.S. Dept. of Justice, L.E.A.A., (March 27, 1967).
18. A.B.A., Special Committee, *Tentative Proposed Revisions of Standards Relating to the Prosecution Function and the Defense Function.*
19. President's Commission, *supra* note 6 at 148.
20. Task Force, *supra* note 7 at 75.
21. N.D.A.A., *supra* note 9.

offices and to formulate standards which will be presented to the National District Attorneys Association Convention. The aim of the conference was to suggest improvements in such areas as personnel, organization, physical facilities, communications, case assignments, warrant processing, preliminary examinations, grand jury and trial preparations, trial, docket and appellate procedures.[22] These were directed primarily at the larger offices.

The National District Attorneys Association has held numerous seminars for prosecutors. It noted in August, 1969 that, although it had conducted fifteen seminars in the preceding two years, "these achieved only a small portion of the essential training of new men." The N.D.A.A. said that the states should not only direct their attention to these needs, but they should "explore the possibilities of their state law schools developing continuing substantive, procedural and administrative curricula involving the whole spectrum of criminal justice." It suggested further that some group act as a coordinating body "to encourage and set uniform standards in many areas to avoid the wide disparity that now exists in the seeking of solutions to state prosecution problems."[23]

A Michigan study found a lack of coordination or interchange of ideas among prosecutors themselves:

> There is no consistency in the prosecutor's definition of his own responsibilities and no agreement among counties as to the resources needed to do the job. . . . No pattern can be found in office policy with respect to such basic issues as staff training, staff specialization, plea bargaining practice, and docket management. The result is a potpourri of local traditions and practices developed from county to county through trial and error.[24]

The Prosecuting Attorneys Association of Michigan produced and adopted, in 1970, standards for Michigan prosecutors' offices.[25]

A related problem is the lack of adequate investigative facilities. C.O.A.G.'s survey found, for example, that only 24 of 656 prosecutors said that their offices contained a crime lab. All but 29 said that they use the state crime lab: 414 use it often, while 170 seldom use it. The lack of local facilities can be counteracted to some extent by informing prosecutors of what state facilities are available and by keeping them abreast of developments in investigative techniques.

The Arizona Attorney General's office refers to a pending study by the State Justice Planning Agency which shows that one reason for the turnover rate among younger prosecutors is their feeling of insecurity when dealing with the criminal law. It notes that "one of the primary causes of friction between the police and prosecutors' offices is a feeling on the part of the police that the prosecutor has improperly evaluated the evidence or has failed to present the case in a professional manner."[26] The Virginia Attorney General's office pointed out that the local prosecutor is the chief adviser to police and sheriffs and that they turn to him when questions of law arise. As case law becomes more complex, this will be increasingly true. The prosecutor, however, must have sufficient knowledge to make the decision "on the spot" and have it meet the tests of the courts that will

22. Metropolitan Prosecutors Conference, Application for Grant, Discretionary Funds, to U.S. Dept. of Justice, L.E.A.A., April 21, 1970.
23. N.D.A.A., PROSECUTION—RELATED ACTION GRANT PROGRAMS IN 1969 STATE LAW ENFORCEMENT PLANS (August 20, 1969).
24. Prosecuting Attorneys Association of Michigan, Project Report to Governor's Office of Criminal Justice Program.
25. Prosecuting Attorneys Association of Michigan, Application for Grant, Discretionary Funds, to U.S. Dept. of Justice, L.E.A.A., September 25, 1970.
26. Attorney General of Arizona, Application for Grant, Discretionary Funds, to U.S. Dept. of Justice, L.E.A.A., June 1, 1970.

later render decisions and opinions in the case."[27] Thus, training of prosecutors benefits law enforcement officers as well as the prosecutors.

2.16 Staff, Reports, Budgets

Adequate data on the staff of prosecutors' offices are not yet available, but indications are that few offices have large or specialized staffs. Of 216 prosecutors reporting to C.O.A.G. that they employed full-time attorneys in their offices, 62 employed one, 61 employed two through four attorneys, 33 employed five to ten attorneys, and 60 employed ten or more. Only 29 prosecutors reported that they had one or more staff members assigned full-time to organized crime control. Only 22 offices said that they had staff assigned full-time to consumer protection.

According to information furnished C.O.A.G. by Attorneys General, local prosecutors in seventeen jurisdictions are required to submit reports to the Attorney General. In nine states, they must report at the Attorney General's request and in another they must report to him "in certain instances." They must report to the Attorney General monthly in one state, quarterly in another, annually in two, "from time to time" in another, and annually and on request in two states. Six additional jurisdictions require that local prosecutors report to other officials, but not to the Attorney General. They must report to the county board in three states, the court in one, the comptroller in one, and the Governor in another.

C.O.A.G's survey of prosecutors asked whether they issued regular reports on the work of their offices and, if so, how often and with what general contents. Of 674 prosecutors, only 206 said that they issued regular reports. Of these, 88 issued reports annually, 36 semi-annually or quarterly, 42 monthly, 9 weekly, 1 bi-annually, 2 daily, one "as often as necessary" and 22 said reports were "periodic." Of the 206 who said they issue reports, 181 said to whom reports were issued. By far the largest number, 66 prosecutors, said that reports were issued to the county court or board. The next largest group, 35 prosecutors, issued reports to the Attorney General. Eleven report to the state judiciary, 7 to the state investigative agency, and 7 to other public agencies. Twenty-four say that they report to "news media;" this form of report is undoubtedly common to others as well. The largest group say that they report on "activities of the office;" most of the rest report statistics on complaints and disposition of cases, and fiscal data.

All available data indicate that reporting requirements are not adequate. Public officials generally are required to report to another officer or to the public directly on their activities, finances and, occasionally, on legislative needs and administrative problems. Prosecutors should be required to issue at least minimal reports on a periodic basis.

Salaries and Budgets. Information reported to C.O.A.G. by Attorneys General's offices indicates that, in those jurisdictions which have local prosecutors, salaries are usually paid by the county. The source of salary is the county in eighteen states, the state in eight, and both in five. In two states, Arizona and Washington, the salary is set by the state but paid by the county. In four others, it is paid by the state but the county may supplement. In two states, Arkansas and Mississippi, the district attorney is paid by the state and the county attorney by the county. Of 583 prosecutors, 410 indicated that less than one percent of their budget came from sources other than the county.

Salaries tend to be low. In C.O.A.G.'s survey, 661 prosecutors reported

27. Attorney General of Virginia, Application for Grant, Discretionary Funds, to U.S. Dept. of Justice, L.E.A.A., May 14, 1970.

2.16 LOCAL PROSECUTORS: SALARY AND REPORTS

	Source of Salary	Reporting Requirements
Alabama	State (County may pay part)	None
Alaska	(No Local Prosecutor)	(No Local Prosecutor)
Arizona	County Board of Supervisors	None
Arkansas	District Prosecuting Attorney—State Deputy Prosecuting Attorney—County	None to Attorney General
California	County	At Attorney General's request
Colorado	State and County	None
Connecticut	Judicial Department	At Judges' request
Delaware	(No Local Prosecutor)	(No Local Prosecutor)
Florida	State	Quarterly to Attorney General
Georgia	State; County May Supplement	None
Guam	(No Local Prosecutor)	(No Local Prosecutor)
Hawaii	County or City	None
Idaho	State	To Attorney General (from time to time)
Illinois	State and County	At request of Attorney General
Indiana	County and State	No reports
Iowa	County	At request of Attorney General or county supervisors
Kansas	County	
Kentucky	County & District	None
Louisiana	State & Parish or District	Monthly Report to Attorney General (on crime)
Maine	State	Annually to Attorney General
Maryland	County or City	None required
Massachusetts		None required
Michigan	County	May be required by Attorney General
Minnesota	County	None
Mississippi	District Attorney: State County Attorney: County	None
Missouri	County	None
Montana	½ County, ½ State	At Attorney General's request: plan periodic reports
Nebraska	County	Quarterly to County Board—Not to Attorney General
Nevada	County	At Attorney General's request
New Hampshire	County	Annual report to county
New Jersey	County	Annual and on request to Attorney General
New Mexico	State	None
New York	County	None
North Carolina	State	None
North Dakota	County	None
Ohio	County	Annual to Attorney General (on criminal matters)
Oklahoma	State; ½ County—½ State	None to Attorney General
Oregon	State; County May Supplement	
Pennsylvania	County	None to Attorney General
Puerto Rico	Commonwealth	At request of Attorney General or Supervisor
Rhode Island	No Local Prosecutor	(No Local Prosecutor)
Samoa	No Local Prosecutor	(No Local Prosecutor)
South Carolina	State	Annual to Comptroller on fiscal matters
South Dakota	County	None
Tennessee	State; Some County Supplement	None

Texas.....County	At Attorney General's request (on criminal matters)
Utah.....State	Reports to Attorney General annually and on request
Vermont.....State	No Formal Reports required
Virgin Islands.....Attorney General's Office	At Attorney General's request
Virginia.....½ State & ½ Local	No Reports
Washington.....Set by State, Paid by County	Annually to Gov. and State Liquor Control Board
West Virginia.....County	To County Court and to Attorney General when required
Wisconsin.....State and County	To Attorney General only in certain instances
Wyoming.....County	County Commissioners

a median annual salary of $10,000 to $11,000. About a third of the respondents, or 206 prosecutors, earned less than $8,000; 108 earned $8,000 to $10,000; 121 earned $10,000 to $15,000; 85 earned $15,000 to$17,000; and 141 earned over $17,000. A 1965 survey found that salaries ranged from a low of $1,200 in Mississippi and Utah to $34,500 in New York.[28] A recent survey of selected offices across the nation found that the major problem was not recruiting prosecutors, but keeping them: prosecutors' offices were, in effect, "training grounds for private and corporate practice."[29] The primary cause of this turnover is low pay.

2.17 Activities of Office

Local prosecutors were asked to estimate the percent of their office's work which is concerned with criminal matters, civil matters, and other concerns. The number of offices in each percentage group is given below:

Percent of Time of Office's Work

	1-25%	26-50%	51-75%	76-100%
Criminal	38	150	219	251
Civil	359	128	29	8
Administrative	418	50	2	1
Other	146	29	3	0

Prosecutors devote most of their time to criminal matters. These data may be compared with a 1963 Kentucky survey which found that county attorneys devoted 60 percent of their offices' work to criminal matters, 14 percent to civil matters, 20 percent to administrative and 6 percent to other matters.[30] Information from 46 Kentucky county attorneys showed that: 26 percent of their time was devoted to prosecution; 23 percent to county advisory matters; 16 percent to pre-trial criminal duties, such as working with the grand jury; 13 percent to assisting the Commonwealth's (district) attorney; 13 percent to county court matters, and the rest to domestic relations and road matters.[31]

The prosecutor's activities are changing as plea bargaining replaces the trial as a method of settling many cases. As the American Bar Association notes:

> The vast majority of criminal cases are disposed of without trial as the result of guilty pleas and, if the system as a whole is working properly, this is as it should be . . . . Properly conducted, plea discussion may well produce a result approximating closely, but informally and more swiftly, the result which ought to ensue from a trial, while avoiding most of the undesirable aspects of that ordeal.[32]

A conference of eighteen metropolitan prosecutors offices in June, 1970, reported that all but three openly engaged

28. N.D.A.A., *supra* note 15.
29. U.S. NEWS AND WORLD REPORT, 34 (December 29, 1969).
30. Dept. of Law, Report to the Committee on the Administration of Justice in the Commonwealth of Kentucky, *The Office of Attorney General in Kentucky*, 51 KY.L.J. 77-S (1963).
31. *Id.* at 78-S.
32. A.B.A., *supra* note 1 at 21.

in plea bargaining, and that 80 percent or more cases resulted in a plea in ten of these offices.[33] Since the Supreme Court has upheld plea bargaining,[34] it probably will become even more prevalent.

As might be expected, the C.O.A.G. survey showed a great variation in caseloads. Of 508 offices reporting, 151 handled from 10 to 90 criminal cases in 1969, 75 handled 100 to 150 cases, 98 handled 200 to 400 cases, 90 handled 400 to 1,000 cases, 43 handled 1,000 to 2,000, and 51 offices handled over 2,000 criminal cases. The number of civil cases was generally much lower. Of 285 offices reporting, 163 handled fewer than 50 cases, 84 handled from 50 to 250 cases, 28 handled from 250 to 1,000 cases, and only 10 handled 1,000 or more civil cases. Of 292 offices reporting, 181 handled fewer than 500 traffic cases, 53 handled from 500 to 2,000 cases, and 58 handled over 2,000 traffic cases. Of 366 offices, 160 handled fewer than 50 juvenile cases, 79 offices handled from 50 to 100 cases, 79 handled from 100 to 300 cases, and 48 handled over 300 cases. The median caseload reported for 1969 was 210 criminal cases, 50 civil cases, 300 traffic cases and 60 juvenile cases.

2.18 Advisory Function

Prosecutors may play an important role in rendering legal advice to officers and agencies of local government, much as the Attorney General is legal adviser to state government. The C.O.A.G. survey asked prosecutors to whom they give legal advice and with what frequency. Responses indicate a variety of recipients:

Frequency of Advice

Recipients	Often	Seldom	Never
Police	603	57	4
Other City Officers	172	263	168
Sheriffs	599	62	11
Clerks of Court	440	280	41
Other County Officers	424	197	38
School Boards	127	223	288
Private Citizens	393	176	73

Other recipients mentioned included welfare officials, state agencies, planning boards and private associations. It is significant that 90 percent of prosecutors say that they often advise police and sheriffs.

Prosecutors were asked to specify on what subjects they give advice most often. Some responses are shown below, ranked according to whether they were named first, second, third or fourth, and giving the number of prosecutors who listed the subject:

Subjects of Advice

Subject	1st	2nd	3rd	4th
Criminal Procedure	296	68	15	1
Whether to Prosecute	66	91	30	3
Family Law	64	27	8	4
"All Matters"	39	17	4	0
Interpretation of Statutes	30	10	6	3
Civil Law	25	48	39	6
Investigation	25	40	18	5
Government Administration	18	24	26	19

Other replies included such varied subjects as narcotics, civil disorders, extradition and even press relations.

2.19 Relationship to Defender Systems

The increasing attention being given to public defense has focused more attention on its relationship to public prosecution. Public defender and assigned counsel systems are discussed in Section 5.5 of this Report, which mentions some of the problems in defining such systems' relationships to prosecutors. Some systems share prosecutorial problems, such as small districts that cannot adequately support a staff, low salaries, and lack of in-service training or information services. A few states are becoming more cognizant of the need to upgrade defense as well as prosecution services. Idaho, for example, is conducting a study of the desirability of establishing a district attorney system; the study will also consider a district defender

33. N.D.A.A., *supra* note 9.
34. *North Carolina v. Alford*, 39 U.S.L.W. 4001 (U.S. November 23, 1970).

system.[35] Maryland plans to invite all professional personnel from the state's three defender offices to its seminars for prosecutors.[36] Oregon included defense attorneys in some sessions of its institute for prosecutors.[37]

Minnesota set up an experimental system of district prosecutors to aid county attorneys. It gave as one reason for a district system the fact that Minnesota set up a statewide public defender system in 1969, organized on the basis of the state's ten judicial districts. A legal training course was also held for defenders. As a result, "perhaps more has been done in the state of Minnesota to protect individual rights than has been done to secure the collective right of the community to an efficient enforcement of the law to the end that the guilty are punished."[38]

35. Interview with Attorney General Robert M. Robson, in Boise, Idaho, October 5, 1970.
36. Maryland State's Attorneys Association, *supra* note 8.
37. Interview with Jacob B. Tanzer, Chief, Appellate Division, Oregon Dept. of Justice, Salem, Oregon, October 6, 1970.
38. State of Minnesota Judicial Council and Attorney General, *supra* note 17.

2.2 The Attorney General's Relationship to Local Prosecutors

The Attorney General's relationship to local prosecutors ranges from complete control in those states where they are under his jurisdiction to a complete absence of formal contact in some states. His role in local prosecutions ranges from complete responsibility for such actions in some states to an absence of authority to intervene in or initiate prosecutions in others.

2.21 Attitudes of Attorneys General and Prosecutors

The large majority of former Attorneys General believe that the Attorney General should have power to intervene in or initiate local prosecutions. Only 26 of 108 respondents, however, believe that the Attorney General should appoint local prosecutors. It is significant that, of 115 former Attorneys General returning C.O.A.G.'s questionnaire, 52 had served as some type of local government prosecuting attorney. Thus, their views as Attorneys General would be tempered by their experience as local prosecutors. A C.O.A.G. analysis of persons who served as Attorneys General between the years of 1963 and 1968 bears out this relationship, as 40 percent had served as a city or county attorney. Of 38 incumbent Attorneys General, only 11 said that the Attorney General should appoint prosecutors.

Attorney General Louis Lefkowitz of New York voiced what is probably the prevalent view among Attorneys General concerning their authority over prosecutors. He said that prosecutors should continue to be independently elected, but:

> There is room for a closer relationship between the Attorney General and the District Attorneys; this would result in better enforcement of the criminal laws. The Attorney General could be authorized to provide a forum for inter-county cooperation between District Attorneys. Periodic meetings could be mandated at which attendance by District Attorneys or their representatives would be required. The Attorney General could prepare and disseminate information of common interest and bring law enforcement to new peaks of efficiency and excellence.[1]

The majority of respondents, 477, in C.O.A.G.'s prosecutor survey described their relationship with the Attorney General as good while 111 termed it fair, and only 29 felt it was poor. In spite of this apparent atmosphere of cooperation, the great majority said that they seldom sought the Attorney General's advice. This lack of real cooperation is further demonstrated by the figures for assistance in handling cases. When queried as to whether they ever sought actual assistance from the Attorney General in handling a case, 267 prosecutors said seldom, 386 said never, and only 7 stated they often sought assistance. Apparently the cooperation which exists does not involve actual day-to-day operations to any great extent.

An alternative explanation could be that most local prosecutors do seek and obtain assistance from the Attorney General but such aid is of an informal nature. When asked whether there was a particular staff member in the Attorney General's office whom they contacted, 394 prosecutors said yes and 259 said no. This could be interpreted as indicative of informal assistance arrangements based primarily on personal friendships and not on formal requests to the Attorney General's office for advice or assistance.

Further examination of the survey data indicates that, while only a small group actually rely on the Attorney General for assistance, a much larger group believe that the Attorney Gen-

1. Position Paper of Attorney General Louis Lefkowitz to Constitutional Convention Committee on the Executive Branch, Hearing Held June 1, 1967, at the State Capital, Albany.

eral is the logical source for advice and possibly for leadership. A majority of local prosecutors stated that the Attorney General could be of greatest help to them in providing interpretations of law. The prosecutors then rank seminars and manuals, courtroom strategy and case theory in that order as the additional subject areas in which the Attorney General is of most help. When asked who was best qualified to prepare a manual for prosecutors, half of the respondents named either the Attorney General or the National District Attorneys Association.

When asked for suggestions as to how cooperation between the Attorney General and local prosecutors could be improved, the suggestions which appeared most frequently were: basic seminars conducted by the Attorney General; more funds and staff for the Attorney General; improved communication between the Attorney General and local prosecutors; assigning specific assistant Attorneys General to help local prosecutors; and, less politically oriented Attorneys General. The responses seem to indicate that most local prosecutors are willing to look to the Attorney General for advice and assistance, but feel that the Attorney General is unable to provide adequate assistance. Perhaps this explains why so many respondents felt the Attorney General needed more staff and funds.

There is a commonality of interest between the Attorney General and local prosecutors, whatever the legal relationships may be in a particular jurisdiction. Both are public prosecutors, subject to legislative definition of powers and duties and to judicial definition of the law and procedures. Both are elective in most jurisdictions, and must be constantly cognizant of political realities. Both must be pragmatic in their approach, as their work will be constantly changing. Both usually come to their jobs without special training, and must learn through experience. This list of common factors could be expanded indefinitely, but it is clear that the two offices have much in common.

2.22 Recommendations of Other Studies

Organization of prosecution functions has been studied by several groups; the consensus is that the Attorney General should strengthen his relationship to local prosecutors.

President's Commission

The President's Commission on Law Enforcement and Administration of Justice recommended that:

> States should strengthen the coordination of local prosecution by enhancing the authority of the state attorney general or some other appropriate statewide officer and by establishing a State council of prosecutors comprising all local prosecutors under the leadership of the attorney general.[2]

It said that the Attorney General should take responsibility for organizing the council, which "could simply be a group which meets periodically to exchange views, although it would be preferable if it could grow to have a real policy-making function." The Commission argued that:

> Since the district attorneys are independently elected officials it would be desirable if the decisions affecting the exercise of their office were the result of collegial discussions of local prosecutors in which all participate. The council could also have the advantage of allaying the fears of local prosecutors that their authority is being subverted by a central, powerful State officer. Cooperation and implementation become less formidable problems when decisions represent the consensus of those who must carry them out at the operating level. Most important, use of the council in setting statewide standards would insure their relevance to local operating conditions....
>
> It might be the function of the attorney general's office to bring continuity of effort that a sporadically meeting council cannot, and to provide a research staff to suggest areas

2. The President's Commission on Law Enforcement and Administration of Justice. THE CHALLENGE OF CRIME IN A FREE SOCIETY, 149 (February, 1967).

in which statewide standards, programs and policies are needed.[3]

The Task Force on the Administration of Justice of the President's Commission said the Attorney General should exercise leadership in "providing technical and statistical services, engaging in training operations, and developing rules of general applicability for the various kinds of discretionary decisions prosecutors make," such as pre-trial disclosure and plea bargaining.[4]

The A.B.A. Standards for Prosecutors

The American Bar Association's Advisory Committee on the Prosecution and Defense Functions has developed a draft of standards for these functions which recommends that authority be vested in a local prosecutor, except in those states where geography or population make it appropriate to create a statewide system under the Attorney General. The A.B.A. standard concurs with the President's Commission in calling for a coordinating council:

> In all states there should be coordination of the prosecution policies of local prosecution offices to improve the administration of justice and assure the maximum practicable uniformity in the enforcement of the criminal law throughout the state. A state council of prosecutors should be established in each state.[5]

The A.B.A. says also that the prosecutor should consult with the Attorney General "in cases where questions of law of statewide interest or concern arise which may create important precedents, the prosecutor should consult and advise with the Attorney General."

The A.B.A. standards provide for supersession and substitution of the prosecutor, but do not necessarily vest this power in the Attorney General:

> Procedures should be established by appropriate legislation to the end that the governor or other elected state official is empowered by law to suspend and supersede a local prosecutor upon making a public finding, after reasonable notice and hearing, that he is incapable of fulfilling the duties of his office.[6]

The state official is further authorized to substitute special counsel in a case upon making a public finding that this is required for protection of the public interest.

Both the A.B.A. and the President's Commission favor retaining local prosecutors, but making the Attorney General responsible for improving coordination. This is a different position than that taken by earlier reports, which tended to favor centralization. The Wickersham Commission, for example, studied the nation's criminal justice system in 1931 and recommended establishment of a statewide system of prosecution.[7]

The Model Department of Justice Act

The A.B.A. Commission on Organized Crime and Law Enforcement developed a Model Department of Justice Act which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1952. The Model Act retains local prosecutors, but provides for direct supervision and control by a Department of Justice, which would be headed by the Attorney General or an officer appointed by the Governor, and would be empowered to: (1) consult with and advise the several prosecuting attorneys in matters relating to the duties of their office; (2) maintain a general supervision over the prosecuting attorneys; (3) assist the prosecu-

3. *Id.*

4. Task Force on Administration of Justice, the President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS, 77 (1967).

5. A.B.A. Project on Standards for Criminal Justice, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Tentative Draft, (1970).

6. *Id.*

7. Wickersham Commission, National Commission on Law Observance and Enforcement, REPORT ON PROSECUTION, No. 4, (1931).

ting attorney in the discharge of his duties when so requested in writing by the prosecuting attorney; (4) supersede the local prosecutor when requested by the Governor; (5) intervene in actions instituted by the local prosecutor when requested by the Governor; (6) supersede the local prosecutor on his own initiative; (7) intervene in actions instituted by the local prosecutor on his own initiative; (8) when so acting, exercise all powers and duties of the local prosecutor and limit the local prosecutor in such instances to the powers and duties required of him by the Attorney General; (9) require reports from prosecutors on any matters pertaining to their duties.[8]

The Commissioners argued that the Model Act would:

> . . . restore what has been lacking in local criminal prosecution in this country for a long time, namely ultimate accountability to a single coordinating official and some measure of administrative responsibility for acts of discretion. At the present time, criminal prosecution in the various states of this country is usually in the hands of an autonomous, independently elected, local official. . . .
>
> . . . the prosecutor is endowed by law with large discretionary powers over the initiation of criminal proceedings, the making of criminal investigations, the presentation of charges to grand juries, the filing of criminal informations and indictments, the dismissal or *nolle prosequi* of criminal cases, the acceptance of pleas of guilty to lessor offenses, the trial of criminal cases, and the sentences recommended for offenders.
>
> These discretionary powers are so great that an inefficient, corrupt or politically controlled prosecutor's office can virtually paralyze law enforcement in any community, while an honest and energetic man in this office can sometimes clean house for his community almost single-handedly.[9]

Other Studies

The few scholarly analyses of prosecution that have been made have indicated a need for more centralization or coordination. Newman Baker and Earl H. Delong's massive 1934 study of the prosecuting attorney analyzed statutes involving the office and concluded that:

> Although the attorney-generals of most of the forty-eight states are authorized to conduct criminal prosecutions, either by the common law or specific statutory provisions, it is quite clear that the extent of state participation in this phase of criminal law enforcement is negligible.[10]

They believed that Attorneys General were reluctant to assume an active role concerning prosecutors:

> Effective supervision of the work of local prosecuting attorneys could contribute greatly to the administration of criminal justice, and it is a field which has hardly been touched. Before anything will be accomplished in this direction, however, it will probably be necessary to give the state officer in charge of prosecution far more than the present broad grants of discretionary power. It must be emphasized clearly in the statutes that the office is intended to assume general responsibility for the quality of prosecution throughout the state and above all, it must be given power to enforce its authority over local prosecuting agencies. That power is nonexistent at the present time.[11]

The Advisory Commission on Intergovernmental Relations, as part of its study of state-local relations in the criminal justice system, concluded that "to achieve more efficient use of manpower and a higher level of prosecution, the Commission recommends that states, where necessary, centralize the local prosecution function in a single office, responsible for all criminal prosecutors."[11a]

8. Model Department of Justice Act, 1952 National Conference of Commissioners on Uniform State Laws.

9. *Id.* at 366-369.

10. Newman Baker and Earl H. DeLong, *The Prosecuting Attorney - Powers and Duties in Criminal Prosecution*, 24 J. CRIM. L. AND CRIMINOLOGY 1025 (1934).

11. *Id.*

11a. Recommendation adopted at September 11, 1970 meeting, by Advisory Commission on Intergovernmental Relations.

The Federal System

Proponents of centralization point to the effectiveness of the federal system. Almost one hundred United States Attorneys, appointed by the President, represent the federal government before the courts. They were assisted in 1969 by 841 Assistant U.S. Attorneys and 1,127 supporting personnel.[12] Their work is coordinated by the Executive Office for United States Attorneys in the Department of Justice, and by four Regional Assistants, who serve as "combination administrators and trouble shooters." An annual conference is held, supplemented by regional conferences and a training conference for new appointees.

2.23 Prosecutor Assistance Programs

Training programs and bulletins for prosecutors are described subsequently in this Report, as are the Attorney General's statutory powers concerning prosecutors. Surprisingly, there is no clear correlation between Attorneys General's statutory authority over prosecutors and their efforts to strengthen prosecutions. Some examples of Attorneys General's programs to strengthen the prosecutorial system are described here. These have been selected to show the variety of approaches that may be used by an Attorney General's office in assisting local prosecutors.

The Attorney General of Arizona has sought federal funds to create a Prosecutor Technical Assistance Unit in his office. By law, he has supervisory powers over county attorneys and may assist any county attorney at the direction of the Governor. At present, however, the Attorney General has neither staff nor facilities to provide more than emergency assistance. The new unit, with a staff of two attorneys and a secretary, will fulfill the following functions:

(1) Providing technical assistance, ranging from specific research to actually participating in the trial of difficult cases;

(2) Conducting four seminars annually, two for new and two for experienced prosecutors;

(3) Developing and maintaining a prosecutor's manual, with detailed information on procedures and evidentiary problems, and a digest of relevant decisions and rulings;

(4) Creating a periodical newsletter to prosecutors and others, concerning current court decisions and other materials of interest;

(5) Providing a clearinghouse for resolving problems and coordinating efforts of prosecutors concerning matters of more than local concern.[13]

New Jersey established a Division of Criminal Justice following passage of 1970 legislation enlarging the Attorney General's prosecutive authority.[14] This consists of six sections:

(1) An administrative section, to handle personnel, finance, and similar matters;

(2) An investigative section, with a chief and six investigators, to assist in post-indictment trial preparation. It will also receive and process citizens' complaints, and direct them to the proper agency;

(3) A special prosecutors' section, that will handle matters related to organized crime. It will prepare applications for electronic surveillance, decide on witness immunity grants, work with statewide grand juries, and prepare cases. This section will consist of a chief, seven attorneys, and two investigators;

(4) An appellate section, which

12. U.S. Department of Justice, 1969 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES, 6.

13. The Attorney General of Arizona, Application for Grant, Discretionary Funds, U.S. Department of Justice, (June 1, 1970).

14. Interview with Deputy Attorney General David G. Lucas, Trenton, New Jersey, September 24, 1970.

ultimately will handle most criminal appeals for local prosecutors;

(5) A trial section, of a chief and six attorneys who will try all cases where the Attorney General intervenes or supersedes;

(6) A prosecution supervisory section, which will work to achieve some uniformity among the state's twenty-one county prosecutors. It will also conduct periodic evaluations of prosecutors' offices;

(7) A research and planning section, which will conduct studies of all law enforcement systems.

A training course for new prosecutors was held by the Division. This dealt with practical matters and apparently was highly successful. A special State Commission of Investigation had reported in 1970 on the county prosecutor system, and had recommended that an executive office for county prosecutors be created under the Attorney General to: (a) conduct a periodic evaluation of each prosecutor's office; and; (b) coordinate activities of county prosecutors.

New Jersey's 1970 statute established the Division of Criminal Justice "to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State." The Attorney General was directed to "consult with and advise prosecutors" and authorized to conduct periodic evaluations of their offices, including audits. The Act further directed that the Attorney General "as often as may be required, call into conference the county prosecutors, the chiefs of police of the several counties and municipalities and any other law enforcement officers" for the purpose of discussing their duties. He was also empowered to make studies of law enforcement agencies.

Oregon's Department of Justice is developing closer relationships with the state's thirty-six prosecutors.[15] One aspect of this is the handling of criminal appeals on request of the district attorneys. This offer has been so well received that the Attorney General now handles 85 percent of appeals. A summer institute for prosecutors, stressing practical problems, was held. A book of forms for indictments and other routine matters has been prepared. A newsletter for prosecutors has been initiated that will analyze all criminal cases in the advance sheets and report on other matters of interest.

The Attorney General's office believes that its success in strengthening the state role is due primarily to the following factors:

(1) Every effort has been made to develop good personal relations with the prosecutors; the head of the state program came to the Attorney General's office from a prosecutor's office, so has rapport with the district attorneys;

(2) The office will provide any type of assistance requested, from informal advice to preparation of briefs;

(3) It will work with the prosecutor at any stage of the trial and play any role, from actually trying the case to sitting in the back of the courtroom and offering advice;

(4) The Attorney General's investigators are available to prosecutors, along with any other staff services;

(5) The office defers to the district attorneys concerning any publicity;

(6) Suggestions are continually solicited from the local prosecutors.

2.24 Attorneys General's Advice

A majority of Attorneys General issue advisory opinions on questions of law to local prosecutors. Chapter 4 of this study discusses advisory opinions, and gives data on the number issued, subjects involved, legal effect, and other matters. It notes that the categories of

15. Interview with Chief Trial Counsel Thomas O'Dell, Portland, Oregon, October 6, 1970.

persons to whom opinions are issued are usually set by statute. In some jurisdictions where local prosecutors are not entitled to official opinions, the Attorney General will still give informal advice.

The C.O.A.G. questionnaire asked prosecutors how frequently they asked the Attorney General for advice, either formal or informal. Of 664 replies, 92 said often, 524 said seldom, and 48 said never. However, information from Attorneys General's offices indicates that the volume of requests from prosecutors is quite large.

2.25 Conferences and Institutes

Training and information is a constant need for any profession. Even an optimum system of career prosecutors would need to be kept informed of changes in the law, new court decisions, improvements in investigative techniques, and a myriad of other matters. The present system in most states of part-time prosecutors, with a high turnover rate, makes training even more imperative.

A number of states hold regular meetings for prosecutors, as a kind of in-service training and a coordinating mechanism. California has been holding periodic meetings of district attorneys for years. The state is divided into three zones for this purpose and a representative of the Attorney General's office attends each meeting. A spokesman for the Attorney General's office reports that:

> While meetings are essentially concerned with local and current matters, the representative carries continuity and coordination from one zone to another. Problems facing the officials are discussed at the meetings and those attending are free to bring up other subjects. Local officials, by and large, are quite enthusiastic about this device as a means of exchanging views with their counterparts in nearby localities.[16]

16. Assistant Attorney General Wallace Howland in REMARKS TO COMMITTEE MEETING February 5, 1970, 13, (N.A.A.G, C.O.A.G.).

Joint meetings of several zones may be held, and a statewide meeting is held annually. Such meetings have a value in stimulating interchange of ideas and developing contacts among prosecutors, in addition to their primary aim of imparting information.

The Attorney General of Indiana holds an annual conference for the state's 84 prosecuting attorneys, with the assistance of the state prosecutors association. In 1969, the three-day conference included talks on various court decisions and related state agencies, by state officials and other experts.[17] Virginia is holding several three-day training courses for local prosecutors and their assistants. The courses, sponsored by the Attorney General's office, will concentrate on explanations of the laws on various subjects, and written synopses will be furnished participants.[18]

The Oregon Department of Justice and the University of Oregon Law School cosponsored an institute for prosecutors, with L.E.A.A. funding. The week-long institute dealt with practical problems of prosecution and was staffed primarily by personnel from the Attorney General's office, with judges, professors, district attorneys and others also appearing on the program. The institute will be continued in future years, possibly in two sections, one for more experienced prosecutors.[19] Its sponsors stress the success of the down-to-earth approach. The bulk of the program was devoted to actual steps in prosecution. The first day, for example, concerned talks on drafting search warrants, exercise of prosecutorial discretion (screening and issuance of complaints, selection of

17. Conference Program, Attorney General's Conference of Indiana Prosecutors, Angola, Indiana, August 6-9, 1969.

18. Attorney General of Virginia, Application for Grant, Discretionary Funds, to U.S. Department of Justice, L.E.A.A., May 14, 1970.

19. O'Dell, *supra* note 15.

charge, interplay with police, alternatives to criminal process), and grand jury and indictments. Luncheon sessions featured talks by persons in related areas, such as a Narcotics Squad officer and the Oregon Medical Inspector.

The Wisconsin Attorney General took a different approach, devoting all of a two-day conference to a single topic, and including sheriffs and police as well as district attorneys. His 1970 Attorney General's Conference on Law Enforcement concerned narcotics and included speakers from L.E.A.A., the U.S. Bureau of Narcotics, the state bureau of investigation and other officials, as well as the Wisconsin Department of Justice.[20]

The National District Attorneys Association has pioneered in developing training programs for prosecutors. In 1971, it will sponsor five regional in-service training programs. Each has two hundred scholarships to cover room and board, through federal funds, and each will last four days. It has, for years, held workshops and meetings on topics which range from budgets and personnel to plea negotiations, case assignment, and trial preparation.[21] These examples indicate that training sessions are being conducted in many states; in addition to the substantive content, such meetings should be of value in fostering better state-local relationships and in improving coordination among the prosecutors themselves.

The National College of District Attorneys, located at the University of Houston School of Law, was opened in 1970. It is sponsored by the N.D.A.A., the A.B.A., the American College of Trial Lawyers, and the International Academy of Trial Lawyers. The initial class was for one hundred trainees, and lasted for thirty days. The initial aim of the college was to train new prosecutors in areas that are not adequately covered in law schools. Now, however, the college has decided to change its format; and to concentrate on prosecutors interested in a career in office, leaving orientation to regional, state and local training programs. The Dean reports that:

> The 1971 Career Prosecutor's Course will focus upon functions and problems common to all prosecutors. Subjects such as administration, office management, budgeting, data processing, information storage and retrieval, the appropriate exercise of discretion, personnel and career motivation for both professional and clerical staffs, and the role of the prosecutor as the chief law enforcement officer in his jurisdiction will be examined in depth. Naturally, attention will be given to recent developments in constitutional law, trends in court decisions and legislation; however, the principal thrust of the Career Prosecutor's Course will be an intensive examination of the Office of Prosecutor itself and its place and importance in the overall criminal justice system.[22]

2.26 Bulletins, Newsletters and Manuals

The Attorneys General of Georgia, Idaho, New Jersey, and Wisconsin are among those who issue regular bulletins for prosecutors. The Wisconsin *Prosecutors' Bulletin* discusses new legislation, court decisions and other matters of concern to prosecutors. The Attorney General of Washington publishes a *Law Enforcement Digest* for all law enforcement officers and prosecutors. It summarizes court cases, describes new publications, and gives miscellaneous information on other subjects. In other states, including Florida and Michigan, the local prosecutor's association issues a regular bulletin.

Missouri's Attorney General instituted a Prosecuting Attorneys Liaison Program to improve communications

20. Program, 1970 Attorney General's Conference on Law Enforcement, May 5-6, 1970, Madison, Wisconsin.

21. See, generally, THE PROSECUTOR, Journal of the National District Attorneys Association.

22. Dean George A. Van Hoomissen, memorandum Re: 1971 Career Prosecutor's Course, January 29, 1971.

with the state's 115 local prosecutors. A major part of the program was the publication and distribution of the "Missouri Prosecutor's Handbook," a loose-leaf service concerning office operations, prosecutions, and other matters. A four-day training seminar was also held. The prosecutors responded to the program "with much enthusiasm, and there has been a tremendous increase in the amount of communication already between this office and numerous prosecutors throughout the state."[23]

The Attorney General of Texas plans an ambitious information service. A director, assistant director and a secretary would staff the Attorney General's Aid and Information Service for Prosecutors and Peace Officers. Equipment would be purchased to permit printing and mailing of 5,000 newsletters in five hours. A monthly newsletter will be mailed, consisting not only of abstracts of cases, but of "authoritative scholarly summaries of specific areas of the law written concisely and clearly so as to be easily understood and so as to provide working rules of thumb for the target groups."[24] Emergency editions will be mailed on a seventy-two hour schedule "from the time the Director receives news of a cataclysmic effect in the prosecution field." Attorneys General's opinions will be included when appropriate. The newsletters will be supplemented by a series of handbooks, dealing with such subjects as extradition, peace officers' civil liability, and habeas corpus.

The District Attorney of Los Angeles has prepared a series of guidebooks for his staff which may ultimately be expanded into a comprehensive manual. The guidebooks provide brief definitions of crimes, case citations, summaries of judicial decisions and statutes, and other relevant material. Some also provide detailed material on specific topics such as the laws of arrest and search and seizure.[25] As an increasing number of states make bulletins and manuals available, local offices might want to develop their own supplementary materials, relying on that furnished by the state for basic interpretations of statute and case law.

2.27 Permanent Staffing

Some states are establishing permanent staff for their prosecutors' association, with assistance from federal funding. In Maryland, for example, the State's Attorneys' Association has applied for about $30,000 in discretionary funds to employ a full-time training coordinator and a secretary as staff. The coordinator will review materials relating to prosecution and disseminate that which he considers helpful through monthly bulletins and through weekly notices when sufficiently critical. He will develop training manuals for use in two seminars to be conducted annually, one for new prosecutors and one for all prosecutors.[26]

The Illinois State's Attorneys' Association has requested funding of a three-part project: staffing the Association; establishing two model regional offices, each serving a number of counties; and providing increased and diversified staff for the Cook county prosecutor's office. The plans for model offices are discussed elsewhere. In terms of permanent association staffing, however, it is significant to note that the Executive Director for the Association would also coordinate the

23. Supplementary Questionnaire for Missouri, to C.O.A.G., January 29, 1970.

24. Attorney General of Texas, Application for Grant, Discretionary Funds, to U.S. Department of Justice, L.E.A.A., May 15, 1970.

25. Evelle J. Younger, District Attorney of Los Angeles County, *Search and Seizure; Legal Note Book; Misdemeanor Pleadings; Felony Pleadings.* (All 1969).

26. Maryland State's Attorneys' Association, Application for Grant, Discretionary Funds, to U.S. Department of Justice, L.E.A.A., April 23, 1970.

grant program, survey and evaluate all state's attorneys' offices, recommend remedial legislation, and serve as supervisor of a model district office. Illinois elects a state's attorney in each of its 102 counties. The State's Attorneys' Association is experimenting with increased coordination by establishing a model office for each of two judicial circuits. The first will be staffed by three assistants state's attorneys, two investigators, three law students and two secretaries, and will serve five counties. The second will have a somewhat larger staff, and will also serve as the Association's headquarters. These regional offices will provide "assistance and augmentation" to county prosecutors on request, particularly in meeting such problems as protracted cases, post-conviction proceedings, and appeals.[27]

Michigan's Prosecuting Attorneys Association has applied for funds to employ a Prosecutor Training Coordinator, who would provide the Association's first staff. His office would serve four functions:

(1) Instituting training programs for prosecutors and their assistants;

(2) Advising prosecutors on appeals and assisting them in handling problems of their office;

(3) Serving as an information clearing house, and issuing a regular bulletin;

(4) Assembling and making accessible a "brief bank" on points of law which prosecutors frequently encounter.

The Michigan Association was initiated by the Attorney General in 1928,[28] and continues to work closely with him.

2.28 Funding Services to Prosecutors

Most of the programs described here are funded at least in part by the Law Enforcement Assistance Administration under the Omnibus Crime Control and Safe Streets Act of 1968.[29] A study of 1969 expenditures under the Act showed that, of the large sums available, an insignificant amount was going to improve prosecution. Twenty-nine states and territories did not allocate any Safe Streets funds for prosecution-related programs; most of the others allocated very little, "with most calling for just a seminar to be held."[30] While the 1970 state plans show much improvement in this regard, it appears that prosecutors are still not receiving a reasonable share of these funds. C.O.A.G.'s survey showed that 421 prosecutors received nothing from the state agencies which distribute these federal funds, while 50 prosecutors receive grants ranging from $200 to $72,500.

The federal funds are intended generally to be "seed money" and not as a continuing source of funds. In developing training and information programs and establishing permanent staffs, provision should be made for ultimate assumption of costs in regular state and local budgets. Funds are seldom budgeted for these purposes, and few Attorneys General would be able to furnish such services within the limits of their regular budgets.

27. Illinois State's Attorneys' Association, Application for Grant, Discretionary Funds, to U.S. Department of Justice, L.E.A.A., May 26, 1970.

28. Prosecuting Attorneys Association of Michigan, Application for Grant, Discretionary Funds, to U.S. Department of Justice, L.E.A.A., September 25, 1970.

29. See description of the Act in C.O.A.G. Preliminary Draft, Section 7.1, Criminal Justice Planning Under the Safe Streets Act (October, 1970).

30. N.D.A.A., PROSECUTION—RELATED ACTION GRANT PROGRAMS IN 1969 STATE LAW ENFORCEMENT PLANS (August 20, 1969).

2.3 Authority to Initiate Prosecutions

As Table 2.3 shows, most Attorneys General may initiate local prosecutions in at least some circumstances. Only six states report that the Attorney General may not initiate prosecutions under any circumstances. His authority in the other jurisdictions ranges from power concurrent with that of the local prosecutor to power to initiate prosecution under certain circumstances, at the request of certain officials, or to enforce certain statutes.[1]

2.31 Attitudes Toward Authority to Initiate

Both prosecutors and Attorneys General apparently believe that the latter should be able to initiate prosecutions. The C.O.A.G. survey of local prosecutors showed that 421 of 630, or about two-thirds of the respondents, believed that the Attorney General should be able to initiate local prosecutions. An even larger number, 481 of 618 responding, said that he should be allowed to initiate criminal proceedings of an inter-jurisdictional nature. Former Attorneys General agreed: of 104 answering the question, 89 said that the Attorney General should be able to initiate prosecutions. Of 33 incumbent Attorneys General responding, all but one advocated authority to initiate litigation.

It is significant that prosecutors think Attorneys General should be able to initiate litigation, although they oppose intervention in litigation initiated by the prosecutor. The reasons are probably that the prosecutor does not want someone taking over his case, but he does not mind another official developing and handling a case from the beginning. Some cases, such as organized crime conspiracies or homicide cases, might demand special investigative and prosecutorial skills that were not available in all county or district offices. The local prosecutor might prefer that the Attorney General handle these.

2.32 Attorneys General Who Initiate All Prosecutions

In six jurisdictions, the Attorney General is responsible for all or most local prosecutions. In American Samoa and Guam, the Attorney General handles all prosecutions in all courts. In the Virgin Islands, he handles all prosecutions in the inferior courts, and may handle district court prosecutions with the consent of the United States Attorney.

The Attorney General of Alaska appoints district attorneys, who serve at his pleasure.

Delaware created a State Department of Justice in January, 1969.[2] The Attorney General is deemed "to have charge of all criminal proceedings." He appoints Deputy Attorneys General, some to serve specified counties and others to serve the state at large. The Attorney General's office prosecutes cases in Superior Court, in the New Castle County Court of Common Pleas, and in various magistrate's courts of sufficient importance to warrant the detail of a deputy to that court. The only prosecutor who is not chosen by the Attorney General is the Wilmington City Solicitor who is appointed by the Mayor. He is, however, considered a Deputy Attorney General especially for prosecution in that court.

Rhode Island has no county or district prosecutors. There are, however, city and town prosecutors who handle felony prosecutions for complaints brought by local law enforcement

1. Newman Baker and Earl H. DeLong, *The Prosecuting Attorney - Powers and Duties in Criminal Prosecution*, 24 J. CRIM. L. AND CRIMINOLOGY 1025 (1934).

2. *See* VOL. 45, DELA. LAWS, ch. 326.

Alabama	Yes—Ala. Code tit. 55, § 235, on own initiative
Alaska	Yes—(No local prosecutors)
Arizona	Yes—Only on request of Governor
Arkansas	Yes—Only under certain statutes, on own initiative
California	Yes—On own initiative
Colorado	Yes—Only in request of Governor
Connecticut	No—Attorney General has no jurisdiction in criminal matters
Delaware	Yes—(no local prosecutors)
Florida	No, but Attorney General may initiate quo warranto proceedings
Georgia	Yes—On own initiative
Guam	Yes—(no local prosecutors)
Hawaii	Yes—On own initiative or at direction or request of Governor
Idaho	No
Illinois	No
Indiana	Yes—When interests of public require it
Iowa	Yes—On own initiative
Kansas	Yes—Only under certain statutes
Kentucky	Yes—Under some statutes for specific crimes
Louisiana	Yes—In criminal cases, when the interests of the state require
Maine	Yes—On own initiative
Maryland	Yes—On request of Governor or Legislature
Massachusetts	Yes
Michigan	Yes—May initiate and conduct criminal proceedings
Minnesota	Yes—At request of Governor; assists county attorney on request
Mississippi	Yes—When required by public service or directed by Governor
Missouri	No
Montana	Yes
Nebraska	Yes—Has concurrent power with county attorney
Nevada	Very infrequent—Only in extreme cases
New Hampshire	Yes—On own initiative; direction of Governor, Legislature, or local prosecutors
New Jersey	Yes—When interest of state requires it
New Mexico	Yes—Only under certain statutes
New York	Yes—Only under certain statutes, on own initiative, at request of Governor or Legislature
North Carolina	Yes—Only for violations of Monopolies and Trust Laws
North Dakota	Yes—On own initiative, or request of County Board, 25 citizens, doctor, judge
Ohio	Yes—On request of Governor
Oklahoma	Yes—On request of Governor or either branch of Legislature
Oregon	Yes—Only on request of Governor
Pennsylvania	Yes—Under certain circumstances
Puerto Rico	Yes
Rhode Island	Yes—(no local prosecutor)
Samoa	Yes—(no local prosecutor)
South Carolina	Yes—On own initiative
South Dakota	Yes—On own initiative
Tennessee	No—(but Governor may appoint extra counsel at District Attorney's request)
Texas	Yes—For election fraud, labor union crimes, misuse of state funds
Utah	Yes—On default of local prosecutor
Vermont	Yes—Undecided if dispute exists over who will prosecute
Virgin Islands	Yes—(no local prosecutors)
Virginia	No
Washington	Yes—On lobbying law, or when prosecuting attorney fails to take proper action; also for certain acts of city or state officers in connection with public funds
West Virginia	No—But Attorney General may replace Prosecuting Attorney if he refuses to prosecute
Wisconsin	Yes—On request of Governor or local prosecutor
Wyoming	Yes—Only for removal of county officer at Governor's request

agencies. The Attorney General's office prosecutes all criminal complaints in the district court which are brought by State Police state narcotics inspectors, and the Department of Natural Resources. The Attorney General also handles all misdemeanor prosecutions in the district (lower) courts and felony prosecutions brought by the state officials. Legislation has been introduced which would make the Attorney General responsible for prosecuting all felony complaints, so that city prosecutors would no longer handle those brought by local law enforcement agencies.[3]

These six jurisdictions are not typical. All have a relatively small population, and most are small in area. Most do not have a strong system of county government. Four of the six have an appointed, rather than an elected, Attorney General. Although exact data are not available, it can be assumed that all have a relatively low criminal caseload.

The centralized system apparently functions well in these jurisdictions. The Attorney General of Delaware commented that "we don't have to worry about someone trying the case in a lower court and making mistakes, then the Attorney General coming in on appeal burdened by whatever lack of capabilities the local prosecutor may have."[4] The Deputy Attorney General who is originally assigned to a case stays with it until final disposition.

2.33 Broad Authority to Initiate

In addition to those jurisdictions which give the Attorney General primary responsibility for local prosecutions, some authorize him to initiate prosecutions at his discretion. This group of jurisdictions includes Alabama, California, Georgia, Hawaii, Iowa, Nebraska, New Hampshire, New Jersey New York, Maine, Michigan, North Dakota, South Carolina, and South Dakota.

Vermont's 1969 legislature provided that:

> The attorney general may represent this state in all civil and criminal matters as at common law and as allowed by statute. The attorney general shall also have the same authority throughout the state as a state's attorney.[5]

Some power to initiate criminal proceedings and to supersede in local prosecutions has been vested in the office since it was established in 1904. It should be noted that the state's attorney is a constitutional office in Vermont, whereas the office of Attorney General is statutory only. This statute, however, gives the Attorney General not only concurrent power to initiate prosecutions, but power to supersede the local officer.

New Jersey's 1970 statute empowers the Attorney General to "initiate any investigation, criminal action or proceeding" whenever in his opinion "the interests of the State will be furthered by so doing."[6] Previously, he could initiate action only by petitioning for the convening of a statewide grand jury in certain circumstances. Georgia empowers the Attorney General to prosecute in any court "for violations of any criminal statute in dealing with or for the State" and he may call on the local prosecutor to assist with or conduct such prosecution.[7]

Data are not available on how frequently Attorneys General initiate prosecutions, but it appears that this power is exercised infrequently. The Attorney General of South Dakota, for example,

3. Memorandum from Assistant Attorney General Robert L. Gammell, Rhode Island, to Patton G. Wheeler, November 27, 1970.
4. N.A.A.G., C.O.A.G., REMARKS TO COMMITTEE MEETING FEBRUARY 5, 1970, 1.
5. VT. STAT. ANN. (1970), Vol. 1, tit. 3, § 152.
6. Criminal Justice Act of 1970, Pub. L. No. 1970, Ch. 74, eff. August 21, 1970; N.J.S.A. 52: 17B-97.
7. GA. CODE ANN., § 40-1616.

may initiate litigation "whenever in his judgment the welfare of the State demands." No records of such actions are kept, but "in the memory of the staff, only four or five major cases during the past three years have originated with this office which could have originated with the state's attorney, but in which action was taken solely on the initiative of the Attorney General." The office reports, however, that it handled many criminal matters at the request of the local prosecutor.[8]

2.34 Limited Authority to Initiate

Some states give the Attorney General either concurrent or exclusive jurisdiction to commence prosecutions under certain statutes. In Indiana, for example, he may initiate prosecution for violations of the lobbyist statute, of a sheriff who permits a lynching, for state tax frauds, and under the Antitrust Act. In North Carolina, the Attorney General may bring actions only for violation of monopoly and antitrust laws. Virginia allows the Attorney General to institute criminal proceedings in cases involving violations of the alcoholic beverage control act, motor vehicle laws, the handling of state funds, and the unauthorized practice of law.

A Kentucky survey found that the Attorney General had exclusive power to initiate criminal action under laws relating to unemployment compensation, agricultural seeds, building and loan associations, and miscellaneous other subjects. It noted that "No general pattern for assigning authority to the Attorney General is apparent, and the statutes do not indicate any clearly defined standards for granting him jurisdiction."[9] This appears to be the case in many states.

2.35 Approval of Another Officer Required

Some states allow the Attorney General to initiate prosecutions only on the request or direction of another officer. Arizona, Colorado, Maryland, Minnesota, Ohio, Oklahoma, Oregon, Wisconsin, and Wyoming allow him to act only on request of the Governor, the legislature, a local officer, or several officers.

2.36 No Authority to Initiate

A few states deny the Attorney General any authority to initiate prosecutions. The Attorney General of Connecticut has no jurisdiction in criminal matters at either the state or local level. In the other states (Idaho, Indiana, Tennessee, and West Virginia), he handles cases at the appellate level but cannot initiate litigation. Legislation was introduced in the 1969 Indiana legislature to allow the Attorney General to represent the state in any criminal case, upon request of the prosecuting attorney; it was, however, defeated.[10] In Missouri, the Attorney General can initiate action to enforce the liquor laws, but only if the prosecuting attorney fails to do so.

8. Letter from Assistant Attorney General Leonard E. Andera to Attorney General John B. Breckinridge, October, 1969.

9. Department of Law, Report to the Committee on the Administration of Justice in the Commonwealth of Kentucky, *The Office of Attorney General in Kentucky*, 51 KY. L. J. 64-S (1963).

10. Memorandum from Chief Deputy Richard C. Johnson to Attorney General John B. Breckinridge, March 12, 1970.

2.4 Authority to Intervene, Supersede or Assist

Table 2.4 shows the Attorney General's authority to assist, intervene, or supersede in cases initiated by the local prosecutor. This ranges from general authority to intervene, supersede or assist on his own initiative to limited authority to act on request of another officer, such as the Governor. Some states also authorize the local prosecutor to request the Attorney General's assistance in the conduct of cases. The power to intervene generally refers to the power to act in conjunction with the local prosecutor, and supersede refers to the power to dismiss him from the proceedings entirely.[1]

2.41 Attitudes Toward Authority to Intervene

C.O.A.G. surveys show that Attorneys General believe that they should have authority to intervene, while prosecutors believe they should not. Thirty-five Attorneys General advocated such authority while only three did not.

Of 115 former Attorneys General, 78 said the Attorney General should be able to intervene on his own initiative, 30 said he should not, and 7 did not answer. Twenty-three said the Attorney General should be able to intervene only with the approval of another authority, 74 said not, and 18 did not answer. A large majority, 96 respondents, said that the Attorney General should take over on request of the local prosecutor, 13 said not, and 6 did not reply.

Only 102 of 591 prosecutors believed that the Attorney General should be able to intervene in local prosecutions on his own initiative. Half of those responding, 307 of 580 thought that the Attorney General should be authorized to intervene upon request of the Governor or other official. Surprisingly, only 177 said that the Attorney General should be authorized to intervene upon request of local officials, while 393 said he should not. All but 27 of 631 respondents said the Attorney General should be allowed to intervene on request of the local prosecutor. A total of 232 believe that the Attorney General should be allowed to intervene on his own initiative only in certain cases, while 421 oppose this view.

1. *Note*, Common Law Power of State Attorneys General to Supersede Local Prosecutors, 60 YALE L. J. 559 (1951).

2.42 Attorneys General With No Authority to Intervene or Supersede

The Attorneys General of five states have no power to intervene or supersede. These are Connecticut, Georgia, North Carolina, Tennessee, and Wyoming. The Attorneys General of Connecticut, Tennessee and Wyoming are also without authority to initiate litigation. In a few other jurisdictions, such authority may be so limited that it is of little practical value. In Arizona and Indiana, for example, the Attorney General may participate in a case only on request of the local prosecutor, and may merely assist.

2.43 Attorneys General With Authority to Intervene or Supersede

There are numerous degrees of authority allowed Attorneys General concerning intervention and supersession. Six jurisdictions (Alaska, Delaware, Guam, Rhode Island, Samoa, and the Virgin Islands) give him full authority in local prosecutions. A few states give the Attorney General full authority to intervene, supersede or assist when he considers it proper. These include California, Illinois, Maine, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Carolina, and Vermont. In other states, including Iowa,

Kansas and South Dakota he may intervene on his own initiative, but it is not settled whether he can supersede.

Some states allow the Attorney General to intervene only at the direction of the Governor or the local prosecutor. These include Colorado, Florida, Kentucky, Minnesota, New Mexico, New York, Oregon, West Virginia, and Wisconsin. Mississippi's Attorney General has jurisdiction in local prosecutions, but it is not clear whether this includes the power to supersede. A few states authorize various arrangements. The Attorney General of Oklahoma, for example, may assist at the request of the local prosecutor, and may intervene at the direction of the Governor or legislature. He may supersede at his discretion.

The Governor of Oregon issued an Executive Order authorizing the Attorney General "to take full charge of any investigation or prosecution of violation of law in which the Circuit Court has jurisdiction" upon request of the District Attorney. This blanket authority enables any District Attorney to request the Attorney General's assistance at any time, without obtaining the Governor's authorization.

The Attorney General of Virginia may intervene only on the direction of the Governor, except in cases involving alcoholic beverage control, motor vehicle laws, or the handling of state funds, where he may intervene on his own initiative.

Michigan reports that the Attorney General enters into criminal prosecutions through:

(1) Criminal actions which are the result of his own office's investigations, where a vital state interest is concerned or the crime involved is of a specialized nature.

(2) Requests from the prosecutor; these are carefully evaluated and if it appears that the "prosecutor wants to avoid his responsibility in handling the case for some personal or political reason, very often the request is denied."

(3) Requests from circuit court judge that the Attorney General file an appearance in a case. Also, a substantial number of prosecutions handled by the Attorney General are the result of indictments by circuit judges, acting as one-man grand juries, who then request that the Attorney General handle the case either exclusively or in cooperation with the local prosecutor.[2]

In Wisconsin, the Attorney General may obtain authorization from the Governor or from either house of the legislature to initiate any action in which the state or the people of the state may be interested. Professor Arlen C. Christenson, a former Deputy Attorney General of Wisconsin, writes that:

> Attorneys general have made good use of this procedure on several occasions in the past. In the last decade, for example, the Attorney General has initiated a broad scale investigation of illegal activities in the Milwaukee area which led to 40 prosecutions by the Attorney General's staff and special counsel, and a grand jury investigation into illegal gambling activities in Kenosha which resulted in numerous prosecutions. In each of these proceedings the Attorney General requested and received authorization from the Governor to initiate the investigation and to prosecute the resulting cases.[3]

Until 1964, the Attorney General of Kentucky had no power to intervene in local prosecutions. Present law authorizes him to "intervene, participate in, or direct" any criminal action "necessary to enforce the laws of the Commonwealth" upon request of the sheriff, mayor, or majority of a city legislative body, or the Governor, a court, or a grand jury. Kentucky's reply to a C.O.A.G. questionnaire points out that this authority is not adequate, as the Attorney General:

2. Memorandum from Assistant Attorney General Solomon Bienenfeld to Attorney General John B. Breckinridge, February 3, 1969.
3. Arlen Christenson, *The State Attorney General*, 2 WISC. L. REV., 320 (1970).

2.4 ATTORNEY GENERAL'S POWERS IN PROCEEDINGS INITIATED BY THE LOCAL PROSECUTOR

Alabama	May intervene or assist in criminal cases at any time he considers proper
Alaska	(No local prosecutors)
Arizona	May assist on request of local prosecutor
Arkansas	May act jointly with local prosecutor under certain statutes
California	May intervene, supersede or assist on own initiative
Colorado	May intervene on request of Governor or legislature. May assist on request of local prosecutor with direction of Governor
Connecticut	No jurisdiction in criminal matters
Delaware	(No local prosecutors)
Florida	May intervene upon request of local prosecutor, at direction of Governor or legislature
Georgia	May not intervene or supersede
Guam	(No local prosecutors)
Hawaii	May intervene or assist on own initiative or at direction or request of Governor.
Idaho	May assist upon request of local prosecutor; may not intervene or supersede. May be appointed as special prosecutor when local prosecutor cannot act.
Illinois	May intervene in any prosecution if state's interest requires it
Indiana	May assist in criminal cases upon request of local prosecutor
Iowa	May intervene on own initiative; may supersede on direction of Governor, legislature, or either house thereof. May assist on request of local prosecutor.
Kansas	May intervene on direction of Governor or either branch of the legislature. May institute action or intervene on own initiative on behalf of any political subdivision in action for conspiracy, combination or agreement in restraint of trade.
Kentucky	May intervene on request of Governor, courts or grand juries, sheriff, mayor, or majority of a city legislative body.
Louisiana	May intervene only when the local prosecutor is unable or unwilling to perform his duties; may not supersede; may assist
Maine	May intervene, supersede or assist on his own initiative
Maryland	May assist on request of local prosecutor or at the direction of the Governor
Massachusetts	May intervene, supersede or assist on his own initiative. May initiate proceedings independent of local prosecutor.
Michigan	May intervene or initiate on own initiative or at direction of Governor or legislature; will assume jurisdiction when requested by prosecuting attorney.
Minnesota	May intervene or assist at direction of Governor or local prosecutor
Mississippi	May intervene or assist at direction of Governor or when required by the public service
Missouri	May intervene or supersede at the direction of the Governor; may assist local prosecutor.
Montana	May intervene or supersede on own initiative or at the direction or request of the local prosecutor
Nebraska	May intervene, assist or supersede
Nevada	May intervene when necessary to determine the state's or peoples' rights in water or public lands. May supersede on own initiative.
New Hampshire	May intervene, supersede or assist on own initiative, or on direction of Governor or legislature. Has full responsibility for criminal cases punishable with death or imprisonment for twenty-five years or more.
New Jersey	When, in his opinion, the interests of the state will be furthered by so doing (1970 Statute).
New Mexico	May intervene or assist on direction of Governor
New York	May intervene or supersede at direction of Governor
North Carolina	No statutes or case law in point
North Dakota	May intervene, supersede or assist on own initiative; on request of majority of board of county commissioners; on petition of twenty-five taxpaying citizens; on written demand of district judge.
Ohio	May appear for state in all cases in which the state is directly or indirectly interested. May appear in any court on direction of Governor or legislature.
Oklahoma	May appear in any case at direction of Governor or legislature and may, at his discretion, supersede. May assist at request of local prosecutor.

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

. . . still does not have effective control over criminal prosecution on the local level and is therefore not in a position to direct prosecution so as to avoid errors at the trial level that may result in reversal upon appeal. It would seem that from the standpoint of more efficient prosecution the Attorney General should have greater control over and authority to direct the course of local prosecutions. The Attorney General should have power to intervene in organized crime matters at his own initiative without the necessity of a request of intervention.[4]

These examples show the great variety of relationships that are involved in intervention and supersession. Not only do these powers vary from state to state, but they may be used frequently or seldom.

2.44 Frequency of Intervention

Available data indicate that Attorneys General intervene or assist in local prosecutions very infrequently, even when they have the power so to do. This probably results from a number of factors: a reluctance to interfere in local situations; a shortage of staff; and political considerations. C.O.A.G.'s survey showed that prosecutors themselves recognize this. When asked how often the Attorney General exercises his power to intervene if he has such power, 331 prosecutors said seldom, 164 said never, and only 9 said often.

Missouri's Attorney General is authorized only to aid in local prosecutions. A study showed that even this limited authority was used only about thirty times over a seven-year period, and that assistance tends to be restricted to special circumstances, such as situations involving prominent local personages, major felony cases for neophyte prosecutors, and when the prosecutor is disqualified through an interest in the case.[5]

Information furnished by Attorneys General's offices to C.O.A.G. substantiates the infrequency of intervention.

4. Memorandum from Attorney General John B. Breckinridge to Patton G. Wheeler, September 26, 1969.

5. Richard A. Watson, OFFICE OF ATTORNEY GENERAL, University of Missouri Studies 1, 35 (August, 1962).

In Maryland, the Attorney General assists in local prosecutions at the direction of the Governor or upon request of a state's attorney; such intervention occurs only three to five times a year, and only under unusual circumstances, as in an investigation conducted at the request of the Governor which culminates in action by a grand jury.[6] Massachusetts reports that the power to intervene or supersede is "rarely exercised, and not at all in the past two years."

Minnesota reports that the Attorney General has not intervened in a local prosecution since sometime in the 1950's, if by intervention is meant entering the case against the wishes of the local county attorney. The Attorney General is empowered to take over a prosecution upon order of the Governor and he has assisted the county attorneys in prosecutions on many occasions. Between October 1967 and November 1969, the Attorney General was involved in a total of ten local prosecutions.[7] Mississippi says that the Attorney General usually comes into local criminal cases by invitation of the district attorney, although he frequently brings suits to recover illegal expenditures by local officials.[8]

California says that:

> The Attorney General intervenes in local criminal procedures only infrequently. We will do so on occasion when requested by a local district attorney where we and he feels that the district attorney is disqualified. On occasion, we have exercised the powers granted to the Attorney General by the State Constitution by taking over criminal proceedings in a county where we feel that the law enforcement process has broken down, but this is most unusual. Finally, on occasion, this office will discover a type of criminal operation that has statewide ramifications. In such instances, since we have developed all of the evidence and our lawyers are familiar with the case, by agreement with the local district attorney, we will prosecute the case locally or join with the local district attorney in the prosecution.[9]

Nebraska says that the Attorney General "can, but rarely does," handle the trial of criminal cases, although he takes them on appeal.[9a] The Attorney General of Nevada can initiate felony prosecutions by obtaining a grand jury indictment; he has done so only once in four years, in a case involving a receivership action. He can also take charge of any prosecution on request of the Governor or when the Attorney General considers it necessary; this authority apparently was exercised only once in 1969, to seek reinstatement of first degree murder counts that the prosecutor had dismissed. The Attorney General also "took public issue" with another district attorney who had failed to prosecute after a grand jury had so recommended. Nevada reports that "only in extreme cases will the Attorney General interfere."[10]

The Attorney General of Vermont reported in 1963 that he could think of no case when an Attorney General had intervened, because "this just is not done," except in homicide cases, where he is required to participate.[11] South Dakota says that "as a matter of policy, it is a rare case when the Attorney General will 'gratuitously' interfere with the activities of the local state's attorney." The general policy is that the Attorney General will assist with a case upon request, or will even handle it if the local prosecutor so desires.[12]

6. Supplementary Questionnaire, Office of the Attorney General of Maryland, to C.O.A.G., January 30, 1970.

7. C.O.A.G., Supplementary Questionnaire for Minnesota, October 26, 1969.

8. Memorandum from Deputy Attorney General Delos H. Burks to Patton G. Wheeler, June 17, 1970.

9. Supplementary Questionnaire for California, to C.O.A.G., October 3, 1969.

9a. Questionnaire on the Office of Attorney General, to C.O.A.G., June 2, 1969.

10. Supplementary Questionnaire for Nevada, to C.O.A.G., October 27, 1969.

11. Letter from Attorney General Charles E. Gibson, Jr., to Attorney General John B. Breckinridge, February 21, 1963.

12. Memorandum from Assistant Attorney General Leonard E. Andera to Attorney General John B. Breckinridge, October 8, 1969.

Kentucky reported in September, 1969, that the Attorney General had only intervened in four cases that year. In one instance, a grand jury requested his assistance in an investigation, on the basis that the Commonwealth's Attorney was not furnishing proper assistance. In another, a Commonwealth's Attorney asked the Attorney General's office to try indictments in which county officers were material witnesses, when these officers had already criticized the local prosecutor's handling of these cases. Both instances involved partisan and personal conflicts, and it was suggested that participation by the state would help establish "an atmosphere conducive to justice and fair play."[13]

Washington reports that the intervention procedure is almost never utilized, but the Attorney General does intervene at the request of the prosecutor or other local official in two types of cases: (1) where there is a vacancy in the office of prosecutor, a member of the Attorney General's staff may be appointed a Special Deputy Prosecutor for the purpose of trying a specific case; (2) if the prosecutor is a part-time officer who is confronted with a particularly difficult case, he may request that a Special Deputy be appointed to assist him.[14]

New Jersey appears to exercise such powers more frequently than most states. It reported on a questionnaire that "at any given time there are about twenty-three supersession cases in the Attorney General's office." These cases "run the gamut of indictable offenses, from burglary to murder. In addition, supersession is frequently requested with reference to alleged municipal official wrongdoing charges.[15] The great majority of Attorneys General, however, intervene or supersede only infrequently.

It should also be noted that the Attorney General often enters a case at the request of the local prosecutor. Minnesota, in response to a C.O.A.G. questionnaire, mentioned some of the more common reasons why a prosecutor requests the Attorney General's assistance: (1) the case is unusually difficult or presents unusual questions of law; (2) the county attorney is not experienced; (3) the county attorney is prosecuting a public official whom he works closely with in his daily work; (4) the defendant is a personal friend of the county attorney, or possibly a relative; (5) the case was originally investigated and handled by a state agency; an example might be an investigation started by the Securities Department, the Public Examiner, etc. and the local law enforcement officials feel the state should handle the prosecution.[16] These conditions could be faced by local prosecutors in any state, and could make the Attorney General's intervention sought after by the prosecutor.

13. Letter from Commonwealth Attorney Donald P. Moloney to Attorney General John B. Breckinridge, October 1, 1968.

14. Letter from Assistant Attorney General Donald Foss, Jr., to Patton G. Wheeler, January 7, 1971.

15. Supplementary Questionnaire for New Jersey, to C.O.A.G., November, 1970.

16. Minnesota, *supra* note 7.

2.5 Statutory and Common Law Powers in Litigation

Litigation is defined as a contest in a court of justice for the purpose of enforcing a right;[1] the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statutory or common.[2] The conduct of litigation on behalf of the state is one of the chief duties of a state Attorney General. The choice of issues to litigate is a major responsibility. The cases an Attorney General chooses to undertake and the success he has with them might be regarded as a significant measure of his effectiveness.

The Attorney General's power to ". . . institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights,"[3] arises from statutory, constitutional or common law powers inherent in him as the chief law officer of the state.

2.51 Statutory Authority to Conduct Litigation

Statutes conferring upon the Attorney General authority to handle litigation may be general, as in Maryland where the statute states, in pertinent part:

> The Attorney General shall have general charge, supervision and direction of the legal business of the state . . . and he, together with his assistants, shall perform the duties now or hereafter prescribed by the Constitution and laws of this State, and . . . shall be the legal adviser and representative of and perform all legal work for the following boards, commissions, departments, officers and institutions: [List omitted] and also all other boards, commissions, departments, officers or institutions of the State government . . . .[4]

Or the statute may be more detailed, as in South Dakota where it provides:

> The duties of the attorney general shall be:
>
> (1) To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested as a party;
>
> (2) When requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands, to appear for the state and prosecute or defend, in any court or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested;
>
> (3) To attend to all civil cases remanded by the Supreme Court to the circuit court, in which the state shall be a party or interested;
>
> (4) To prosecute, at the request of the Governor, state auditor, or state treasurer, any official bond or contract in which the state is interested; upon a breach thereof, and to prosecute or defend for the state all actions, civil or criminal, relating to any matter connected with either of their departments;
>
> (9) To prosecute state officers who neglect or refuse to comply with the provisions of statutes of this state prohibiting officers of the state from accepting any money, fee or perquisite other than salary for performance of duties connected with his office or paid because of holding such office and the statute requiring issue and delivery and filing of prenumbered duplicate receipts and accounting for money received for the state;
>
> (11) To attend to and perform any other duties which may from time to time be required by law.[5]

Perhaps a more typical statutory approach than either of the foregoing is that of Alabama. This state defines the Attorney General's powers in litigation in the following two provisions:

1. BLACK'S LAW DICTIONARY, FOURTH EDITION 1082 (1951).

2. *Missouri, K & T Ry. Co. v. Hickman*, 22 S. Ct. 18, 21, 183 U.S. 53, 46 L. Ed. 78 (1901).

3. 7 AM. JUR. 2d, *Attorney General*, § 11, p. 14.

4. MD. ANN. CODE art. 32A, § 2 (Supp. 1969). Certain state and county agencies are exempted from the provisions of this statute. *See* MD. ANN. CODE art. 32A, § 12 (1957).

5. S. D. COMP. LAWS ANN. § 1-11-1 (1967).

The attorney general shall . . . perform the following duties:

He must attend, on the part of the state, to all criminal causes pending in the supreme court or court of appeals, and to all civil suits in which the state is a party in the same courts. He shall also attend to all causes other than criminal that may be pending in the courts of Montgomery County, in which the state may be in any manner concerned; and when requested so to do by the governor, in writing, shall appear in the courts of other states, or of the United States, in any cause in which the state may be interested in the result.[6]

In addition:

The attorney general may institute and prosecute civil actions for the state. —The attorney general is authorized to institute and prosecute, in the name of the state, all suits and other proceedings at law or in equity, necessary to protect the rights and interests of the state.[7]

While no two states have identical statutory provisions, certain specific duties in litigation are commonly assigned to the Attorney General by statute. These include the conduct of criminal appeals; the handling of civil cases in state courts where the state is a party; appearance for the state in federal courts and in the courts of other states; representation of state officers or employees when sued in their official capacities; defense of the constitutionality of legislation, administrative orders, regulations, ordinances and franchises granted by the state; handling litigation for state agencies; and, in some instances, the initiation of criminal actions or intervention and supersedure in criminal actions initiated by local prosecutors, either at the discretion of the Attorney General or at the request of the Governor or some other authority.

A list of duties reported to C.O.A.-G. by Attorneys General would include the following, which would require them to conduct prosecutions;

1. prosecute violations of election laws or election frauds,
2. defend constitutionality of municipal ordinances,
3. handle escheats, real or personal,
4. enforce abandoned property laws,
5. abate public nuisance,
6. handle *quo warranto* proceedings to try title to public office or to oust a public official who has forfeited right to office,
7. dissolve fraternal benefit societies to preserve funds,
8. collect revenue for the state,
9. intervene in civil cases where interests of the state or people are involved,
10. enforce "errant father" laws,
11. sue officers indebted to state,
12. recover from sureties for default of state officers or employees,
13. collect bad checks for state treasurer,
14. prosecute violations of liquor and gambling laws,
15. enforce narcotic drug laws,
16. prosecute civil or criminal action for offense in dealing with the state,
17. collect fees and property due state when proper official fails to do so, including unpaid docket, court fees, and licenses,
18. handle proceedings for disbarment of attorneys,
19. prosecute and defend all criminal and civil actions relating to any executive department,
20. handle ouster proceedings against state and local officials,
21. prosecute or appear in all murder trials,
22. prosecute persons who trespass or commit nuisances on state lands,
23. prosecute revenue law violators,
24. prosecute trespasses or injury to timber lands,
25. defend or prosecute all causes where county is a party, unless the interest of the county is adverse to that of the state,
26. prosecute civil and criminal violations of civil rights laws,
27. recover state monies illegally expended,
28. prosecute any official bond or contract in which state has an interest,
29. prosecute corporations which fail to pay fees or make reports required by law,
30. prosecute state officer for accepting any money, fee or perquisite other than his salary for performance of duties connected with his office,
31. bring action in courts of other states to collect taxes legally due the state,
32. enjoin or dissolve *ultra vires* acts of corporations from the transaction of unauthorized business,
33. prosecute labor union crimes,
34. prosecute crimes involving misapplication of state funds,
35. institute civil actions to confiscate illegally sold or transported liquor,
36. institute condemnation proceedings,
37. institute civil actions for forfeiture of cars used in illegal narcotic drug traffic,
38. enjoin actions tending to cause racial conflicts and violence,
39. enforce statute against slot machines,
40. enforce anti-lobbying statute,
41. exercise the power of eminent domain to preserve any historical monument or memorial,
42. prosecute cases involving the practice of law without being duly licensed, or the illegal practice of law, and
43. institute actions to maintain rights of the state and its citizens in waters of interstate streams.

This list, while not a complete compilation of all duties in litigation which Attorneys General might be empowered to exercise, illustrates the scope of matters involved in prosecutions.

6. ALA. CODE tit. 55, § 228 (1958).
7. ALA. CODE tit. 55, § 229 (1958).

2.52 Extent of Discretion

Many statutes expressly state the extent of the Attorney General's discretion in bringing actions. New Mexico statutes, for example, say that the Attorney General shall:

> prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor; . . .[8]

Upon the failure or refusal of any district attorney to act in any criminal or civil case or matter in which the county, state or any department thereof is a party or has an interest, the attorney general be, and he is hereby authorized to act on behalf of said county, state or any department thereof, *if after a thorough investigation, such action is ascertained to be advisable by the attorney general.* Provided, that the attorney general shall, upon direction of the governor, investigate any matter or matters in any county of the state in which the county, state or any department may be interested. After such investigation, *the attorney general be, and he is hereby authorized to take such action as, in his opinion, conditions warrant.*[9]

The statutes appear to grant discretionary powers to the Attorneys General by their language. Two Minnesota cases confirm the existence of such discretionary power in the Attorney General in conducting litigation for the state; this discretion is held to be plenary, and not reviewable.[10] The Iowa Attorney General issued an opinion to the effect that he had sole responsibility for determining whether action could be maintained upon request by the Executive Council, and the manner of prosecuting or defending interests of the state, and hence would treat a resolution of Executive Council "order-

8. N. M. STAT. ANN. § 4-3-2 (Supp. 1969).
9. N. M. STAT. ANN. § 4-3-3 (Supp. 1969).
10. *Slezak v. Ousidigian*, 260 Minn. 303, 110 N.W. 2d 1 (1961); *State ex rel. Peterson v. City of Fraser*, 191 MINN. 427, 254 N.W. 776 (1934).
11. Attorney General of Iowa, 1900-01 OP. ATTY. GEN. 1900-01 87.

ing" him to bring suit on bond of Clerk of Supreme Court as mere request.[11] The Iowa statute used the phrase "when, in his judgment, the interest of the state requires." The phrase "when in his judgment the interests of the state require such action" is found in the statutes of many states.

New York reports that the Attorney General is not required to handle all litigation involving the constitutionality of legislation; however, a New York statute provides that when the constitutionality of legislation is brought into question upon a trial or hearing of any criminal or civil action or proceeding in any court of record, the court may make an order directing the party desiring to raise such question to serve notice thereof on the Attorney General and that he be permitted to appear and be heard.[12]

Most state statutes pertaining to this area require that the Attorney General be given notice of cases wherein the constitutionality of state legislation is brought into question but make no provision requiring the Attorney General to appear in such cases. Clearly, the question of whether or not to appear in these cases is left to the Attorney General's discretion.

It would appear that statutes stating that the Attorney General shall perform certain actions would make the performance of such actions mandatory, but no such flat rule seems applicable. Rather, the situation varies from state to state. For example, North Carolina's statute states that "[T]he Attorney General shall defend all actions in the appellate division in which the state shall be interested or is a party . . ."[13] North Carolina's Attorney General states that he has no discretion in the handling of appeals, but is required to do so by law. Conversely, although Minnesota's statute would appear to make substantially the same provision in its wording that "[T]he Attorney General shall appear for the state in all causes in the Supreme and Federal Courts wherein the state is directly interested,"[14] the Minnesota Attorney General reports that he handles criminal appeals at his option.

There is a significant exception to the principle that the Attorney General is free to exercise independent discretion in the institution of litigation. Provisions of certain of the statutes set out above illustrate this exception where action by the Attorney General is requested or required by the Governor or other authorized official pursuant to statutory authority, such request is considered mandatory and the Attorney General has no discretion to refuse to act in the matter in question.[15]

Except for these provisions, "[i]t is generally acknowledged that the attorney general is the proper party to determine the necessity and advisability of undertaking or prosecuting actions on the part of the state."[16] This rule appears well settled where the statutes indicate the existence of such discretionary authority; however, no data are available from reporting jurisdictions to support any definite conclusions in those instances where there is no such statutory provision. The rule would appear to remain as it was laid down in 1929 in *State v. Finch:*

> [O]rdinarily the attorney general, both under the common law and by statute, is empowered to make any disposition of the state's legislation which he deems for its best interest; and that where the attorney general appears in a legal prosecution, he is entitled to have full charge thereof . . .[17]

2.53 Consent to Intended Litigation

Although a state enjoys ready access to the courts to enforce its rights and

12. N. Y. EXEC. LAW § 71 (1951).
13. N. C. GEN. STAT. § 114-2 (1) (Supp. 1969).
14. MINN. STAT. ANN. § 8.01 (1967).
15. 7 AM. JUR. 2d, *Attorney General*, § 13, p. 17, citing *State ex rel. Stubbs v. Dawson*, 86 Kan. 180, 119 P. 360 (1911).
16. 7 AM. JUR. 2d, *Attorney General*, § 13, p. 16.
17. *State v. Finch*, 128 Kan. 665, 280 P. 910 (1929).

privileges, a private party having a cause of action against a state might not be so fortunate. A state may not be sued without its consent and, unless duly authorized by law, the Attorney General may not waive this immunity of the state from suit.[18] "[T]hus [the Attorney General] cannot bind the state by appearing in an action so as to give the court jurisdiction."[19] Nor can he forfeit the rights of the state by an admission in court as to the legal effect of a statute.[20]

In 1914, the Supreme Court of Iowa affirmed the statutory right of an heir to recover an estate after an order of escheat to the state had been entered and funds dispersed to various county auditors for the benefit of the school fund. The plaintiff, a non-resident alien, made the state treasurer and auditor defendants. The court held the statute in question, providing for a claimant to show himself entitled to receive funds, implies proof would be made in due form to the proper court, and for all intents and purposes was a consent by the state to submit its adverse claims, if any, to the adjudication of that court. The court further held the voluntary appearance by the Attorney General on behalf of the state in the suit and in filing answers to the plaintiff's claim upon its merit was a clear waiver of its right to deny its consent to the jurisdiction of the court.[21]

Clearly, where the Attorney General properly enters an appearance "for and on behalf of the state" pursuant to statutory mandate, such appearance will be held to be a waiver by the state of its immunity from suit, and such immunity cannot be involved in an ancillary suit subsequently brought to enforce a prior decree.

The Supreme Court of the United States held, where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibits of the eleventh amendment.[22] In this case, a South Carolina statute provided for the county treasurer, as an agent of the state, to defend any suits for and on behalf of the state, and required him, to be represented by the Attorney General. The Supreme Court had little difficulty in holding a prior decree involving a substantially identical factual situation, was res judicata against the state, when the Attorney General had voluntarily entered his appearance in the former suit in compliance with the statute.

The general rule would apparently be identical to the law of agency, that where the principal has authorized and directed an agent to act in his behalf and the agent so acts, in substantial compliance thereof, the principal cannot at a later date renounce this authority.

Although this principle of governmental immunity remains solidly entrenched in most jurisdictions, a definite trend toward abrogation of the doctrine has developed. The underlying reason for this trend is the need to balance the legitimate interest of the public with that of the state.

The private individual should not be required to bear the burden for injuries sustained as a result of the tortious conduct of public employees. At the same time, the state has an interest in not being subjected to the overwhelming burden of suits and

18. Annotation, *Consent to Suit Against States*, 42 ALR 1484; *see also* cases cited at 50 ALR 1408.
19. 7 AM. JUR. 2d, *Attorney General*, § 15, p. 20, citing *Dunn v. Schmid*, 239 Minn. 559, 60 N.W. 2d 14 (1953); *McShane v. Murray*, 106 Neb. 512, 184 N.W. 147 (1921); *Morrah v. Dr. John de la Howe Industrial School*, 120 S.C. 197, 113 S.E. 70 (1922).
20. *Id.*, citing *State Hwy. Comm. v. Rawson*, 210 Ore. 593, 312 P. 2d 849 (1957)
21. *McKeown v. Brown*, 167 Iowa 489, 149 N.W. 593 (1914).
22. *Gunter v. Atlantic Coast R.R.*, 200 U.S. 273, 284, 26 S. Ct. 252, 50 L. Ed. 477 (1906). 7th S. Cir. Ct).

payment of resulting claims which might follow total abrogation of immunity.[23]

Approximately thirty states retain the basic common law doctrine providing immunity for the state and political subdivisions. The remaining twenty states have altered the doctrine substantially; however the degree of alteration varies from state to state.

Alaska, Arizona, Hawaii, Iowa, Nevada, New York, Oregon, and Washington have abrogated the immunity with respect to both the state and its political subdivisions. Arkansas, Florida, Indiana, Kentucky, and Minnesota have abrogated the doctrine at the municipal level, but the immunity of the state has been preserved to a great extent. Vermont has abrogated the immunity at the state level without making significant changes in the rule as applied to its political subdivisions. California, Illinois, New Jersey, North Carolina, Utah, and Wisconsin have made substantial changes in the immunity doctrine without abrogating the rule with regard to any political entity of the state.[24]

2.54 Common Law Powers

These descriptions of authority are based on statutes. It should be noted that Attorneys General may derive additional authority from the common law, according to the rulings of some courts.

There has been extensive litigation concerning the Attorney General's common law powers in local prosecutions. Section 1.3 of this C.O.A.G. study analyzes the relevant case law, which is not consistent in its conclusions. Briefly, some courts have said that, because the office of Attorney General existed at common law while that of prosecutor did not, he retains certain powers in local prosecutions. Other courts have held that legislative delegation of power to a local prosecutor deprives the Attorney General of that power. The highest court of one state has said that the legislature may not deprive the Attorney General of powers he had at common law. Others states' courts have held that the Attorney General may exercise certain authority, such as supersession or appearance before a grand jury, even if it is not specifically conferred by statute. Some, however, hold that he has only those powers specified by legislative act.

23. G. Majure, W. Minick and D. Snodgrass, *The Governmental Immunity Doctrine in Texas—An Analysis and Some Proposed Changes*, 23 SOUTHWESTERN L. J. 341 (1969).

24. *Id.* at 362-363.

2.6 Authority in Appeals

Of 537 prosecutors responding to C.O.A.G.'s survey, 378 said that the Attorney General never handled civil appeals, 74 said that he handled some, and 85 said that he handled all. Of 550 responding, 364 said that the Attorney General handled all criminal appeals, 123 said he handled some, and 203 said he never handled such cases.

N.A.A.G. recommends that the Attorney General should appear for the state in all criminal appeals, to assure their uniform quality, provide the necessary expertise in complex cases, and assure a thorough review of the record by someone who was not previously involved.

2.61 The Attorney General's Role

Table 2.6, based primarily on C.O.A.G. questionnaires, shows the Attorney General's role in criminal appeals. He handles at least some criminal appeals in all jurisdictions except Connecticut; even there, he handles habeas corpus petitions in the federal courts. Hawaii reports that the Attorney General does not ordinarily appear for the State in criminal cases on appeal. New York's Attorney General handles appeals only on request of the Governor. In the Virgin Islands, the Attorney General's jurisdiction is limited to misdemeanors at all levels, including the appellate.

Some states give the Attorney General and the prosecutor concurrent jurisdiction in appeals. Ohio requires the Attorney General to appear before the Supreme Court in cases where the state has an interest, and also requires him to advise prosecutors in all actions in which the state is a party.[1] Another statute says that "in conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court."[2] In practice, the prosecutor handles all appeals, with the Attorney General's assistance. In Georgia, the Attorney General appears for the state in appeals to the Supreme Court from convictions of capital felony offenses. The district attorney involved also files a brief. The Attorney General does not appear in other appeals.[3]

Michigan law[4] requires the Attorney General to prosecute and defend all actions in the Supreme Court in which the state is interested. The law[5] also requires the prosecuting attorney to prepare a brief in all criminal cases on appeal to the Supreme Court which arise from his county, and to give the Attorney General a copy of the brief at least twenty days before the case is to be heard. Upon request of the Attorney General, the prosecutor must make the oral argument; the Attorney General's office estimated in 1969 that the prosecutor makes the argument in over half the cases. The office reports that its Appellate Division works very closely with prosecutors and "frequently the brief presented is the product of a joint effort between the Attorney General and the prosecutor."[6]

The most frequent statutory provision, however, is for the Attorney General to appear before the highest court in all cases where the state has an interest or is a party. In the majority of jurisdictions, the local prosecutor's responsibility ends at the trial level.

The statutory provisions for handling appeals do not always prevail in actual

1. OHIO REV. CODE ANN. § 109.02, 104.14.

2. OHIO REV. CODE ANN. § 309.08.

3. Letter from Executive Assistant Attorney General Harold N. Hill, Jr., to Patton G. Wheeler, December 30, 1970.

4. MICH. STAT. ANN. § 3.181.

5. MICH. STAT. ANN. § 5.771.

6. Memorandum from Assistant Attorney General Solomon Bienenfeld to Attorney General John B. Breckinridge, February 3, 1969.

2.6 ATTORNEY GENERAL APPEARS FOR STATE IN CRIMINAL CASES ON APPEAL

Alabama ..... Yes
Alaska ..... Yes—no local prosecutor. Attorney General handles all stages.
Arizona ..... Yes
Arkansas ..... Yes
California ..... Yes

Colorado ..... Yes
Connecticut ..... No criminal jurisdiction
Delaware ..... Yes—no local prosecutors.
Florida ..... Yes—in district Court of Appeals, Supreme Court, and all U. S. courts.
Georgia ..... Yes—in appeals from capital-felony convictions; d. a. also files a brief.

Guam ..... Yes—local prosecutor. Attorney General handles all stages.
Hawaii ..... Not ordinarily
Idaho ..... Yes
Illinois ..... Yes
Indiana ..... Yes—local prosecutor may assist.

Iowa ..... Yes
Kansas ..... Yes
Kentucky ..... Yes
Louisiana ..... Yes
Maine ..... Some—Handles own appeals; not those of local prosecutors.

Maryland ..... Yes
Massachusetts ..... Yes—Attorney General handles appeals he took over from local prosecutor and all cases before Supreme Court and U. S. courts.
Michigan ..... Yes—local prosecutor required to prepare brief on appeal and Attorney General may request he handle oral argument.
Minnesota ..... Yes—but local prosecutor in Hennepin, Ramsey and St. Louis counties handle own appeals
Mississippi ..... Yes

Missouri ..... Yes—Attorney General may require local prosecutor to submit brief, but this is seldom done.
Montana ..... Yes
Nebraska ..... Yes
Nevada ..... Attorney General has statutory authority but local prosecutors handle appeals.
New Hampshire ..... Yes

New Jersey ..... Some—Attorney General handles appeals of cases on request from prosecutor; in addition, he may file brief and appear as amicus curiae in other cases
New Mexico ..... Yes
New York ..... No, unless he is requested to appear for the state on appeal by the Governor.
North Carolina ..... Yes—Attorney General handles appeal before Court of Appeals and Supreme Court.
North Dakota ..... Yes—but local states attorney usually handles appeal.

Ohio ..... Yes—Attorney General assists, but prosecuting attorney retains primary responsibility.
Oklahoma ..... Yes—District Attorneys assist with preparation of briefs.
Oregon ..... Yes—on request of local prosecutor.
Pennsylvania ..... Some—District Attorney handles most appeals but Attorney General handles some.
Puerto Rico ..... Yes—before Supreme Court and all U.S. courts.

Rhode Island ..... Yes—no local prosecutors.
Samoa ..... Yes—no local prosecutors.
South Carolina ..... Yes
South Dakota ..... Yes—state's attorney works closely with Attorney General on appeal.
Tennessee ..... Yes

Texas ..... Yes
Utah ..... Yes
Vermont ..... Yes (Both the Attorney General and the state's attorney represent the state on appeal.)
Virgin Islands ..... Some—Attorney General handles all stages in misdemeanor cases; U. S. Attorney handles felonies.
Virginia ..... Yes—local prosecutor must file brief in opposition to granting appeal.

Washington ..... Yes—upon request of local prosecutor.
West Virginia ..... Yes
Wisconsin ..... Yes
Wyoming ..... Yes

practice. Nevada law, for example, charges the Attorney General with appearing for the state before the Supreme Court; the long-standing practice, however, is to permit district attorneys to represent the state in criminal appeals, with the Attorney General assisting.[7] Washington law directs the Attorney General to represent the state before the Supreme Court in all cases in which the state is interested, but he actually participates in ordinary criminal appeals only on request of the local prosecutor. Otherwise, involvement in criminal appeals is only in the context of habeas corpus actions.[8]

There appears to be a trend toward the Attorney General playing a greater part in appeals where he does not do so already. The Attorney General of New York, who can appear before the Supreme Court only when requested by the Governor, has said that the Attorney General should be able to handle appeals if requested by district attorneys. He held that "some local prosecutors are ill-equipped to handle complex criminal appeals because of a limited staff."[9] Oregon's Department of Justice offered to represent district attorneys on appeal of criminal cases. By October of 1970, 25 of the 36 local prosecutors accepted. Out of the 181 cases decided in the 1969 fiscal year, 85 percent were handled by the Department of Justice, and the rate of reversals was lower in these cases than in those handled by the district attorneys.[10] It is expected that the percent of appeals handled by the Attorney General will increase, because of this record, and because county commissioners will urge prosecutors to have the state handle appeals, to reduce the need for additional local staff.[11]

The Chief of Illinois' Criminal Justice Division gives an interesting analysis of the Attorney General's changing role in criminal appeals in that state. The statutes provide that the Attorney General shall represent the people in the Supreme Court. This gave him appellate duties in all felony cases until a 1964 constitutional amendment limited the Supreme Court's mandatory jurisdiction to constitutional questions, capital cases and cases of habeas corpus. It became the practice for state's attorneys to handle all felony appeals in the Appellate Court without supervision by the Attorney General. Even cases before the Supreme Court were actually handled by the state's attorneys, without supervision by the Attorney General. In 1969, a criminal division was created and close supervision is now exercised. Under a new Constitution, which becomes effective July 1, 1971, the Supreme Court will have mandatory jurisdiction only in felony cases. If the case load then allows it, the Attorney General's office will handle all appeals.[12]

2.62 Procedures on Transfer of the Case

C.O.A.G. questionnaires queried Attorneys General as to procedures relative to transfer of jurisdiction. The most frequent reply was that there is no set procedure; the Attorney General simply takes charge. Kentucky, for example, reports to C.O.A.G. that "there are no problems or procedural difficulties. There is no formal transference in criminal cases when cases reach the Court of Appeals." Generally, "the local prosecutors responded well whenever specific requests were made

7. NEV. REV. STAT. § 228.140.
8. WASH. REV. CODE ANN. § 43.10.030; Letter from Assistant Attorney General Donald Foss, Jr., January 7, 1971.
9. *Position Paper of Attorney General Louis Lefkowitz to Constitutional Convention Committee on the Executive Branch, Hearing Held June 1, 1967, at the State Capital, Albany.*
10. Interview with Attorney General Lee Johnson, Salem, Oregon, October 6, 1970.
11. Interview with Chief Trial Counsel Thomas O'Dell, in Portland, Oregon, October 6, 1970.
12. Letter from Assistant Attorney General James B. Zagel, Chief, Criminal Justice Division, to Leslie A. Fleisher, February 11, 1971.

by the Attorney General for additional information and assistance."

A few states, however, noted a need for more cooperation when a case is transferred. South Dakota, for example, said that the local prosecutor should work closely with the Attorney General at all stages of the appeal, because the prosecutor "tried the case and should have a vivid recollection of the live trial, live witnesses and live evidence and all else that has occurred in the trial court. The Attorney General has only a cold record on appeal to work with."[13] A Missouri study has commented that the Attorney General's office seldom is able to obtain a copy of the local prosecutor's memoranda or briefs; "This means that the staff of the Attorney General must, in effect, start from scratch in researching the myriad legal issues raised by these appealed cases."[14]

The C.O.A.G. questionnaire asked what prosecutors did when a case went to the Attorney General on appeal. The replies were as follows:

	Always	Sometimes	Never
Turn memoranda or briefs over to Attorney General	230	149	110
Confer with the Attorney General's staff about the case	174	232	88
Attend when the case is before the court	122	148	206
Handle the case, with the Attorney General's assistance	79	105	285

This indicates a considerable degree of cooperation on transfer: most, for example, confer with the Attorney General's staff. A substantial number attend when the case is before the court even if they are not handling the case.

The amount of cooperation may depend on the particular case. California, for example, reports that the Attorney General usually handles appeals without any particular assistance from the local prosecutor. Where a trial has been very involved, however, the Attorney General may ask the prosecutor to present his version of the facts, and to furnish the legal authorities he relied upon in the lower court. In every instance where such a request has been made, local prosecutors have responded willingly and well.

The typical way in which a case is transferred to the Attorney General is by the entering of a notice of appeal by the appellant in the trial court. In Virginia, the appellant applies for a writ of error; when this is granted, the case is transferred to the Attorney General. Once jurisdiction has been transferred to the Attorney General, it remains in him through subsequent proceedings. Hence, the Attorney General handling an appeal at the appellate level in state courts would continue to handle subsequent appeals in higher level appellate courts and in the federal courts.

Frequently, the Attorney General has no knowledge of the pendency of the case or his need to appear for the state until he receives a copy of the appellant's brief or is notified by the clerk of the appellate court that an appeal has been filed.

Two major problems involving the transfer of jurisdiction have been described by one reporting state. First, the record on which the appeal is based may be incorrect or inadequate. This record, including the trial papers and narrative summary of oral presentations on which the appeal must be based, is approved as to content by the appellant and the local prosecutor prior to the Attorney General's knowledge of or involvement in the case, and is available to the Attorney General only in final form. Errors or inadequacies are finalized prior to the Attorney General's participation in the case and the Attorney General has no recourse in the

13. Memorandum from Assistant Attorney General Leonard E. Audera to Attorney General John B. Breckinridge, October 8, 1969.

14. Richard A. Watson, OFFICE OF ATTORNEY GENERAL, University of Missouri Studies 1, 27 (August, 1962).

matter. He is bound by the record so prepared.

Appellate proceedings are almost always based entirely on the record of the proceedings below. The parties must submit their arguments based on this:

> Under the principle of timely presentation, they are not permitted, as it is said, to "go outside the record." No contentions can be made on appeal unless the argument involved was presented at the proper time in the trial court and unless the record shows that any evidence necessary to establish the contention was presented in the trial court. On appeal the parties cannot offer additional evidence to supplement the record, nor, as a general matter, introduce any assertion not made in the trial court. Appellate litigation is, in the very strictest sense, review rather than fresh consideration of the case.[15]

The A.B.A. Standards stress the value of good records in appellate procedures and suggest that continuing efforts be exerted to improve techniques for the preparation of records of appeal. They recommend that new ways of reproducing such records be examined and, where practicable, adopted with a view toward minimizing the cost of preparation in terms of money and time.[16]

The Attorney General may be placed at a distinct disadvantage by the time requirements for filing his brief. His office may have relatively little time to become familiar with the fact situation and pertinent law of a theretofore strange case, and to confer with the local prosecutor prior to drafting the brief on which the state's argument must stand or fall. A petition for extension of time to file the Attorney General's brief may be used, but this would obviously be bad policy if it were employed in every case and, hence, is seldom done.

15. Geoffrey C. Hazard, Jr. *After the Trial Court - The Realities of Appellate Review*, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION, 73 (1965).

16. A.B.A. Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO CRIMINAL APPEALS, TENTATIVE DRAFT 83 *et seq*, (1969).

2.63 Function of Appellate Procedures

In a capsule description of the optimum criminal proceeding, the late Roscoe Pound made it clear that appellate procedures are indispensable:

> An ideal criminal proceeding in a common law jurisdiction would involve a preliminary examination in order to ascertain whether there is probable cause to hold the accused, a trial in order fully to bring out the facts and apply the law to them, and, in case there was reasonable ground to think that the trial was prejudicially unfair, or the facts were not correctly determined, or the law was not rightly conceived or rightly applied, a review of the case by a competent appellate tribunal.[17]

In his comprehensive work on criminal appeals, Lester B. Orfield states that the functions of appeal are to see that justice is done to the appellant, to determine and maintain consistent standards in the trial courts, and to work out or develop the law of the jurisdiction.[18] Recognizing the existence of various other devices, such as writs of mandamus, prohibition and certiorari, granting of a new trial, and executive pardons, he concluded that:

> Under existing constitutional arrangements, the three functions—deciding the particular case, keeping the law uniform, and developing the law—can only be served satisfactorily by appeal.[19]

Despite arguments that appeals constitute an unnecessary expense, are rarely won, and encourage a low standard of conduct by the lower court,

> it is, in the last analysis, a credit to the stability of our institutions that we are willing to subject their actions to the probing of appellate procedure. And even if we regard appellants as nothing more than devil's advocates, it says a great deal for a system of government that it allows even the devil to have his day in court.[20]

While the sovereign position of a

17. Quoted in: Lester B. Orfield, CRIMINAL APPEALS IN AMERICA 11, 12 (1939).

18. *Id.* at 32-34.

19. *Id.* at 34.

20. Milton Pollak, *The Civil Appeal*, COUNSEL ON APPEAL 33-38 (1968).

state government confers no special right of appeal, a state has the same right of appeal in civil cases as does any private party. A state can seek appellate review of any judgment, by which it is aggrieved and as to which a private party in the same circumstances would have a right of review. In criminal actions, however, the right of the state to appeal from a judgment is generally either non-existent or sharply limited. This general prohibition of a state's right to appeal in criminal cases has its primary basis in double jeopardy prohibitions, although other factors are involved.[21]

2.64 Right of Prosecution to Appeal

Legal scholars are in general agreement that there was no right of appeal by the crown at common law,[22] and the United States Supreme Court has impliedly adopted this view.[23] The question, however, has not been resolved. There is strong argument that the right of appeal existed for the prosecution at common law and accordingly the state courts should not deny it to the states solely on the ground it did not exist at common law.[24]

Apparently, only three states specifically deny the right of appeal to the state in all criminal proceedings.[25] However, Georgia seems also to deny the right by omitting mention of the state in the statutory provisions authorizing allowable appeals in criminal cases.[26]

Authorities uniformly condemn this disparity in the right of appeal. They argue the recent decisions of the Supreme Court insuring the accused receives a fair trial, coupled with the general rules of criminal procedure affording the accused the presumption of innocence, requiring specificity in indictments, and proof beyond a reasonable doubt for conviction, makes the complete denial of a state appeal unreasonable.[27]

The remaining states permitting some form of appeal by the prosecution may be subdivided into three general categories:

(1) Appeal solely for the purpose of determining the law.[28] These "moot" appeals, not affecting the defendant, are usually *ex parte* proceedings, although a few states have made provisions for the appointment and payment of an attorney to contest the appeal.[29] Apparently, in recognition of the considerable criticism directed at "moot appeals",[30] and the historical reluctance of courts to consider moot questions of law,[31] the A.B.A. standards for criminal justice have determined the practice to be unsound, stating that:

> As a practical matter, one could anticipate very few appeals by prosecutors in such cases. The quality of litigation engendered and the absence of the cutting edge of the adversary system suggest that the decisions so obtained would not be of the highest order,[32]

(2) Appeal after jeopardy has attached. Three states have adopted statutes which permit an appeal by the state after an acquittal.[33] The Connecticut statute provides:

> Appeals from rulings and decisions of the superior court, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court, in the same manner and to the same effect as if made by the accused.[34]

In 1937, the United States Supreme Court had the occasion to determine the validity of states appeal under the foregoing statute, in the case of *Palko v. Connecticut*.[35] Palko, although indicted for first-degree murder, had been convicted of murder in the second-degree by a jury in a Connecticut state court. The state appealed and a new trial was ordered. Palko was retried and convicted of first-degree murder Palko argued that the Fifth Amendment prohibition against double jeopardy was incorporated into the Fourteenth Amendment and as such was applicable against the state of Connecticut as a bar to the second trial. The Supreme Court disagreed, holding the federal double jeopardy standards inapplicable against the states, with the exception of the kind of jeopardy which subjected a defendant to " . . . a hardship so acute and shocking that our polity will not endure it."[36] On this basis the Connecticut theory of "continuing jeopardy," which does not attach until there is a final settlement in the case, was approved.

However, in 1969, the Supreme Court overruled *Palko* in deciding the case of *Benton v. Maryland*,[37] holding the double jeopardy prohibition of the Fifth Amendment enforceable against the states through the Fourteenth Amendment.[38] The court decided the case utilizing federal double jeopardy standards. The federal standards were clearly enunciated in 1904, when the Supreme Court held the Fifth Amendment prevented appeals by the United States from a verdict of acquittal.[39]

It is argued by legal scholars that to use the jeopardy doctrine in any degree to prevent an appeal by the state results in an absurdity, a basic unfairness to the state and the people.[40]

(3) Appeal on matters of law, recognizing the limitation of double jeopardy. In 1930, The American Law Institute proposed a section for its code of criminal procedure which provided:

> An appeal may be taken by the State (Commonwealth or People) from: (a) an order quashing an indictment or information or any count thereof. (b) an order granting a new trial. (c) an order arresting judgment. (d) a ruling on a question of law adverse to the State where the defendant was convicted and appeals from the judgment. (e) the sentence, on the grounds that it is illegal.[41]

The President's Commission on Law Enforcement and Administration of Justice stressed the need for establishing the right of prosecution appeal from pretrial orders suppressing evidence. The Commission stated that the present state of the law of search and seizure and confessions is uncertain, and that, therefore, lower court decisions restricting police conduct should be open to testing on appeal. The Commission recommended:

> Congress and the states should enact statutes giving the prosecution the right to

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21. President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS 47 (1967).
22. Arnold Wood, *Criminal Law—The Right of the State to Appeal in Criminal Cases*, 42 N.C.L.R. 887, 888 (1964); William Skelton, *State Appeals in Criminal Cases*, 32 TENN. L. REV. 449 , 450 (1965) citing Orfield, CRIMINAL APPEALS IN AMERICA, ch. 3, p. 57 (1939); Justin Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J., 486, 491 (1926).
23. *United States V. Sanges*, 144 U.S. 310, 312 (1891).
24. Jerry Kronenberg, *Right of a State to Appeal in Criminal Cases*, 49 J. CRIM. L., C. & P.S. 473, 476 (1959). *See also*, Henry Dickinson, *Right of A State to Appeal*, 45 KY. L.J., 628, 629 (1957).
25. Texas, Illinois & Massachusetts. David Corson, *The State Right to Appeal: Has Maine been Too Cautious?*, 21 ME. L.R. 221, 225 (1969); Skelton, *supra* note 22 at 453; Dickinson, *supra* note 24 at 630 n. 7; Kronenberg, *supra* note 24.
26. GA. CODE ANN. § 6-901; *Eaves v. State*, 113 Ga. 749, 39 S.E. 318 (1901).
27. Robert Marriott, *Appeals by the Prosecution and Protection of the Accused in State Criminal Proceedings*, 35 U. CIN. L. REV. 501, 507 (1966).
28. COLO. REV. STAT. ANN. § 39-7-26(2), (1964); IDAHO CODE ANN. § 19-2804(5), § 19-2808 (1948); IND. ANN. STAT. § 9-2304, § 9-2307 (1956); NEB. REV. STAT. § 29-2315.01 to 29-2315.16 (1964); OHIO REV. CODE § 2945.67 to 2945.70 (Supp. 1967).
29. NEV. REV. STAT. § 29-2315.02 (1964); OHIO REV. CODE § 2945.69 (Supp. 1967).
30. Marriott, *supra* note 27 at 508; Corson, *supra* note 25 26 227.
31. Edwin Hicks, *Moot Appeals by the State in Criminal Cases*, 7 ORE. L. REV. 218, 219 (1928).
32. A.B.A. Project, *supra* note 16 at 37.
33. CONN. GEN. STAT. ANN. § 54-96 (Supp. 1969); VT. STAT. ANN. tit. 13, § 7403 (1958); WIS. STAT. ANN. § 958.12 (1953).
34. CONN. GEN. STAT. ANN. § 54-96 (Supp. 1969).
35. *Palko v. State of Connecticut*, 58 S.CT. 149, 302 U.S. 319, 82 L.Ed. 288 (1938).
36. *Id.* at 328.
37. *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 707, 89 S.Ct. 2056 (1969).
38. *Id.* at 796.
39. *Kepner v. United States*, 195 U.S. 100 (1904).
40. Miller, *supra* note 22 at 496.
41. A.L.I. Code of Criminal Procedure, § 428 (1930).

appeal from the grant of all pretrial motions to suppress evidence or confessions;[42]

The A.B.A. standards favor prosecution appeals only in certain situations and has adopted the following standard reflecting this position:

(a) The prosecution should be permitted to appeal in the following situations:

(i) from judgments dismissing an indictment or information on substantive grounds, such as the unconstitutionality of the statute under which the charge was brought, or for failure of the charging instrument to state an offense under the statute;

(ii) from other pretrial orders that terminate the prosecution, . . .;

(iii) from pretrial orders that seriously impede, although they do not technically foreclose, prosecution, such as orders granting pretrial motions to suppress evidence or pretrial motions to have confessions declared involuntary and inadmissible. Such judgments are likely to rest upon principles that ought to be clearly and uniformly applied throughout the state.

(b) Where more than one level of appellate review is provided, the prosecution should be permitted to seek further review in the highest court whenever an intermediate court has ruled in favor of a defendant-appellant.[43]

Most states have adopted legislation incorporating one or more of the foregoing recommendations. As an example New York provides for appeal by the state in six circumstances:

An appeal may be taken by the people as of right in the following cases to the court to which an appeal would be in the same action or proceeding from a judgment of conviction other than death, . . .;

1. From a judgment for the defendant, and a demurrer to the indictment;

2. From an order of the court, arresting the judgment;

3. From an order of the court, made at any stage of the action, setting aside or dismissing the indictment on a ground other than the insufficiency of the evidence adduced at the trial;

4. From an order granting a motion to vacate a judgment of conviction, otherwise known as a motion or application for a writ of error *coram nobis;*

5. In all cases where an appeal may be taken by the defendant, except where a verdict or judgment of not guilty has been rendered;

6. From an order of a court entered prior to trial granting a motion for the return of property or suppression of evidence . . . ; or for the suppression of a confession or admission . . . , or for the suppression of eavesdropping evidence . . .[44]

Maine's statute is similar to the proposed A.L.I. recommendation, with the exception that an appeal from an order granting a new trial was apparently omitted. In an avowed effort to limit state appeals, the Maine Supreme Judicial Court amended their Rules of Criminal Procedure to provide for the signature of the Attorney General on the written approval of the appeal action, in an attempt to avoid the danger of a lesser official "rubber stamping" cases on appeal.[46]

In addition to the foregoing, various states have permitted appeals by the Attorney General in the following instances:

(a) appeals from an intermediate court of appeal to a court of last resort;

(b) appeals to review decisions upon pleas in abatement and pleas in bar;

(c) appeals from orders dismissing an indictment or information or a decision sustaining a demurrer thereto;

(d) appeals from orders made after judgments which affect the substantial rights of the state;

(e) appeals from an order arresting judgment of conviction;[47]

(f) appeals from a declaration that a statute is unconstitutional.[48]

Likewise, various states statutes have severely limited the right of state appeal. In Michigan, the state may appeal from an order to quash or to arrest judgment only when these orders are based on the unconstitutionality of a statute. Virginia's Constitution gives the state right to appeal only those criminal cases involving the state revenue.[49]

The examples of other limitations imposed by other states are too numerous to mention. It suffices to say that prosecution appeals are, in some states impossible, and in most frought with difficulties.

42. President's Commission on Law Enforcement and the Administration of Justice, *supra* note 21.

43. A.B.A. Project, *supra* note 16.

44. N.Y. CODE CRIM. PROC. § 518 (1969).

45. ME. REV. STAT. ANN., tit. 15, § 2115-A (Supp. 1968).

46. Corson, *supra* note 25 at 236.

47. *See* Skelton, *supra* note 22 at 455 for case citations.

48. Kronenberg, *supra* note 23 at 477 (note 24).

49. *Id.* at 477, 478.

2.65 Caseloads

The number of cases handled by an Attorney General's office depends on many factors, including his power to initiate litigation and conduct appeals, the number of state agencies which handle litigation, and the size of the jurisdiction. C.O.A.G. questionnaires asked offices to list the number of cases they handled in 1968, by categories. The results were not sufficiently consistent or complete to afford a valid basis for analysis, but did produce some information of interest. Two conclusions are apparent: one, that Attorneys General handle a large volume of litigation, particularly appeals; two, that a great variety of litigation is involved.

Maryland, for example, described its 1968 caseload in detail, as follows:

Supreme Court of the United States (Includes Petitions for Certiorari)	62
U.S. Court of Appeals for the Fourth Circuit	111
U.S. District Court for the District of Maryland	156
Court of Appeals of Maryland, (Sept. Term, 1968)	
Civil Appeals	40
Criminal Appeals	11
Post Conviction	2
Miscellaneous Docket (Petitions for Certiorari)	242
Total	295
Court of Special Appeals of Maryland (September Term, 1968)	
Criminal Appeals Docketed	500
Post Conviction	122
Defective Delinquent	23
Total	645
Cases in Lower Courts	93
Maryland Tax Court Cases-Closed in 1968	185
-Filed in 1968	250
Department of Employment Security-Circuit Courts & Balto. City	63
State Accident Fund-Circuit Courts & Balto. City	295
Total	886

Wisconsin estimated that of about 1,250 cases handled, 450 were criminal cases, and 250 of these were some aspect of habeas corpus. Of the remainder, about 350 were for the Department of Industry, Labor and Human Relations, which includes Workmen's Compensation. From 75 to 100 of the total cases were before federal courts. Alabama reports 20 state and 20 federal civil cases, 700 criminal appeals, 400 post conviction proceedings, 600 driver's license revocation appeals, and 600 Board of Adjustment claims. Iowa reports 551 state and 8 federal civil cases, 121 state and 35 federal criminal appeals, 40 habeas corpus proceedings and 7 Liquor Commission cases.

These random examples show the impossibility of comparing caseloads. The figures below are those reported for criminal appeals, with habeas corpus cases shown separately when they were so reported:

	Appeals	Habeas Corpus & Coram Nobis
Alabama	700	400
California	2,183	
Colorado	126	20
Florida	1,550	
Indiana	130	16
Iowa	156	40
Kentucky	113	61
Maryland	184	
Missouri	160	70
Nebraska	339	74
New Jersey	218	(Total appeals)
Oklahoma	488	104
Puerto Rico	296	
South Dakota	22	29
Tennessee	325	152

This at least indicates the significance of criminal appeals to Attorneys

General's offices, and the relatively large number of post conviction actions.

Available data also indicate a growth in the caseload of Attorney General's offices. Kentucky, for example, almost doubled the number of criminal cases in federal courts in a six-year period. In the 1962-63 biennium, 25 criminal cases were heard by the U. S. District Courts, 4 by the U. S. Circuit Court of Appeals and 24 by the U.S. Supreme Court. In the 1968-69 biennium, it reported 65 cases in U.S. District Court, 27 in the U.S. Circuit Court and 12 in the United States Supreme Court. A similar increase has probably occurred in most jurisdictions.

2.7 Post-Conviction Proceedings

The President's Commission on Law Enforcement and Administration of Justice noted a sharp upturn in one area of litigation:

> There has been a rapid growth in the number of petitions for habeas corpus and similar relief filed in the Federal Courts between the 1940's, when a few hundred petitions were filed each year, and 1965 when 5,786 reached the courts. Our system is unique in the extent to which a person convicted at trial can continue to challenge his conviction in a series of appeals and collateral attacks in the nature of habeas corpus in the State and Federal courts . . .
>
> The vast increase in the number of petitions . . .; public exasperation about cases in which punishment is postponed, sometimes for many years, because of successive hearings; the resulting sense of friction between the State and Federal courts—all have reinforced the need for reevaluation of the use and administration of the writ. A result has been new Federal legislation and extensive studies by the Judicial Conference of the United States, the National Conference of Commissioners on Uniform State Laws, and a committee of the American Bar Association Project on Minimum Standards for Criminal Justice.[1]

The President's Commission further noted in 1967 that, "Far fewer than half of the States now have satisfactory post-conviction procedures by statute or judicial rule."[2] This section examines the development and impact of these writs and some of the recommendations for revision that have been advanced.

2.71 Development of Remedies

It was recognized, as early as 1953, that American post-conviction procedure was far less than adequate when the Conference of Chief Justices' Committee on Habeas Corpus issued a report calling for action to eliminate excessive reliance on federal habeas corpus through reform at the state level.[3] A sense of urgency did not develop until 1963, however, when the Supreme Court decided several cases involving new far-reaching post-conviction principles. With *Fay v. Noia*[4] and *Townsend v. Sain*[5] new standards were established for the states to follow in post-conviction procedures. The problem for the Attorneys General was stated in practical terms by Maine's Attorney General in discussing the work of his office for the years 1963 and 1964:

> Because of pronouncements by the United States Supreme Court in respect to the rights of individuals, there has been an increase of post conviction actions prosecuted in both state and federal courts. This office represents the State of Maine in this type of action under our habeas corpus statute. In 1963, forty-six post conviction petitions for the writ of habeas corpus were filed in the Superior Court, and eight petitions were filed in the Federal District Court.[6]

This can be compared with 1957 in Maine, when fourteen petitions for habeas corpus were filed in state courts and six in the Federal District court.[7]

Traditionally, post-conviction proceedings have been confined to two very narrow areas of challenge: the writ of habeas corpus and the writ of error *coram nobis*. Both writs originated in Tudor England. Habeas corpus, a King's Bench writ, challenged the court's jurisdiction over a person or subject or the court's authority to render particular judgments. *Coram nobis*, a Chancery Court writ, was brought to present facts not before the courts at the time of trial or to correct substan-

1. The President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 139 (1967).
2. *Id.*
3. Uniform Post Conviction Procedure Act 202 (1966).
4. 372 U.S. 391 (1963).
5. 372 U.S. 293 (1963).
6. REPORT OF THE ATTORNEY GENERAL, STATE OF MAINE 1963-64.
7. REPORT OF THE ATTORNEY GENERAL, STATE OF MAINE 1955-56.

tial errors of fact presented at trial. To obtain a habeas corpus writ, the defendant had to be in the court's custody, but a *coram nobis* writ did not require that defendant be in custody. Both writs, although challenges to criminal convictions, were, and are still, considered to be civil proceedings. Unlike appellate procedures, neither writ is limited to any statutory time requirements. The writs can be sought many years after conviction, so long as the other requirements are fulfilled.[8]

The recent increase in habeas corpus proceedings is due to the use of federal habeas corpus writs, not to challenge the court's jurisdiction, but to present cases concerning a wide variety of "constitutional" issues. In *Fay v. Noia* and *Townsend v. Sain* the Supreme Court expanded post-conviction rights by holding that: (1) a defendant did not have to exhaust all state remedies at the time of habeas corpus petition, only those still available at the time of petition; (2) the defendant must intentionally waive federal claims in state proceedings or intentionally by-pass state procedures; and (3) the defendant, not merely his lawyer, must knowingly make choices of rights to be waived. Obviously, these questions are a far cry from the original use of habeas corpus to challenge court jurisdiction. It should be kept in mind that the Sixties was an era of expanding concepts of due process and habeas corpus was the traditional instrument of challenge. The state courts were simply unprepared to deal with the disparity between state and federal standards.[9]

2.72 Post-Conviction Statutes

A few states had experience with post-conviction acts before *Fay* and *Townsend*. 1957 Maryland legislation was modeled on the Revised Uniform Post-Conviction Procedure Act of 1955,[10] promulgated by the National Conference of Commissioners on Uniform State Laws. Justice Thomas B. Finan, a former Attorney General, discussed problems arising under Maryland's act in a recent law review article.[11] He concluded that, while the procedure under a post-conviction statute is an improvement over sole reliance on common law habeas corpus petitions, statutes enacted before *Fay* and *Townsend* must be revised substantially to conform to new federal standards. Specifically, problems arose concerning constitutional questions, waiver in confessions, questions of finality of litigation, the circumstances of hearings and the right of prisoners to trial transcripts. Justice Finan suggested that post-conviction legislation should include specific provisions in these problem areas. He pointed out that state-federal friction arose often because the defendant was not afforded the opportunity to properly raise federal constitutional questions in state courts.[12]

A revised Uniform Post Conviction Procedure Act was approved in 1966 in order to include changes in constitutional law.[13] It describes, in detail, the types of questions to be raised in a post conviction proceeding: (1) the conviction violates the state or federal constitution; (2) the court lacks jurisdiction; (3) the defendant's sentence exceeds the legal maximum; (4) material facts were not presented at the trial; (5) the defendant's sentence has expired or he is being otherwise unlawfully deprived of probation or parole; (6) the conviction is subject to other

8. Michael Cole and Jeffrey Small, *State Post Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U.L. REV. 154, 158-159 (1965).
9. *Id.* at 157.
10. MD. ANN. CODE art. 27, § 645A-645J (1957).
11. Comment, *The Uniform Post Conviction Procedure Act: One State's Experience*, 2 HARV. J. LEGIS. 185 (1965).
12. *Id.* at 194.
13. Uniform Post Conviction Procedure Act 271 (1966).

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collateral attack.[14] The Act sets out details of appellate jurisdiction and procedure for filing applications and provides a payment system for court costs and stenographic services should a defendant be unable to pay.

As a member of the North Carolina Attorney General's staff, points out, convicted prisoners use the habeas corpus writ to challenge many different aspects of their imprisonment including: the propriety of extradition proceedings, the computations of the time served on sentences and time credited for good behavior made by the Department of Corrections. "It would be difficult, if not impossible, to list all the areas of use of the writ. And that is a clue to anyone who might try to completely cover the subject by statute."[15]

2.73 A.B.A. Standards

The A.B.A. Standards Relating to Post-Conviction Remedies "outline a system of post-conviction relief to deal with questions that have not been finally adjudicated in the proceedings leading to conviction and sentence." They provide that:

(1) There should be a single, unitary post conviction remedy so that applicants and courts need not be concerned with whether the proper form of relief has been sought.

(2) The scope of the remedy should be broad enough to encompass all grounds for attacking the validity of a conviction or sentence in a criminal case, including violation of the United States Constitution or state constitution, lack of jurisdiction over the person or subject matter, unlawful sentence, new evidence of material facts or new developments in legal standards applicable to prior convictions.

(3) The post-conviction remedy, unlike habeas corpus, should be available even though the applicant is not presently serving the sentence he seeks to challenge.

(4) No fixed period of limitation should be established, although courts should have discretion to refuse to consider stale claims where the applicants have no demonstrable present need for relief.

(5 Measures should be taken to improve in-prison counselling so that persons incarcerated will have a better understanding of what is, and what is not, a basis for post-conviction relief.

(6) Efforts to effect final disposition of applications on the sufficiency of allegations should be restricted in favor of inquiries more likely to disclose the validity of claims. At the same time, significant improvement in pleadings can be obtained through the development and use of standardized application forms or questionnaires.

(7) Discovery devices, specially adapted to the needs of post conviction relief, should be available to bring to the surface the evidentiary bases for post conviction claims. Controlled discovery will enable courts to avoid unnecessary and time-consuming plenary hearings. Where such evidentiary hearings are required, the products of discovery will facilitate definition of and resolution of material factual questions.

(8) The pre-hearing conferences should be liberally utilized both to explore the possibility of summary dispositions without hearing and to narrow and focus such hearings as are needed. Such conferences can be held without the necessity of the applicant being present, a considerable saving in convenience and expense, not to say avoidance of risk.

(9) Beyond the limited threshold inquiry appropriate for the pleadings, counsel should be provided for applicants who are unrepresented and without funds to pay for their own lawyers. If private attorneys are assigned to represent indigent applicants, they should be adequately compensated from public funds.

(10) Full and accurate records of proceedings, particularly plenary hearings, should be carefully compiled and retained, so that the evidentiary basis for findings of disputed fact will be available. Ordinary rules of evidence should be followed.

(11) Dispositive orders should indicate explicitly the grounds for decision. Findings of fact should be carefully prepared to keep separate the trier's determinations of relevant historical events from legal characterization of those events.

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14. *Id.*
15. Dale Shepherd, *A Critical Examination of Habeas Corpus*, an article to be published in 17 N. C. BAR J., No. 2.

(12) Appellate review should be available as a right at the instance of either party. An opinion indicating the basis for decision on appeal ought to be filed in every case.[16]

These standards no longer consider post-conviction review as a part of the overall criminal process: They stress a balance between the rights of defendants and the need for systematic state post-conviction procedure:

While this report is addressed primarily to the state's needs, it is applicable in the main to the system of post-conviction for federal prisoners in federal courts. In both instances, the law proscribing the conduct and the system of enforcement are part of the same sovereignty. Unlike the federal system of criminal law, no state system is wholly unitary, since to a substantial extent, federal law is applicable to state prosecutions and imposes restrictions both substantive and procedural in nature. This complication of the state systems will account for some difference between state post-conviction remedies for state prisoners and federal post-conviction remedies for federal prisoners. Nevertheless, there is a substantial similarity between the problems of the two.[17].

As to the Attorney General's role, the A.B.A. standards provide that:

The legal officer with primary responsibility for responding to applications for post-conviction relief should be the attorney general...[18]

The commentary points out that:

Because of the nature of post-conviction claims and the probably pervasive importance to criminal process in any state, it is preferable to charge the office of the attorney general or comparable official with basic responsibility for representing the state in such cases.[19]

Dean Daniel Meador points out that, if the standards are adopted, the legal system can stop "tinkering" with the "great writ" [habeas corpus] and leave it to its original role of challenging illegal convictions. Dean Meador also contends that there is a lack of confidence in the ability of American lawyers and postulates that most post-conviction challenges are, really, directed at the competency of counsel rather than the constitutional issues actually raised in petitions.[20]

2.74 Finality of Judgments

In 1965, questionnaires were submitted to selected Attorneys General and state judges by Michael Cole and Jeffrey Small in connection with their study of post conviction remedies.[21] The authors found that the greatest criticism of *Noia* and *Townsend* was that they destroyed the finality of state judgments. The problem of finality is best illustrated in an article by Justice Aubrey M. Cates, Jr.,[22] of the Court of Appeals of Alabama. He presents a complete list of all the post conviction remedies available at this time to a convicted criminal defendant:

1. Motion for New Trial.
2. Writ of error or an appeal to the Court of Appeals.
3. Certiorari to the Supreme Court of Alabama.
4. Automatic appeal in a capital conviction direct to the Supreme Court of Alabama.
5. Application for certiorari to Supreme Court of the United States.
6. Petition to the State circuit courts for the county in which penitentiary is located for a writ of habeas corpus.
7. Appeal (either by State or prisoner) from habeas corpus.
8. Certiorari to the Supreme Court of Alabama.

16. A.B.A. Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO POST-CONVICTION REMEDIES 3 (1968).
17. *Id.* at 6.
18. *Id.* at Section 1.3 (a).
19. *Id.* at 27-28.
20. Dean Daniel Meador, *Book Review of Standards Relating to Post-Conviction Remedies*, 66 MICH. L. REV. 197, 204-208 (1965).
21. Cole and Small, *supra* note 8 at 154.
22. Aubrey Cates, Jr., *Post-Conviction Remedies*, 28 ALA. LAWYER 257.

9. Certiorari to the Supreme Court of the United States.
10. Petition for writ of error coram nobis to the circuit court of original conviction.
11. Appeal (either by State or prisoner) from judgment of circuit court in coram nobis.
12. Certiorari to the Supreme Court of Alabama.
13. Certiorari to the Supreme Court of the United States.
14. Petition to United States District Court where penitentiary located for habeas corpus review.
15. Appeal to United States Court of Appeals Fifth Circuit.
16. Appeal or certiorari to U.S. Supreme Court.

The repetition of several of the remedies such as the petitions of certiorari in the Alabama and the United States Supreme Courts highlights the basic confusion of the present system.

Obviously, as states adopt uniform post conviction procedures many of the above procedures will fall into disuse. However, it is doubtful that absolute finality of criminal judgments with no room for post conviction maneuvering is an entirely desirable goal. As the A.B.A. standards point out:

Where prisoners believe that their failing to win relief is the result merely of inability to start the judicial machinery, a festering condition is created which could have a detrimental effect on rehabilitation programs and prison morale.[23]

2.75 Increased Burden on State Facilities

It was noted at the 1964 Conference of the National Association of Attorneys General that during 1963 some 2,106 habeas corpus petitions and motions were presented in state courts.[24] Then-Attorney General Arthur Sills of New Jersey, in discussing the additional problems presented under the then-new Supreme Court standards pointed out that the quality of the habeas corpus petitions themselves placed a heavy burden on courts since they were most often drawn up by "jailhouse" lawyers. The petitions are often presented in such an unintelligible fashion that courts are unable to determine the nature of the claim, let alone whether it is meritorious.

General Sills suggested that the problem of unintelligible petitions should be temporarily solved by the adoption of a standard post-conviction relief form.[25] The minimum standards include such a form, which has the advantage of clarity and is written in layman's language.[26] General Sills felt, however, that a standard form was merely a stop-gap, and that prisoners should be represented by counsel in all post-conviction proceedings.

North Carolina is among the jurisdictions where the Attorney General's office has developed standard forms for: petition for writ of habeas corpus; affidavit of indigency (court furnishes attorney); application for certiorari; application for post-conviction hearing; and application for federal habeas corpus hearing. Each standard form is accompanied by a detailed instruction sheet explaining the purpose of the petition and how to fill it out.

The increase in post conviction proceedings has continued rather than abated in recent years.[27] In 1968, the N.A.A.G. Report of the Committee on Habeas Corpus and Bail discussed these difficulties, emphasizing the friction caused between state and federal courts and the public dismay at the release and retrial of prisoners. The Committee recommended that the best means of limiting the numbers of habeas corpus

23. A.B.A. Project, *supra* note 16 at 51.
24. 1964 CONFERENCE OF ATTORNEYS GENERAL 45.
25. *Id.* at 42.
26. A.B.A. Project, *supra* note 16 at 98.
27. 1968 CONFERENCE OF ATTORNEYS GENERAL 161.

petitions would be to improve state trials generally and the state procedures for handling post-conviction claims, especially those raising federal constitutional issues. The Committee assumed that the growth of the burdensome number of habeas corpus petitions would not soon be reduced, but pointed out that the sheer number of petitions could well be an added impetus to hasten the adoption of improved state procedures for the administration of criminal justice.[28].

The 1971 Winter Meeting of N.A.A.G. adopted a resolution calling for appointment of a committee to study amending the federal Habeas Corpus Act to provide that a federal judge shall entertain a petition for habeas corpus in behalf of a state prisoner:

> only on a ground which presents a substantial federal constitutional question (a) which was not theretofore raised and determined, (b) which there was no fair and adequate opportunity theretofore to raise and have determined, and (c) which cannot thereafter be raised and determined in a proceeding in the state court; or, in the alternative, a consideration of other proposed amendments limiting the jurisdiction of federal district courts on habeas corpus petitions from prisoners incarcerated under state court judgments.

A paper prepared by California's Attorney General's office cites statistics showing that prisoners' petitions, both state and federal, have risen from 4 percent of total civil filings in 1963 to 18 percent, and the number of federal applications by state prisoners has risen from 1,020 in 1961 to 9,063 in 1970. The paper says that:

> These statistics mirror the crushing work load imposed upon both the federal courts and the states' attorneys who must respond to and litigate the petitions. Few would complain of that burden if it served to disclose and correct arbitrary or unjust criminal convictions. The continuing low rate of successful applications, however, must be taken as an indication that the states' systems of criminal justice are in truth not all that bad; and as at least raising the question of whether there is not here an astounding waste of what the Supreme Court has termed 'scarce judicial and prosecutorial resources.'[29]

Habeas corpus and post conviction relief should be considered as aspects of the administration of criminal justice in general, rather than in isolation. Chief Justice Warren Burger placed post conviction procedure in perspective at a recent N.A.A.G. meeting when he remarked that states should be urged to adopt simple procedures which give prisoners with grievances the opportunity for a prompt and fair hearing. He contrasted the American system with other countries, where teams of lawyers, psychologists and counselors regularly visit all prisons, and concluded that: "With us, the prisoner hopes that some distant proceeding before a remote judge will enable him to have his cries heard."[30]

Judge Howard Bratton comments cogently that: "The best way to protect criminal dispositions from subsequent collateral attacks is to isolate and deal with potential constitutional issues before criminal trial proceedings have been concluded."[31] The A.B.A. standards include provisions covering pretrial discovery and procedure, the most innovative feature of which is an omnibus hearing. If constitutional issues are dealt with, successfully, the basis for many post conviction remedies can be negated, and the burden of this type of litigation reduced.

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28. *Id.* at 161-162.

29. State of California, Office of the Attorney General, *Federal Habeas Corpus and State Prisoners* (mimeo., no date).

30. Summary, Winter Meeting of the National Association of Attorneys General 6 (February 4-6, 1970).

31. Howard Bratton, *Standards for the Administration of Criminal Justice*, NAT. RESOURCES J. 133 (1970).

2.8 Legal Powers in Investigation and Prosecution

Section 2.5 discussed the statutory authority for prosecution. This section discusses statutes concerned with procedures in prosecution and investigation: subpoena power, electronic surveillance, witness immunity, and special investigative grand juries.

2.81 Subpoena - Investigative Power

The writ of *Sub Poena* (under penalty) originated in the 14th Century when the King's Council instituted semi-judicial proceedings in order to reach local officials too powerful to be summoned before ordinary courts. These officials were usually summoned to answer for misdeeds of oppression or disorder. The power to compel witnesses to attend trials was not granted by Parliament until the middle of the 16th Century. The Crown was given the power to bind over witnesses to appear in criminal trials in 1555 and contesting parties were given the power to compel the witnesses to appear in civil trials in 1563.[1] Although under common law no one could be brought into court without specific notice of the matter to be answered, under *sub poena* no such notice was necessary.[2]

The nature of the power to subpoena has remained unchanged since its early origins. In a New Jersey case, *Catty v. Brockelbank*, subpoena was described as "the process to cause a witness to appear and give testimony."[3] Suspicion of this broad power to question an individual was strong during its development in the 14th Century and it has not been dispelled in the 20th Century.

Unlimited (or Broad) Subpoena Power

Table 2.8 shows the Attorney General's subpoena powers. Of the fifty-four jurisdictions, only eleven give the Attorney General broad powers to issue investigative subpoenas. In four of these (California, Delaware, Montana, and Oklahoma) the Attorney General's broad subpoena powers are derived solely from statute.[4] Minnesota's Attorney General is granted broad subpoena power through statutes and common law.[5] One state, Utah, reported in a C.O.A.G. questionnaire that they "are of the opinion that the Attorney General has all the powers of subpoena which arose by judicial process invested in that office under common law."

The statute granting subpoena power to Oklahoma's Attorney General is a typical example of a broad unrestrictive statute:

> The Attorney General shall have authority for conducting investigations and it shall be the duty of the Department of Public Safety of the State of Oklahoma, when so directed by the Governor of the State of Oklahoma, to furnish him with investigators from the personnel of said Department, to assist in such investigations and to assemble evidence for the Attorney General in any cases to be tried or in any matters to be investigated. Likewise, it shall be the duty of the State Examiner and Inspector, upon request of the Attorney General to furnish him with experienced auditors and/or accountants from the personnel of his department to make audits and check records for the Attorney General in any case to be tried or in any matter being investigated by the Attorney General.[6]

Limited Subpoena Powers

In the jurisdictions reporting that Attorney General's subpoena powers are limited to one or a few specific

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1. T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW, 435-436.

2. E. Jenks, THE BOOK OF ENGLISH LAW, 34.

3. 124 N. J. Law 360, 362, 12 Atl. 2d 118, 129 (1940).

4. CAL. GOV'T CODE, tit. 2, Div. 3, § 11181(e), § 12550, § 12560 (1945); DEL. CODE ANN. tit. 29, § 2508 (1953); MONT. REV. CODES ANN. § 25-218, § 94-8901 (1947); OKLA. STAT. tit. 74, § 18f (1961).

5. MINN. STAT. § 300.63, § 317.27, § 1742.06 (1967). Also subpoena powers derived from civil and criminal law and common law.

6. OKLA. STAT. tit. 74 § 18f (1961).

2.8 THE ATTORNEY GENERAL'S SUBPOENA POWERS

	No Power	Broad Power	Limited Power	
Alabama	X			
Alaska	X			
Arizona			X	Under consumer fraud law
Arkansas	X			
California		X		
Colorado			X	Under consumer protection law only
Connecticut		X		
Delaware		X		
Florida			X	Under Antitrust law
Georgia		X		
Guam			X	Granted "in a number of Acts"
Hawaii			X	Under antitrust act
Idaho			X	Charitable trust and antitrust matters
Illinois		X		
Indiana	X			
Iowa			X	Under consumer fraud law
Kansas		X		
Kentucky		X		
Louisiana	X			
Maine			X	In monopoly cases only
Maryland			X	Securities Act and unauthorized practice of law
Massachusetts	X			
Michigan			X	In adm. of charitable trusts & removal proceedings
Minnesota		X		Minor statutory power; common law power
Mississippi	X			
Missouri			X	Under antitrust law
Montana		X		
Nebraska			X	Antitrust and related matters
Nevada			X	Only before grand jury
New Hampshire	X			
New Jersey			X	Under statewide grand jury law
New Mexico	X			
New York			X	Consumer frauds, condominium, syndication and theater financing, election, stock fraud, and investigations
North Carolina			X	Can apply to courts in investigation of trusts
North Dakota			X	Cases involving alcoholic beverage laws
Ohio	X			
Oklahoma		X		
Oregon			X	When directed by Gov. to supersede district atty.
Pennsylvania			X	Criminal matters and consumer protection
Puerto Rico			X	Criminal matters and special investigators
Rhode Island	X			
Samoa	X			
South Carolina	X			
South Dakota			X	Investigations ordered by Gov. & legislature
Tennessee	X			
Texas	X			
Utah		X		
Vermont			X	Consumer fraud law
Virgin Islands	X			
Virginia	X			
Washington			X	Consumer protection, or when representing state agencies
West Virginia	X			
Wisconsin			X	
Wyoming	X			

statutory areas, the most common areas are consumer protection and antitrust. Seven jurisdictions reported that the Attorney General had subpoena powers under consumer protection statutes and seven under antitrust or antimonopoly laws. Two states specifically give the Attorney General subpoena powers in charitable trusts, and two to securities investigations.

In seven jurisdictions, the Attorney General has subpoena powers for various special investigations, including criminal, which are specifically directed by grand juries, legislatures or Governors. Other jurisdictions grant subpoena powers in the following areas: Unauthorized practice of law; alcoholic beverages control; condominium; syndication; theatre financing; elections, and removal proceedings. One state (Washington) reports that the Attorney General can exercise the subpoena powers of any state agencies he is required to represent, in addition to those granted specifically to him.

Florida's statute on antitrust investigation is an example of a narrowly-drawn designation of subpoena powers granted to the Attorney General and other officials:

> Any court, officer or tribunal having jurisdiction of the offense defined in this Chapter, [combinations restricting trade or commerce] or the attorney general, or any state attorney or county solicitor or grand jury, may subpoena persons and compel their attendance as witnesses to testify as to the violation of any provisions of this chapter. Any person so summoned and examined shall not be liable to prosecution for any violation of this chapter about which he may testify fully and without reservation.[7]

The Attorney General of the United State's subpoena powers are limited to immigration and naturalization areas, to require attendance of witnesses in immigration hearings.[8] Additionally, the Attorney General may issue a "civil investigative demand" requiring persons to produce material for examination by the Antitrust Division.[9]

No Investigative Subpoena Power

In nineteen jurisdictions the Attorney General has no power to issue investigatory subpoenas. Three of these commented in questionnaires that the lack of subpoena power is an impediment to the proper exercise of the Attorney General's responsibilities.

Judicial Definitions of the Attorney General's Subpoena Powers

One of the most comprehensive discussions of the nature of the Attorney General's subpoena powers is found in *Bronelli v. Superior Court of Los Angeles County.*[10] In this case the Attorney General issued subpoenas *duces tecum* on the officers of a firm, specifying one year's business records, pursuant to an investigation under the California Unfair Practices Act. They refused to comply with the subpoenas. The court, in directing compliance, stated that the Attorney General's subpoena power in an administrative inquiry is analogous to a grand jury's power in that the Attorney General does not have to have a case pending in order to issue subpoenas. He may proceed on mere suspicion that a law is being violated or merely to assure himself that a law is not being violated.[11] The court also pointed out that the Attorney General is prohibited from violating constitutional protections against self-incrimination or unreasonable searches and seizures.

When an Attorney General's subpoena powers are limited by statute to specific areas of investigation, the subpoena power itself can still be a very broad one. In New York, the Attorney General is granted the power to subpoena in investigations of, *inter alia*,

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7. FLA. STAT. § 542.11 (1967).
8. 8 U.S.C. § 1225 (a).
9. 15 U.S.C. § 1312.
10. 56 CAL. 2d 524, 364 P. 2d 462 (1961).
11. 56 CAL. 2d at 528, 364 P. 2d at 464 (1961).

monopolies in restraint of trade.[12] In *Application of Louer,*[13] the court held that the Attorney General may issue subpoenas to strangers as well as parties to a controversy and he is not required to disclose, to the party subpoenaed, the violation of law or illegal acts against which the inquiry is directed.

In *Commonwealth ex rel. Margiotti,* [14] however, the Pennsylvania court refused to enforce subpoenas issued by the Attorney General, holding that: "Neither an Attorney General, nor a district attorney who he supersedes, has any common law power of subpoena . . . the power of subpoena, except by a court, is purely statutory." The Attorney General's statutory power of subpoena in Pennsylvania is limited to hearings before the Department of Justice.

Need for Subpoena Powers

A 1959 study by L. J. Fein and Frederick Stackable[15] pointed out that the Michigan legislature, in a six-year period, defeated four bills which would have broadened the Attorney General's power to subpoena witnesses. The Michigan Attorney General's subpoena power was limited at the time of the study to removal proceedings. Fein and Stackable surveyed local officials as to whether or not the Attorney General should be granted broad subpoena powers. They found that:

> . . . the controversy centers around the problems of potential infringement of civil rights and of effective criminal investigation. On both these issues, as well as on several of lesser importance, opinion is sharply divided.[16]

The Michigan officials favoring an extension of the Attorney General's subpoena power saw it principally as an effective law enforcement tool. It could be used to investigate antitrust cases and to investigate interjurisdictional criminal conspiracies, since Michigan's grand juries are limited county unit organizations. Those favoring broad powers also mentioned the writ's original purpose: to investigate officials suspected of crime. The officials opposing such powers argued that: too much power should not be granted to any public official; a broad subpoena power could be used to smear individual reputations; an unwarranted assumption of guilt might be directed at innocent witnesses. While Fein and Stackable do not draw any definite conclusions from their survey, they note numerous state agencies which have subpoena powers that the Attorney General lacks. These include: boards of county canvassers, mayors of fourth-class cities, the Racing Commission, and school boards.

Another study of the office of Attorney General points out that the difficulty in securing such powers may be more one of attitude than practicality. Apparently, the main reason the Attorney General is denied subpoena power is that it is normally a judicial and legislative function, and the Attorney General is concerned with prosecutions. It appears that the question is one of precedent, rather than principle.[17] The Committee on the Office of Attorney General has recommended that the Attorney General should have broad subpoena powers, as a necessary investigative tool.

12. NEW YORK CODE, Art. 22, Gen. Bus. Law 343 (1943):

> Whenever it shall appear to the attorney general . . . that any person . . . shall have engaged in or engages in or is about to engage in any act or practice by this article prohibited [Monopolies or in control of agreement for restraint of trade] or declared illegal . . . or whenever he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such person . . . to file with him a statement . . . concerning the subject matter which he believes is to be to the public interest to investigate. The attorney general may also require such other data and information as he may deem relevant . . . The attorney general, . . . is empowered to subpoena witnesses . . . and require the production of any books or papers which he deems relevant to the inquiry.

13. 252 n.y.s. 2d 469, 43 Misc. 2d 822 (1964).

14. 368 Pa. 259, 81 Atl. 2d 891 (1951). *See* discussion of subpoena powers in Remarks by Attorney General Sennett to the C.O.A.G., February 5, 1970, published by C.O.A.G.

15. L. Fein and Frederick Stackable, THE SUBPOENA POWER OF THE ATTORNEY GENERAL: A REVIEW (1959).

16. *Id.* at 8.

17. Kentucky Dept. of Law, *The Office of Attorney General in Kentucky;* 51 Ky. L. J. 998, 1008 (1963).

2.82 Electronic Surveillance

Wiretapping and other forms of electronic surveillance are among the most controversial aspects of organized crime control proposals. The conflict lies between the individual right to privacy and the public right to gain information necessary to investigate criminal activities. Most officials who are involved in criminal prosecution believe that some use of electronic surveillance is essential. A recent survey of Attorneys General, district attorneys, and their assistants concerning the use of electronic surveillance showed that 94 percent of 1,058 respondents favored the use of wiretapping and electronic listening devices under court supervision in cases involving national security, organized crime, and major felonies. Eighty percent felt that such devices would be an effective tool in fighting crime in their jurisdiction.[1] A recent C.O.A.G. survey of local prosecutors showed that they were virtually unanimous in calling for electronic surveillance legislation. Those opposing it have chiefly been concerned with the issue of the right to privacy and the right to be secure from intrusions in one's home, rights secured under the Fourth Amendment.

There are complex constitutional issues involved, as reflected in a series of Supreme Court cases. Recent decisions have modified the position taken in the 1928 case of *Olmstead v. United States.*[2] In that case, the court upheld Olmstead's conviction, despite the fact that evidence used against him had been secured through wiretaps. The court held that:

> There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk. . . .
> The [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by use of the sense of hearing and that only. . . .

Justice Brandeis dissented, arguing that the Constitution protected "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." In a long line of cases, not characterized by consistency, the Court defined and redefined the legal status of wiretapping and eavesdropping. It was not until 1967 that it clearly stated the constitutional requirements for wiretapping.

In two 1967 cases, the Supreme Court clarified the constitutional requirements for electronic surveillance. *Berger v. New York*[3] concerned a New York law which allowed electronic surveillance under a court order, which was awarded after showing of reasonable belief that a crime had been committed. Justice Clark, in the majority opinion, found that the statute did not meet constitutional requirements, because it failed to: (1) require a sufficiently particular description of the objects of the search; (2) require a sufficiently particular description of the crime that had been or was about to be committed; (3) require a particular description of the type of conversation; (4) limit the search to authorized areas only; (5) require a showing of probable cause in securing a renewal of the search order; (6) require dispatch in executing the order; (7) require that the officer report back to the court which

1. W. Wyatt, *Wiretap Legislation: Good or Bad,* 4 THE PROSECUTOR 205, 207 (1968).

2. *Olmstead v. United States,* 277 U. S. 438 (1928).

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

had approved the surveillance; (8) require justification for not giving prior notification to the persons involved.

In the other 1967 case, *Katz v. United States*,[4] Justice Stewart said for the Court that:

> . . . although a closely divided Court supposed in *Olmstead* that surveillance without material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass' . . . . Once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physicial intrusion into any given enclosure.

However, the court held that federal authorities could seek court authority for electronic surveillance even in a state which had no statute authorizing wiretapping.

Osborn v. United States[5] was another case which stressed that electronic surveillance may be permitted only "under the most precise and discriminate circumstances, circumstances which fully [meet] the 'requirement of particularity.'" The Court has recently held that the standards set out in *Berger and Katz* are not retroactive.[6]

Osborn and a 1963 case, *Lopez v. United States*,[7] set forth requirements for surveillance conducted with the consent of one of the parties and upheld the party's right to thus obtain the best possible evidence.

State laws regarding electronic surveillance vary widely, although many are apparently reviewing their statutes in the light of the new federal law. The Library of Congress Legislative Reference Service recently surveyed federal and state statutes and noted that:

> When tapping of [telephone] lines was first recognized as a problem, the states reacted in one of two ways. They either amended their 'malicious mischief' statutes to include wiretapping or they tried to prosecute those who engaged in wiretapping under the already existing malicious mischief statute. . . . The courts have consistently held that the malicious mischief laws do not cover wiretapping unless explicitly stated in the statute. . . .

As to specific state laws concerning electronic surveillance,

> . . . there was little uniformity either in the case law or in the statutes. Some states had no statutes at all.
>
> Many states still had malicious mischief statutes broadened to include wiretapping, but made no mention of electronic eavesdropping. Other states prohibited both. Some states explicitly excluded police from coverage; others expressly included them; and still others made no mention of the issue at all. A few states allowed their law enforcement personnel to wiretap and/or use electronic surveillance only under judicial supervision.[8]

According to this report, seven states have neither wiretapping nor eavesdropping laws. Forty-two of the rest have laws prohibiting wiretapping, and twenty-five of these also prohibit eavesdropping. One state has forbidden eavesdropping but has no wiretap law. The Pennsylvania Crime Commission Report points out that, despite the debates about wiretapping, "with the technological refinement of overhearing devices, eavesdropping presents a more serious, widespread, and indiscriminate threat to privacy."[9] The report also notes the dangers of "non-governmental snooping" and the need to curb such private efforts.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes wiretapping and electronic surveillance under certain conditions. The Act found that:

> . . . (I)t is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.[10]

Interception of communications is made a felony unless authorized by the Act. The following persons are authorized to apply to the appropriate court for permission to wiretap: the Attorney General of the United States, or an assistant designated by him; the principal prosecuting officer of a state; or the principal prosecutor of a political subdivision, if authorized by state law to apply.

Application must include: the applicant's identity; facts and circumstances to justify issuance of an order; facts concerning any previous surveillance of the same person; the time for which authority is requested; a statement of other investigative procedures that have been tried; other information required by the judge.

The judge may authorize the intercept if: there is probable cause for belief that a crime punishable by more than a year's imprisonment and as otherwise defined by the Act is involved; there is probable cause for belief that particular communications concerning that offense will be obtained; "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;" there is probable cause for belief that the facilities involved are being or will be used in connection with the offense.

The judge may authorize intercept only for as long as necessary to achieve the particular objective, but in no case for longer than thirty days. He may authorize an extension for up to thirty days. The prosecuting attorney may intercept communications without first obtaining an order if an application for approval is made within forty-eight hours.

Detailed reports of authorized surveillance must be filed with the Administrative Office of the United States Courts, which must make a full report to Congress.[11] A summary report for the period from June 20, 1968 to December 31, 1969 is shown below. This shows a total of 476 authorized intercepts. The full published report gives information on each intercept, listed by jurisdictions. The Administrative Office also promulgates regulations and issues forms for the required reports.

The states which authorized wiretaps in 1969, with the number of wiretaps authorized, were: Arizona—8; Colorado—2; Florida—2; Georgia—2; Maryland—15; New Jersey—39; Rhode Island—1; New York—182. Not all of these were actually installed; Arizona, for example, authorized eight wiretaps but installed only five. A total of 304 applications were made to state and federal judges, and two of these were denied.

The length of time authorized varied from a few hours to the maximum thirty-day period. Of the 271 intercepts which were actually installed, 250 involved a telephone tap, fifteen involved a listening device, and six used both.

These data indicate that only limited use is being made of authorized intercepts in most states. Their primary use is for gambling, which was specified in

4. *Katz v. United States*, 389 U. S. 347 (1967)
5. *Osborn v. United States*, 385 U. S. 323 (1966).
6. *Kaiser v. New York*, 394 U. S. 280 (1969)
7. *Lopez v. United States*, 373 U. S. 427 (1963).
8. Charles Doyle, WIRETAPPING AND EAVESDROPPING: Electronic Surveillance: A Brief Discussion of Pertinent Supreme Court cases, a Summary and Compilation of Federal and State Statutes and a Select Legal Bibliography. Library of Congress, vii (1970).
9. Pennsylvania Crime Commission. REPORT ON ORGANIZED CRIME. Office of the Attorney General, Commonwealth of Pennsylvania 109 (1970).
10. Pub. L. 90-351, 82 Stat. 197, 90th Congress, Title III, § 801(b).
11. Administrative Office of the United States Courts, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS FOR THE PERIOD JANUARY 1, 1969, TO DECEMBER 31, 1969.

SUMMARY REPORT ON AUTHORIZED INTERCEPTS GRANTED PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 2518
June 20-December 31, 1968, and January 1-December 31, 1969

TYPE OF FACILITY

Reporting Period	Total	Residence	Apartment	Multiple dwelling	Business	Business and Living Quarters	Not indicated and other
June 20-Dec. 31, 1968	174	67	49	10	45	-	3
Jan. 1-Dec. 31, 1969	302	135	68	14	71	5	9

INTERCEPTS AUTHORIZED

Reporting Period	Total		Average Length (in days)				
	Authorized	Installed	Number of Extensions	Original authorization	Extension	Actual Use Days	Actual Use Hours
June 20-Dec. 31, 1968	174	147	128	20	20	NA	NA
Jan. 1-Dec. 31, 1969	302	271	194	26	22	9.019	3½

MAJOR OFFENSE SPECIFIED IN APPLICATION

Reporting Period	Total	Drugs	Extortion	Gambling	Hijacking	Homicide	Larceny	Robbery	All other
June 20-Dec. 31, 1968	174	71	13	20	-	21	19	8	22
Jan. 1-Dec. 31, 1969	302	88	10	102	4	19	10	24	45

AVERAGE NUMBER PER AUTHORIZED INTERCEPT

Reporting Period	Intercepts		Persons involved	Intercepts	Incriminating Intercepts
	Total*	Installed			
June 20-Dec. 31, 1968	174	147	29	454	98
Jan. 1-Dec. 31, 1969	302	271	116	641	252

AVERAGE COST PER AUTHORIZED INTERCEPT

Reporting Period	Total where cost reported	Manpower	Other	Total cost
June 20-Dec. 31, 1968	120	$1,305.00	$ 53.00	$1,358.00
Jan. 1-Dec. 31, 1969	262	$2,455.00	$179.00	$2,634.00

*Authorized by judges. *Source:* Administrative Office of the United States Courts

102 applications, and drugs, which were specified in 71; offenses specified ranged from abortion to usury. The cost, including manpower and equipment, ranged from a low of $20 for one intercept to a high of $45,554 for another. Of the 262 where cost was reported, 172 cost less than $2,000. Finally, as of April 30, 1970, a total of 625 arrests had been made as a result of authorized intercepts.

The federal legislation authorized wiretaps by Attorneys General or local prosecutors, according to subsequent state legislation. The Florida law[12], for example, authorizes taps by the Governor, Attorney General, State Attorney or County Solicitor, subject to court approval. An issue of the Florida prosecutors newsletter explained the new law and suggested that prosecutors also discuss procedures with the telephone company representatives.[13] Attorneys General can assume leadership in assuring that authorized officials understand the procedural requirements for legal intercepts.

Since passage of the Omnibus Act, wiretaps are a felony unless approved by a court. It authorizes federal officers to obtain approval for intercepts, and authorizes the states to confer similar authority upon their prosecutors. Thus, the Act prohibits as well as permits electronic surveillance. It reflects the kind of argument advanced by Attorney General Robert W. Warren in support of Wisconsin legislation which closely resembles the federal law:

> Today's law enforcement officers need the legal authorization to record the conversations of criminals and others who are reasonably suspected of serious crimes, and particularly organized crime. . . . I do not advocate, and, indeed, this bill opposes the indiscriminate or uncontrolled or unsupervised use of electronic surveillance by law enforcement officers or agencies. I am unalterably opposed to any electronic surveillance by private individuals or corporations. The latter ought to be completely prohibited and violations severely punished, and law enforcement usage should be allowed only upon court approval and supervision.[14]

The federal law makes it imperative that each state review its own statutes to study their relationship to the new standards. The federal statute says that "the principal prosecuting attorney of the State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute" may apply to a court for a warrant to intercept. The court must, as a minimum, comply with the requirements of federal law in issuing the warrant. This would seem to impose some limits on state laws.

There are sixteen states which presently authorize electronic surveillance by prosecutors officers upon approval of a court. These are: Arizona, Colorado, Florida, Georgia, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Dakota, Washington, and Wisconsin. Statutory provisions of these states vary considerably. Several states limit the period of time from which warrants may be issued to less than the thirty days prescribed by the Omnibus Act, for example; New Hampshire and Minnesota set it at ten days. Florida, South Dakota, Rhode Island, and Washington are among the states where law substantially complies with the federal statute. New Jersey's 1968 statute is probably typical. It permits authorized wiretapping by the Attorney General, the county prosecutor, or the chairman of the State Crime Commission, or persons designated to act for such officials. A court order is necessary to begin communication interception. The application must contain

12. FLA. STAT. ANN. ch 69-17.
13. *Florida Prosecuting Attorneys Association, News-letter*, 1, No. 2 (October, 1969).
14. Analysis of Assembly Bill 980, Attorney General of Wisconsin.

information concerning the offense, the identity of the person committing the offense, and particulars about location and length of time for the intended surveillance.[15]

The federal statute raises problems of compliance as well as preemption; it is not clear to what extent it makes preexisting state law obsolete. The act's declaration of policy, for example, states that Congress will "define on a uniform basis the circumstances and conditions" under which intercepts are allowed." Other sections of the Omnibus Act expressly indicate when there is no intention to preempt state law, which may indicate that the wiretapping statute was intended to confer a degree of uniformity upon the states.[16]

The Council of State Governments has included a model law concerning eavesdropping in its 1970 suggested state legislation. The act was developed by the States Urban Action Center, Urban America, Inc. The act is similar to federal eavesdropping legislation, with a few essential differences.
Court-order eavesdropping warrants are to be issued only to the Attorney General or the district attorney. The model act also requires that an eavesdropping application include a statement as to whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried. The act, unlike the Omnibus Crime Act, does not include any provision permitting use of "emergency" eavesdropping powers, "due to the high risk of unwarranted invasion of privacy inherent in such procedures."[17]

Another model law was set forth in a 1968 law review article by G. Robert Blakey and James A. Hancock. This proposal, which was accompanied by a detailed commentary, authorizes prosecutors to approve applications to courts for orders allowing interception. It contains many provisions, some more permissive and others more restrictive, that are not in the 1968 federal law. Some provisions, such as allowing intercepts for forty-eight hours without approval are similar to the law. Commentary to this proposal notes that it provides the option of limiting authorization to the Attorney General and district attorneys. Centralization "will thus avoid the possibility of divergent practices developing, and if abuses should occur, the lines of responsibility will be clear."[18]

The A.B.A. Standards relating to electronic surveillance were being developed during the time that the Supreme Court decided the *Berger* case. Therefore, some provisions of the Standards are under review and may be revised.[19]

The Standards correspond in most respects with the Omnibus Act: that wiretapping should be limited to law enforcement offices; that authorization for electronic surveillance should be issued through appropriate administrative and judicial processes; the order authorizing surveillance should contain the time period authorized.[20] The Standards also suggest that law enforcement agencies adopt administrative regulations dealing with electronic surveillance techniques, such as limiting the number of agents authorized to use the techniques, saying the circumstances under which they may be used, and restricting the custody of and access to overheard communications.

15. N. J. STAT. ANN., ch. 409.
16. Telephone interview with Charles Doyle, Legislative Attorney, Library of Congress Legislative Reference Service, November 10, 1970.
17. Council of State Governments, 1970 SUGGESTED STATE LEGISLATION, 44-22-00, 197.
18. G. Robert Blakey and James A. Hancock, *A Proposed Electronic Surveillance* Control Act 43, NOTRE DAME LAWYER, 657 (1967-1968).
19. A.B.A. Section on Criminal Law, Section's Unresolved Difference and Commentary Thereon Pertaining to Tentative Draft of Standards Relating to Electronic Surveillance.
20. A.B.A. Project on Minimum Standards for Criminal Justice. STANDARDS RELATING TO ELECTRONIC SURVEILLANCE. Institute of Judicial Administration, 1-12 (1968).

Since *Berger* and *Katz*, it would be difficult to argue that law enforcement authorities should be denied the use of electronic surveillance; the question then becomes one of adopting enabling legislation that defines sufficient safeguards. The Attorney General can play a major role in ensuring proper use of such powers. First, he can take the initiative in drafting legislation that embodies the necessary safeguards and in working with the legislature to secure its enactment in proper form. Second, he can see that the legislation includes a requirement that he approve all applications for intercepts, or that other officials who are so authorized must report to him. Third, he can establish reporting procedures so that full public records are maintained of surveillance activities. Fourth, he may use bulletins and conferences to help local prosecutors understand requirements of the law. Fifth, the Attorney General can build into the administrative process provision for periodic review of the law's operation and effect. This can be done either through his own office, or by creating a special watchdog commission.

The Attorney General can also play a key role in prohibiting illegal wiretaps, by taking action against violators, and by encouraging local prosecutors to do likewise. He can work to assure that unauthorized electronic surveillance by law enforcement officers as well as by citizens is promptly detected and punished. The United States Attorney General, John N. Mitchell, said that "we believe it is our duty to be just as diligent in halting the illegal use of wiretap as in using authorized wiretap to combat organized crime." He pointed out that "If this can be done at all levels of government, we will go far toward removing fear of wiretap and establishing public respect for its proper use."[21]

2.83 Witness Immunity

The power to grant immunity to witness in criminal investigations and prosecutions has long been recognized as an important tool in crime control. Professor Henry Ruth, at a recent N.A.A.G. conference, stressed the critical need for testimony by cooperating witnesses in the fight against organized crime:

> I recall a remark made here in Massachusetts a couple of years ago when a bill was pending that 'We do not want our cases made by finks.' Well most of the organized crime cases are made by finks, and you are going to want to subpoena them to these investigative grand juries and maybe give them immunity. At least, you will want the authority available; if not general immunity, certainly immunity for those crimes in which organized crime enforcement will most likely come up with indictments.[22]

Former Attorney General William G. Clark of Illinois pointed out that witness immunity was an exchange. A witness or defendant receives freedom from prosecution in return for supplying evidence to a governmental agency.[23]

Traditionally, immunity has been granted by executive pardon, as well as statute. This has fallen into disuse since the Supreme Court held in *Burdick v. United States*[24] that the pardonee could reject the pardon, because accepting could be seen as an admission of guilt.[25] Many of the states have statutes dealing with witness immunity.[26] A survey of the At-

21. John N. Mitchell, *Wiretapping and Other Current Law Enforcement Problems*, XXXVII, THE POLICE CHIEF, 51 (December, 1970).
22. N.A.A.G., 1968 CONFERENCE, 53.
23. N.A.A.G., 1966 CONFERENCE, 2.
24. *Burdick v. United States*, 236 U. S. 79 (1915).
25. George Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U.L. REV. 327, 330-31 (1966).
26. Comment, *State Immunity Statutes in Constitutional Perspective*, DUKE L. J. 311, 318-19 (1968).

torneys General, conducted in 1965, showed that over half of forty-six respondents had some type of witness immunity. Eighteen states had statutes relating to such criminal activities as bribery, gambling, prostitution and liquor law violations. Seven had general witness immunity statutes, and some states had specialized provisions. The new federal organized crime statute provides for general witness immunity, as do some state statutes. Other states are considering such legislation. Attorneys General should be especially cognizant of their potential role under various legislative approaches.

The President's Commission on Law Enforcement and Administration of Justice recommended that broad general immunity statutes should be enacted at both the state and federal level. The Commission stressed that the state's chief prosecutor, who would be the Attorney General in most jurisdictions, should give prior approval to grants of immunity:

> Federal, State, and local coordination of immunity grants, and approval by the jurisdiction's chief law enforcement officer before immunity is granted, are crucial in organized crime investigations. Otherwise, without such coordination and approval, or through corruption of officials, one jurisdiction might grant immunity to someone about to be arrested or indicted in another jurisdiction.[27]

Similarly, the chief of L.E.A.A.'s Organized Crime Programs Division pointed out to a conference that many part-time prosecutors are ill-equipped and ill-trained, and need guidance in such matters as the selective application of immunity.[28]

In a 1892 case, *Counselman v. Hitchcock*,[29] a unanimous court held that a statute which provided that the evidence compelled could not be used against the witness in any criminal proceeding complied with the Fifth Amendment guarantee against self-incrimination. It said that the legislation must be as broad as the privilege it replaced. Subsequent federal and state statutes provided for what is known as "transaction" immunity, barring prosecution for any matter as to which testimony was compelled. *Malloy v. Hogan*[30] held that the Fifth Amendment privilege against self-incrimination was applicable to state criminal proceedings; at the same time, *Murphy v. Waterfront Commission*[31] indicated that a state witness could be compelled to testify, after invoking the privilege against self-incrimination, but that this testimony and its fruits must be excluded from any subsequent federal prosecution against the witness. The rationale of *Murphy* indicates that the grant of state immunity acts as a grant of immunity from federal prosecution unless the federal government is able to obtain evidence from another source. Presumably, the decision would cover a reverse situation by protecting a witness with a federal grant of immunity from state prosecution and further, perhaps, by protecting witnesses with immunity in one state from prosecution on the same testimony in a sister state.

The Pennsylvania Attorney General's brief in *Pennsylvania ex rel. Specter v. Mario Riccobene*[32] gave the following definitions of "transaction" and "use" immunity:

> This distinction may be illustrated as follows: if an individual receives 'transaction immunity' in a grand jury investigation of narcotics in which he also is compelled to discuss his participation in a murder, prosecution for murder could not subsequently be undertaken. Thus, the witness may not be prosecuted for any crime about which he is compelled to testify before the grand jury. In contrast, 'use immunity' is much narrower. The grant of immunity is limited to the actual testimony concerning the actual testimony which the witness is compelled to give. Thus, in a hypothetical [case] outlined above, although the actual testimony concerning the murder could not be used, the witness would still be subject to prosecution for the murder to which he referred if other independent evidence could be obtained.
>
> . . . [U]nlike a 'use' immunity statute where independent evidence derived from compelled testimony could be used, the 'transaction' immunity statute is an absolute bar.

The difference between these two types is basic to any legislative approach.

A model state witness immunity act was developed by the A.B.A. Commission on Organized Crime and approved in 1952 by the Commissioners on Uniform State Laws.[33] The Act provides that a witness who has invoked a valid claim of Fifth Amendment protection may be compelled to answer or provide evidence on the motion of the prosecuting attorney "and with the approval of the Attorney General or the court" in return for a grant of immunity from prosecution. A witness would still be vulnerable to a perjury prosecution on the evidence given in accordance with the order. This model provides for transaction, rather than use, immunity.

The A.B.A. Commission report on the Model Act discusses some inherent problems. The Commission felt that some prosecutors' offices were not subject to adequate supervision.[34] It was concerned that the immunity grant should not be too broad. It should be limited to evidence which would be protected by the privilege against self-incrimination. Where there is no privilege, there is no necessity to grant immunity.

The Organized Crime Control Act of 1970 substitutes a general witness immunity law for the many immunity provisions previously scattered throughout the U. S. code. It applies to proceedings before federal courts and grand juries, federal agencies, and either house or committees of Congress. Requests for immunity must be approved by the Attorney General or his designated assistant. The general nature of the law and provision for clearance through the Attorney General reflect recommendations of the National Commission on Reform of Federal Criminal Laws. The statute provides immunity for "testimony or other information compelled under the order," rather than for the entire transaction.[35]

New Jersey and Pennsylvania exemplify two current approaches to witness immunity laws. New Jersey's 1968 law provides that the Attorney General, or the county prosecutor with the Attorney General's approval, may request the court to order an individual to testify before a court or grand jury. "Such testimony or evidence may not be used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer" if he otherwise would have been privileged to withhold the information.[36]

Pennsylvania's 1968 statute, on the other hand, is a "transaction immunity" statute, providing that no witness shall be prosecuted "for or on account of any transaction, matter or thing con-

27. President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 200 (1967).
28. Remarks by Martin Danziger to Eastern Regional Conference on Organized Crime, Minutes of February, 1970 Meeting, Council of State Governments, 2.
29. *Counselman v. Hitchcock*, 142 U. S. 547 (1892).
30. *Malloy v. Hogan*, 378 U. S. 1 (1964).
31. *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964).
32. Supreme Court of Pennsylvania, Eastern Division, April Term 1970, No. 854.
33. *Council of State Governments*, 1953 SUGGESTED STATE LEGISLATION, 90.
34. A.B.A. Commission on Organized Crime, 1 ORGANIZED CRIME AND LAW ENFORCEMENT 35 (1952).
35. 18 USC § 6002.
36. N. J. STAT. ANN. 52-9M.

cerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence."[37] Pennsylvania's Crime Commission held that the statute far exceeds constitutional requirements and recommended a "use" type statute. It also recommended that, in court or grand jury proceedings, the prosecutor be required to obtain the approval of the Attorney General, who is in a position to cross-check with federal and state agencies concerning the merits and consequences of the proposed grant of immunity. Legislative committees would also be required to consult with the Attorney General before granting immunity. The courts, in each case, would oversee the immunity procedure.[38]

Maine's 1968 immunity statute requires the Attorney General to approve the prosecutor's request that the court compel testimony, and granted immunity for "any transaction, matter or thing" concerned.[39] Rhode Island's 1969 law was used almost immediately in the trial of the "boss" of Rhode Island.[40] Massachusetts enacted a witness immunity law in 1970.

The federal statute and those of several states make the Attorney General responsible for coordinating immunity grants. In New Jersey, the Attorney General has played a further role by developing forms for prosecutors to petition the Attorney General for approval of immunity. These furnish detailed information needed by the Attorney General to assess whether or not immunity was appropriate and that the legislature might eventually wish to know. The prosecutor is also requested to report whether the individual ultimately testified under immunity or not, and whether a conviction resulted.[41].

Controversy exists as to the extent to which later decisions changed the *Counselman* role, and as to whether transaction immunity is still required. Pending the court's confirmation or rejection of *Counselman*, questions of constitutionality will still handicap efforts to draft general immunity laws. The federal law assumed that *Murphy* and other recent cases indicate that complete immunity from future prosecution is not essential.[42] Others hold that the later decisions did not in fact change the *Counselman* rule. Authorities generally agree, however, that states should review their many immunity laws, which are often inconsistent, and consider a single statute.[43]

Related to witness immunity is the need to provide facilities to protect witnesses from possible criminal retaliation. Few states are now able to offer such security. The federal Organized Crime Act gives the Attorney General broad authority to provide for the security of witnesses and their families, and includes witnesses of state and local governments as well.[44]

2.84 Investigative Grand Juries

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

> . . .[A] grand jury is awesome. The right of subpoena vests it with power that no detective or agent can legitimately wield. The threat of perjury prosecutions can cajole timid witnesses into giving information which would otherwise remain hidden. When a witness is immunized, under a proper statute, he can be coerced into telling all he knows with the threat of contempt proceedings. Perhaps most importantly, the psychological effect of being called before the grand jury, of being summoned to answer questions in solemn surroundings before ordinary citizens—this can unnerve the most hardened *capo* in La Cosa Nostra.[45]

37. 19 P.S., § 640.3.
38. Pennsylvania Crime Commission, *supra* note 9 at 177-81.
39. ME. REV. STAT. ANN., 15, 1314-A (Supp. 1970)
40. Grant application, quoted in Office of Law Enforcement Programs, L.E.A.A., U.S. Dept. of Justice, 1970 STATE LAW ENFORCEMENT PLANS SUBMITTED UNDER TITLE I, OMNIBUS CRIME CONTROL ACT, 49 (July, 1970).
41. May 15, 1969 Letter to all New Jersey prosecutors from Attorney General Arthur Sills.
42. *See, e.g.*, Dept. of Justice comments on 5.30, *Congressional Record* S9702 (August 12, 1969).
43. *See* detailed description of state immunity statutes in DUKE L. J., *supra* note 25.
44. 84 STAT. 922, Pub. L. 91-452, 91st Congress, Title V, § 501-504.

While the composition and practices of the grand jury vary from state to state, a few generalities are common to many state systems. The membership of the grand jury ranges from fifteen to twenty-three in number. The grand jury investigates criminal matters presented to the jurors by a court, a district attorney or other prosecutor, or by a fellow grand juror. The proceedings are usually held behind closed doors and are somewhat less formal than court proceedings in that strict rules of evidence are not observed. The grand jury may subpoena witnesses and compel anyone but a prospective defendant to testify. Witnesses may, of course, plead the Fifth Amendment privilege against self-incrimination. If indictments should result from the proceedings, the prosecuting attorney usually prepares them.[46] The findings which are a product of an investigation by the grand jury itself, rather than a prosecuting attorney, are termed a presentment.[47]

The grand jury is often criticized when criminal justice procedures are being evaluated; the suggestion is not uncommon that it be abolished.[48] However, as Judge J. Edward Lumbard pointed out in a recent defense of the grand jury, it has several distinctly valuable features. The grand jury can act as a safeguard for those accused of a crime, since it is not dependent on the judgment of one individual, as is a prosecutor system. Through its investigations, the grand jury can secure evidence for law enforcement officials. The grand jury can act as a community Ombudsman by investigating derelictions of duty by state and municipal office holders. The system of holding regularly scheduled grand jury proceedings tends to involve many different citizens in the criminal law processes of the community.[49]

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

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

45. Remarks of William S. Lynch to L.E.A.A. Conference, Norman, Oklahoma, March 4, 1970.
46. Law Student Research Council *Survey of the Grand Jury System*, 3 PORTIAE L. J. 70, 81-82 (1967).
47. *See* discussion in The Council of Younger Lawyers of the Federal Bar Association, THESE INALIENABLE RIGHTS 37 (1968).
48. Melvin Belli, *The Useless Coroner and the Redundant Grand Jury*, 6 TRIAL 51, 52 (Feb./Mar. 1970).
49. J. Edward Lumbard, *The Criminal Justice Revolution and the Grand Jury*, 39 N. Y. STATE B. J., 397 (1967).

the Attorney General or Governor.[50] In California, for instance, special investigators may be hired to examine the records of public officials. The California Attorney General is authorized to hire special counsel and investigators at the request of the grand jury. He may also have a grand jury impaneled at any time he deems necessary and may take full charge of the grand jury presentation.[51] Finally, the Commission recommended that the grand jury should be able to file a public report regarding organized crime conditions in the community.

A 1968 New Jersey law empowered the Attorney General to petition a State Supreme Court judge to convene a statewide grand jury. The judge may impanel such a grand jury for a "good cause," provided the Attorney General presents a showing that the matter cannot be handled by a county grand jury. The Attorney General or his designee presents evidence to the state grand jury, which has the same powers as a county grand jury.[52]

Soon after the passage of the New Jersey State Grand Jury Act, the Attorney General established an organized crime legal unit within his office to coordinate criminal investigations, in order to obtain indictments before the state grand jury. Between March and November, 1969, this unit was able to obtain indictments against thirty-eight defendants.[53] A Division of Criminal Justice was established in the New Jersey Department of Law and Public Safety by the 1970 legislature. It includes a Special Prosecuting Section that will work with the two statewide grand juries in selecting cases and charges.[54]

A few other states give the Attorney General powers in grand jury investigations. In Ohio, for example, he may initiate a special grand jury for conspirary to defraud the state. In Michigan, he can apply to the circuit judge to convene a grand jury. Nevada and California allow the Attorney General to appear before the grand jury, examine witnesses, and present evidence.

The federal Organized Crime Control Act (Title I) authorizes the Attorney General, the Deputy Attorney General, or designated Assistants to request the chief judge of any judicial district with more than four million inhabitants to order that a grand jury be convened. The grand jury serves for up to eighteen months; extensions may be granted for up to thirty-six months. The grand jury is required to "inquire into offenses against the criminal laws." The court may order that additional grand juries be impaneled.

At the completion of its term, the grand jury submits to the court a report on organized crime conditions and "concerning non-criminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public official or employee as the basis for a recommendation of removal or disciplinary action." This includes a federal, state, territorial, or local officer or employee. A copy of the report must be given to the officer or employee and he has at least twenty days to respond. His response becomes an appendix to the report, except for any parts which the court considers

50. Task Force on Organized Crime. The President's Commission on Law Enforcement and Administration of Justice. TASK FORCE REPORT: ORGANIZED CRIME, 16 (1967).

51. G. Robert Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases*, in Task Force Report, *supra* note 50 at 80, 84. footnotes omitted *Contra, see* comment, *The Propriety of a Breach of Grand Jury Secrecy When No Indictment is Returned*, 7 HOUSTON L. REV. 341, 345-46 (1970).

52. N. J. REV. STAT. 2 A:73-A-1-8 (1968).

53. Attorney General Arthur Sills, New Jersey's Approach to the Problems of Organized Crime, Remarks to a National Association of Attorneys General Workshop at Woodbridge, New Jersey, November 10, 1969.

54. Interview with David Lucas, Chief, Criminal Division, New Jersey Department of Law and Public *Safety, Trenton, N.J. September 24, 1970.*

have been inserted "scandalously, prejudiciously, or unnecessarily." Subject to certain other conditions, the report is then given to the officer or body who has jurisdiction over the person concerned. These provisions for the individual to reply apparently are based on a 1964 New York statute.[55] The American Bar Association was among the groups which opposed public grand jury reports on non-criminal misconduct of officials.

2.85 Extended Sentencing

The 1970 Organized Crime Control Act provides increased sentences for certain offenders. The President's Commission had proposed[56] that federal and state laws be enacted to provide extended prison terms "where the evidence, presentence report, or sentence hearing shows that a felony was committed as part of a continuing illegal business in which the convicted offender occupied a supervisory or other management position."

The law[57] provides that the prosecutor may file with the court notice that the defendant is a "dangerous special offender", "setting out with particularity" the reasons for such belief. Such allegation may not be disclosed to the judge or jury prior to plea of guilty or a finding of guilt. After a plea or finding of guilty for a felony, the court holds a hearing. The court may withhold part of the presentence report for specified reasons. If it "appears by a preponderence of the information" that the defendant is a dangerous special offender, the court may sentence him for a term not to exceed twenty-five years "and not disproportionate in severity to the maximum term otherwise authorized by law for such felony." Appeal may be taken from the special sentence.

The definition of special offender given is complex, requiring that: (1) he has been previously convicted for two or more offenses committed on different occasions, and punishable by death or more than a year in prison. Less than five years must have elapsed between his release from prison for the first and commission of the second; or (2) the defendant committed the felony "as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise;" or (3) the felony was part of a criminal conspiracy with three or more other persons and the defendant did, or agreed that he would, "initiate, organize, bribe or use force as all or part of such conduct." The defendant must have been imprisoned for one of his previous offenses. This summary is a simplification of the actual definitions, which are complex.

The concept of extended sentences has been supported by many groups. The A.B.A. Standards for Sentencing Alternatives and Procedures would allow an increased term because of prior criminality, but cautions that "any increased term which can be imposed because of prior criminality should be related in severity to sentence otherwise provided for the new offense," if the court finds that such a term is necessary in order to protect the public from further criminal conduct by the defendant."[58] The A.B.A. Standard includes other restrictions. The American Law Institute's *Model Penal Code* and the National Council on Crime and Delinquency's *Model Sentencing Act* also provide for special offender sen-

55. *New York Code of Criminal Procedure*, § 253(a).

56. President's Commission, *supra* note 26 at 203.

57. 62 Stat. 837, 18 U.S.C. 3561-3574.

58. A.B.A. Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, Approved Draft, 1968, 3.3(a) (i).

tencing.[59] These three all favor some such sentencing as part of the general move toward special term sentencing, and away from mandatory minimum or maximum terms.

The federal Organized Crime Control Act requires that states enact legislation requiring that records of felony convictions be sent to the Attorney General. To achieve compliance, the U. S. Department of Justice suggests the enactment of language similar to that in 18 U.S.C. 3578 (c) (2), which permits repository records to be furnished a state if state law requires that:

> [U]pon conviction of a defendant in a court of the state or any political subdivision thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court shall cause a certified record of the conviction or determination to be made to the repository [established pursuant to section 3578 of Title 18 of the United States Code] in such form and containing such information as the Attorney General of the United States shall by regulation prescribe. . . .[60]

Section 2.64 of this Report discusses the right of the prosecution to appeal. Some states give the government a limited right to appeal inadequate sentences or orders terminating prosecution. These may be of considerable value in crime control.

59. American Law Institute, MODEL PENAL CODE, Proposed Official Draft, 1962, § 7.03, 7.04; Advisory Council of Judges, National Council on Crime and Delinquency, MODEL SENTENCING ACT, Art. III, § 5 (1963).

60. Quoted in The Council of State Governments, Washington Office, January 20, 1971, Memorandum to Attorneys General.

3. ORGANIZATION, ADMINISTRATION AND PERSONNEL

This chapter is primarily concerned with operation of Attorneys General's offices: how they are organized; how staff is recruited; what salaries are paid, and how much money is appropriated; how staff is directed and evaluated; what reporting and planning processes are used, and other aspects of translating constitutional and statutory authority into activities and programs. These practical considerations are the essential basis of any successful efforts to strengthen the office.

3.1 Relationship to State Government Structure

The importance of organization and administration are increasingly recognized by Attorneys General. Broad statutory authority and adequate appropriations do not ensure an effective office, unless good organization exists to effectuate them. One authority defines organization as:

> . . . the arrangement of personnel for facilitating the accomplishment of some agreed purpose through the allocation of functions and responsibilities. It is the relating of efforts and capacities of individuals and groups engaged upon a common task in such a way as to secure the desired objective with the least friction and the most satisfaction to those for whom the task is done and those engaged in the enterprise.[1]

Attorneys General apparently are becoming more aware of the importance of organization. This results from increases in responsibilities without concomitant increases in staff or funds, and the resulting need to ensure effective use of existing capabilities. Conversely, it also results from increases in staff and appropriations, which create new problems of management. More offices are undertaking reorganization studies, designing formal organization charts, hiring administrative personnel, and generally attempting to strengthen organization and administration. Attorneys General are also more cognizant of the issues involved in state government organization.

3.11 State Government Organization

Many facets of state administrative organization affect Attorneys General's offices. All Attorneys General render legal services to state agencies; how these agencies are structured helps govern how the services are rendered. Most Attorneys General are assigned some functions which could feasibly have been placed elsewhere; the scope of such functions has a bearing upon their traditional duties. The extent to which responsibilities relating to law enforcement are consolidated in state government helps determine the Attorney General's effectiveness.

State reorganization is a continuing process. Legislatures have often distrusted central control and created new boards or agencies each time a new program was promulgated. The result has been a "loose aggregation of departments, boards, commissions, and other agencies, without a single responsible administrative head to coordinate programs and activities."[2] One reason reorganization has been slow is that state governments have seemingly managed to operate relatively effectively, despite faulty organization. As one authority says:

> Taken function by function, the services of

1. John Gaus, Leonard White and Marshall Dimock, FRONTIERS OF PUBLIC ADMINISTRATION 66, 67 (1936).

2. J. Phillips, STATE AND LOCAL GOVERNMENT IN AMERICA 205 (1954).

state government are more often than not carried on satisfactorily, in spite of their not being properly grouped and related to one another and to the chief executive.[3]

Typical of many states is North Carolina, where 317 administrative units exist.[4] As in other states, there is considerable overlapping of functions and conflicts of jurisdiction inevitably arise. For example, eighteen different governmental units are concerned with the environment, fifteen different units with welfare services. While the problem would be accentuated in other states because of a multitude of appointment mechanisms,[5] in North Carolina all agency heads are directly responsible to the Governor. While such direct responsibility might be desirable, the inappropriately large number of agencies so taxes a busy Governor that he is unable to effectively control the administrative branch.

The need for reorganization has been recognized for over half a century. It was given incentive by President Taft's appointment in 1910 of a federal Commission on Economy and Efficiency. Within a year, New Jersey, Massachusetts and Wisconsin established similar commissions and fifteen states had done so by 1917. Illinois, in 1917, was the first state successfully to adopt a comprehensive reorganization scheme.[6] Virtually all states have since undergone extensive reorganization studies, and some have put the studies into effect.

The constant growth of state government makes reorganization efforts a process that is continually needed. For instance, as new issues emerge, established units of government want to incorporate the functions, but the units which acquire the new functions are not necessarily the most appropriate. Several units may acquire related responsibilities, which are then not properly coordinated. The great variety in organization of new functions is illustrated by consumer protection activities. Primary responsibility in a state may be assigned to the Governor, the Attorney General, a special agency, or a department of agriculture, or any combination of these. Agencies may compete before the legislature for authority and appropriations to administer consumer protection programs. The result may be inefficiency and ineffectiveness of administration.

The Council of State Government's *The Book of the States* reports biennially on reorganization. For instance, recently Colorado has consolidated its administration into seventeen departments, Florida into twenty, and Massachusetts into nine. By executive order California has adopted four "super" agencies to coordinate all activities of the executive branch.[7] Approximately two states undertake extensive reorganizations each biennium with many others having more limited reorganizations.[8]

The standards of reorganization were set forth by A. E. Buck as follows:

1. Administrative agencies should be departmentalized by functions performed.
2. There should be fixed and definite lines of responsibility for all departmental work.
3. The terms of office for all administrative officials should be properly coordinated.
4. Boards should not be utilized to perform purely administrative functions.
5. Administrative staff services should be coordinated.
6. There should be a provision for an independent audit.[9]

3. John Perkins, *Reflections on State Reorganization*, 45 AMER. POL. SCI. REV. 507 (1951).

4. State Government Reorganization Commission, STATE GOVERNMENT REORGANIZATION IN NORTH CAROLINA (April, 1970).

5. Clyde Snider, AMERICAN STATE AND LOCAL GOVERNMENT 281 (1965).

6. *Supra* note 1 at 211.

7. George Bell, *State Administrative Organization Activity 1968-1969*, 1970-71 BOOK OF THE STATES 135-138.

8. The Council of State Governments, 1962-63, THE BOOK OF THE STATES 135-138; 1964-65 THE BOOK OF THE STATES 138-140; 1966-67 THE BOOK OF THE STATES 127-129; 1968-69 THE BOOK OF THE STATES 123-125.

State governmental reorganization can be beneficial to the Attorney General in clarifying legal problems. When eighteen agencies concerned with the environment act independently of one another, for example, it is quite possible that the wrong agency will act to enforce pollution abatement mandates or that each will count on the others to act. Interjurisdictional disputes over authority would be lessened considerably if one agency handles all functions in one area. The Attorney General would be better able to furnish counsel for consolidated agencies than for many units.

3.12 Agencies Responsible to the Attorney General

Jurisdictions vary greatly in the scope and variety of functions they assign to the Attorney General in addition to the common core of legal duties.

N.A.A.G. has adopted a recommendation that, generally, the Attorney General's office should have responsibility only for those functions which involve law enforcement, legal services, or appropriate related services, such as investigations. This recognizes that his duties as the state's chief law officer are sufficiently broad to demand his full attention. In some states, however, where state services have been consolidated into relatively few departments and the Attorney General heads one of these, he will obviously have responsibility for many functions that are not assigned to him in most states.

Pennsylvania and New Jersey's Attorneys General, both of whom are appointive, have a greater variety of administrative assignments than do their colleagues. The Attorney General of Pennsylvania is in charge of the Bureau of Corrections, the Board of Probation and Parole, the Board of Pardons, the Bureau of Weights and Measures and the Pennsylvania Crime Commission, as well as the Department of Justice's more usual functions.

New Jersey's Attorney General is head of the Department of Law and Public Safety, which has about 4,500 employees and operating expenses of about $46 million a year. In addition to the Division of Law, the Department includes the Divisions of Criminal Justice, State Police, Medical Examination, Motor Vehicles, Alcoholic Beverage Control, Weights and Measures, Civil Rights and Professional Boards. It also includes the Racing Commission, the Police Training Commission, and the Veterans Loan Authority. A recent study by the Governor's Management Commission found some problems, including an unworkable span of control, the "semiautonomous inclinations of many of the operating units", some lack of coordination, and the lack of a strong administrative services group. While the study made recommendations for reorganization, it did not recommend that the Attorney General be divested of his existing responsibilities.[10]

The Governor's Commission recommended placing all administrative functions under six secretaries, one of whom would be the Attorney General. He would have the following agencies under him:

(1) A Civil Law Agency, with Divisions of Law, Civil Rights, and Administration;

(2) A Law Enforcement and Correction Agency, with Divisions of Defense, Criminal Justice, State Police, and Corrections and Parole;

(3) A Public Regulation Agency, with Divisions of Industry (including Bureaus of Banking, Insurance, Public

9. A. E. Buck, ADMINISTRATIVE CONSOLIDATION IN STATE GOVERNMENTS 5,6 (1938).

10. Governor's Management Commission, State of New Jersey, SURVEY REPORT AND RECOMMENDATIONS, 81-84 (1970).

Utilities, Alcoholic Beverage Control, Real Estate, Agriculture, Lottery and Sports), Standards (including Bureaus of Engineering and Safety, Labor Standards, and Housing Inspection), and Public Protection (including Bureaus of Consumer Protection, Consumer Credit, Weights and Measures, Professional, Occupational and Commercial Boards, and Public Information). The Attorney General's responsibilities would be greatly expanded under this plan.

Other states give the Attorney General various responsibilities in addition to those usually associated with the office. In Alabama, he is the State Securities Commissioner. In Tennessee and West Virginia, he is reporter for the state supreme court. In American Samoa, he is Chairman of the Immigration Board and head of the police and fire departments. South Dakota's Attorney General's Office includes Offices of Consumer Affairs, the Labor Commissioner, the Industrial Commissioner, Drug Control, the State Radio Communication System, and the Division of Criminal Investigation.

State reorganization plans formulated in recent years do not exhibit any clear trends toward either expanding or restricting the scope of the Attorney General's authority. As indicated, New Jersey recommended increasing his duties. A 1969 Pennsylvania plan recommended that the Bureau of Certification of Elections be taken from the Secretary of State and given to the Attorney General:

> The assignment of election functions will result in a greater degree of responsiveness because of the various legal aspects which must be considered in resolving election problems.[11]

A 1965 Michigan reorganization placed the function of supervision of charitable trusts with the Department of the Attorney General.[12] A 1970 New Hampshire Task Force report recommended the creation of a new position of counsel to the Governor, who perform certain duties traditionally assumed by the Attorney General, including legal guidance to the Governor in matters of policy.[13] The Vermont office acquired, by 1967 legislation, supervision over the Law Enforcement Training Council.[14] 1970 proposals for reorganizing North Carolina government would not alter the functions of the office of the Attorney General.[15]

Reorganization plans in some states would restrict the power of the Attorney General. The 1967 reorganization report in Colorado recommended taking four functions from the office of Attorney General:

(1) The State Information Agency was to be placed with the Department of Social Services;

(2) The Colorado Bureau of Investigation was to be moved to the Department of State and Local Services.

(3) The Division of Securities was to be placed with the Department of Regulatory Agencies, and

(4) The Legislative Reference Office was to be placed with the Legislative branch.

The reorganization report stated that in recommending such "the committee recognizes the desirability of having the Attorney General freed from many administrative duties in order that he and his staff may spend more time in fulfilling the major role of the office to serve as the legal advisor for

11. PENNSYLVANIA GOVERNMENTAL REORGANIZATION PLAN (January, 1969).

12. The Council of State Governments, 1966-67 THE BOOK OF THE STATES 127.

13. NEW HAMPSHIRE REPORT OF THE CITIZENS TASK FORCE (1970).

14. James Oakes, THE BIENNIAL REPORT OF THE ATTORNEY GENERAL OF VERMONT (1968).

15. State Government Reorganization Commission, STATE GOVERNMENT REORGANIZATION IN NORTH CAROLINA, 1970.

the state government."[16]

In Minnesota, the 1969 legislature took the Bureau of Criminal Apprehension from the Attorney General's office and placed it under a new state Department of Public Safety. The Consumer Protection Division was also taken from the Attorney General's office and placed in the Department of Commerce. Even where the Attorney General has primary responsibility for a function, his responsibility may be limited. A recent article, for example, notes that in California, sixty-one agencies deal independently with different aspects of the consumer protection issue and the legislature "has slashed funds for the Attorney General's Consumer Fraud Unit for the second year in a row."[17]

16. Colorado Legislative Council, REORGANIZATION OF THE EXECUTIVE BRANCH OF COLORADO STATE GOVERNMENT (Research Publication 131, December, 1967).

17. *New York Times*, August 9, 1970.

3.2 Organization of Office

Certain functions, such as issuing opinions and preparing briefs, are common to all Attorneys General's offices. Attorneys General also have in common the fact that they provide legal service for many or all state agencies. These common functions, however, have not led to any uniformity in organizational patterns.

As offices grow, there undoubtedly will be more emphasis on formal organization. This was not needed in the days when an Attorney General had only one or two assistants, but becomes imperative as personnel and functions expand and his duties become more varied.

3.21 Types of Organizational Structure

Organization is apparently not rigid in most states. Colorado reports to C.O.A.G. that "while there are assistants who are assigned particular duties, the assignment is determined by the Attorney General on the basis of need." Similarly, Delaware notes that "in practice the Civil and Criminal Divisions are still not rigidly divided—there is still some overlap." Tennessee's office is operated with a minimum of specialization: "assignments are neither permanent nor exclusive and it is expected that any member of the staff can perform any duty asked of him." Iowa's Attorney General's office reports that it is very flexible in work assignments and has no organization chart.

Georgia, Hawaii, Maine, Maryland, Nevada, New Mexico, and Oklahoma are among the states which report that all attorneys share in the task of writing opinions and in handling litigation. Oklahoma says that "every effort is made to give all assistants experience in all phases of the office's duties and responsibilities." California says that attorneys assigned to particular departments write opinions and handle litigation involving those departments: "some of the considerations involved are morale, plus the fact that these assistants working in a particular field soon become experts." In Kentucky, Assistant Attorneys General "are not assigned by either statute or regulation to sections or divisions; however, each of them specialized in various areas of the law upon assignment of the Attorney General."

Organizations may be grouped roughly into several patterns. At one extreme are the offices in which there are no formal divisions, although there may be some specialization. These include Nebraska, Tennessee, West Virginia, and Wyoming.

In North and South Dakota, Mississippi, New Mexico, and Louisiana, a slightly different pattern prevails. These offices have some specialized divisions. However, the major portion of the office staff works directly under the Attorney General or a chief deputy and not within the divisions. Some states have established identifiable consumer protection units, for example, although other functions are not separately organized.

In a third group of states almost all staff members work within divisions, but these divisions are few in number and perform very broad functions. Some, for example, have only a criminal and a civil division. Other divisions with broad functions include divisions of legal affairs, litigation and appeals. Within this third grouping are Alaska, Arkansas, Colorado, Guam, Kansas, Maine, Maryland, Montana, Oklahoma, Delaware, Idaho, and Samoa.

Most of the remaining jurisdictions demonstrate a more structured form of organization. These states have several divisions which perform both general

3.21 SECTIONS, DIVISIONS AND BRANCH OFFICES

Alabama ..... Office of Attorney General
Divisions (not statutory) in office:
Civil Division (3 attorneys)
Criminal Division (11 attorneys)
Opinion Division (all attorneys write opinion)
Highway Division (6 attorneys)
Exec. Asst. to A.G. handles administrative duties
A.G. is also the State Securities Commissioner

Alaska ..... Department of Law includes:
2 Civil Divisions
Criminal Division, with 5 district attorneys offices.
Branch offices in: Anchorage, Fairbanks, Juneau, Ketchikan and Nome.

Arizona ..... Department of Law
Divisions under the Chief Assistant:
Administrative Division
Criminal Division
Tort Claims Division
Consumer Fraud Division
Divisions directly under the A.G.:
Highway Legal Division
Land Department Attorney
Welfare Attorney
Appraisal and Assessment Attorney
Employment Security Commission Attorney
Power Authority Attorney
Narcotics Division

Arkansas ..... Office of the Attorney General includes:
Opinions Section
Litigation Section
Special Services Section

California ..... Department of Justice includes:
3 criminal law sections: Appeals; Writs; Advice, etc.; Trials and Investigations.
8 civil law sections: Administrative Law; Business Law; Condemnation and Torts; Government Law; Land Law; Public Resources Law; Public Welfare Law; Tax Law.
An Assistant A.G. is in charge of each Section statewide, and has a "lead man" in each branch office.
There are also special units:
Constitutional Rights; Consumer Frauds; Special Projects (incl. Trust and Trade Practices, Charitable Trusts).
There are offices in Sacramento, Los Angeles, San Diego and San Francisco. An Office Assistant is in charge of all personnel and administrative matters for each office.

Colorado ..... Department of Law includes:
Division of Inheritance tax (statutory)
Division of Legal Affairs (statutory)—23 attorneys, plus 2 special assistants and 3 part-time who are assigned to agencies which do not require full-time services. Two assistants handle appellate criminal cases full-time, and three more do so in connection with other duties. Six are assigned to the Highway Department. One administers the Consumer Protection Act.
1 Administrative Officer.

Connecticut ..... Attorney General's Office is divided into 16 units, each covering a different area of law. There are from 1 to 9 attorneys in each unit.

Delaware ..... Department of Justice includes:
Civil Division (statutory), under the State Solicitor.
Criminal Division (statutory), under Chief Prosecutor.
Administrative Assistant, Supervisor of Records and State detectives are also under the A.G. and chief deputy.
Additional deputies are authorized by statute, as local prosecutors: 3 for Kent County, 3 for Sussex County, 2 additional statewide.
1 Assistant assigned exclusively to environment.

Florida ..... Department of Legal Affairs includes:
Administrative Law Division
Civil Law Division
Criminal Law Division
Criminal Intelligence Division
Environmental Control Division
Land Division
Tax Division
Administrative Department (handles personnel and finance)
Branch offices: Tallahassee, Miami, Lakeland, West Palm Beach

Georgia ..... Department of Law includes the following divisions, each with about 5 attorneys, supervised by a Division Head:
I. CIVIL. Provides legal services to approximately 50 state agencies.
II. CIVIL. Provides legal services to approximately 75 state agencies.
III. CRIMINAL. Provides legal services to Corrections, Pardon and Parole Board, Department of Public Safety (Highway Patrol and Georgia Bureau of Investigation).
IV. HIGHWAY. Provides legal services to State Highway Department, including acquisition of land.
V. REVENUE. Provides legal services to State Revenue Department and handles revenue bond financing for state authorities.
VI. REAL PROPERTY. Handles legal aspects of real property transactions for all state agencies, excluding the Highway Department.
The A.G. and Executive Assistant A.G. supervise all assignments. Staff also includes an Office Manager, Administrative Assistant, and investigators.

Guam ..... The Attorney General's office includes:
Civil Division (6 attorneys)
Criminal Division (3 attorneys, plus a special investigator)
Divisions are established by statute and each is headed by a Deputy Administrative officer who is in charge of secretarial staff.
A Tax Attorney and a Land Attorney are hired under special contract.

Hawaii ..... Department of the Attorney General
Deputy A.G.s are assigned to advise specific agencies, and are supervised by senior deputies.

Idaho ..... Office of Attorney General has a civil and a criminal section.
Chief Deputy is in charge of Assistant A.G.s for tax, education, insurance, agriculture, water, land, health, public assistance, finance, employment, public utilities, plus all other minor civil agencies.
Criminal Deputy is in charge of Assistant A.G.s for all appellate criminal cases, habeas corpus, and post-conviction cases, penitentiary, state police, department of law enforcement, drug control and licensing boards.
Investigators are under the Attorney General.

Illinois ..... The Office of Attorney General has the following divisions:
Consumer Fraud
Charitable Trusts and Solicitations
Inheritance Tax
Civil Rights
Court of Claims
Corporations and Dissolutions
Habeas Corpus
Criminal Law
Air and Water Pollution
Antitrust
Financial Institutions
General Law
Income Tax
Most staff are located in Chicago and Springfield.

Indiana ..... The Office of the Attorney General includes the following sections, under the A.G., the Chief Counsel, and the Chief Deputy:
Highway Section (24 attorneys)
Appellate & Criminal (7 attorneys)
Schools & Professional Boards (2 attorneys)
Claims & Insurance (3 attorneys, 2 investigators)
Taxation & Financial (21 attorneys)
Departmental (21 attorneys)

Iowa ..... The Department of Justice has flexible work assignments.
Solicitor General is A.G.'s first assistant.
A Special Assistant A.G., with varying number of assistants, is assigned to each of the following: antitrust; highway commission; revenue department; social services; tort claims. Other Assistant A.G.s have various assignments, sometimes overlapping.

Kansas ..... The Office of Attorney General is divided into civil and criminal divisions, each headed by an Assistant A.G. One Assistant is assigned to consumer fraud. The non-legal staff includes investigators.

Kentucky ..... The Department of Law has the following divisions, established informally:
Litigation Section
Opinion Section
Administrative and Program Section
Consumer Protection Division
Assistant Attorneys General are assigned by statute to 4 state agencies; other Assistants are assigned by the Attorney General.

Louisiana ..... The Department of Justice has full-time staff at Baton Rouge and New Orleans. There are resident Assistant A.G.s in 7 other cities, who work part-time out of their own offices.
A special Tidelands Staff is under the A.G.'s supervision.

Maine ..... Department of the Attorney General operates as follows:
Deputy A.G. handles fiscal matters and is in charge of the office in the A.G.'s absence.
Chief Administrative Assistant assigns work, arranges staff meetings, etc.
Chief of the Criminal Division (statutory) supervises 3 Assistants who handle only criminal matters and 2 investigators. Division tries murder, narcotics, and gambling cases, advises county attorneys, and seeks to coordinate criminal prosecutions and investigations.
12 Assistants in main office are responsible for certain agencies, among other assignments.
Assistants assigned to departments do all legal work for those departments.
Law clerk dockets cases, manages library, prepares biennial report, etc.

Maryland ..... The Office of Attorney General includes:
Civil Division, headed by an Assistant A.G.
Criminal Division, headed by an Assistant A.G.
Consumer Protection Division, headed by an Assistant A.G.
Special Assistant A.G.s who are assigned as house counsel report to the Deputy A.G.
Investigators are assigned to "storefront centers" in Baltimore and visit other cities for the Consumer Protection Division.
Annapolis office operates during the legislature.

Massachusetts ..... The Department of the Attorney General includes the following divisions:
Administrative (includes section for By-laws [zoning]) (13 full-time, 2 part-time)
Citizens' Aid
Civil Rights (3)
Consumer Protection (3)
Contracts (6 full-time, 1 part-time)
Criminal (15)
Drug Abuse (4)
Eminent Domain (16 full-time, 8 part-time)
Employment Security (3)
Health, Education and Welfare (11 full-time, 3 part-time)
Industrial Accidents (5 full-time, 4 part-time)
Organized Crime (2)
Public Charities (4)
Torts and Claims (8)
Veterans' (1)
Branch office in Springfield (2)

Michigan ..... The Department of Attorney General has the following divisions, under the Chief Assistant A.G.:
State Agency Services
Civil Rights and Civil Liberties Division (2 attorneys)
Commerce, Licensing, and Regulation Division (9)
Conservation Division (6)

Education and Retirement Division (4)
Highway Division (19)
Labor Division (13)
Municipal Affairs, Social Services and Health Division (4)
State Affairs (3)
Enforcement Services
Solicitor General—Appellate Division (3 attorneys)
Criminal Law Division (6)
Organized Crime Division (1)
Consumer Protection, Charitable Trusts Division (2)
Detroit Office (4)
Public Administration Division (2)
Revenue and Collections Division (9)
Uninsured Motorists Division (3)
Deputy A.G. and Administrative Assistant are responsible to A.G.; Assistant Deputy for Legal Affairs, Chief Assistant A.G., Assistant Deputy for Administration, and Administrative Services are under the Deputy.

Minnesota ..... Office of the Attorney General has Solicitor General and a Chief Deputy A.G. Statutes provide for Assistant A.G.s to be assigned to: the Department of Public Welfare; the Department of Taxation; the Department of Conservation; the Department of Employment Security. Other Assistant A.G.s are assigned part-time to various departments and boards.

Mississippi ..... Department of Justice is authorized by statute 13 Assistant A.G.s and such special assistants as are needed. A.G. has appointed a First Assistant A.G. Department includes a special Civil Rights Division and a Criminal Division.
No statutory divisions; however, by administrative action, have established a Criminal Division to a Federal Litigation Division.

Missouri ..... The Office of Attorney General includes a First Assistant A.G., who has office management duties, and Assistant Attorneys General, some of whom are assigned to various agencies on a permanent basis. Special Assistant A.G.s are employed part-time. Investigators are employed full-time and part-time.
Consumer Protection Division.
Supervisors of Tax Collections are employed in Jefferson City, St. Louis and Kansas City.

Montana ..... Office of the Attorney General includes:
Criminal Division
Civil Division
Appellate Division
State and Federal Agencies Division

Nebraska ..... Department of Justice has no formal divisions.
Deputy A.G. and some Assistant A.G.s are located in the A.G.'s office; others in the agencies to which they are assigned.

Nevada ..... Department of the Attorney General has Chief Deputy A.G., 3 Deputy A.G.s, 1 investigator and 1 legal analyst in capitol.
17 Deputy Attorneys General and 2 Research Assistants are assigned to specific state departments; Gaming Commission and Gaming Control Board; Department of Health, Welfare and Rehabilitation; Department of Motor Vehicles; Department of Conservation and Natural Resources; Department of Commerce; Department of Highways.
Full-time Special Deputy A.G.s are assigned to: Colorado River Commission; Department of Highways.
6 Special Deputy A.G.s are assigned to specific cases for the duration of said litigation.
Branch offices in Reno and Las Vegas.
One Executive Secretary, Training Coordinator for the Peace Officers Standards and Training Commission.

New Hampshire ..... Attorney General's office includes:
General and Administrative Division
Charitable Trust Division
Criminal Division
Eminent Domain Division
Staff consists of A.G., Deputy, 7 Assistant A.G.s, 4 Attorneys, 1 Administrative Assistant, 2 Legal Research Aides, 6 Legal Stenographers, 1 Clerk, 1 Receptionist, Director of Charitable Trusts (part-time) and Registrar of Charitable Trusts.

New Jersey ..... The Department of Law and Public Safety is headed by A.G.
First Assistant A.G. serves as liaison between the A.G. and Divisions, as well as the Director of the Division of Law.
Divisions are as follows:
1. Division of Law, headed by Attorney General and administered by the Deputy Attorney General or an Assistant Attorney General—as a matter of practice, is administered by the First Assistant Attorney General. 5 Assistant Attorneys General are responsible for supervising the work of the remaining 80 Deputy Attorneys General with regard to litigation, appellate work, legislation, criminal work and general administrative services. Division of Law also includes: Office of Consumer Protection, headed by an Executive Director; Bureau of Securities, headed by a Bureau Chief; Bureau of Claims; Bureau of Escheats, headed by an Escheator, and the Bureau of Prosecution.
2. Division of State Police, headed by the Superintendent of State Police.
3. Division of Alcoholic Beverage Control, headed by a Director.
4. Division of Motor Vehicles, headed by a Director.
5. Division of Weights and Measures, headed by a Superintendent.
6. Division of Professional Boards, headed by the Attorney General.
7. Division on Civil Rights, headed by a Director.
8. Police Training Commission, headed by a Commissioner.
9. Division of State Medical Examination, headed by the State Medical Examiner.
10. Division of the Racing Commission.

Consumer Protection office located in Newark.

New Mexico ..... Department of Justice includes:
Deputy and 10 Assistant A.G.s, plus 64 special Assistant A.G.s (employed by departments). Deputy, in cooperation with A.G., assigns and coordinates work.
Consumer Protection Division
Other staff includes: Administrative Officer, Administrative Aide, and investigators.

New York ..... Department of Law personnel, both legal and clerical, are assigned as follows:
Albany Office
Administration, Executive, Personnel and Stenographic (59);
Appeals and Opinions (29);
Claims and Litigation (98);
Employment Security (2);
General Laws (25);
Labor Relations (1);
Law Library (4);
Legislative (2);
Mental Hygiene, Contract and Lien, Trusts and Estates (8);
Real Property (208);
Records (11);
Water and Air Resources (9).
New York Office
Administration (46)
Anti-Monopolies (18)
Charity Frauds and Miscellaneous Compliance (7);
Civil Rights (8);
Claims and Litigation (19);
Condominium, Theatre, and Syndication Financing (28);
Consumer Frauds and Protection (23);
Education (12);
Election Frauds (9);
Employment Security (23);
Executive (16);
Labor (27);
Litigation (28);
Mental Hygiene (12);
Real Property (20);
Securities (25);
Special Prosecutions (8);
Stenographic (57);

Trusts and Estates (14);
(Charitable Foundations Division) (15)
Auburn Office (3);
Binghamton Office (9);
Buffalo Office (23);
Plattsburgh Office (2);
Rochester Office (8);
Syracuse Office (14).

North Carolina ..... Department of Justice includes the following divisions:
Revisor of Statutes
Land and Contracts (1 Deputy, 23 other attorneys)
Education and Correction (1 Deputy, 4 attorneys)
State Boards (1 Deputy, 5 attorneys)
Local Government (1 Deputy, 4 attorneys)
Consumer Protection (1 Deputy, 2 attorneys, 5 investigators)
Special Legal Assistant and Special Administrative Assistant work directly with A.G.

North Dakota ..... The Attorney General's Office has 6 Assistant A.G.s, and about 10 Special Assistant A.G.s assigned to State Agencies.
Licensing Division has a Chief Clerk, 2 secretaries, 5 inspectors
Office also has a Consumer Fraud Division, Bureau of Criminal Identification and Apprehension, and State Fire Marshall.

Ohio ..... The Office of Attorney General has a First Assistant A.G., Chief Counsel, and other personnel assigned as follows:
Administrative Agencies (23 attorneys);
Claims (3 attorneys);
Highway (43 attorneys);
Aid for the Aged (1 attorney);
Liquor Control (3 attorneys);
Motor Vehicle—Point System (1 attorney);
Mental Hygiene (1 attorney);
Taxation (4 attorneys);
Workmen's Compensation (26 attorneys);
Bureau of Unemployment Compensation (10 attorneys);
Natural Resources (4 attorneys);
Public Utilities (2 attorneys);
Antitrust Division (3 attorneys, 1 accountant);
Agriculture (1 attorney);
Department of Public Works (2 attorneys);
Industrial Relations (2 attorneys).
Cleveland Office (8 attorneys)
Non-legal personnel include a public relations assistant, personnel assistant, finance officer, 28 investigators, 5 mail room, 29 stenographers and secretaries, 5 legal aides and librarians, 38 clericals and 1 docket clerk.

Oklahoma ..... Office of the Attorney General includes:
Bond Approval Section (1 attorney);
Criminal Section (3 attorneys);
Civil Section (8 attorneys);
A.G. or First Assistant A.G. coordinates and supervises work.

Oregon ..... Department of Justice includes:
Appellate Division (Solicitor General)
General Counsel Division (Senior Counsel)
Trial Division (Chief Trial Counsel)
Tax Division (Chief Tax Counsel)
Welfare Recovery Division (Chief Counsel)
Antitrust and Consumer Protection Division (Chief Counsel)
District Attorney Assistance Division (Chief Trial Counsel)
Portland Office (Chief Counsel)
Deputy Attorney General and Executive Assistant work directly with the A.G.
Offices are in Salem and Portland.

Pennsylvania ..... Department of Justice includes:
Office of Criminal Justice, which includes staff services to Crime Commission; General Crime Division; Major Fraud Division; Organized Crime Division
Office of General Counsel—Civil Law

Office of Taxation
Office of Human Rights
Executive Assistant and Public Relations officers serve under A.G. Executive Deputy A.G. helps supervise other offices and the following:
Bureau of Corrections
Bureau of Consumer Protection
Bureau of Investigations
Administrative Services
Branch offices in Erie, Philadelphia, Pittsburgh, Scranton, for consumer protection.

Puerto Rico ..... Department of Justice includes:
Office of the A.G.
Office of the First Assistant A.G.
Office of the Solicitor General (appointed by Gov.)
Office of Administration
Office of Legal Counsel
Office of Litigation and Monopolistic Affairs
The Office of the First Assistant Attorney General supervises: the Investigation and Criminal Affairs Division; the Property Registry; the Parole Board; the Administration of Penal Institutions; and the Prison Industries Corporation.
The Assistant Attorney General for Administration supervises the Finance, Personnel, and Service Division
The Assistant Attorney General in charge of Legal Counsel supervises the Opinions, Legislation and Codification Division.
The Assistant Attorney General in charge of Litigation supervises the General Litigation, Tax Cases, and Land Cases Division.

Rhode Island .....

Samoa ..... Department of Public Safety and Legal Affairs includes:
Office of the Attorney General
Police and Fire Departments
Immigration Division

South Carolina .....

South Dakota ..... Office of the Attorney General has no Chief Assistant or Deputy. There are:
9 Assistants located in A.G.'s office.
10 Assistants assigned to and paid by specific agencies (see Table 5.15).
5 Part-time special assistants for special duties; 2 of whom are paid by A.G.: Habeas Corpus; Antitrust; Probation and Parole; Highway Department; Dairy Marketing.

Tennessee ..... Office of the Attorney General has flexible organization.
Seven assistants, in addition to other duties, brief and try all appealed criminal cases; another spends most of his time attending to the business of the Department of Revenue; another handles insurance matters; and 2 others are responsible for the legal work of the Department of Highways.

Texas ..... Office of the Attorney General includes:
Law Enforcement Division
Oil and Gas Division
Highway Division
Insurance Division
Taxation Division
Water Division
Transportation Division
State and County Affairs Division (represents all state agencies not otherwise assigned; serves as primary opinion-writing division)
Antitrust and Consumer Protection Division
Bonds and Charitable Trusts Division
Crime Prevention Division (handles liaison with local police agencies)
Central staff consists of Attorney General; First Assistant (who serves as Executive Officer); Administrative Assistant (responsible for non-professional personnel); Executive Assistant (responsible for professional personnel). Division chiefs are responsible for daily operations.

Utah ..... Office of the Attorney General includes:
Business and Property Section (2 Assistant A.G.s)
Criminal Appeals Section (3 Assistant A.G.s)
Road Commission Section (6 Assistant A.G.s)
Opinions and Legislature Section (4 Assistant A.G.s)

Welfare Section (2 Assistant A.G.s)
General Opinions Section (2 Assistant A.G.s)
Deputy and Administrative Assistant serve under the A.G.

Vermont ..... Office of the Attorney General includes:
Deputy A.G.
Litigation Chief and 3 Assistants;
Two Investigators;
Local Affairs: Chief and 2 Assistants;
Environmental Control and Consumer Protection Bureau Chief;
Legislative task force (not a separate division) drafts and works for passage of legislation during session;
Consumer Protection Bureau Chief;
Collection, Social Welfare and Taxes, with 1 Assistant for each;
Governmental Affairs Chief and Special Assistant;
Under the Chief are Assistants for Education, Employment Security and Highways.

Virgin Islands ..... Department of Law has no formal organization, but includes the A.G., First Assistant A.G. and 10 Assistant A.G.s.

Virginia ..... Office of the Attorney General includes:
Division of Legal Services (commonly known as the Attorney General's Office; under First Assistant Attorney General).
Division of War Veterans Claims
Division of Central Criminal Records Exchange
Division of Promotion of Uniformity of Legislation.
Certain Assistant A.G.s are assigned to various departments.

Washington ..... Office of the Attorney General includes:
Administrative Assistant in charge of: Research & Information Services; Printing Services; Fiscal Services; Office Services; Information Officer
Deputy A.G. in charge of divisions of: Transportation; Torts; Utilities; Motor Vehicles; Pharmacy; Fish and Game; Agriculture; Liquor Control.
Deputy A.G. in charge of divisions of: Opinions and General Legal Revenue; Universities; Education; Public Assistance; Health; Institutions; Labor & Industries; Employment Security.
Chief Deputy A.G. in charge of divisions of: Legal-fiscal Affairs; Community Affairs; Public Employment; Insurance; Environmental Quality; Natural Resources; Parks & Recreation.
Deputy A.G. in charge of: Consumer Protection; Antitrust; Law Enforcement.
Branch offices in Seattle, Spokane, Tacoma, Everett, Vancouver, University of Washington (Seattle), Washington State University (Pullman), Central Washington State College (Ellensburg).

West Virginia ..... Office of Attorney General has Deputy A.G.s who supervise Assistant A.Gs. Administrative Assistant to A.G. has no legal responsibilities.

Wisconsin ..... Department of Justice includes:
Administrative Division (Administrator, 2 receptionists, 1 accountant, 1 Administrative Assistant, 2 clerical, 1 typist, 1 messenger)
Division of Criminal Investigation
Fire Marshal Bureau (1 Chief, 6 Fire Marshals, 1 clerical)
Intelligence Bureau (1 Chief, 4 special agents, 3 clerical)
Enforcement Bureau (Director, Training Officer, 41 investigators, 1 chemist, 10 clerical)
Crime Lab Division (1 Administrator, 1 Administrative Assistant, 13 crime lab analysts, 8 clerical, 3 part-time)
Legal Division (1 Administrator, 39 attorneys, 19 clerical, 3 investigators)
Executive Assistant and Deputy A.G. work directly with A.G.

Wyoming ..... Office of the Attorney General includes A.G., Deputy A.G. and 3 Assistant A.G.s at the capitol, 10 Special Assistant A.G.s who are assigned to departments.

and specialized functions. Personnel are assigned to a specific section or division, with specialized responsibilities.

Table 3.21 lists the sections, divisions and branch offices of Attorneys General's offices. Many of these offices have formal organization charts which clearly delineate the relationships between the various units. In Vermont, for example, the Deputy is shown directly under the Attorney General. Under him are six units: Governmental Affairs, Collections and Taxes, Consumer Protection, Environmental Control, Chief Investigator, and Litigation. Although this is a relatively small office, with only twenty-five full time employees, it recognizes the advantages of carefully-developed organization and methods.

Washington, with more than 130 attorneys, has developed a detailed series of organization charts to delineate relationships and responsibilities. A Pennsylvania Department of Justice chart shows an Executive Assistant and a Public Relations specialist as staff to the Attorney General, and an Executive Deputy as his subordinate. Under the Deputy are four offices and four bureaus. Wisconsin shows an Executive Assistant to the Attorney General and a Deputy. Under the Deputy are four divisions; one of these divisions includes three bureaus. Florida's chart has an Administrator who reports to the Attorney General, but no Deputy. There are seven divisions responsible to the Attorney General.

Some of these states have branch offices as well as divisions. This complicates considerations of whether organization should be divided according to procedures, (administration, litigation, appeals), substantive areas of law, (civil and criminal), or clientele (state agencies, consumers). There is no single best plan, but each state should plan an organization that best meets its own needs.

Some states have divisions of both substantive law areas and procedures, in addition to clientele-oriented divisions. Michigan, for example, has divisions for Criminal Law, Organized Crime, Consumer Protection, Appeals (Solicitor General), Commerce and Licensing, in addition to a Detroit office. The abstract rule that all divisions at a certain level should be of equal importance is also violated by the fact that the staff for these divisions range in size from one to nineteen persons.

In California, major branch offices have section heads who supervise personnel in that office. Personnel are also subject to supervision by an attorney in charge of that division; if they are in a Land Law Section within the office, for example they also are under the supervision of an assistant who oversees all land law work for the state. The dual supervision may violate principles of administration, but Assistant Attorney General T. A. Westphal said that it is "a crazy system, but it works. The guiding criteria for any office should be 'does it work'."[1] Experience both in the state and in other states, should take precedence over abstract principles.

3.22 Sections and Divisions

Some states have no divisions, several have two (usually civil and criminal), whereas many states have over ten. New York has a total of thirty-two divisions, of which twelve are in Albany and twenty in New York City. Five of the twenty New York City divisions perform functions identical to Albany divisions. As expected, the number of divisions is usually related to the size of the legal staffs in the states. Often, divisions parallel the agencies which the Attorney General is required to represent. In other cases, for instance, Hawaii and Nevada,

1. Interview with Assistant Attorney General T. A. Westphal, Jr., in San Francisco, California, April 21, 1970.

lawyers are simply assigned to specific state agencies without being incorporated into a division structure.

The categorizations of sections below refers only to sections within the office of the Attorney General which are staffed with professional legal personnel.

The size of the divisions or branches might vary considerably. When a division has a very small staff, such as a single attorney, it may indicate that it is so important that the Attorney General wants no division head between him and the staff. It may indicate that the particular area needs the emphasis that designation as a division can provide. On the other hand, a large number of small divisions reporting to the Attorney General might not be the most rational arrangement. More divisions require more supervision, more reporting, more coordination. In the usual pattern where there are divisions, a high-ranking staff member is in charge of a division. In North Carolina and Idaho, these division heads are designated as Deputies. In Florida, they are Directors; in Iowa, Special Assistants; in California, Assistants; in Oregon, Chief Counsels. These division heads then supervise the work of other staff attorneys.

Many competing concerns face the Attorneys General as they contemplate arrangements of their office. On the one hand, a permanence of organization aids staff in definition of tasks and helps clarify communication links. On the other hand, permanence can cause a distortion of work load, vested interests and unhealthy competition. Studies of public administration can only point out the implication of particular arrangements. They cannot designate "one best way".

The greatest number of divisions deal with criminal and public safety concerns. Criminal divisions *per se* exist in the offices of twenty-one Attorneys General. California also has sections dealing with criminal appeals, trials, and investigations. Illinois has a habeas corpus division. Sections concerned specifically with criminal identification, records, and intelligence are found in Florida, Pennsylvania and Wisconsin, North Dakota, and Virginia. Law enforcement divisions exist in Texas and Washington. Michigan and Massachusetts have organized crime sections. Oregon has a division for assistance of district attorneys. Nine states have highway divisions, and others have divisions for motor vehicles. Additionally, there are liquor control divisions and narcotics divisions in a few states.

A civil section or division exists in sixteen jurisdictions. However, almost every jurisdiction with formal organization has a division with civil law. Sections which are concerned with litigation are found in five states; a section concerned with state boards and agencies, in three states.

Antitrust and consumer protection divisions are listed by seventeen states. Divisions dealing with conservation, natural resources and the environment are found in thirteen jurisdictions. Revenue and taxation sections are found in thirteen states, and sections on bond approval in two states.

Among the multitude of other sections are five dealing with civil rights, seven concerned with opinion writing, five with litigation and ten with the administration of the Attorney General offices.

3.23 Branch Offices

N.A.A.G. recommends that branches of Attorney General's offices should be established in large cities where other state agencies have branch offices, to enable them to render service more expeditiously. Fourteen states now maintain branch offices, according to information furnished to C.O.A.G. Table 3.22 lists the location of branch offices.

In only one state, Maryland, is the Attorney General's official address a city other than the capital. His office is located at Baltimore, and an office at the capital is staffed only during the legislative session.[2]

In both California and Illinois, most staff are assigned to offices in cities other than the capital, and the Attorney General spends as much time at the branch office as at the capital. Branch offices are usually located in the state's larger cities: New York's Attorney General has a branch in New York City, Illinois in Chicago, Ohio in Cleveland, Oregon in Portland, Michigan in Detroit, and Washington in Seattle.

The New York Attorney General has staff in eight cities. The Albany and New York City offices are much larger than the others and are divided into functional units. Some of these appear to be exclusive; the Albany office, for example, has a nine-man section for Water and Air Resources, but the New York City office has no comparable unit. Both offices, conversely, have Employment Security Divisions. The staff of the other branch offices ranges from two in Plattsburgh to twenty-three in Buffalo.

In Pennsylvania, according to the budget document, "a staff of attorneys is maintained throughout the Commonwealth and is generally assigned to larger counties where direct supervision from Harrisburg is impractical". Alaska reports offices in Anchorage, Fairbanks, Ketchikan, and Nome. The Alaska pattern of decentralization results in part from the fact that the Attorney General has control over all local prosecutional functions. This is also the case in Delaware where the county prosecutors offices are in reality branch offices of the Attorney General, as the prosecutor is a deputy Attorney General.

A North Carolina branch office in Asheville has two professional staff members. Missouri maintains special offices for tax collection in two cities. Washington has branch offices at colleges.

In Louisiana, the Department of Justice staff is divided between Baton Rouge and New Orleans, but there are also resident Assistant Attorneys General in seven other localities. These are part-time assistances, who work out of their own offices. In Nevada, "the main reason for branch offices is to handle legal matters for branches of state agencies located in Reno and Las Vegas area . . . , they handle some, but not all, of the litigation and administrative hearings in that area. All opinions are written in the central office." Massachusetts' branch office in Springfield was first established to handle eminent domain matters in that part of the state. Now, it handles all departmental matters arising in that part of the state and has a staff of two attorneys, two research assistants, two investigators and two secretaries.

There appear to be no constitutional restrictions on the maintenance of branch offices. However, many constitutions require that the Attorney General maintain offices at the capital.

The number of states which have opened branch offices indicates these may meet a real need, particularly where the capital is not located in the major metropolitan area. A further consideration is that it may be easier to recruit staff to work in a city than in the capital, if the capital is a town with limited resources.

3.24 Reorganization

Any office structure must be subject to review and reorganization. In all reporting jurisdictions, the Attorney General may reorganize his office, although the consent of another official may be required. Information on this subject is not available from Kansas or Louisiana. Reorganization is generally taken to mean the creation or rearrange-

2. Attorney General Francis B. Burch, ANNUAL REPORT FOR 1968.

ment of functional units, which involves substantial reassignment of staff.

In Samoa and Hawaii, reorganization requires approval of the Governor. New Jersey stipulates that reorganization of the office may not extend to the creation of new bureaus or division. In Guam, new positions may not be created, and primary personnel are prescribed by statute in Wyoming. Classified civil service provisions and budgets also limit the reorganization plans in many states.

Indications are that internal reorganization is a constant concern of the Attorneys General. This may be in response to changing responsibilities, or reflect an effort to improve efficiency. The Attorney General of Vermont's 1968 Biennial Report commented upon reorganization:

> . . . .[T]he office has been reorganized into three divisions—Litigation, Opinions and Appeals and Legislation. This division, while generally of some use, has its own shortcomings, and it should be flexible. It is necessarily dependent on individual personnel and should not be subject to hard and fast bounds. The system of division has worked well but can be further improved upon.[3]

That office has since been subsequently reorganized, partly to emphasize new functions. Oregon, New Jersey and Washington are among the other states in which the Attorney General's office has been recently restructured.

3. James Oakes, THE BIENNIAL REPORT OF THE ATTORNEY GENERAL OF VERMONT, 12 (1968).

3.3 Administrative Procedures

Attorneys General, like other officials, are becoming more aware of the importance of good administrative practices and procedures. N.A.A.G. recognized in its recommendations that administrative functions should be clearly identified and should be performed by persons with appropriate qualifications. It further recommended that internal communications and controls should be constantly reviewed and that staff meetings, reports and other administrative procedures should be employed as appropriate.

3.31 Administrative Staff

Administrative staff are becoming increasingly important to Attorneys General. A study of the office of Secretary of State found a similar trend in that office because:

> For some organizations, separate staff personnel are probably unnecessary. But it seems clear that in larger secretariats, just as in large businesses, adequate planning, research, and advisory services cannot be provided by persons involved in the day-to-day management of a state department at the operational level of administration. Distinct and sufficient staff services become more essential as the size of a state department increases or as the allotment of the secretary's time becomes more heavily committed to *ex officio* duties connected with board memberships.[1]

Thirty-four Attorneys General's offices report that they have administrative and fiscal personnel, in addition to stenographic and clerical staff. These range from forty-eight such positions in California to one position in twelve reporting jurisdictions. A wide range of positions are included, such as administrative assistants, auditors, press relations specialists and budget officers. The N.A.A.G. recommendations recognize the advantages of employing personnel with training in management or public administration to handle administrative and fiscal matters.

A tentative plan of administrative functions distribution proposed for the Washington Attorney General called for an Administrative Assistant with responsibility for facilities coordination, special assignments, public and press relations, and public information. Under him were four other administrative positions: (1) a Research and Information Services Supervisor, responsible for research, law libraries, special reports, special information files, public inquiries response, and data processing coordination; (2) a Printing Services Supervisor, responsible for printing, binding, distribution, and general office support; (3) a Fiscal Officer, responsible for budget preparation, financial control, accounting, payroll, financial reports, and property inventory; (4) an Office Services Supervisor, responsible for personnel, purchasing, forms and office procedures control, supplies, files, mail processing, and reception.

The functions described in the Washington plan probably exist to some extent in any office, but are always consciously delineated.

Administrative functions would vary from one office to another, but most offices would have a common core of duties which might best be performed by a person trained in administration, rather than by an attorney. The list of duties below is based upon generalized observations of administrative functions in various offices:

(1) Budgeting - preparing budget requests and relating these to agency performance;

(2) Fiscal administration—supervising whatever payment or audit functions were performed by the agency;

(3) Planning—assisting policy-makers

1. James T. Havel, THE OFFICE OF STATE SECRETARY OF STATE IN THE UNITED STATES, the University of Kansas Governmental Research Series No. 36, 19 (1968).

in defining plans and goals for the agency and its components;

(4) Supervising non-professional staff —overseeing generally the assignment and supervision of support staff;

(5) Developing and maintaining routine forms, procedures manuals, and other written tools, with appropriate assistance from other staff;

(6) Supervising physical facilities—assigning space, supervising maintenance, and otherwise taking responsibility for the office;

(7) Developing and supervising information retrieval systems, whether these be simple files or complex computer systems;

(8) Handling routine personnel matters, such as approving leave requests and maintaining attendance and payroll records;

(9) Handling acquisition and distribution of supplies, books, and similar purchases;

(10) Supervising maintenance of case dockets, work assignments, "tickler" files, statistical indices of performance and similar records.

Particular assignments might range from developing a budget which projected far-ranging plans to arranging schedules for secretaries' coffee breaks. Not only is it wasting attorneys' legal skills to make them responsible for administrative matters, but these tasks are generally best handled by a single person in each office.

North Carolina's Attorney General created the position of Special Administrative Assistant, which is staffed by a non-attorney. His duties include working with the Attorney General to reorganize the office and to design and implement new office procedures. He was also made responsible for handling requests for assistance of a non-legal nature.

3.32 Administrative Structure

No formula has been found to ensure successful administration. As one authority has said:

> Organization is more than a matter of the structure of an individual enterprise or a department of government. It involves as its basic elements the physical acts of production and management or the intellectual acts of management and administration; and its main object is to secure an effective grouping of these elements or acts and of the human beings who perform them.[2]

Consequently, administration involves not only technical matters of structure and procedures, but the whole field of human relations. Extensive studies have produced no simple rules for the administrator to follow. There are, however, some concepts and practices that merit attention.

One key concept in analyzing organizations is hierarchy, or the relationships of superiors and subordinates. Attorneys General's offices would almost inevitably reflect some degree of hierarchy, as a single individual, the Attorney General, is the source of authority. Some line of authority or chain of command will exist between him and subordinate staff members. The number of persons subordinate to any individual in the hierarchy may be increased by increasing the number of persons directly responsible to him or by increasing the number of persons responsible to his subordinates.

Hierarchic level does not by itself determine the status of all positions. For example, an administrative assistant may have a lower rank than an administrator who appears several levels down on the line of authority. Hierarchic authority is never absolute; it is virtually always confined to a particular area of operations and limited by a superior authority. At the top of the organization, it is limited by the purposes and goals of the organization and by certain external controls.

2. Albert Lepawsky, ADMINISTRATION 254 (1949).

Bertram Gross has pointed out that hierarchic centralization of authority depends for its existence upon a certain amount of decentralization. The "centralizing effects" of the line of authority are brought about primarily through grants of formal authority from those at the higher positions on the line to those in lower positions. These grants may be stated specifically, as delegations of authority, or they may be explicit.[3]

Lines of authority also serve as formal channels for communication. The superior is expected to communicate with lower levels through such lines. He may maintain ultimate authority through his right to review the decisions of his subordinates, but he does not have a direct personal relationship with most of them. The lines serve also as possible ladders for advancement within the organization. This may provide incentive and strengthen identification with the organization. However, an overly-rigid hierarchy may lead to stagnation and general breakdown in meaningful communications.

Though traditional hierarchic models are often built on the assumption that every subordinate has only one direct superior, actual practice may deviate considerably from this pattern. Two or more lines of authority may converge upon one subordinate. This may result from a distinction between different kinds of authority. For example, there may be superiors relating to functions as well as professional matters. One member of the organization may be superior to another only in a specialized area. Some form of multiple hierarchy may also be appropriate in appeal procedures, the purpose of which is to allow subordinates to bypass their superiors.

3. Bertram Gross, ORGANIZATIONS AND THEIR MANAGING 222 (1964).

An analysis of one federal agency argued that:

> The theory of hierarchic decentralization should openly proclaim that lines of authority in the organization are frequently dual or even multiple, that the reaction of technology on administration is apt to increase the proportion of situations in which such conditions exist, and that the arrangement of structure and the training of personnel must provide for nicely divided loyalties.[4]

This study emphasized the distinction between administrative authority and technical authority. Authorities suspect that studies would reveal that a substantial proportion of intra-organizational disputes reflected confusion concerning lines of authority. Although few would question the need for patterns of hierarchy within organizations, overemphasis on vertical relationships should be avoided. With the growth of specialization and interdependence, there arises a greater need for horizontal relationships.

Another key concept is polyarchy, or shared responsibility, a relationship in which co-ordinates share responsibility for the same tasks or services. When a particular problem relates to the interests of a number or units within the organization, there are few other ways to meet it. One alternative might be to redefine the roles of individual units, but this may be costly as well as time consuming. Another might be to turn the problem over to one unit in the regular hierarchy, but this is often not feasible when the interests of several units are involved. At some point in the process, communications among units are almost certain to be necessary. Committee may serve to bring together people from different levels in the hierarchy and enable the administrator to have direct contact with those several steps below him. Committees may also

4. A. Macmahon, John Millett, G. Ogden, THE ADMINISTRATION OF FEDERAL WORK RELIEF 236 (1941).

play an important role in adjudicating disputes which arise within an agency, or assist in the recruitment, evaluation, and promotion processes. They may also be used to mobilize an organization for action or, conversely, to delay some unwanted program.

Another generally recognized administrative concept is the span of control, or the number of persons who report directly to a superior. Many public administration authorities believe that supervision should be limited to seven subordinates and that the administrator should exercise direct control over at least three subordinates. E. G. Hart wrote:

> The 'three and seven' rule is a very important one in the matter of division. When one divides, it should, if possible, be into not less than three, and not more than seven parts. If there be less than three, there is a great temptation for the head to interfere and take personal control of one or both the divisions under him. Also, where the divisions are equal in all respects, two is too small a number to get any of the benefits of friendly competition. When the number of divisions is more than seven, there are too many to inspect and control adequately. It is not always possible to divide according to the 'three and seven rule'—geographical or other considerations may forbid; but where possible everything should be done to secure it.[5]

Mitigating the "three and seven rule" is the belief that communication is impeded when there are too many levels in a hierarchy. It should also be pointed out that there is nothing magical in these particular numbers.

John D. Millet argued that the ideal number of subordinates depended upon such factors as the supervisor's personal capacity, the other demands on his time and changing circumstances.[6]

Direct contact on a continuing basis perhaps is a fitting criteria for selecting a particular span of control. Recent developments in communication technology probably permit a supervisor to be in direct contact with more people, but even communications systems will not permit Attorneys General to have direct, continuing contact with their entire staffs. They must, therefore, delegate authority and divide their tasks in order to effectuate an optimum degree of control.

3.33 Personnel Administration

Section 3.4 of this Report describes the staff of Attorneys General's offices. This section considers staff only in terms of the administrative process.

A report on *Modern Court Management* by the Director of an L.E.A.A.-funded court management study[7] notes that the quality and quantity of professional service is determined in large part by support staff, and raises the following questions concerning personnel:

> Does the court have enough competent employees?
>
> What uniform standards of employment should be followed by the court?
>
> How should court employees be trained?
>
> Is there a way to motivate for higher levels of performance?
>
> Is it possible to convince employees to make organizational goals their own?
>
> Who will maintain relationships with groups of employees who are not directly hired by the court . . .?

These questions should be considered by Attorneys General in evaluating their own personnel administration.

The administrator must continually evaluate, or compare actual with desired performance, on both the individual and the organizational level. Evaluation may be formal or informal, but it exists in every office, and is the basis for promotions, assignments, and all phases of personnel management. Its validity depends upon its basis, its content, and how it is conducted. A sound evaluation is based upon the agency's goals as expressed in its administrator's plans. The agency's goals will be achieved if individuals perform in a satisfactory manner at a specified time. The effectiveness of any evaluation depends upon the plans which serve as its basis. Both the administrator and the individual being evaluated should be thoroughly familiar with these plans. Seeking agreement in these standards prior to the formal evaluating process may aid in: (1) clarifying the administrator's own thinking; (2) alleviating later morale problems; and (3) bringing the administrator and subordinate together in a working relationship. Evaluation should involve concrete examples of performance, because the administrator might have overlooked circumstances pertinent to the evaluation.[8]

Bertram Gross has outlined some desirable traits in evaluation. An evaluator should: subordinate the evaluation to the objective of improved performance, as overemphasis on evaluation may undermine future performance; look at evaluations made by others as data to be evaluated rather than as final judgments; consider his own biases when making a judgment.[9] Evaluation is particularly difficult when it involves professional personnel such as lawyers.

Some problems can be avoided if a definite understanding concerning tasks is reached, and staff members are advised of office procedures, including evaluation. New staff members should be advised of the office's expectations concerning their performance. Many problems relating to performance can be solved through procedures which require frequent reporting. Written reports have the advantage of forcing the staff member to state his progress in a concise and explicit manner; conferences allow an interchange of ideas.

As an example of how an evaluation procedure operates, the work of staff attorneys in Ohio is evaluated at two crucial stages. New attorneys are hired as Assistant Attorneys. After five months, it is decided whether the attorney is capable of doing his own work, and making his own appearances. If he is favorably judged, he is given a substantial raise. He is evaluated again at the end of two years and is either promoted again or dismissed.[10]

As Attorneys General's offices grow in size it becomes increasingly difficult to maintain adequate internal communications. It is important that the Attorney General communicate his plans to his staff and that he learn from them. It is also important that individuals and units know enough about what others are doing to coordinate their efforts and avoid conflicts. In larger offices, it is difficult for staff attorneys to have sufficient access to the Attorney General, and for the Attorney General to keep informed about his staff's work. Even in smaller offices, he must carefully plan communications procedures lest he become overburdened with routine administrative problems.

One authority wrote that "A communication that cannot be understood can have no authority."[11] Accordingly, the problem of communication may be called a problem of understanding. Administrators tend to view communication as the dissemination of information; however, one could provide truckloads of information without improving understanding. Peter Drucker has written that "the essence of communication

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5. E. Hart, *The Art and Science of Organization*, 7 THE HUMAN FACTOR 337-338 (1933).

6. John Millett, MANAGEMENT IN THE PUBLIC SERVICE 162 (1954).

7. David J. Saari, MODERN COURT MANAGEMENT: TRENDS IN THE ROLE OF THE COURT EXECUTIVE, U. S. Department of Justice, Law Enforcement Assistance Administration, 6-7 (July 1970).

8. L. Thayer, ADMINISTRATIVE COMMUNICATION 161-65 (1961).

9. Gross, *supra* note 3 at 602.

10. Interview with Robert Macklin, Chief Counsel, Office of Attorney General, Columbus, Ohio, August 14, 1970.

11. Chester Barnard, THE FUNCTIONS OF THE EXECUTIVE 165 (1938).

is the ability and willingness to listen and to understand the interests and concerns of people in various parts of an organization."[12] Unless the administrator has enough imagination and knowledge to understand the behavior of subordinate personnel, communication is difficult.

Students of public administration have emphasized that communication is a two-way process. It consists of transmitting information and advice to an individual who is responsible for making particular decisions. Then decisions are transmitted to the other parts of the organization. This communication takes place both laterally and vertically throughout the organization. The expertise which influences decisions may exist at various points within the organization. Often an expert on a particular matter will wield heavy influence on matters relating to his special area of competence. Herbert Simon in *Administrative Behavior* suggested that decision-making be assigned to the member of an organization possessing the relevent information, but added that most decisions require the participation of several individuals. Consequently, a communication process should be set up so that the various inputs can be weighed by a central decision maker.[13]

Procedures to foster coordination include staff meetings, manuals and memoranda.

3.34 Staff Meetings

Of forty-five jurisdictions reporting to C.O.A.G. twenty-seven hold staff meetings regularly. Eight others hold staff meetings, but not on a regular basis, and one office reported that it planned to start regular meetings. Offices which do not hold regular staff meetings may actually meet often, on an irregular basis. There is considerable variation in who attends meetings, how frequently they are held, and who attends. Data are not available as to what records are kept of such meetings.

The larger jurisdictions, those which employ at least a hundred attorneys, all hold regular staff meetings, usually for different levels of personnel. Michigan reports that the entire staff meets at least twice a year to discuss general policy and departmental directives. Division meetings are held at least once a year, and more frequently if called by the division head. California holds numerous staff meetings. There are regular staff meetings of all section assistants. The location varies among the branch offices, partly for morale reasons. The legal work in California is divided into eleven sections and three units; some section leaders meet regularly every two weeks and others meet as the need arises.

New York holds bureau-head staff meetings monthly in New York City and yearly in Albany. Discussion usually focuses upon substantive and procedural legal problems and internal administration. Section chiefs meet once a month in Ohio. Participants also include the Attorney General, First Assistant to the Attorney General and the Chief Counsel. Both legal and administrative matters are discussed. Puerto Rico holds monthly meetings of top personnel and the Attorney General of Texas meets weekly with division chiefs and the administrative staff. Washington usually holds a meeting at least monthly.

In Minnesota, weekly staff meeting were held with division heads, who gave a brief report of the past week's activities and outlined the next week's projects. Each division head held a weekly meeting with his own staff.

At the other end of the scale, six offices with fewer than twenty attorneys report that they hold regular staff meetings, while four do not. Tennessee, Guam and South Dakota schedule weekly staff meetings, although those

12. Peter Drucker, THE NEW SOCIETY 191 (1949).
13. Herbert Simon, ADMINISTRATIVE BEHAVIOR 155 (1945).

3.34 ADMINISTRATIVE PRACTICES: STAFF MEETINGS

	Are Staff Meetings Held Regularly?
Alabama	No—meet in small groups on particular problems
Alaska	
Arizona	Yes—monthly when possible, attended by all Assistant Attorneys General
Arkansas	
California	Yes—some sections meet every 2 weeks, others as need arises
Colorado	No
Connecticut	Not regularly, but held as necessary, with all legal staff
Delaware	No
Florida	No
Georgia	Yes—Division heads usually monthly; entire staff 2-3 times per year
Guam	Yes—weekly for professional staff
Hawaii	No—hold meetings, but not on a regular basis
Idaho	No—held on an unscheduled basis
Illinois	
Indiana	Yes—Monthly or as the need arises; all deputies attend
Iowa	No
Kansas	
Kentucky	Yes—monthly or as needed
Louisiana	Yes—2 or 3 times per week, with all assistants
Maine	Yes—average about monthly, but not regularly
Maryland	Yes—at least monthly, with division heads
Massachusetts	Yes—Division heads monthly
Michigan	Yes—twice a year of whole staff; divisions at least annually
Minnesota	Yes—weekly for dept. heads; 6 times a year for full staff
Mississippi	Yes—frequency varies; all assistants attend
Missouri	No—held 4 times in 1969 with all attorneys present
Montana	No
Nebraska	
Nevada	No—held when necessary
New Hampshire	
New Jersey	No
New Mexico	No
New York	Yes—bureau heads meet monthly in NYC, annually in Albany
North Carolina	Yes—weekly for professional staff
North Dakota	No—held when necessary
Ohio	Yes—monthly meetings of Sec. Chief, Chief Counsel, First Asst. & Attorney General
Oklahoma	Yes—weekly, with all attorneys, to review opinions
Oregon	Yes—weekly with division heads and agency counsel
Pennsylvania	Yes—monthly with all deputies; exec. group of 5 meets weekly
Puerto Rico	Yes—monthly with Div. Chiefs and Asst. Attorneys General
Rhode Island	
Samoa	
South Carolina	No—held irregularly
South Dakota	Yes—usually weekly, attended by all Assistants
Tennessee	Yes—weekly with all staff members
Texas	Yes—weekly with Division chiefs and administrative staff
Utah	No
Vermont	Yes—monthly for all staff
Virgin Islands	No—will be held regularly to ascertain the status of assignments
Virginia	No
Washington	Yes—at least monthly, as needed
West Virginia	Yes—every two weeks, with all Assistants
Wisconsin	Yes—held irregularly about 4 times a year
Wyoming	

in the latter state are not always held. Staffs in Connecticut and Idaho meet as the need arises.

Most of the other jurisdictions hold staff meetings, with varying degrees of formality. In Oregon, the Staff of Attorneys Conference meets once a week for the review and approval of opinions which are ready for approval by the Attorney General. Meetings of the entire staff are held when the need arised. The Attorney General holds Monday morning staff meetings with division heads. He also holds Thursday luncheon meetings with the agency counsel. There are occasional meetings of the entire staff. In Pennsylvania, the Attorney General and deputies meet once a month to review departmental matters. In addition to this, an executive group of five meets weekly. Wisconsin's office has about four staff meetings a year. Possible topics for discussion include the pay plan, ways of handling mail, and docketing.

Although Alabama does not schedule regular staff meetings, the opinion committee meets as necessary upon the call of the Deputy and staff members having similar interests meet in small groups. Louisiana reports that staff meetings are held two to three times a week. All attorneys on the staff attend and opinion requests and pending litigation are discussed. In North Carolina, the Attorney General holds a meeting of all professional staff members every Friday afternoon to discuss the week's past activities, departmental programs of special interest and other matters. The meetings sometimes include outside speakers who discuss matters related to the administration of justice. These speeches are taped and available for subsequent review. The staff meetings thus become a vehicle for training, as well as communication. In Ohio, there are no general staff meetings, but each section holds meetings and the First Assistant holds regular meetings with the section chiefs. An office court meets each week to discuss pending opinions.

3.35 Procedures Manuals

Increasing attention is being given to the use of staff manuals to improve communication. N.A.A.G. recommends that procedures manuals should be developed for both professional and clerical staff and should be revised periodically. It further notes that responsibility for continuing review and revision of the manual should be definitely assigned.

A recent C.O.A.G. survey showed that, of forty jurisdictions responding, only seven states actually had manuals for professional staff, but four others were developing or planned to develop such a manual. The jurisdictions which have manuals are California, Georgia, Kentucky, Minnesota, New Mexico, Ohio, and Vermont. Iowa, Maryland, the Virgin Islands, and Wisconsin were developing manuals and may have them in use by now. Nine jurisdictions had or were developing manuals for clerical staff. The larger states are not necessarily the chief users of manuals.

California has one of the most comprehensive professional procedural manuals. It covers such matters as civil litigation, special procedures for civil matters, criminal appeals, writs, extraditions, administrative matters, dockets and briefs. Departmental policies are outlined in great detail. Various methods of communications and their appropriateness are discussed.

Maryland is in the process of devising a procedures manual. Each member of the staff and each secretary will receive the manual which will be in loose-leaf notebook form. Directives will be numbered 1-70, 2-70, etc.; the first number will represent the order in which the directive was issued and the second number the year. When procedures are amended, directives noting such amendments will be cross-referenced to the original.

Mississippi issues administrative directives by way of memorandum, "believed to be helpful in getting more efficiency from secretaries and greater input from all attorneys." South Dakota has a loose-leaf manual for clerical personnel. It includes sample copies of commonly-used legal pleadings and instructions for filing and docketing. Indiana also makes extensive use of manuals. There are written instructions concerning bill reviewing, advisory opinions, general office procedures and sick leave. Wisconsin recently adopted a clerical procedures manual and is now in the process of writing a manual for professional personnel. Ohio utilizes several manuals for professional personnel. Topics include administrative procedures, opinion instructions and Ohio Bar instructions.

Some Attorneys General have specialized manuals for particular staff areas. Washington's Consumer Protection and Anti-Trust Division has a seventy-page staff manual which describes office organization, files, and gives the addresses of better business bureaus, legal services centers, and Attorneys General's offices. Most of the manual is devoted to particular subjects ranging from "cleaning and dyeing" to "unsolicited merchandise." Thus, a staff member has printed guidelines on most problem areas.

Informal Communications

Some states prefer more informal communications. Concerning a manual, one small office replies: "Heaven forbid we ever have one." The absence of office manuals is not, however, limited to the smaller departments. New York, for example, does not use a manual for clerical or professional personnel, but policies are carefully spelled out through memoranda. Conferences are another device which may be used. Staff members whose work is unsatisfactory or who are having other problems may be called into the Attorney General's or a senior staff member's office for a conference, or the conference procedure may be used on a regular basis in order to follow as well as to direct the work of various staff members.

Informal communication is also important and may occur in many different ways, as through informal conversation among staff members. The Attorney General may tend to consult individuals for whom he has high regard outside the chain of command. One state reports that the Attorney General meets with individual staff members for lunch in order to discuss their work and outline plans. In North Carolina, staff members make reports to the Attorney General by using tapes which enable him to follow the work of the office more rapidly than would otherwise be possible. He can, for example, listen to reports while driving a car.

Many demands are placed on the time of the Attorney General and there are far more requests for his time than can possibly be granted. The Attorney General must spend a considerable amount of time meeting with other governmental and political leaders. He is sought after as a public speaker. Accordingly, his time must be carefully budgeted. Many persons with legal problems automatically seek his advice although the problem may more appropriately be referred to a subordinate. When an individual asks for an appointment with the Attorney General, his purpose may be determined and he may then be referred to an appropriate staff member. General legal inquiries which demand immediate attention may be directed to another staff member. Procedures must be developed to insulate the Attorney General from visitors and phone calls, and to schedule carefully his limited time.

3.36 Records and Reports

The nature of an Attorney General's office's work makes accurate records especially essential.

Report forms may be used to provide

a basis for evaluating performance. Massachusetts' Attorney General's office, for example, had a series of forms to be completed by various staff members.[14] These included both divisional and individual activity reports. The individual report was a four-page form calling for statistical data on opinions issued, cases disposed of and pending, the number of trials, hearings, briefs and other matters, the amount of money collected and saved, the number of administrative hearings attended, the number of legal instruments and accounts processed, the number of investigations conducted, and the number of bills drafted. These reports not only provided a statistical description of office activity, but were an objective basis for evaluating individual output.

Written reports and records may be used as as administration tool. California, for example, requires each of its eleven assistants in charge of law sections to furnish a monthly report, indicating the number of case dispositions and the number pending. This is related to the various clients that the office represents. Each month, an opinion report is prepared by the clerical staff. This provides an up-to-date picture of the opinion record. Missouri maintains a central record of cases through the use of docket cards, alphabetically arranged. Each case is assigned to a particular attorney. It then becomes his responsibility to maintain the current docket entries. A docket system is alsc maintained on a calendar basis, showing the date that pleadings are due.

Oklahoma keeps a card index which notes every statutory section cited or construed in a particular opinion. The index is updated on a monthly basis. Whenever an opinion cites a specific statutory section, the card bearing that number is pulled, along with other relevant information, such as the opinion date and addresses. This enables investigators to know at the outset whether an opinion has already been issued and avoids the likelihood of conflicting opinions.

Like many states, Utah makes several copies of all correspondence. There is a chronological file, as well as a file on each individual attorney. The office reports that the attorneys' file and the monthly chronological file are "helpful in analyzing our total product and that of each attorney." Utah also reports that this method enables the office to evaluate "the quality of the attorneys' work without snooping."

In Iowa, the Governor's Economy Commission suggested procedures "to create direct, definite lines of communication and responsibility" in the Attorney General's office. One was to establish an internal reporting system to allow the Attorney General to maintain closer control over operations. It suggested that each attorney submit a summary report of activities periodically, probably once a month, to his division head, who would then transmit summaries to the Solicitor General, who is the Attorney General's chief assistant. These reports would show cases, opinions, and other assignments disposed of and in progress.

Vermont pointed out that coordination and control are especially difficult in an office of attorneys since most attorneys work independently. Vermont prefers an informal approach to the problem:

> We encourage distribution of all opinions to the entire office and distribution of memoranda by attorneys as they work on cases in an attempt to at least let people know what's going on. We also encourage discussion among attorneys of cases which are being handled and insist upon periodic meetings between the Attorney General, the Deputy, and division heads for the purpose of briefing one another on office activities.[15]

14. Letter from Attorney General Elliott L. Richardson to Attorney General John B. Breckinridge, December 20, 1968.

15. Vermont Supplementary C.O.A.G. Questionnaire, June 30, 1970.

Further difficulties may arise from the fact that most Attorneys General must be highly cognizant of political, as well as administrative, factors. This obviously affects their priorities in using time, their relationship to staff members, some of whom may be informally involved in political planning, and their relationships to other individuals and agencies.

3.37 Planning and Evaluation

Long-term planning to determine goals and strategies for obtaining them is too often neglected. Minnesota's former Attorney General, Douglas M. Head, emphasized its importance. He held day-long seminars with the eight division heads at the beginning of each fiscal year. Originally, goals were set for the next three years, next one year, and for the next three months. The Attorney General would review each division head's plan with him, to see if it was adequate or if it was too far-reaching. Each division head also prepared job descriptions for his subordinates. Plans and job descriptions were carefully reviewed later to determine the extend to which they were met, providing an objective basis for evaluation.[16]

Some Attorneys General have contracted with private management firms to make studies of procedures and organization. The success of such an approach depends largely on the competence of the particular firm, but it can offer objective evaluation, based on broad experience. New Jersey and Oregon's Attorneys General both had such studies conducted upon taking office. In each case, analysts interviewed every staff member, reviewed all work operations, and submitted detailed designs for improving operations. Such studies should, of course, be viewed as a supplement to, not a substitute for, in-house planning and evaluation procedures.

3.38 Procedures for Transition

An important administrative problem about which little information is available is the transition when a new Attorney General takes office. The turnover in personnel may be virtually complete, or only one or two jobs may be affected. Procedures and policies may be changed drastically, or few changes take place. In either case, some formal procedures to smooth the transition are desirable. The N.A.A.G. recommendations include a statement that provision should be made for an orderly transition when a new Attorney General is elected. It further recommends that a staff member should be specifically assigned to work as liaison between the outgoing and incoming Attorneys General.

A study of gubernatorial transitions found that a new Governor needs the following to acquaint himself with his new position prior to inauguration: funds for staff; office space in the Capitol; provision for orderly transfer of records; briefing on routine office procedures; participation in budget preparation; access to primary information concerning budget and state policies.[17] Another study pointed out that effective transition must begin far ahead:

> The effective transition period should be recognized as existing both before and after the 'actual' transition period, customarily thought to exist from Election Day to inauguration. In fact, the transition begins as soon as the campaign starts and extends several months into the new administration.[18]

16. Letter from Assistant Attorney General Kevin P. Howe to Mrs. Patton C. Wheeler, November 30, 1970.

17. *See generally*, The Council of State Governments, GUBERNATORIAL TRANSITION (1968).

18. Thad Beyle and Oliver Williams, NEW GOVERNORS IN NORTH CAROLINA, POLITICS AND ADMINISTRATION OF TRANSITION 33 (1969).

In the case of the office of Attorney General, orderly transition would involve careful briefing on pending litigation, outstanding opinion requests and continuing investigations as well as administrative matters.

3.4 Personnel

Table 3.4 shows the personnel employed by Attorneys General's offices. Originally, Attorneys General served as individual legal officers for states, with possibly a clerk to assist them. Now, they employ not only attorneys and clerical staffs, but an increasing number of other categories, such as investigators, accountants and librarians. There is every indication that staff size will continue to increase at a rapid rate, and that a greater variety of skills will be represented on Attorneys General's staffs.

3.41 Number, Qualifications and Titles of Legal Staff

The quality of the legal staff and the efficiency with which it is used are the most important factors in determining the effectiveness of Attorneys General's offices. Attorneys General's offices employ a total of 2,760 attorneys full-time and 292 part-time. Other state agencies employ 730 attorneys full-time and 20 part-time. Additionally, an undetermined number of attorneys are employed as special counsel on a temporary basis. Table 3.4 gives the number of attorneys employed by each state.

The number of full-time attorneys ranges from four in American Samoa to 462 in New York's Department of Law and 246 in California's Department of Justice. The Attorneys General of Illinois, Ohio, Puerto Rico, Texas, and Washington each employ more than one hundred attorneys full-time. The jurisdictions are grouped below according to the number of full-time attorneys employed in the Attorney General's office.

Under 4: Montana, Nebraska, Samoa, South Dakota.
10-14: Arkansas, Delaware, Guam, Kansas, New Hampshire, New Mexico, Tennessee.
15-19: Alabama, Idaho, Kentucky, Louisiana, North Dakota, Mississippi, Oklahoma, Vermont, Virgin Islands, Wyoming.
20-25: Alaska, Arizona, Maryland, Maine, Nevada, South Carolina, Utah, Virginia, Rhode Island.
26-30: Colorado, Georgia, Iowa, Missouri, West Virginia.
30-49: Connecticut, Florida, Hawaii, North Carolina, Wisconsin.
50-99: Indiana, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Pennsylvania.
100 and over: California, Illinois, New York, Ohio, Puerto Rico, Texas, Washington.

In some jurisdictions, a large number of attorneys are employed on a part-time basis. Louisiana, for example, has seventeen full-time and twenty-one part-time attorneys. The part-time attorneys are located throughout the state and work out of their private law offices. The percent of time they work on state business depends on the complexity of problems assigned to them. Georgia and Missouri also employ a substantial number of part-time attorneys.

Titles

All jurisdictions use the title Attorney General. Titles of others staff members vary, so a title that indicates a certain rank in one jurisdiction may indicate a different rank elsewhere. In twenty jurisdictions, the top assistant is called the Deputy Attorney General; in four others, he is the Chief Deputy Attorney General, and in one he is the First Deputy Attorney General. In eleven jurisdictions, this top position is called First Assistant Attorney General. Iowa and Minnesota use the term Solicitor General. In Indiana, the Chief Counsel and the Chief Deputy Attorney General apparently are both directly under the Attorney General. The Attorney General of Georgia's chief aide is called the Executive Assistant Attorney General.

3.4 PERSONNEL OF ATTORNEYS GENERAL'S OFFICES: 1968-69 FY

	Attorneys (incl. A.G.)	Legal Aides	Investigators	Steno & Clerical	Administ. & Fiscal	Librarians	Other
Alabama	19			14			1
Alaska	20**			17			
Arizona	22	3	1	10		1	
Arkansas	14		1	8			
California	246	12	24	249	48	5	5
Colorado	28	2	1	6	1		
Connecticut	35						
Delaware	10&9PT*		5	21	2	3Title	Spec.
Florida	43		5	8	8	1	4
Georgia	28&13PT*	6PT*	2	19	4		13
Guam	11	2	1	6	1		
Hawaii	44		5	28			3
Idaho	17		1	5			
Illinois	101&223PT*						
Indiana	76		5	37	1	0	1
Iowa	30			10			
Kansas	10	3	3	7			
Kentucky	15	5		16			1
Louisiana	17&21PT*	2	2&3PT*	16	1	2	7
Maine	25		2	7	1		
Maryland	24		2	20	3		1
Massachusetts	92		16	61	9	1	11
Michigan	96	10	7	38			11
Minnesota	54	6	1	16	1		
Mississippi	15		1	12	1		
Missouri	28&10PT*		4&2PT*	24	4		
Montana	8&3PT*	1	2	4	1		
Nebraska	9			4			
Nevada	24&6PT*	1	1	4	3		3
New Hampshire	13			8			3&1PT*
New Jersey	89	2PT*	36	82	7		9
New Mexico	13	1	2	6&1PT*	3		1
New York	462	7	44	269	2		
North Carolina	45		4	35	2		1
North Dakota	17		5	8	2		6
Ohio	140	20	28	68	3	5***	6
Oklahoma	16	2	0	14	1		2
Oregon	97	3	10	76	2	1	0
Pennsylvania	59		35	84	46	1	42
Puerto Rico	164		9	115	91	2	
Rhode Island	20						
Samoa	4						
South Carolina	21&1PT*	4&2PT*		7	1		
South Dakota	9&6PT*	1-3	12	3	1		
Tennessee	13						
Texas	123	6		9	5	1	75
Utah	24	8		21	1		
Vermont	16	3PT*	2	7			
Virgin Islands	15	2	1	12	4	1	1
Virginia	22			15			
Washington	131	15	6	29	4	1	
West Virginia	29	7	1	22	2		7
Wisconsin	41		3	24	5		1
Wyoming	16	0	0	3	0	0	

*Part time; **Alaska: Plus 5 District Attorneys, 13 Assist. Attorneys, 14 clerical-stenos. ***Ohio: Classified as Legal Aides & Librarians

In other jurisdictions, these terms may be used for subordinate positions. Thus, Deputy Attorneys General in New Jersey are subordinate to Assistant Attorneys General, who, in turn, are subordinate to the First Assistant Attorney General. In California, Deputy Attorneys General are subordinate to Assistant Attorneys General, who are subordinate to the Chief Deputy. In most offices, however, the Assistant Attorneys General are subordinate to the Deputy Attorneys General.

The use of other titles is equally inconsistent among jurisdictions. The term Special Assistant Attorney General, for example, may refer to part-time counsel, as in Missouri and West Virginia, or to counsel assigned to or hired by a state agency, as in Iowa, Maryland and Montana. In South Dakota, the title refers to part-time Attorneys General working outside the capital, and in Mississippi it refers to a staff member who has not been a member of the bar long enough to be a regular Assistant Attorney General.

Qualifications

Specific data on qualifications required for staff attorneys are not available, but it can be assumed that bar membership is required, although law school graduates who have not yet passed the bar may be hired on a temporary basis. Kentucky, for example, requires that Assistant Attorneys General "shall each be a person admitted to the practice of law by the Court of Appeals of his Commonwealth and shall qualify by taking the oath of office."

Some jurisdictions have additional requirements, such as being a member of the bar in good standing for a stated number of years. Others, including Alabama and Connecticut, require successful completion of a civil service examination. Residence in a particular locality may also be required, as in Delaware, where certain Deputies must be practicing members of the bar in counties where they serve.

Most Attorneys General now conduct active recruiting campaigns. California pioneered in this. Former Chief Assistant Attorney General T.A. Westphal told a N.A.A.G. meeting that a new recruiting system was started in 1940, whereby personnel of the Attorney General's office visited law schools and talked to the top students. They were hired on a reduced salary basis after graduation until they could pass the bar examination and were allowed time to study for the bar.[2] This system is still in effect, but competition from private firms now makes recruitment more difficult.

Visits to law schools are now a routine recruiting procedure. Some states even visit out-of-state schools; Oregon and Washington's Attorneys General, for example, go to private universities in the east to talk to potential recruits. New Jersey's recruiting program includes advertisements in professional journals. Former Attorney General Elliot Richardson set up a three-man screening committee to interview applicants and check their references, as a step toward "maximum professionalization of the Commonwealth's law firm."[3]

3.42 Tenure and Civil Service

Recruiting a qualified staff is of little purpose unless that staff can be retained. A study by a firm of management specialists noted the particular importance of tenure in rendering effective legal services to state agencies:

> Tenure allows an attorney to develop specialized skills and intimate familiarity with agency operations. Because the activities and problems of state agencies are so diverse,

1. KY. REV. STAT. § 15.105.

2. N.A.A.G., 1953 PROCEEDINGS, 121-122.

3. Elliot Richardson, *Office of Attorney General: Continuity and Change*, 53 MASS. L.E. 21 (1968).

effective legal representation necessitates specialization in many fields and, in some cases, technical expertise in agency operational areas. . . . Clearly, the long tenure of house counsel is not only valuable, but essential for cost effectiveness. Recruiting and training new attorneys is an expensive, lengthy process. Moreover, since many cases and legal problems go on for long periods of time, changing attorneys causes considerable duplication of effort.[1]

Salaries, retirement and tenure all play a role in recruitment and retention of personnel. Attorney General Eugene Cook of Georgia commented to the 1960 National Association meeting that:

> There are three factors involved that must be considered when you recruit personnel, and number one is salary. It must be adequate, it must be attractive.
>
> Number two, is security. Lawyers must have some sense of security when they go into state government because they realize that primarily people in state government are under political pressure....
>
> Then the other is an incentive. The average young lawyer who comes into the office and seeks employment, asks the question, what incentive is offered me.[2]

Salaries have not caught up with private firms and the evidence indicates that the second of the factors, security, is also lacking in many jurisdictions. We do not have data on the reasons for high staff turnover in Attorneys General's offices; but these undoubtedly include salaries and lack of job security.

The attached table shows the length of service of legal personnel in those offices which have reported this information to the National Association of Attorneys General. Of thirty-four jurisdictions, twenty-six report that half or more of their attorneys have less than four years with the Attorney General's office. In only ten jurisdictions have 25 percent or more of the attorneys been with the office over ten years. In eleven jurisdictions, no attorneys have been with the office more than ten years. This low retention rate means, in effect, that Attorneys General's offices are training personnel to work elsewhere once they have gained experience.

Other available information bear out this contention. An article by a former Attorney General of Massachusetts noted that the change of Attorneys General in that state in 1966 involved a turnover in thirty-four of the seventy-four positions in the office, although both the outgoing and the incoming Attorneys General were of the same political party.[3] Georgia reports in a memorandum to N.A.A.G. that thirteen of fifty-five full-time employees of the Department of Law in 1969 had been employed under the previous Attorney General, who left office in 1965.[4]

Thirty-seven jurisdictions have provided specific information about appointment. Of these, twelve, (Alabama, California, Connecticut, Guam, Michigan, Nevada, New Hampshire, New York, Samoa, Vermont, Virgin Islands, and Wisconsin) note that almost all or part of the professional personnel in the Attorney General's office are selected under a civil service merit system. Under such a system, personnel are selected: on the basis of competence, as shown by their educational background and experience or a competitive examination; by a neutral selection body such as a civil service commission; and have job security so long as they perform in a satisfactory manner and cannot be dismissed for political reasons. Although only twelve jurisdictions have indicated specifically that a civil service merit system exists for professional personnel in their jurisdictions, *The Book of the States, 1968-69*, indicates that thirty-eight jurisdictions have general civil service coverage for state employees.[5] This would indicate that the Committee on the Office of Attorney General data may be incomplete.

In most of the twelve jurisdictions, the Attorney General retains the authority to appoint his chief deputy and one or two other attorneys. In Michigan, for example, he has the power to appoint his deputy and two assistants. In Vermont, the opposite is true; only the First Assistant is under civil service and the remainder of the Assistant Attorneys General are appointed.

New Jersey has an unusual arrangement. About twenty-five of the eighty-six staff attorneys will be given tenure, providing a core of attorneys to go from one administration to the next and assist the new Attorney General in understanding the office. Tenure will be awarded only to carefully selected staff.

Attorneys General are divided in their attitudes toward a merit system. Attorney General Roth of Michigan, speaking to the National Association at its Annual

3.42 LENGTH OF SERVICE OF LEGAL PERSONNEL

	Percent of Attorneys Who Have Been With Office		
	Over 10 years	4-10 years	Less Than 4 years
Arizona	0%	32%	68%
California	26	35	39
Colorado	14	21	65
Connecticut	27	35	38
Georgia	0	17	83
Hawaii	13	17	70
Indiana	2	0	71
Louisiana	25	41	34
Maine	0	50	50
Michigan	35	27	38
Minnesota	10	10	80
Mississippi	11	33	56
Missouri	3	13	84
Montana	0	0	100
Nevada	0	44	56
New Jersey	9	13	78
New Mexico	0	13	87
New York	39	26	35
Ohio	5	38	57
Oklahoma	0	15	85
Oregon	32	24	27
Pennsylvania	37	22	41
Puerto Rico	16	22	62
South Dakota	0	38	62
Texas	12	34	54
Utah	0	8	92
Vermont	6	6	88
Virgin Islands	0	25	75
Virginia	38	12	50
Washington	18	21	72
West Virginia	4	37	59
Wisconsin	32	32	36
Wyoming	19	6	75

1 McKinsey & Co., Inc., Management Consultants, *Strengthening Legal Representation for Agencies of the State of Texas*, May, 1969, 2-2.

2. 1960 CONFERENCE OF ATTORNEYS GENERAL, 130-131.

3. Elliot Richardson, *The Office of the Attorney General: Continuity and Change*, 53 MASS. L. Q. 21-22 (1968).

4. Memorandum from Harold N. Hill, Jr., Executive Assistant Attorney General, State of Georgia, April 17, 1969.

5. The Council of State Governments, THE BOOK OF THE STATES 1968-69, 158-161.

Meeting in 1949, said:

> You have a few other impediments in the way of increasing efficiency and one on which the public is oversold, in my opinion, is civil service. If you will analyze the situation under civil service, you will find that you are up against pretty much the same sort of complaint that the employer in private industry makes in connection with labor unions. In some of our states we are finding that civil service, in effect, is becoming the fourth branch of government, and in many respects is seeking to grasp control of state government and I think a serious question can be asked about whether the introduction of civil service has resulted in more public service, better public service, or less.[6]

General Hadden of Connecticut added another criticism:

> In Connecticut, in order for me to hire an assistant, a special civil service examination has to be held. In other words, you can go to an accredited law school and graduate and take a Bar exam. After you pass that, you are then qualified to represent anybody in the State of Connecticut except the State of Connecticut. If you want to represent the State, you have to take another examination.[7]

Eight years later a successor to General Hadden, Attorney General John J. Bracken, noted that when he took office he believed that it was his poor fortune to have the power to appoint only two individuals; one a personal secretary and the other a Deputy Attorney General. However, after discussing the operation of the office, he concluded that:

> I would advocate that in the states where your appointments are made on appointive basis, you seriously consider going to your general assembly and asking that a merit system be put in. I submit that much of your work will be taken over by these men who remain in office year after year and because they start the case, they continue and finish the case. It is not a question of your breaking these men in when you become Attorney General; it is they who break you into the duties of the office.[8]

The "spoils system" and patronage practices that provided the original rationale for merit systems have largely ceased to exist. There is seldom a surplus of competent attorneys seeking jobs, and few Attorneys General now would hire unqualified personnel. The duties of the office have become too complex to allow for less than competent staff. Politics seems to be diminishing as a factor in employment by Attorneys General, who increasingly emphasize professional rather than partisan qualifications. There remains, however, a problem of inadequate continuity in some states, where a large percentage of the staff changes when a new Attorney General takes office.

The C.O.A.G. recommended that no professional staff members should have tenure or be under a merit system, although this was not a unanimous recommendation. The Committee did, however, recommend that continuity of service be promoted, recognizing the value of experienced staff, particularly when there is considerable turnover among Attorneys General themselves.

3.43 Limitations on Private Practice

Table 3.43 shows limitations on private practice, as reported by the states. The Attorney General may practice within limits in twelve jurisdictions and without any limits in nine. Private practice by the Attorney General is prohibited by law in thirteen jurisdictions and by custom and policy in nineteen. One jurisdiction did not answer this question. Six jurisdictions allow unlimited private practice by staff, and fifteen allow it within limits. Private practice by staff is prohibited by law in eleven jurisdictions and by custom and policy in twenty two. The

6. 1949 CONFERENCE OF ATTORNEYS GENERAL, 18.
7. *Id.* at 21.
8. 1958 CONFERENCE OF ATTORNEYS GENERAL, 37.

	Attorney General	Staff
Alabama	May practice—no limits	May practice—no limits (Deputy); Prohibited by law
Alaska	Prohibited by custom & policy	Prohibited by custom & policy
Arizona	Prohibited by law	Prohibited by law
Arkansas	May practice—within limits	May practice—within limits
California	Prohibited by law	Prohibited by custom and policy
Colorado	May practice—within limits	May practice—within limits
Connecticut	May practice—no limits	Prohibited by law
Delaware	May practice—within limits	May practice—within limits
Florida	Prohibited by policy	Prohibited by policy
Georgia	Prohibited by custom & policy	Prohibited by custom & policy
Guam	Prohibited by policy	Prohibited by policy
Hawaii	Prohibited by law	Prohibited by law
Idaho	Prohibited by policy	Prohibited by policy
Illinois	Prohibited by policy	Prohibited by policy
Indiana	Prohibited by policy	Prohibited by policy
Iowa	May practice—no limits	Prohibited by law
Kansas	May practice—within limits	May practice—within limits
Kentucky	May practice—within limits	May practice—within limits
Louisiana	Prohibited by law	May practice—within limits
Maine	May practice—within limits	May practice—within limits
Maryland	May practice—no limits	May practice—no limits
Massachusetts	Prohibited by custom	May practice—within limits
Michigan	May practice—within limits	Prohibited by policy
Minnesota	Prohibited by custom	Prohibited by policy
Mississippi	Prohibited by law & custom	Prohibited by law
Missouri	Prohibited by law	Prohibited by law
Montana	Prohibited by policy	Prohibited by policy
Nebraska	May practice—no limits	May practice—no limits
Nevada	May practice—within limits	May practice—within limits
New Hampshire	May practice—no limits	May practice—no limits
New Jersey	May practice—within limits	Prohibited by custom & policy
New Mexico	May practice—within limits	May practice—within limits
New York	Prohibited by custom	Prohibited by policy
North Carolina	Prohibited by law	Prohibited by policy
North Dakota	Prohibited by law	Prohibited by law
Ohio	May practice—within limits	Prohibited by policy
Oklahoma	Prohibited by custom	Prohibited by custom
Oregon	Prohibited by custom	May practice—within limits
Pennsylvania	May practice—no limits	May practice—no limits
Puerto Rico	Prohibited by custom & policy	Prohibited by law
Rhode Island		May practice—within limits
Samoa	Prohibited by law	Prohibited by law
South Carolina	Prohibited by policy	Prohibited by policy
South Dakota	Prohibited by law	May practice—within limits
Tennessee	Prohibited by law	Prohibited by law
Texas	Prohibited by custom & policy	Prohibited by custom & policy
Utah	May practice—no limits	May practice—no limits
Vermont	Prohibited by policy	May practice—within limits
Virgin Islands	May practice—within limits (Policy currently under study)	May practice—within limits
Virginia	Prohibited by custom	Prohibited by custom & policy
Washington	Prohibited by policy	Prohibited by policy
West Virginia	May practice—no limits	May practice—no limits
Wisconsin	Prohibited by policy	Prohibited by policy
Wyoming	Prohibited by law	Prohibited by policy
United States	Prohibited by law	Prohibited by law

Committee on the Office of Attorney General recommended that such practice, if permitted, should be subject to strict controls.

Prohibitions against such practice vary. In Wyoming, only the Attorney General is expressly prohibited by law from engaging in private practice, but a departmental rule extends the prohibition to all other members of the staff, excepting those matters which were pending at the time a staff member accepted an appointment.

The Attorney General of Tennessee and his assistants, by statute, are under the same "disabilities, restrictions and disqualifications" as district attorneys, who are prohibited by law from private practice. Kentucky reports that:

> There is no statute prohibiting the Attorney General or any Assistant Attorney General from handling any matter of private practice. However, professional ethics prohibit representation of conflicting interest and, therefore, the Attorney General and any of his assistants could not in any case attempt to represent the person charged with some violation of criminal law. . . . In civil cases the Attorney General could not represent any party whose interest would be incompatible or in conflict with the interest of the Commonwealth.

Attorney General Fred Speaker of Pennsylvania, for example, set forth rules governing private practice in memoranda dated October 1, 1970. Legal staff who were compensated on a salary basis:

> (1) Shall not appear, practice or in any manner represent any private client at any stage of any civil proceeding in which the Commonwealth is an adverse party; or in any stage of any criminal proceeding; or before any administrative department, board, commission, authority or agency of the state government.
>
> (2) Shall not be associated with any person, partnership or firm which engages in practice before any administrative department, board, commission, authority or agency of the state government.
>
> (3) Shall not receive from any person, partnership or firm a share in any proceeds derived from or any compensation or fee as a result of the representation by any such person, partnership or firm of any private client at any stage of any civil proceedings in which the Commonwealth is an adverse party; or in any stage of any criminal proceeding; or from practice before any administrative department, board, commission, authority or agency of the state government.

In addition, they were prohibited from engaging in outside employment which conflicted with regular work hours "or otherwise affects his efficiency or effectiveness."

In Michigan, the Attorney General may practice, but prohibits practice by the staff even though civil service regulations allow supplementary employment if it does not interfere with the employee's duties. Alaska and Florida have no constitutional or statutory prohibitions against practice by the Attorney General or his staff but as a matter of policy they do not engage in private practice. The Minnesota Attorney General is not legally prohibited from private practice and the court has never discussed the issue. However, Minnesota responded to the N.A.A.G. questionnaire:

> No instance has been found where the Attorney General has engaged in the private practice of law while occupying this office. His duties preclude such practice. His staff, however, is prohibited by the Code of Public Ethics from engaging in private practice.

In Hawaii, a statutory prohibition against private practice by the Attorney General and his staff does not apply to Special Deputy Attorneys General who are hired on a part-time basis for a limited period of time.

In three jurisdictions (Ohio, Michigan and Iowa) the Attorney General is allowed to practice but his staff is not. In Connecticut, the Attorney General and the Deputy Attorney General may engage in private practice. New Jersey formerly allowed some staff members to practice, but no longer does so. In California, the staff is prohibited from engaging in private practice as a matter of policy while the Attorney General is forbidden to do so by statute.

In those jurisdictions which do permit private practice, some limits are usually set in order to avoid a conflict of interest.

The question of what type of private practice constitutes a conflict of interest came before the Supreme Court of Delaware in a case involving a Deputy Attorney General. Three separate questions of conflict were brought before the court. In one instance the deputy represented a client against an automobile dealer, against whom the client had sworn out a warrant for arrest. The court said since the deputy had criminal power, his representation of a client in a case which would involve a criminal action was improper. In another instance the deputy accepted private employment in a matter involving the state and found himself confronting a fellow member of the Attorney General's staff who was representing the state in a contested claim. Again, the court said such private representation was improper. Finally, the court said it was improper for the deputy to associate himself with another attorney representing a client before the State Board of Health even though there was an absence of showing that such a representation was detrimental to the public interest.[1]

Arizona prohibits private practice by statute. An Assistant Attorney General contended that he was not subject to the statute because he was only a special counsel to the highway department, paid from their funds. The Supreme Court of Arizona held that he was part of the Attorney General's staff, despite the source of salary, and the legislative prohibition was intended to confine attorneys to the legal business of the state.[2]

1. *In re Ridgely*, 106 A. 2d 527 (1954).
2. *Conway v. State Consolidated Pub. Co.*, 57 Ariz. 162, 112 P 2d 218 (1941).

Additional limits probably are imposed by conflict-of-interest laws in some states. A current investigation of private practice by a former Attorney General does not concern the legality of such practice, but whether it violated conflict-of-interest laws.[3]

An increasing number of jurisdictions are prohibiting private practice, because of the increasing workload of the office and the possibility of conflicts. A few states still do not consider the office full-time, so would obviously not prohibit private work. Maine, for example, reports that Attorneys General devote about three days a week to the office. The overwhelming majority of Attorneys General, however, devote full-time to the office.

Prohibitions against private practice are feasible only if salaries are adequate. Louisiana recognized this when its 1970 legislature prohibited private practice while, at the same time, substantially increasing the Attorney General's salary. The many jurisdictions where salaries are low might find it difficult to keep staff unless they were able to augment their income with private fees.

3.44 Temporary Legal Aides

Of forty-five jurisdictions reporting, thirty-six employ legal aides during the summer and fifteen employ them part-time during the school year. The jurisdictions which report that they do not employ such aides are Colorado, Guam, Maine, Mississippi, North Dakota, Puerto Rico, Tennessee, Virginia, and Wyoming. The number employed ranges from one in two states, to twenty in New York and Ohio. Twenty-four Attorneys General report a total of up to one hundred and ninety legal aides. Minnesota indicated that the number employed depends on the funds available and Maine indicated that it would like to hire legal aides if funds were available.

3. Investigation of fees received by former Attorney General O'Connell of Washington, *New York Times*, Dec. 21, 1969, 1, 42.

Aides are used primarily for research, which may involve assisting with briefs or opinions. Texas reports that they are also used for filing and Indiana that they perform "office errands". The extent to which training is offered varies greatly, although this would probably be a key factor in the effectiveness of their work. In Georgia, law clerks spend two weeks in each of five divisions and in the Executive Assistant's office. They are supervised by a group coordinator as well as by the particular attorneys they are assisting. In Maryland, the Deputy Attorney General and the chiefs of the civil and criminal divisions supervise their preparation of memorandums and general research. In Michigan, a student is assigned to a single division for the entire summer and works under the head of that division. The assignments may vary and may include library and factual research or assisting in litigation or preparing briefs, participating in hearings, or holding conferences and reviewing legislation. A weekly conference is held at which the division head discusses the operations of the division and the office with the students.

The salary of these part-time legal aides ranges from a high of approximately $714 per month in the Virgin Islands to a low of no salary at all in Colorado. The remaining jurisdictions pay on an hourly basis, from a low of $1.50 per hour in Florida to a high of $3.00 per hour in Maryland.

Student aides not only provide assistance for the regular staff, but may provide a source of employees. Attorney General Jack Gremillion of Louisiana remarked to the 1967 N.A.A.G. Conference that:

> Sometimes these law clerks get so interested in the office that when they graduate they come back to me to give them a job. Some of them stay with me for three or four years. I find that it provides a wonderful field for trained assistants. They are right there and know what to do and they know the procedures of the office. I would recommend to you that, if at all possible, you utilize the field of law clerks as much as possible because you are going to find that you will be solving a number of your problems in locating assistants in the future.[1]

He also noted that he used the law students all year by working out a part-time schedule to fit with their school hours.

Attorney General Louis Lefkowitz of New York said that his office had a rather large number working in the summer and that they did provide a pool for permanent personnel: ". . . If they spend the summer with us, they can apply for a full-time job as an assistant attorney general when they are admitted to the bar. Quite a number have been admitted to the staff under these circumstances."[2] It has also been noted that the presence of students can stimulate thinking of the regular staff, as they bring a fresh approach to assignments.

3.45 Stenographic and Clerical Personnel

The effectiveness with which legal personnel can be utilized depends on the adequacy of supporting staff. Briefs and opinions must be typed, proofread and printed. Letters must be prepared incoming mail recorded and routed, files maintained, accounts maintained, and many other services performed if the legal work is to proceed smoothly.

Forty-nine Attorneys General's offices report that they employ a total of 1,490 clerical and stenographic personnel. The number ranges from 3 in Wyoming and South Dakota to 269 in New York. It is not possible to compute the ratio of professional to clerical personnel accurately, because some attorneys may use secretarial services of

1. 1967 CONFERENCE OF ATTORNEYS GENERAL, 113.
2. *Id.*

the agencies to which they are assigned, and secretaries in some offices perform administrative and fiscal duties that are performed by special staff in other jurisdictions. A review of Table 3.4 indicates the wide disparity in the ratio of professional to other staff.

Some jurisdictions have furnished more detailed information on distribution of clerical and stenographic staff. All Attorneys General apparently have one or more personal secretaries. Many have receptionists. Some designate a chief clerk. Minnesota reports that the office's chief clerk is responsible for: (1) the mail system; (2) reception of visitors; (3) recruiting secretaries; (4) coordinating review of legislation; (5) main office filing; (6) research for old opinions; (7) interoffice coordination, and (8) keeping the secretarial manual current.

During a discussion of administrative problems at the 1967 N.A.A.G. Conference, Attorney General Jack Gremillion suggested using specialized clerks to relieve some of the pressure of legal staffs:

> It seems to me that the profession needs legal technicians or, what you might term, law clerks. These technicians could be trained to do basic research and collect material for the attorney to read, thus relieving the attorney of some very tedious and time-consuming activity. Perhaps such technicians or law clerks could be trained in junior college or vocational schools.[1]

Attorney General Faircloth of Florida concurred, noting that:

> I know that we all have had the happy experience of having a secretary now and then who would fit that description. Some of the best research people that I have seen have been secretaries who have been around a long time and have had a lot of experience in finding the citations, finding the law and doing the preliminary work for you.[2]

Oregon is initiating a new approach to typing services, after an organization and methods analysis by a private company. The Attorney General's staff will be located in especially-designed offices. Each division will have one administrative secretary who will answer telephones and do other non-typing tasks. All other secretaries will be located in a pool, which has been designed to create an optimum work environment. They will use an advanced form of MTST typewriters which they will be trained to use, and all will be classified in the top salary range. Attorneys will use dictaphones exclusively, and there will be no contact between them and the typists. It is expected that high salaries and excellent working conditions will compensate for the lack of personal communications.[3]

New Jersey's management study, described in more detail in Section 3.22 of this report, recommended increased specialization of stenographic-clerical work. It proposed establishing a Secretarial Supervisor, to supervise typists and secretaries, and a Services Supervisor, to supervise Xerox, supplies, equipment, messenger service, phone and receptionist service and similar work. They, in turn, would report to a Director of Administration. As in Oregon, the consultants stressed the importance of planning such physical factors as soundproofing typing areas, locating files for convenient access, and planning traffic patterns. Since much of the work in the typing pool does not require shorthand, they suggested creating a pool of clerk-typists to handle such items.[4]

3.46 Investigators

Thirty-eight Attorneys General's offices report that they employ investi-

1. National Association of Attorneys General, 1967 CONFERENCE, 112.
2. *Id.*
3. Interview with Deputy Attorney General Diarmuid O'Scannlain, October 6, 1970, in Salem, Oregon.
4. Daniel T. Cantor & Co., *Preliminary Report and Proposal for Further Services for the Attorney General of the State of* New Jersey, typed report, (September, 1970).

gators. The number ranges from one in several jurisdictions to forty-four in New York.

The duties of investigators vary from jurisdiction to jurisdiction. In one, the duties may be confined largely to general criminal investigation; in another they may be involved with consumer protection and; in another, they may relate to special investigation in the field of organized crime.

Idaho reported that the two investigators in the Attorney General's office assist all the attorneys in the office "in investigation and preliminary matters concerning every facet of the duties of the Attorney General." In Nevada, the investigators handle all state investigations required by the Attorney General and assist small counties in criminal investigations upon request. The position of criminal investigator was created by a 1965 Montana statue which empowered them to:

(1) Assist city, county, state and federal law enforcement agencies at their request by providing expert and immediate aid in investigation and solution of felonies committed in the state;

(2) Assist various law enforcement schools held in the state for law officers when requested;

(3) Co-operate with the bureau of criminal identification and investigation.[1]

In Maryland and North Carolina, investigators are assigned exclusively to the consumer protection division. In Oregon, the investigators are employed only in the Welfare Recovery Division, to investigate cases involving non-support and welfare frauds. An investigator and one state police detective are assigned to the Attorney General in Maine to do all types of investigation from general complaints to homicide.

Some states have provided information on the qualifications for an investigator. Idaho requires that they have general investigative and law enforcement background. Montana law requires that qualifications shall be equal to those of similarly-assigned Federal Bureau of Investigation personnel. Oregon requires that investigators have at least two years of college, with some courses in law or business administration, and two years experience in investigation or the equivalent. Vermont requires a minimum of a high school education and seven years experience, or a college education and three years experience. Required skills are defined by the Personnel Division to include:

Thorough knowledge of the methods and techniques of investigative work.
Considerable knowledge of court practices and procedures.
Ability to organize and coordinate investigational activities.
Working knowledge of Vermont law.
Ability to establish and maintain effective working relationships with associates, state and local public officials, law enforcement agencies and the public.
Ability to conduct investigation with tact and understanding and the ability to recognize when such is necessary.
Good general health with no physical defects or impairments.

The use of investigators undoubtedly will increase as Attorneys General's offices become more active in areas such as organized crime, where legal skills must be supplemented by those of other specialties.

1. MONT. REV. STAT. § 82-416.

3.5 Appropriations and Compensation

While there is great diversity among Attorneys General's offices in organizational patterns, administrative procedures and staff qualifications, there is one factor which they share: the need for adequate appropriations to carry out their duties and programs. All Attorneys General are dependent on their jurisdictions' legislatures to furnish the funds that make it possible to operate. This section examines the budgeting procedures through which requests for money are defined, the amount of appropriation which are forthcoming, and the subsequent salary levels.

3.51 Types of Budgets

"A budget is a proposed work program, with estimates of funds necessary to execute it."[1] Planning and budgeting are complementary operations.[2] Policy and programs are translated into dollar amounts through an agency's budget.

Until recent years, most budgets were line-item, and specified exact amounts for particular objects of expenditure. Line-item budgets did not usually allow transfer from one line in the budget to another, even within one agency. They also allowed the legislature to specify to the dollar what salary would be paid each employee.

Without any definite meaning attached to job titles, there is no basis for legislative comparison of the salaries paid different employees. Hence, inequities of the grossest sort are bound to - and in fact do - arise. Moreover, the line-item budget encourages the individual employee to try to secure a salary increase by direct political influence.[3]

The purpose which led legislatures to excessive itemization of budgets and appropriations was sound, for their intention was to keep spending officers in the bounds of public policy, to prevent deficits and facilitate audits. In practice, however, such itemization unduly restricted administrators and did not help legislators understand the purposes of expenditures. The International City Managers Association evaluated the line-item budget and found that:

—Line-item budgeting facilitates expenditure control, but it does not help decision makers to evaluate unit costs and program accomplishment; it does not show the existing personnel situation and the condition of management and equipment; it does not show a legislator how his own electorate is affected by specific projects; and it has no educative value to citizens.
—The line-item budget cannot show the relationship between program inputs and outputs; it conceals issues rather than clarifies them; it does not reveal aggregate benefits but only specific items such as the cost of light bulbs.
—Line-item budgets are virtually useless as a guide to deciding between alternative lines of action and identifying the relative costs and benefits of each.
—Consequently, the central budget office tends to be more interested in financial accounts than in the objectives and accomplishments of program.[4]

Nineteen Attorneys General's offices reported to C.O.A.G. that they still operate under a line-item budget. The trend is away from such budgets. Arkansas, Kansas and Maryland are among the states which reported line-item budgeting in a 1961 N.A.A.G. survey, but now use another method.

Nine reporting jurisdictions operate under a lump-sum budget and three more operate under lump sums for sections or divisions. Under a lump-sum

1. Leonard White, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION, 68 (1955).
2. Robert Walker *Relation of Budgeting to Program Planning*, 4 PUBLIC ADMINISTRATION REVIEW 97 (1944).
3. Herbert Simon, Donald Smithburg, and Victor Thompson, PUBLIC ADMINISTRATION, 357 (1950).
4. International City Managers Association, PLANNING AND BUDGETING IN MUNICIPAL MANAGEMENT, 9-10 (1965).

budget, the agency receives a single sum of money for prescribed purposes which the administrator spends as he thinks best. This type of budget provides the flexibility to meet unexpected emergencies and changes in the demand for services.[5]

Twenty-two jurisdictions have combination lump-sum and line-item budgets, or program budgets:

> The trend of financial development eventually provided another solution to the problem which preserved the proper discretionary power of the administration. Itemized *estimates* are still required in the preparation and drafting of the budget; but the *appropriations* tend to become general in nature —'lump sum' in the usual phase.[6]

The program or performance budget has evolved from the lump-sum concept. This type of budget classifies expenditures so that a department will receive a lump-sum for the operation of each of its different activities. For example, an Attorney General's office would receive specific sums for its consumer protection program, its litigation division, or its organized crime programs. Legislators and citizens can tell the purposes for which funds are being spent and can compare past performances with future requests. It encourages an agency to do a better job of thinking through its needs and reduces the tendency to stockpile material or accelerate purchases in order to exhaust an appropriation.[7] Marshall and Gladys Dimock, in their standard work on public administration, point out that:

> Under performance budget procedure, final services are broken down in terms of work loads or units of performance, creating units of measurement which are then used to calculate the labor and the material inputs required to achieve the objectives of a given program.[8]

5. Charles R. Adrian, STATE AND LOCAL GOVERNMENTS, 370 (1960).
6. White, *supra* note 1 at 6.
7. Adrian, *supra* note 5 at 378.
8. Marshall Dimock and Gladys Dimock, PUBLIC ADMINISTRATION, 535 (1969).

The unit cost of program results can be identified, although the detailed data ordinarily found in a line-item budget are still available.

Program and performance budgets appear to be the most acceptable for the operation of a dynamic office such as that of the Attorney General. A report prepared by a joint committee of the State Budget Officers Association and the Council of State Planning Agencies defined modern budgeting:

> Budgeting has always been conceived as a process for systematically relating the expenditure of funds to the accomplishment of planned objectives.
>
> This financial planning process has moved from the line item approach—in which major concern is in the objects of expenditure such as salaries and supplies—to the program and performance approach. In the latter, attention is directed to the activities government performs and the measurement and costing of physical accomplishment—patients fed and cost per meal, miles of streets paved and cost per lane mile. Now budgeting is beginning to embrace the more rigorous tools of analysis—setting explicit goals of social achievement rather than measures of physical output, examining the effectiveness and costs of alternate ways to achieve goals, and performing these analyses for several years into the future. Budgeting thus becomes closely related to planning.[9]

Maryland and Wisconsin are among the states which have adopted program budgeting.

Some Attorneys General have revolving funds for special purposes. Arizona, for example, created an antitrust enforcement revolving fund to be administered by the Attorney General. The statute says that:

> On or before the fifteenth day of January, April, July, and October, the attorney general shall cause to be filed with the governor, with copies to the director of finance, the president of the senate, and the speaker of the house of representatives, a full and complete account of the receipts and disbursements from the fund in the previous calendar quarter. The auditor general shall audit the fund once each fiscal year.
>
> Monies in the fund shall be used by the attorney general for costs and expenses of antitrust enforcement undertaken by his office and may be expended for such items as filing fees, court costs, travel, depositions, transcripts, reproduction costs, expert witness fees, investigations, and like costs and expenses. Except for the attorney fees due upon the initial recovery of monies in no event shall any of the monies in the fund be used to compensate or employ attorneys or counselors at law.[10]

9. The Council of State Governments, National Association of State Budget Officers and the Council of State Planning Agencies Relations Committee, THE INTEGRATION OF PLANNING AND BUDGETING IN THE STATES. Report of the National Governor's Conference Committee on Executive Management and Fiscal Affairs Advisory Task Force, 3-4 (1969).

10. ARIZ. REV. STAT. § 41-191.102.

3.52 Budget Preparation and Review

All jurisdictions report that original budget estimates are usually prepared by the Attorney General's office, in cooperation with the executive budget staff. The budget may be prepared by special fiscal or administrative staff, or by regular legal personnel, or through a committee.

From the Attorney General's office the budget goes to some other agency for review, usually to a state budget agency or department of administration.

This agency or department then examines the budget, discusses it with the Attorney General, then makes recommendations to the Governor. The Governor, in turn, submits the budget to the legislature. In some states, a legislative committee initially reviews the budget. In North Carolina, for example, it is submitted to the Advisory Budget Committee which then makes recommendations to the General Assembly. The Attorney General of Mississippi explains his budget request to the Budget Commission, a combination legislative-executive group. All jurisdictions except Tennessee report that the Attorney General or a member of his staff may explain the budget to the legislature or to a legislative committee. Information from most jurisdictions indicates that there is no legal requirement for the Attorney General to appear before the legislature to explain his budget, but that this procedure is customary.

3.53 Transfer of Appropriations

Nineteen Attorneys General's offices report that their appropriations are line item, but only four of these (Illinois, Michigan, Missouri, and Utah) report that appropriations may not be transferred. The remaining jurisdictions with line item budgets allow transfer of appropriations. As a general rule, this must be done with the approval of some other office. In California, for example, the Department of Finance must approve the change. In Delaware, the approval comes from the Budget Director. In Maine, transfer may be made within subsidiary accounts with the approval of the Governor and Council. In New Hampshire, the Comptroller approves transfers.

Three jurisdictions (Arkansas, Tennessee and Washington) said that there was no occasion for transfer of funds since the appropriation was lump sum. The other jurisdictions which have lump sum appropriations indicated that transfers of appropriations must have the approval of some other authority. For example, in Guam, approval of the Governor and Committee on Rules of the Legislature is required. In Hawaii and Kentucky, the department or division of the budget must approve, as must the Secretary of the Budget in Pennsylvania. Florida and South Dakota have lump sum appropriations for sections or divisions and do not permit transfer of appropriations. Four jurisdictions(Arizona, Colorado, Kansas, and Texas) which use a combination of lump sum and line item budget said that no transfer can be made. The others which combine budgeting meth-

3.54 APPROPRIATIONS FOR THE ATTORNEY GENERAL'S OFFICE

Note: Figures are given for the 1970-71 fiscal year; where these are not available, figures are given for the 1968-69 fiscal year, and indicated by a (*).

Total for office or department includes all functions, even those that are not usually under the Attorney General; total for A.G.'s office includes only those normally assigned to him, to provide a better basis for comparison among jurisdictions. Special appropriations are not included in the totals.

	Total for Office or Department	Total for AG's Office	Special Appropriations
Alabama	$ 513,661*	$ 513,661*	
Alaska	1,416,500*	1,416,500*	$281,000 reimbursement by highway department.
Arizona	616,039	616,039	
Arkansas	262,000*	262,000*	
California	26,337,384	10,636,090	
Colorado	380,464	380,464	
Connecticut	1,791,476	860,094	$931,312—State employees workmen's compensation.
Delaware	515,100	515,100	
Florida	1,532,634	1,532,634	
Georgia	1,006,200	1,006,200	
Guam	237,089*	237,089*	
Hawaii	1,172,010	—	
Idaho	250,000*	250,000*	(*Appro. 500,000 for Biennium)
Illinois	7,088,502	7,088,502	$886,935-Building & Equipment
Indiana	1,201,872	1,201,872	
Iowa	496,028	496,028	Unlimited for spec. claims attys., litigation exp. & outside counsel fees. (1969-70)
Kansas	381,657	381,657	
Kentucky	439,190	—	
Louisiana	665,400*	547,880*	$117,520-Spec. Legal Tidelands Group
Maine	444,473	444,473	
Maryland	1,082,194	1,082,194	
Massachusetts	2,046,781	2,046,781	$108,000-Settlement of certain claims
Michigan	4,286,120	4,286,120	$63,500-Federal grant
Minnesota	741,000	741,000	$40,000-Special contingent
Mississippi	555,400	502,150	$50,000-Federal litigation $ 1,250-Mineral Lease Commission $ 2,000-Rate investigation
Missouri	822,186	822,186	$ 5,000-Boundary dispute $23,500-2nd Injury & Workmen's Comp. $15,000-Court costs
Montana	222,465	222,465	
Nebraska	230,303	230,303	$120,000-Boundary cases $ 1,000-Equal Opportunity Comm.
Nevada	375,615	375,615	$ 10,000-Defensive suits fund
New Hampshire	256,733*	256,733*	
New Jersey	50,038,910	618,139	
New Mexico	347,250	347,250	$ 5,000-Grant, civil rights case
New York	12,340,721*	12,340,721*	
North Carolina	3,846,235	943,059	$2,903,176-SBI; $ 6,000-Legal Intern Program
North Dakota	254,113	254,113	(Biennial appro. FY-July 1969 to July 1971); $9,000-Antitrust case in litigation.
Ohio	3,476,454	3,476,454	$40,000-Special grand jury
Oklahoma	375,947	363,447	$12,500-Narcotics & drug abuse
Oregon	2,749,385	2,749,385	$50,000-Antitrust revolving account
Pennsylvania	5,455,396	5,455,396	$1,569,342-Legal services
Puerto Rico	15,306,700	2,366,800	"Services at penal institutions; strengthening of legal services fields; strengthening of personnel in prosecuting attorneys offices expanding the program to use microfilms of the Property Registry records."
Rhode Island	656,102	411,933	$88,040-Crim. identification $ 5,000-Crim. investigation $ 2,000-Crim. Laboratory $14,912-Med. Exam.
Samoa	580,000	102,373	
South Carolina			
South Dakota	923,288	167,276	$20,722-Special invest. & carryover
Tennessee	327,700	327,700	
Texas	2,278,754	2,278,754	$600,000-Highway right-of-way $ 71,800-Texas Employment Commission
Utah	649,400	649,400	
Vermont	431,428	430,308	
Virgin Islands			
Virginia	561,860	505,860	$53,000—aid to localities & where Governor directs AG to intervene, prosecute, etc.
Washington	1,200,000	1,200,000	
West Virginia	665,860	665,860	
Wisconsin	2,260,500*	2,260,500*	
Wyoming	244,679	244,679	N/A

ods say that funds may be transferred only with approval of some authority, usually the budget director. North Dakota has an Emergency Commission which must approve the transfer of funds but may do so only when an emergency exists. The Transfer Board in Oklahoma is the approving authority but permission is needed only if the transfer is over 25 percent. In Vermont and Montana, approval of the Governor is needed.

3.54 Amount of Appropriations

Table 3.54 gives appropriations for 1970-71 fiscal year or, in some cases, for the 1968-69 fiscal year. Two sets of figures are given: one is the total for the office, and the other the total for legal service functions.

Total appropriations range from a high of $26,337,384 in California to $125,000 in Samoa. If only the total for functions involving legal service is used, the high is $10,636,090 in California. Pennsylvania's Department of Justice received a $5,455,396 appropriation, of which $1,569,342 was for legal services, $1,462,767 for the Crime Commission, $674, 535 for the Bureau of Correction, $404,158 for consumer protection, $75,-365 for the board of pardons, $486,933 for standard weights and measures, and $782,290 for executive and general administration. Vermont's Attorney General receives $430,308 for his office and an additional $51,120 for the law enforcement training council.

The jurisdictions with annual budgets of over a million dollars for the Attorney General's office only are Alaska, California, Florida, Georgia, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, New York, Ohio, Oregon, Pennsylvania, Puerto Rico, Texas, Washington, and Wisconsin. Those with budgets of under $500,000 are Colorado, Guam, Iowa, Idaho, Kansas, Kentucky, Maine, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, Samoa, South Dakota, Tennessee, Vermont, and Wyoming. The others fall between $500,000 and $1,000,000.

In addition to regular appropriations, many jurisdictions report special funds, or say that some attorneys are paid by the departments to which they are assigned. This precludes valid comparison of appropriations. Iowa, for example, reports a $496,028 appropriation, but says it has an unlimited appropriation for special claims attorneys, litigation expenses and outside counsel fees. Additionally, salaries for attorneys assigned to highway, revenue and social services department, are reimbursed to the Attorney General. Iowa's appropriation, therefore, would be considerably less than what is actually spent for legal services under the Attorney General. Illinois, on the other

hand, reports some special appropriations which are presumably non-recurring, such as $415,000 for a new building and $85,000 for remodeling an existing office. Michigan, in addition to its $4,286,120 budget, has a $63,500 federal grant to establish an organized crime prosecutors unit. Missouri, however, includes a $10,000 federal crime control grant in its regular appropriation.

Appropriations have increased sharply in recent years, reflecting the increase in Attorneys General's responsibilities. Figures are available from forty-seven jurisdictions for both the 1955-56 and 1968-69 fiscal years. These show an aggregate appropriation of $18,250,753 for fiscal 1955-56 and $56,522,212 for 1968-69, or an increase of 242 percent. In only four jurisdictions did the appropriation increase by less than 100 percent, while in five states it increased more than 500 percent in that period.

3.55 Compensation of Attorneys General

Table 3.55 shows the salaries of Attorneys General for the 1970-1971 fiscal year, or for the latest year for which information is available. Salaries range from $6,000 a year for the Attorney General of Arkansas to $60,000 for the Attorney General of the United States. California pays the highest salary of any state: $42,500 a year, plus a $5,000 expense allowance. Of the fifty-four Attorneys General, four have an annual salary of under $15,000; nine are paid from $15,000 to $19,000; eighteen are paid from $20,000 to $24,000; eleven are paid from $25,000 to $29,000; eight are paid from $30,000 to $34,000, and four are paid $35,000 or more.

Comparison of the Attorney General's salary with that of other state officials shows that he is usually among the highest paid state officers. In 1969, the latest year for which comparable data are available, he was, for example, paid more than the Secretary of State in thirty-two jurisdictions, the same amount in fourteen jurisdictions, and less in five jurisdictions.[1] He was paid less than the Governor in all but two jurisdictions.

Information is available from forty-two jurisdictions on the salaries paid Attorneys General in the 1959-60 and the 1969-70 fiscal years. The Attorney General's salary increased an average of 65 percent during that decade. In only one jurisdiction, Arkansas, did the Attorney General's salary stay the same. In six states, the salary increased at least 100 percent. In most jurisdictions, the Attorney General's pay increased from 20 to 60 percent.

Some states give the Attorney General a fixed expense allowance. In Arkansas, for example, he receives $1,800 a year. The highest allowance reported is $12,000 in New York. Other reported expense allowances are $4,000 in North Dakota, $3,000 in Virginia, $5,000 in California, and $3,200 in Puerto Rico. The more prevalent arrangement is to reimburse the Attorney General for actual and necessary expenses. Such reimbursement may be subject to a ceiling; in New Jersey, for example, the Attorney General is repaid for expenses incurred, not to exceed $30 per diem, of which not more than $21 may be for lodging out of the state and $22.50 for lodging in the state.

A recent survey by the State of Nebraska secured detailed information on fringe benefits as well as salaries. This showed that, of twenty-three Attorneys General on whom data were obtained, 92 percent are eligible for group health insurance; 91 percent are eligible for employees' retirement; 17 percent are eligible for continuing income during long-term disability; 36 percent have an airplane available

1. The Council of State Governments, THE BOOK OF THE STATES 1970-71, XVIII, 150 (1970).

3.55 SALARIES FOR CERTAIN POSITIONS, 1970-71 FISCAL YEAR

	Attorney General	Chief Deputy or 1st Assistant	Other Attorneys
Alabama	22,500	21,500 (1968-69)	
Alaska	27,500 (1970)		
Arizona	20,000	20,940	9,444-20,292
Arkansas	6,000 (1969)		
California	42,500	26,148-28,920	10,440-28,836
Colorado	26,000	15,960	8,400-12,400
Connecticut	20,000	16,470	10,748-25,181
Delaware	20,000	20,000	10,000-17,500**
Florida	34,000	18,862-26,100	8,664-22,596
Georgia	30,000-34,000	27,000-32,000	11,000-23,000
Guam	15,750 (1970)		
Hawaii	30,250	25,713	13,200-24,684
Idaho	12,500 (1970)		
Illinois	30,000	18,000-29,004	8,400-27,996
Indiana	18,000	14,520-17,760	9,000-12,840
Iowa	22,000	21,900	9,000-20,500
Kansas	17,500 (1969)		
Kentucky	20,000	16,860	7,716-17,700
Louisiana	26,500 (1970)		
Maine	14,468	20,800	9,256-19,500
Maryland	36,000	30,900	12,852-26,423
Massachusetts	30,000	25,000	9,804-20,543
Michigan	32,500	29,500	10,837-28,042
Minnesota	22,000	22,000	10,500-20,000
Mississippi	25,000	22,000	7,200-20,000
Missouri	25,000	21,300	9,600-18,900
Montana	15,500	15,000	8,400-12,000
Nebraska	24,000	19,800	10,000-18,600
Nevada	22,500	17,664	12,696-16,800
New Hampshire	18,200 (1969)		
New Jersey	40,000	28,890-37,560	12,003-29,428
New Mexico	20,000	15,000	9,120-14,750
New York	40,000		
North Carolina	27,000	21,180	8,568-21,180
North Dakota	13,000	19,000	14,500-16,500
Ohio	25,000	20,384	9,214-17,056
Oklahoma	16,500-22,500	15,675-16,875	10,000-15,750
Oregon	23,000	21,936	10,500-21,936
Pennsylvania	25,000	24,984	10,432-20,629
Puerto Rico	25,000	16,200	9,600-13,800
Rhode Island	22,000	16,569	8,260-16,280
Samoa	24,000	16,000	11,000-18,000
South Carolina	30,000 (1970)		
South Dakota	18,500		7,200-16,000
Tennessee	24,000	20,400	12,000-18,000
Texas	29,000	25,000	8,976-19,104
Utah	17,500	17,400	9,500-16,000
Vermont	22,000	19,950	11,000-20,800
Virgin Islands	21,589-28,669		
Virginia	30,000	22,500	11,000-21,000
Washington	23,000	27,000	10,800-25,800
West Virginia	18,500	19,400	12,000-16,000
Wisconsin	20,000 (1970)		
Wyoming	17,000*	14,000*	10,500-12,000
United States	60,000	40,000	11,905-35,505

*Wyoming: effective April 1, 1971. **Max. $10,000 part-time.

when needed; 16 percent have a state car specifically assigned to them; 17 percent are provided with a driver, and 4 percent are provided with an annual expense allowance to cover items not reported in normal expense accounting.[2]

3.56 Compensation of Other Staff

Compensation is a major factor in recruiting and retaining competent staff. While many attorneys would accept salaries lower than those available in private practice in return for the opportunity to work in an Attorney General's office, a reasonable salary standard is essential.

Table 3.56, based on a C.O.A.G. questionnaire, shows salaries in forty-two Attorneys General's offices. It is difficult to compare salary levels for comparable positions, because of differences in titles and classifications. Therefore, the questionnaire asked what salaries would be paid to a person with a given level of experience.

The salary for an attorney with no experience ranged from a low of $7,200 in Mississippi and North Dakota to $13,200 in Hawaii. About half the reporting jurisdictions would pay such a person less than $10,000 a year, while half would pay him more. After four years service with the office, the attorney's salary would range from a low of $10,000 in North Dakota to $17,700 in California. After four additional years, the range is even greater, from $12,400 in Colorado to $21,516 in California, and a maximum of $22,768 in Pennsylvania.

An attorney on the Attorney General's staff who served as head of legal services to a major state agency would earn a low of $12,600 in North Dakota and a high of almost $30,000 in New Jersey. The maximum paid a person in this position is $25,000 or over in eight jurisdictions, $20,000 to $25,000 in eight others, $15,000 to $20,000 in eleven, and under $15,000 in three.

Table 3.55 shows salaries of the Attorney General's chief deputy or assistant; the title of this position will vary among jurisdictions. Where the 1970-71 salary is not available, it is given for an earlier year. These salaries range from $14,000 in Wyoming to a maximum of $37,560 in New Jersey and $40,000 in the United States Department of Justice. Thirteen jurisdictions pay the principal assistant $25,000 or more a year.

In several states, the deputy earns more than the Attorney General. This may be because of constitutional limits on the latter's salary which do not apply to his assistants, or may be because of increments for seniority. West Virginia, for example, reports a salary of $18,500 for the Attorney General and $19,400 for his deputy; Maine pays the Attorney General only $14,468, but pays his top assistant $20,800. Maine is among the states where the office of Attorney General is not considered full-time.

No current average salaries for attorneys in private practice are available for comparative purposes. The data that are available show that salaries of attorneys in public service are substantially below those of private practice. A 1963-64 study, for example, found that the average net income of a partner in a private firm was $21,000.[1] Although salaries have risen substantially since that year, most deputy Attorneys General still earn less than that amount. A 1965 North Carolina survey found that the private practitioner who had his own office had a median income of $12,392, while the attorney in govern-

2 State of Nebraska, *Report of Compensation and Related Data for Selected State Government Officials* (no date).

1. Cullen Smith and N. S. Clifton, *Income of Lawyers 1963-1964*, 54 A.B.A.J. 51 (1968).

3.56 ESTIMATED AVERAGE ANNUAL SALARIES, 1970-71 FISCAL YEAR

Note: Offices were asked to give the average salary that would be paid to an attorney with: (1) [illegible] experience; (2) 4 years service with the office, but no other experience; (3) 8 years service with the office, but no other experience; (4) serving as head of legal services to a major state department.

	No Experience	4 Years Service	8 Years Service	Head of Legal Services to Agency
Arizona	$ 9,444-11,748	$13,248-16,932	$15,900-20,292	$19,104-24,384
California	12,576	17,700	21,516	27,456
Colorado	8,400	12,400	12,400	N/A
Connecticut	10,748	15,881	18,060-20,223	20,465-25,181
Delaware	10,000 FT, 7,500 PT	15,000	17,500	
Florida	8,664	15,000	19,000	N/A
Georgia	11,000	15,000	18,000	23,000
Hawaii	13,200	17,000	21,000	23,000
Illinois	8,400-12,000	13,200-14,400	14,400-17,000	17,000-24,000
Indiana	9,000	N/A	N/A	12,840-15,720
Iowa	10,000	14,000-17,000	18,000-20,500	18,000-20,500
Kentucky	7,716	11,412	13,860	13,500 approx.
Maine	9,256	11,700-17,700	19,200-19,500	13,780-17,680
Maryland	12,852	14,565-18,049	16,020-19,854	19,854-26,423
Massachusetts	8,000	12,000		
Michigan	12,000	16,000	18,600	25,000
Minnesota	10,500	(varies with performance)		22,000 max.
Mississippi	7,200	14,000-16,000	16,000-20,000	20,000 max.
Missouri	9,600	N/A	N/A	16,800
Montana	8,400	14,500	Unknown	N/A
Nebraska	9,000-11,000	12,000-14,000	14,000-16,000	Set by Ag'y Served
Nevada	12,696	14,131	15,456	16,000
New Jersey	12,003-15,603	15,320-19,916	18,622-24,208	22,636-29,428
New Mexico	9,420	13,920	14,750	14,750
North Carolina	8,568	11,304	15,852	19,224
North Dakota	7,200-8,500	10,000-12,000	12,500-16,500	12,600-18,408
Ohio	9,214	12,043	14,352	15,600-17,056
Oklahoma	9,000	12,500		14,850 (div. head)
Oregon	10,500	12,816	14,832-18,900	19,884-21,936
Pennsylvania	8,163-10,432	13,301-16,978	17,839-22,768	22,768-26,367
Puerto Rico	9,600	12,000	13,800	
Rhode Island	8,260	12,000	15,000	16,000
Samoa	11,000-12,000	16,000	18,000	N/A
South Dakota	7,800	12,000	14,000	15,000
Texas	8,976-10,524	10,836-12,816	13,200-15,444	16,020-19,104
Utah	9,100	(varies)	(varies)	15,500
Vermont	10,000	14,500	18,000	16,000
Virginia	11,000	11,000-21,000		
Washington	10,800	13,000-18,000	15,000-21,000	18,000-25,800
West Virginia	12,000	16,000		
Wyoming	10,500	12,000	13,000	N/A
United States	11,905	17,319	22,885	N/A

ment service had a median income of only $9,200.[2]

A survey conducted by the Bureau of Labor Statistics in 1960 indicated that salaries of government employees in executive and professional positions were 14 to 37 percent lower than those in comparable private positions.[3] State salaries are generally lower than those for federal service. C.O.A.G. data for 1969 showed an average maximum salary of $18,276 for state assistant or deputy Attorneys General, while upper level attorneys in the federal service earned from $25,044 to $28,967. In 1967, Attorney General Shepard of Texas remarked to a N.A.A.G. conference that:

> We are a clearing house for personnel. Some of the larger law firms in the state seem to take a good deal of pride in the fact that the majority of their staff have been stolen from my office. This gets to be a large size problem. . . . Their average stay in my office is two to three years.
> It is a problem. I do not know how we are ever going to solve it without our legislature coming to the realization that lawyers are worth at least as much money as our physicians, engineers, dentists and accountants.[4]

Attorney General Clarence Meyer of Nebraska agreed, pointing out that "To turn a perfectly green man loose on an important law suit is rather risky."[5] Attorney General Waggoner Carr of Texas told a 1964 N.A.A.G. meeting that he had discussed the problem of staff salaries with his state bar association. It had created a committee of outstanding attorneys which appeared before the legislature to "bring to their view the great disparity that exists between the salaries in government service and salaries of private attorneys."[6]

Retirement

Of thirty-seven jurisdictions reporting, only four say that the Attorney General does not have retirement coverage. Eight others say that it is optional. Other attorneys, however, have retirement coverage or are eligible for it in all reporting jurisdictions, including Indiana, which says that retirement is optional.

2. Burke A. Parsons, *Report of the North Carolina Survey of the Economics of the Bar*, North Carolina Bar Association (1966).
3. John I. Corson and Joseph P. Harris, PUBLIC ADMINISTRATION IN MODERN SOCIETY, 43 (1963).
4. 1967 CONFERENCE OF ATTORNEYS GENERAL III.
5. *Id.*
6. 1964 CONFERENCE OF ATTORNEYS GENERAL 125.

3.6 Reports and Publications

Reporting has long been required of most government agencies, as a method of ensuring accountability. Reporting is now being used more widely as a method of informing the public. Virtually all Attorneys General now issue some reports. These range from compilations of opinions to newsletters, pamphlets and other materials for broad distribution.

3.61 Reports to Governor and Legislature

Most jurisdictions require that the Attorney General make periodical reports to the Governor and Legislature and have so required since the office was established.[1] Today, all but five jurisdictions report to the Governor or legislature. Twenty-five report biennially, twenty-two report annually, and the others upon request. Annual reports are required in the following jurisdictions:

Alaska	New Mexico
Arizona	New York
Connecticut	Ohio
Guam	Pennsylvania
Indiana	Puerto Rico
Maryland	Rhode Island
Massachusetts	Samoa
Mississippi	South Carolina
Montana	Virgin Islands
Nevada	Virginia
New Jersey	West Virginia

Biennial reports are required in the following:

Alabama	Iowa
Arkansas	Kansas
California	Kentucky
Colorado	Louisiana
Florida	Maine
Idaho	Michigan
Illinois	Minnesota
Nebraska	Texas
New Hampshire	Utah
North Carolina	Vermont
North Dakota	Washington
Oregon	Wyoming
South Dakota	

Reporting requirements are generally set by law, or, in a few jurisdictions, by constitution. The Illinois Constitution, for example, says that "The officers of the executive department . . . shall at least ten days preceding each regular session of the general assembly, severally report to the governor, who shall transmit such reports to the general assembly."[2] Statutory requirements frequently specify the content of reports. Kentucky statutes say that "The Attorney General shall biennially, . . . report to the Governor a full statement of the business done in his office."[3] Iowa law requires a biennial report on the conditions of the Attorney General's office, opinions rendered, and business transacted.[4]

Twenty-five Attorneys General are required to report only to the Governor, six only to the legislature, five to the Governor and legislature, two to the Governor for transmittal to the legislature, and one to the Governor or legislature. The Attorney General of Indiana reports to the Governor and the Auditor, and the Attorney General of Maine to the Governor and the Council. The Attorneys General of Guam and the Virgin Islands report to the Governor, who includes their report in the one he makes to the Secretary of the Interior.

In many jurisdictions, the annual or biennial report includes the full text or summaries of formal opinions rendered during that period. Publication

1. Lewis Morse, *Historical Outline and Bibliography of Attorneys General Reports and Opinions*, 30 LAW LIBRARY J. (1937).
2. ILL. CONST. Art. V, § 21 (1870).
3. KY. REV. STAT., § 15.080.
4. IOWA CODE 1966, § 13.2, 17.6.

of opinions is discussed in Chapter 4 of this Report. Table 4.7 shows that forty-three jurisdictions publish opinions in volume form. These opinion volumes frequently contain a statistical summary of litigation, the names of staff employed during the period, and a brief description of major activities of the office.

3.62 Publication Programs

Table 3.62 lists the publications issued by each Attorney General's office. Samoa and Tennessee are the only jurisdictions which say that the Attorney General does not issue any publications, although data are not available from some states.

In addition to the formal reports required by law or computations of opinions, a great variety of reports, pamphlets, newsletters, manuals and directories are issued, although this is a new activity in many states. A number now publish booklets or folders to educate the consuming public about deceptive trade practices. New York's "Your ABC's of Careful Buying" was probably the first such publication. Pennsylvania now has a series of eight consumer protection pamphlets. Public education programs in consumer protection are described in section 6.63 of this Report.

Publications to assist local law enforcement officers are being issued by an increasing number of Attorneys General; these are described below.

3.62 REPORTS AND PUBLICATIONS

	Type of Publication	Frequency
Alabama	Biennial Report to Legislature	Biennial
	Opinions	Quarterly
Alaska		
Arizona	Annual Report (including opinions)	
	Consumer Protection Pamphlet	
Arkansas		
California	Biennial Report to Governor	
	Department of Justice Bulletin	Quarterly
	Pamphlets: Protecting Your Rights as a Stockholder; What to do When You have been Cheated; Know Your Rights	(not periodical)
	Prepared by Bureau of Criminal Statistics: Drug Arrests and Dispositions; Crime and Delinquency in California;	Annual
	Robberies of Banks and Savings & Loan Associations in California.	Annual
	Special Reports prepared by Bureau of Criminal Statistics; Drug Offenders—a Follow-up Study: Adult Criminal Detention; Bank Robberies, 1931-68; Death in Custody; California Peace Officers Killed; Kidnap Study; Juvenile Camps and Recidivism in California; Juvenile Probation Data; Law Enforcement—Extended Data; Superior Court Probation and/or Jail—a One-Year Follow-up for Selected Counties	(not periodical)
Colorado	Biennial Report (Summary of opinions and current dockets)	Biennial
	Consumer Protection Pamphlet	(not periodical)
Connecticut		
Delaware	Opinions (since 1963)	Annual
Florida	Prosecutors' News Letter	Monthly
	For the Record (digest of opinions on topical matters handled by AG's office)	Monthly
	Publications on legal matters as they arise	(not periodical)
	Consumer Protection Pamphlet	
	Opinions	Biennial
Georgia	Opinions of the Attorney General	Annual
	Know Your Law Department	
	Opinions of the Attorney General Construing the Georgia Election Code	

	Memoranda to District Attorneys re: Recent Decisions of Interest	(not periodical)
	Memoranda to Solicitors General	(not periodical)
Guam		
Hawaii	Consumer Protection Pamphlet	
Idaho	Criminal Law Newsletter Prepared for Prosecutors and Law Enforcement	Bi-monthly
	Biennial Report to Governor	Biennial
Illinois	Consumer Protection Pamphlet	
Indiana		
Iowa	Consumer Protection Pamphlet	
Kansas	Consumer Protection Pamphlet	
Kentucky	Biennial Report to Governor	Biennial
	Kentucky Attorney General Opinions	Every 4 years
	Criminal Justice Newsletter	
	Consumer Protection Pamphlet	(not periodical)
	Consumer Protection newspaper column	(not periodical)
	Precinct Election Officers' Manual	(not periodical)
Louisiana	Report to Legislature	Biennial
	Criminal Statistics	Biennial
Maine	Biennial Report	Biennial
Maryland	The Attorney General's Digest (summary of recent state and federal court decisions)	3 times a year
	Consumer protection pamphlet	
Massachusetts	Enforcing the Criminal Law: A Handbook for Police Officers in Massachusetts	Annual
	Report of the Attorney General	Annual
	Consumer Protection Pamphlet	(not periodical)
	"Tracks", a bulletin on narcotics abuse	Monthly
	Pamphlet: The Attorney General—Lawyer for the People	
	Pamphlet: If you are Arrested	
Michigan	Know Your Michigan Law (newspaper column)	
	Annual Report	Annual
	Index to Attorney General's Opinions	(not periodical)
Minnesota	Biennial Report	Biennial
Mississippi	Annual Report to legislature	Annual
	"Criminal Law Newsletter" (to district and county attorneys, circuit judges)	Monthly
Missouri	Consumer Protection Pamphlet	(not periodical)
Montana		
Nebraska	Annual Report	Annual
	Official Opinions	Biennial
Nevada		
New Hampshire	Selected Opinions of the Attorney General	Biennial
	Political Calendar	
	Law Enforcement Manual	
	Directory of Charitable Trusts	
New Jersey	Annual Report to Governor	Annual
	Uniform Crime Reports	Annual
	Division of Criminal Justice Newsletter	Monthly
	Equal Opportunities—Newsletter of the N. J. Division of Civil Rights	Monthly
New Mexico	Annual Report to Governor and Legislature	Annual
	Pamphlet prepared by Consumer Protection Division: 20 Ways Not To Be Gypped	(not periodical)
New York	Opinions of the Attorney General	Annual
	The Attorney General Reports	Monthly
	Annual Report	Annual
	Pamphlets Prepared by Department of Law: A 10-Point Guide for the Careful Investor;	(not periodical)

	Civil Rights in New York State; Your ABC's of Careful Buying; Your Rights if Arrested; *Attorney General's Committee on Human Relations;* Department of Law *Lexogram*	Bi-weekly
North Carolina	Consumer Protection pamphlet	
North Dakota		
Ohio	Annual Report to Governor	Annual
	Functions of the Office of Attorney General in Ohio	(not periodical)
	Consumer Frauds and Crimes Bulletin	(not periodical)
	Bulletin: Searches and Seizures	(not periodical)
	Obscenity Laws	(not periodical)
Oklahoma	Digest of Opinions	Monthly
	Attorney General's Opinions	Annual
Oregon	Opinions of the Attorney General	Quarterly
	Bulletin	
Pennsylvania	The Attorney General's Bulletin	
	Annual Report to Governor	Annual
	Consumer Protection booklets:	(not periodical)
	Your ABC's of Careful Buying	
	The Great Family Hold-Up . . . Bait and Switch Advertising	
	Conorad Consumer's Sock-it-to-'Em Survival Manual	
	The Franchise Trap	
	Home Improvement Without Headaches	
	What's Right for Consumers in Pennsylvania	
	"Come into my Classroom" said the Shyster to the scholar	
	The Meanest Racket of All	
	Shopping card issued by Weights & Measures	
Puerto Rico	Annual Report of Attorney General	Annual
	Statistical Abstract	2 years
	Opinions of Attorney General	
	Statistical Report	Annual
Rhode Island	Annual Report to Governor	Annual
Samoa	None	
South Carolina	Annual Report	Annual
South Dakota	Workmen's Compensation Law Handbook	Annual
	Division of Criminal Investigation Bulletin	Weekly
	Law Enforcement Handbook	(not periodical)
	Consumer Affairs Bulletin	Bi-weekly
	Radio Communications Procedures Manual	(not periodical)
	Law Enforcement Newsletter	Monthly
	Biennial Report to Governor	Biennial
Tennessee	None	
Texas	The Duties and Functions of the Attorney General of Texas	(not periodical)
	Biennial Report to Governor	Biennial
Utah	Biennial Report to Governor	Biennial
Vermont	Manual for law enforcement officers (Assisting in the preparation of a pamphlet for juveniles)	(not periodical)
Virgin Islands	Opinions	
Virginia	Opinions of the Attorney General	(not periodical)
	Various bulletins concerning the interpretation and enforcement of certain statutes	(not periodical)
Washington	Biennial Report to Governor	Biennial
	Law Enforcement Digest	Bi-monthly
	Consumer "Bill of Rights"	
	Other misc. consumer protection publications	(not periodical)
West Virginia	Biennial Report of the Attorney General	Biennial

Wisconsin	Law Enforcement Memorandum	Weekly
	Law Enforcement Bulletin	Weekly
	Prosecutors' Bulletin	(every 3 weeks)
	Consumer Protection Report	Monthly
Wyoming	Report to Governor	Biennial

3.63 Publications for Local Officials

As the list of publications in Table 3.6 shows, a substantial number of Attorneys General now publish handbooks, manuals, bulletins or newsletters for local prosecutors and law enforcement officials. This is a recent trend, and indicates that Attorneys General are assuming leadership in informing local officers about changes in statute and case law.

The Attorneys General of Florida, Georgia, Idaho, Kentucky, Mississippi, South Dakota, Vermont, Washington, and Wisconsin report that they issue publications for local officials. Texas is initiating an elaborate publication program for prosecutors, which is described in Section 2.26 of this Report. It will provide for immediate dissemination of important news, as well as for periodic publications.

Some Attorneys General issue periodic bulletins. Washington, for example, has a Law Enforcement Digest, which summarizes state statutes and court cases, and reports on other matters of interest to law enforcement officers, such as descriptions of new books, announcements of forthcoming meetings, training courses available and items of particular importance from other states or from local offices. New Jersey initiated a criminal justice newsletter in January, 1971.

South Dakota Attorney General's Division of Criminal Investigation issues a weekly bulletin which contains specific information for law enforcement officers such as descriptions of items believed to have been stolen, information on crimes or wanted persons reported by local law enforcement officers, motor vehicles involved in offenses in other states, and other data. Wisconsin's Law Enforcement Services Division issues a confidential bulletin for law enforcement officers, with descriptions of wanted persons, new laws, court decisions, job openings, and other information.

Massachusetts' Attorney General publishes a handbook for police officers. The 44-page booklet is about 4" x 6", small enough to be carried in a pocket. It describes in clear language such matters as arrest, "stop and frisk", search and seizure, and procedure after arrest. It cites statutes and court decisions where appropriate, but avoids technical language. The South Dakota Attorney General's office prepared a loose-leaf handbook, 5" x 6½", for law enforcement officers. In addition to criminal procedure, it concerns such matters as police-citizen relations, note taking and report writing, and "miscellaneous police procedures", including the mentally ill, civil disorders, and law enforcement trainings. The loose-leaf form permits periodic revision and updating.

3.64 Publications for General Distribution

Another trend is toward publication of pamphlets for wide distribution. This is particularly true in the consumer protection field, where many Attorneys General publish booklets. These are described in Section 6.65 of this Report.

Some Attorneys General issue publications describing functions of their office. Georgia's *Know Your Law De-*

partment contains a two-page history of the office and pictures and biographies of staff attorneys. Massachusetts has a leaflet, *The Attorney General—Lawyer for the People,* which lists the Department's divisions, and gives a brief statement of its duties. Massachusetts also publishes a folder stating procedures and rights when a person is arrested. It includes a list of defender services, with telephone numbers.

New York's Attorney General has issued leaflets to inform the public for many years. These are published in both English and Spanish. Of particular interest is a ten-page, 4″ x 8″ booklet, entitled *Your Rights if Arrested.* Profusely illustrated, it gives clear answers to such questions as: "when does the policeman need a search warrant?", "what are your rights when you are in police custody?", and "is a permanent record made of every arrest?" Another pamphlet deals with civil rights and presents a summary of New York laws that protect citizens from discrimination in voting, employment, and other areas.

The New Jersey Department of Law and Public Safety's Division on Civil Rights issues a monthly newsletter entitled *Equal Opportunities.* This reports on enforcement of laws relating to civil rights, activities of related agencies, and other matters of interest to minority groups.

A type of publication that has been initiated by several Attorneys General and undoubtedly will be issued by others is compilations of criminal statistics. The Attorney General of Wisconsin, for example, issued *Wisconsin Criminal Justice Information* for the first time in 1969. This is a 227-page summary of crime and related police activity and is a direct outgrowth of Wisconsin's new statewide criminal justice information system. New Jersey has issued *Crime in New Jersey,* a similar publication, for several years.

3.65 Public Information Programs

The N.A.A.G. recommendations include one that public information programs should be conducted and specialists should be employed for such programs. While Attorneys General have presumably been concerned with good public relations, this recognition of public information as an important aspect of their duty is relatively recent.

A C.O.A.G. survey of thirty-eight Attorneys General showed that they feit it their responsibility to develop public education programs. Thirty-three thought the Attorney General should develop public education programs in organized crime, thirty-three in the Administration of justice, thirty-one in consumer protection, twenty-one in environmental control, and nineteen thought he should have educational programs in corrections.

Information reported to C.O.A.G. by Attorneys General's offices indicates that almost all conduct some regularly-scheduled public relations or educational activities. Most noted that the Attorney General and members of his staff participate in programs at schools and colleges, and make appearances before civic, professional and other groups. They may speak to groups touring the Capitol, or lecture to state prison inmates; they may speak to high school or college groups.

A number of states, including California, Florida, Ohio, and Pennsylvania, have public information specialists on the Attorney General's staff. The Public Relations Director of Pennsylvania furnished a detailed outline of his position to C.O.A.G.[1] He believes that the public relations person should be a former reporter and a layman, and that he should be well-informed in the particular subjects involved: "this involves

1. Letter from Paul Zdinak, Public Relations Director, Pennsylvania Office of the Attorney General, April 7, 1970.

consultation with the people involved, considerable research and considerable reading." He also believes that it is important to be involved in projects he will be publicizing as near to their inception as possible. He stays in close contact with the Attorney General, and frequently travels with him. Above all, he believes that rapport with the press is of primary importance and that "reporters expect and should get full, honest and immediate service from public relations people." Florida's Director of Information said that his main function was to arrange statewide press coverage on major legal opinions and special projects. He also helped arrange press coverage on the Attorney General's speeches.[2]

Virtually all Attorneys General's offices participate in Law Day activities. The first Presidential proclamation of Law Day was on May 1, 1958; it was conceived of as emphasizing the rule of law in the United States, and is now observed in other countries as well.[3] Most Attorneys General give law day speeches, frequently at law schools.

The other subject most frequently mentioned by Attorneys General's offices in connection with public information programs is consumer protection. Some programs are described in Section 6.65 of this Report. Consumer protection education programs include speeches, special classes, newspaper columns, storefront information centers, and radio or television programs. The Washington Attorney General's office presents twenty radio dramatizations a week, plus bi-weekly programs on educational television. Several states have weekly newspaper columns prepared by the Attorney General's staff, such as Kentucky's "Consumer Comments" and Colorado's "Action Line." Maryland uses inner-city locations to receive complaints and to educate consumers. Many states issue pamphlets explaining about deceptive practices.

Many Attorneys General, or their staff members, speak at high school assemblies about the function of the Attorney General's office and their rights and obligations under the laws. Georgia has a summer intern program where "students are rotated every two weeks through the five divisions and the two executive assistant's offices for a twelve-week program. They are supervised by a coordinator in general and the lawyers using their services on particular research projects."

The North Carolina Attorney General's office has developed a kit on *Youth and the Law,* which contains talks written by staff attorneys. The talks are primarily for high school students, although they may also be adopted for civic groups. It defines one or more criminal offenses, explains the penalties, and gives actual case histories. The talks average twenty minutes in length which leaves time, in a typical class period, for questions and answers. The talks are on the following topics; use of alcohol, auto theft, shoplifting, carrying a concealed weapon, vandalism, larceny and receiving stolen goods, and accessory before and after the fact. Attorney General Robert Morgan explains what the program is designed to accomplish in the introduction to the kit:

> Out of ignorance of the criminal laws and their penalties, out of boredom, idleness, and the tensions of modern society, some of our youth turn to crime.
>
> I want to acquaint the youth of our state with our basic criminal laws and show them the serious and often tragic consequences which inevitably follow the commission of crime.[4]

Several Attorney General's offices have included drug problems in their

2. Letter from Richard B. Knight, Director of Information, to Patton G. Wheeler, August 3, 1970.

3. Hamilton Burnett, *Law Day - U.S.A.,* 30 TENN. L. REV. 487, 488, (1963).

4. The Justice Foundation of North Carolina, YOUTH AND THE LAW (1970).

programs for youth. In Florida, the Attorney General includes material on drug abuse in programs presented to high schools; in Ohio, a narcotics seminar is held with educational personnel and in South Dakota an assistant Attorney General makes numerous appearances to give programs concerning drug abuse.

The Maryland Attorney General's office has prepared a detailed high school program with a special emphasis on drug problems. A high school conference on crime, including a seminar on narcotics, was held by Attorney General Burch in 1970. Various state health and law officials addressed the students and special discussion sessions were led by six ex-narcotics users. The students received reprints of F.B.I. bulletins on various drug problems and a Baltimore Police Department Newsletter.[5]

A few Attorneys General are developing programs on environmental problems. Michigan issues a question and answer sheet on legal questions concerning environment, such as "What does the law say about throwing beer cans along the highway and what are the state penalties for this?"[6] The Illinois Attorney General introduces a film on pollution, "Alone in the Midst of this Land," which has been presented on a Chicago television station. It advises citizens to report any pollution they find by calling the Attorney General's office or reporting it to the television station.[7]

The Attorney General of Washington participates in a television series, "Law in Action" which covers such topics as the penal institutions of the state and consumer protection.

The American Bar Association has recently established an educational program designed to develop student awareness and understanding of the working of the "law society." The educational material used is geared to the student's age level, and to the particular social studies level that the students are being taught. Teenage students are introduced to legal analysis techniques. The most important feature of the program is the development of a working liaison between teachers and lawyers. The teachers, after studying the A.B.A. material, may contact members of the lawyers resource team to answer questions or assist in developing questions for the course. Pilot projects are now being developed in several school systems and are being evaluated for wider applications.

5. Speech presented by Assistant Attorney General H. E. Lenz, at the Southern Regional Conference of Attorneys General, April, 1970.

6. Attorney General of Michigan's Office, *Questions Concerning Environmental Pollution and the Citizen's Responsibilities in the Matter of Curbing Pollution.*

7. 1970 PROCEEDINGS OF NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 3-4.

3.7 INFORMATION STORAGE AND RETRIEVAL

Attorneys General's offices, by the nature of their work, generate a great deal of written material, including opinions, briefs, and memoranda. This material usually contains some information of continuing interest and importance, so must be stored for future reference. Attorneys Generals also use a great deal of written material, not only that produced by them, but statutes, court decisions and legal references. Provision must be made for efficient storage and retrieval of information.

3.71 Libraries

The most important tool used in the preparation of legal briefs is a good law library. Thirty-six jurisdictions reported that the Attorney General's office had a library of its own, while only two states, Alabama and Vermont, did not report a library expenditure. These libraries are stocked with the standard works of the legal profession: American Jurisprudence, C.J.S., A.L.R., Words and Phrases, federal and state statutes, codes and court reports, and various encyclopedias, digests, and form books. In addition, New York and Guam report that they keep newspaper files in their law libraries.

The expenditure for upkeep of these libraries varies greatly as the following data show. These annual expenditures for law libraries were reported on C.O.-A.G. questionnaires or shown in the offices' budgets:

California	$100,795
New York	44,728
Florida	29,907
Washington	18,291
Puerto Rico	14,000
Ohio	13,300
Missouri	13,000
Louisiana	12,368
Michigan	12,000
Virgin Islands	11,355
Wisconsin	10,005
Pennsylvania	8,000
Hawaii	7,920
West Virginia	7,233
Kentucky	6,676
Indiana	6,569
Georgia	6,350
Connecticut	6,000
Maryland	5,800
Iowa	5,400
Utah	5,000
North Carolina	4,930
Arizona	4,500
Minnesota	4,200
Oregon	3,500
Oklahoma	3,000
New Jersey	3,000
Wyoming	2,691
Idaho	2,500
South Dakota	2,500
Tennessee	2,500
Virginia	1,491
Colorado	1,000
Nevada	870
Montana	500
Maine	100-200

Kentucky reported an additional expenditure of $5,643 to purchase a new set of books.

Some annual expenditures seem hardly adequate to support a complete library. A sample list of annual costs for typical library series would include: U. S. Supreme Court Digest, $65; Federal Reporter, $185; state citations (Shepard's), $44; state law school review, $9; state annotated code, pocket parts, $35 per set. Even these basic series cost over $1,000 a year to maintain.

All reporting jurisdictions said that their staff has the use of libraries other than the Attorney General's. The state law library or Supreme Court or Court of Appeals library is generally available to the staff. In at least five states the Attorney General's staff may also use the extensive facilities of university law libraries. In several states, special-

ized department libraries such as highway, securities and tax are open to the Attorney General's office. The availability of duplicate libraries has caused at least one Attorney General to consider abandoning his own library, to use extra funds on personnel. Library facilities are frequently mentioned as a reason for locating staff in one place, to avoid unnecessary duplication.

3.72 Files and Indexes

Procedures for filing and indexing advisory opinions are described in Section 4 of this Report. All offices maintain opinion files, usually cross-indexed by subject, requestor, number, and other entries.

An attorney can often benefit from rereading a particularly well-written brief when preparing a brief on the same or a similar point of law. However, the vast information contained in briefs can be reached only through a good index system. Most reporting states indicate that they use an indexing system to file briefs. The most common methods of brief indexing are by case number or alphabetically. Several states also maintain a subject index because case number or alphabetic indexes require that attorneys rely on their own or their colleagues' memories to connect a case name or number with a particular legal argument.

Minnesota has both an alphabetic and a case number system, but comments that while the procedure is satisfactory, "there can be a loss of continuity from one administration to the next due to the lack of a subject matter index." On the other hand, the South Dakota Attorney General's Office has found no apparent need for a subject matter index because, "the vast majority of briefs are prepared for courts embraced by the national and regional reporter systems." Delaware, Georgia and Tennessee are among the states with subject matter indexes. Wisconsin files appellate briefs in a temporary file for two years, by the name of the case. They are then bound and placed in its law library. A "fair sampling" of informal typewritten briefs is kept by subject matter in a "precedence file" in the library. Wisconsin is now placing all records on computers, with standard subject indexes.

Of nine states reporting that they do not use any brief indexing system at all, two states, Maine and Utah, plan to institute indexing systems in the future. The Guam Attorney General's Office commented on the lack of an indexing system: "We have no system on this and it is one of the most obvious errors in our office procedure. Briefs are simply filed in the case file."

The Kentucky Attorney General's Office described their filing and indexing system in some detail.

> Copies of briefs are given to the Central Files Clerk who files them in case files in her office according to the office docket number which has been assigned to the case by the Docket Clerk and which is stamped on the copy of the brief. The case files which currently contain other papers in addition to briefs, are divided into three sections denominated "Board of Claims" (i.e., those civil suits against state agencies filed in the Board of Claims seeking damages for injuries caused by negligence), "Criminal Cases," and "Civil Cases." An index card is prepared for each case which is indexed under the style of the case. The index card contains the office docket number of the case, the names of attorneys for appellant and appellee, and other information.

While the above system has proved satisfactory Kentucky plans to bind and index briefs separately in order to eliminate clutter.

In Indiana, cases are assigned to four categories: department litigation (including highway condemnation), appeals, general, and tax assessment. A docket sheet is prepared for each complaint, showing the court, and the names of the parties and attorneys. All pleadings are entered on the docket sheets, which constitute a continuing record of each case. Two card indexes are also kept, one alphabetically and one chronologically. Attorneys instruct the logging clerk of the date each pleading or hearing is due, and the card is filed on a date five days prior to that. The clerk gives a copy of the card to the attorney on that date as a reminder.

Arizona has a printed, one-page form which the attorney fills out for filing briefs. It is a checklist showing the type of crime, constitutional issues, defenses, nature of evidence, and other matters. This makes it easy to identify the content of a case. Florida states that it uses a mechanical filing system. Undoubtedly many Attorneys General's offices will convert to mechanical and computer filing and indexing which will allow for flexible and convenient information retrieval systems.

3.73 Library and Filing Personnel

In the 1968-69 fiscal year, only twelve jurisdictions reported that they employed librarians. The value of such specialized staff is becoming increasingly recognized, not only to avoid burdening attorneys with responsibility for libraries and files, but to assure competent records and library management. Someone whose primary responsibility is information retrieval will obviously do a better job of this than an attorney or clerk who does this in addition to their regular duties. New Jersey's management study recommended creation of a centralized file system, saying that it was impossible to assure retrieval of files unless all routine handling of all files were placed under direction of a central file department.

As increasing use is made of automated data processing, there will be a concomitant need to centralize files, records, and library services and to place them under control of special staff. Greater reliance will be placed on standardized index entries, coding of data, and other aids to identification of data. This, in turn, will require continuing supervision by a person trained to process records and data.

The study of New Jersey's Attorney General's office recommended creating a new position of Information Retrieval Supervisor, supported by a Librarian, two file clerks, two record-room clerks, and one data clerk. The Supervisor would be generally responsible for the design and implementation of centralized indexing and filing systems with information retrieval capabilities for both legal and managerial data. The librarian would be responsible for the examination, evaluation and classification of briefs, legal memoranda and other documents, and for ordering additional items to upgrade library facilities. One clerk would sort and file legal memoranda, one would handle briefs, one would maintain looseleaf services and process library material, and one would handle activity and reminder files to the legal staff.

3.8 Data Processing

Some Attorneys General's offices are now making extensive use of data processing, while others are considering possible applications. Automatic data processing is adaptable to needs of different size offices and can involve a wide range of applications and expenditures. N.A.A.G. recognized this by recommending that each Attorney General should consider the possible application of automatic data processing to his office. It was pointed out that computer services can be used to index, record and retrieve virtually the entire data base involved in Attorneys General's work: statutes, briefs, and even correspondence and memoranda.

3.81 Application to Attorneys General's Offices

Among computer uses which are relevant to Attorneys General's offices are the following: legal research, wherein statutes, opinions, memoranda, etc., may be stored on a computer and researched; case dockets, to store selected information about litigation; identification systems relating to individuals, motor vehicles, stolen property, etc.; administrative controls, such as analyses of work assignments, fiscal controls, etc.

An attorney with North Carolina's Department of Justice identified thirty-one potential computer applications for highway cases.[1] A few of these are listed below:

(1) The number of cases disposed of by an attorney in a given period;

(2) Analysis of jury results of individual attorneys;

(3) Correlation of verdicts with particular witnesses;

(4) Analysis of verdicts by county;

(5) Correlation of verdicts to trial judge;

(6) Automatic printout of notice to attorneys on various dates such as deadline for filing maps, time to determine issues, time to move for default judgment, etc.;

(7) Analysis of case-related costs;

(8) Automatic printout of notice that the case is delaying closing of federal aid project;

(9) Comparison of verdicts and comparison of pending cases on various types of property;

(10) Quick retrieval of special type problem cases;

(11) Location of memoranda of law and other research relative to various points which may be found in case file.

Attorney General Robert Warren of Wisconsin has completely computerized that office's records. Wisconsin uses automatic data processing to provide each attorney with a current list of assignments and to provide reports on which work load analysis and budget preparation can be based. The docket includes court cases, administrative cases, formal and informal opinions, correspondence, areas of assignment and expertise, and representation of agencies, boards, and commissions.

Each docket entry has a numeric code. Entries for each case are coded by the attorney's secretary. Each heading includes the docket number, case name, attorney, agency represented, subject, jurisdiction, and office role. A code book was developed containing numerical codes for about five hundred items, such as particular motions, petitions, briefs, and case dispositions. Entries are added as necessary.

Each attorney receives monthly his docket printout, which includes the complete history of cases, opinions, and other matters assigned to him. From these basic reports a number of administrative reports are generated. The agency report lists all case headings handled for each agency. The quarterly summary report provides tallies of briefs written within the office, hearings and trials attended, cases by subject matter, and cases by jurisdictions. An inactive case report lists such cases by subject. The computer also prints a monthly status report of opinions pending and lists of overdue correspondence.

There are special reports on certain subjects, such as what charitable trusts should be filing reports. A consumer fraud data file includes a name file, including aliases, of offenders, and a potential money recovery tally.

A remote access terminal in the Attorney General's office makes possible immediate inquiry and response. The terminal can printout a daily remainder of work due, such as pleadings and briefs. It is also possible to print output data on microfilm, which may be used to produce hand copies.

No one claims that a computer can substitute for a competent attorney. It can, however, offer two advantages over manual efforts. The first is speed: the computer can research all the statutes of a state to isolate specific references to a phrase in less than 20 minutes, a job that would take a prohibitive amount of time for an individual. The second is accuracy: assuming that programming was correct, and that the inquiry is framed accurately, the computer is not subject to error. As an example of speed, Iowa's research agency cites a manual research project which took four researchers ten days to study about 3,000 pages of the Code; this kind of task now requires about ten minutes of computer time.[2] As an example of accuracy, the adversary in a case before the New Jersey Supreme Court argued that the term "beneficial interest" as used in a statute was so vague and obscure as to be unconstitutional. The computer negated this argument by locating forty-five statutory references using this term.[3]

A further advantage is that computers help eliminate reliance on indexes, which may vary greatly in quality and depth. They also solve the problems of storing and cataloguing manually great amounts of reference materials.

3.82 Terminology and Technology

Among their other effects, computers have generated a new vocabulary. A few of the common terms are defined here:

A.D.P. is Automated Data Processing; *E.D.P.* is Electronic Data Processing. Both terms are used to describe the computer process;

Coding is the process of translating data into forms where it can be used by the computer, and serve the purposes intended by the user;

Data Base is the information stored in the computer, from which the desired information is extracted;

Hardware refers to computer equipment; *Software* refers to the non-equipment aspects of a computer system, such as programming;

Interface is compatibility between computer systems, which determines the extent to which information may be exchanged;

Input and *Output* are used to refer to the information that is fed into the computer and that is put forth by the computer. They may refer to the form or content of the data;

Modular refers to computer hardware which can be increased in capacity by merely adding components, without

1. Address by Deputy Attorney General Harrison Lewis, *Computer Application for the Administration of Highway Legal Affairs*, before the American Association of State Highway Officials Legal Affairs Committee, Philadelphia, Pennsylvania, October 29, 1969.

2. Stephen E. Furth, *Automated Retrieval of Legal Information: State of the Art*, COMPUTERS AND AUTOMATION, December, 1968.

3. N.A.A.G. PROCEEDINGS, 1965, p. 105; Speech by First Assistant Attorney General Alan B. Handler of New Jersey.

necessarily changing the whole system;

Printout is the result of a search, the written material furnished by a computer;

Programming is the process of instructing the computer what to do with data which are fed into it, under various circumstances;

Search is a research problem processed against a specific data base;

Time Frame is the schedule of application of systems or of information.

This survey is not concerned with hardware, since few Attorneys General would be purchasing equipment. It is helpful, however, to have some understanding of what components make up a data processing system.

Information must be fed into the computer in a form it can "read". One method is for the operator to feed the information into the computer by means of a keyboard, located either at a remote terminal or at the computer console itself. The limitations of this method are that there is no practical way to verify the accuracy of the information before it enters the computer, and that it ties up too much of the computer's time. A second method is to put the information into machine readable form offline, then let highspeed peripheral equipment "read" this information into the computer. This method is not only faster, but allows the data to be checked for accuracy before entry into the computer.

There are alternative forms in which the data can be made machine readable. The original and still most frequently used form is the punch card. Other forms now available include paper tape, magnetic tape, typewritten material, mark sense (as in test grading), and handwritten material. A regular Selectric typewriter can be used in typing data to be read by the computer, by placing an element with machine-readable characters in it.

The information is used by the central processing unit. It is here that programs for the computer to follow and data for those programs are stored when in use. All the actual computing goes on within this unit. The mass of data in a computing system is kept not in the "core storage" of the central processing unit, but in peripheral storage devices. These data may be the equivalent of large files, but are retained by the computer in compact form. Data so stored can be accessed, manipulated, updated and replaced with great speed and accuracy by the central processing unit.

In very basic systems, storage may be in form of cards or paper tape. Such storage is not really peripheral, because the data has to be fed manually into readers. Although the information can be manipulated and updated by the punching of a new card or tape, it cannot be replaced by the computer itself. Magnetic storage devices, on the other hand, can operate without human intervention once the information is initially recorded, and the record can be accessed, updated and replaced by the computer. The amount of information which can be stored is virtually unlimited, and multiple storage units can be attached to the same central processing unit.

There are three primary types of peripheral storage devices now commonly in use: tape, disk, and data cell. They are generally used for different purposes. If a job can be "batched", or put into an order corresponding to that of the computer files, magnetic tape is adequate. If the sequence of data does not correspond, the computer may have to go from the beginning of the tape to the end and back looking for information. Thus, tape is not efficient if the user has need for instant access to data. A magnetic disk offers instant access to records; it is unnecessary to "batch" jobs because any information on the disk can be reached within a fraction of a second. This allows direct or random access, with what resembles the arm of a record player sweeping the disk looking for specific data. The data cell combines the extra volume of storage available on tape with direct access afforded by a disk, although it is slower than a disk.

The computer's output may be furnished to the inquirer by use of a typewriter printer, which prints out the information at a rate of about 150 words per minute. This is adequate for small scale inquiries. For broader inquiries, a line printer will print the information at a rate of up to 1,400 lines per minute.

Terminals are points where information is fed into or out from the computer. A single computer may have many terminals, and may utilize different types of terminals. There are three types: inquiry, input, and input-output. The first allows an inquiry from the terminal to the computer concerning the status of a record on the computer without changing information on the record. The second is used primarily to update information without any output and the third permits updating information and printing changed records. The actual connection with the computer is usually made over a telephone line, although a cable may be used if the distances are not too great.

Input-output terminals may make inquiries to the computer and return responses. There are various types of such terminals. One uses a small computer as a terminal to a large one. Another relies on the printed word: an operator types information on the terminal's keyboard, which is then relayed to the computer, and the data is returned in typed form. More complex is the visual display unit: the computer is addressed by typing information or keying inquiry codes, then its response appears on a tube similar to a television picture. This information can even be modified from the tube itself by use of a special "light pencil". There is even an audio response unit, wherein the computer is addressed by inquiry codes.

A new development in data processing is printing output data on microfilm. The microfilm printer translates computer digital data into readable text which is produced on a cathode ray tube and printed on film. The film may be viewed at remote stations or used to produce hard copies. This approach is advantageous where there is frequent updating of a large index, especially where the complete text is also on microfilm.

3.83 Legal Search Systems

There are now several types of computer search systems. Legal research using A.D.P. had its practical beginning about 1960, when the University of Pittsburgh's Health Law Center started developing search systems for health laws. Early efforts indicated that excellent results could be obtained by using A.D.P. to search statutes. By 1961, various specialized systems had been developed in government to use electronic techniques for storing and retrieving information in such fields as patents, medicine, law and engineering. The U.S. Air Force in 1962 approved the development of a computer system to store and search the total text of legal documents.[4]

Today, a number of jurisdictions use computer systems for legal research. Texas is recodifying statutes with A.D.P. Ohio, Maryland, Rhode Island, and Virginia are among the states where the legislative service agencies have contracted with a private corporation for unlimited search privileges for their statutes. Wyoming's Attorney General's office has contracted with a firm to place the Wyoming statutes and constitution on tapes, keyed to *Words and Phrases;* the tape will then be placed at the state data processing center. The initial cost is $45,000 and Wyoming has the option to update after each legisla-

4. J A G LAW REV., Vol. VIII, No. 6, 1966. Special Issue on L.I.T.E.

tive session at a cost of $10,000.[5] Ohio's Attorney General's office has installed a teletype machine that is connected to a computer in a nearby city. Assistant Attorneys General can research the Ohio Code and case law at a cost of $100 per hour for search time, plus a monthly charge for the machine.

Examples of specific systems help clarify the processes involved.

The L.I.T.E. (Legal Information Through Electronics) system is operated by the United States Air Force, and is available to users within the federal government. The entire text of the U.S. Code, Appropriations Acts, and certain other documents is placed on the computer. Some common words are then eliminated, and those remaining constitute a vocabulary file. A location code is then developed to identify the specific location of each word in the vocabulary file whenever it occurs. A word being searched is processed first against the vocabulary file to identify locations, then against the text files to retrieve the appropriate citations or texts. The Chief of L.I.T.E. reports that it "has proved to be an invaluable tool for purposes of legal research."[6]

Several private corporations have put state statutes on computers. A user may contact for unlimited search privileges, or may order individual searches and may choose among various output options.

The initial research into the application of computers to law research was made by such groups as the A.B.A. and J.A.G. with the cooperation of private corporations.

Existing systems generally fall into the following classifications:[7]

(1) Total, or original text, method, wherein the researcher feeds words into the computer, which then pulls out the full text surrounding these words whenever they occur. This ensures thoroughness, but the researcher must then go through numerous references to find those which pertain to his problem.

(2) Predesignated index system, which stores citations or text together with a predetermined set of designators. Searches must be phrased in terms of the available descriptors. The computer itself can develop these "vocabularies" by analyzing the frequency with which words in the data base are repeated, and storing references to the documents in which they are located.

(3) Keywords, Keyphrases, or Key Words in Context (K.W.I.C.), where single words are used for a search, or single words are connected by the use of logical operations, such as "and", "or" and "not". The researcher must phrase his inquiry to fit the key words.

(4) The "Socratic method", in which a law text is broken into units of information. The researcher states his general area of interest and the computer asks questions which the researcher answers to narrow down the area of inquiry. The percentage of non-relevant data retrieved is thus reduced, but an error in judgment by the researcher could result in pertinent texts being overlooked.

Most computer systems can adapt to any of these search techniques, all of which have been oversimplified in the descriptions above.

None of these systems rely on the index headings that appear in the statutes, since they do not necessarily identify the subject of the search.

The user may elect a full-text printout, with the entire section surrounding the word or phrase. He may elect a printout of the one line containing the word, or several lines above and below. The citation may be sufficient. The utility of computers in legal research depends, of course, on the accuracy of the data base; if it is not rapidly updated as new laws take effect and carefully purged of statutes that have been repealed it will produce erroneous information.

5. Letter from Assistant Attorney General Fred C. Reed to Attorney General John B. Breckinridge, November 5, 1969.

6. Letter from William E. McCarthy, Col. U.S.A.F., to Attorney General John B. Breckinridge, 25 September 1969.

7. *See:* Bertram S. Sackman, *Electrifying Law Research*, LAW AND COMPUTER TECHNOLOGY, March 1, 1968, p. 2; S. H. Fuld, *Computers in Law*, 40 N.Y.S. BAR J., 1968, p. 230; Stephen E. Furth, *supra* note 2 at 25; Bertram S. Sackman and Morris A. Abrams, *Automated Law Research.*

3.84 Developing an A.D.P. System

If an Attorney General is interested in A.D.P. for his office, he would take certain steps to determine what is needed. Basically, the process of computerization involves the following:

(1) Identifying potential areas of application, by internal study, with or without the assistance of a software company;

(2) Determining the size of the data base or bases—for example, the number of opinions to be programmed;

(3) Deciding who will convert the data to computers;

(4) Deciding on the form of data: full text, abstracts, etc.;

(5) Obtaining a cost analysis and probably setting priorities for implementation.

Most authorities recommend that an overall plan be developed, then priorities established within a comprehensive time frame. With present modular computer systems, an initial computer application may be expanded to fit other applications as an office's budget permits.

"Software" companies specialize in making program analyses and presenting options; they may or may not recommend specific hardware. Feasibility studies usually result in alternative recommendations, with price estimates. The user then makes decisions regarding the data base, the number and type of terminals, etc.

One private company gives the following examples of the types of questions that occur:

> What will be the sequence of the data base? Will the base be contained in one or several discrete files? What storage devices will the files require? . . . What input/output devices will be used for the information processing and retrieval? Who will update the information? What are the editing criteria? Who may have access to it? What are the requirements for interface with other systems? What reports should be generated?[8]

Decisions on the data base directly affect costs, and will be determined by needs of the individual office. For example, an Attorney General who wished to place opinions on a computer might: use all opinions written in the past ten or twenty years; select only opinions on topics of continuing interest; those of major importance; place all opinions on the computer as they were issued.

Most companies offer some training and information services without charge. Conferences may be held or arranged to suit a prospective customer. I.B.M., for example, holds schools to which Attorneys General or members of their staffs may be invited, to explain the applications of computers to the judicial process. Experts agree that the staff of an agency which adopts computer methods should be familiar with the goals of the program; it will be of little use if the staff is hostile to it.

3.85 Other Uses of A.D.P. in the Administration of Justice

Most of the states have established police information network (P.I.N. system), with financial assistance from L.E.A.A. The National Crime Information Center, under the F.B.I., began continuous operation in 1967. As areas develop computer systems with N.C.I.C. interface, there will be a national network to transmit information on wanted persons, stolen cars, stolen or missing guns, etc.[9]

8. Computer Usage Co., MANUAL OF LAW ENFORCEMENT E.D.P., August, 1969, p. 126.

9. *See:* The President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY, Ch. 6, *Criminal Justice Information Systems* (1967).

The Minnesota Crime Information System (MIN.C.I.S.), for example, will hook into the N.C.I.C. computer and make information from the federal government and other states available instantly in the Bureau of Criminal Apprehension for transmission to other agencies. Information will include data on wanted persons; stolen vehicles and property; drivers' licenses and motor vehicle registration; known criminals, their associates and *modus operandi*; fingerprint information; outstanding felony warrants and other information. In future years, MIN.C.I.S. will be expanded to include information of assistance to court and correctional agencies and for statewide criminal justice planning.

Other types of data which are being stored on various state and local law enforcement computer systems include: boat registrations; fraudulent checks; jail populations; missing persons; intelligence data on organized crime; manpower and resource allocation; officers' reports; field interrogations; accounting and budgeting data; traffic accidents and arrests. Access to particular types of data can be limited to certain terminals, so all the information need not be made available to all users.

The applications of computers to the judicial process has become fairly widespread, particularly in the areas of jury selection, court fee accounting, and registers of actions. Two examples are given here.

The Judicial Conference of the State of New York uses a computer to process information concerning: criminal statistics, from fingerprintable arrests to final disposition; retainer and closing statements filed by attorneys in cases involving contingent fees; statements of appointment and services of court-appointed individuals where fees are paid; statistics on family court proceedings; statistics on civil cases calendars; reports on assigned counsel; and other information. Additional applications currently under study are: a central calendar system; a central jury selection system; a family court payment system; the handling of traffic cases and a central indexing system for habeas corpus petitions and writs of *coram nobis*.[10]

The Supreme Court of Kansas uses A.D.P. for court statistics. Previously, the clerk of each district court sent in annual inventory sheets listing all cases during the previous year. Now, clerks report throughout the year, and the data is recorded on a computer. Judges of district courts are furnished with compete printouts of their dockets at various times.[11]

The National Association for State Information Systems (N.A.S.I.S.) was established in 1969 as a permanent organization of the states to improve management of information systems. The purposes of N.A.S.I.S. include study for improved systems; "to focus its attention on the potential for invasion of privacy occasioned by the data processing revolution; to concern itself with the development and use of accurate, compatible, relevant, timely and complete information to improve the effectiveness of decision making within governments. . . ." N.A.S.I.S. has developed standard contracts, policy statements on privacy, and similar documents of interest to the states.

No specific work has been done on legal research by N.A.S.I.S., although there would appear to be some benefit to be gained from interstate cooperation in this area. By way of comparison, the Western Interstate Commission for

10. Letter from George J. Levine, Planning Officer, to Attorney General John B. Breckinridge, September 15, 1969.

11. Letter from James R. James, Judicial Administrator, Supreme Court of Kansas to Attorney General John B. Breckinridge, September 22, 1969.

Higher Education is developing a body of uniform data elements which all participating educational institutions in a thirteen-state area will use to some degree in building their data bases. Likewise, legal research users might aim at developing interface for comparable data bases.

Extensive data on computer applications to the law have been published. The Public Administration Service issued an annotated bibliography which includes listings of books, articles and other materials on the computer in government, and on textbooks and other basic guides to data processing.[12]

12. Public Administration Service, THE COMPUTER IN THE PUBLIC SERVICE, compiled by Public Automated Systems Service (1970).

4. ADVISORY OPINIONS

All Attorneys General render advisory opinions on questions of law. This is inherent in their role as the state's chief legal advisor and is made mandatory by statute or constitution in most jurisdictions.

Beyond the fact that they all issue opinions, the fifty-four Attorneys General's offices exhibit their usual lack of uniformity in powers and procedures. Some issue only formal, official opinions, while others rely primarily on informal, unofficial opinions. The number of formal opinions issued annually ranges from only one to over one thousand. Some render opinions only to state officers, while others issue them to a wide range of inquirers, including private citizens. Preparation procedures may be defined by administrative rule or may not be standardized. Opinions may be screened by a special committee, or may be written and issued by the Attorney General independent of committee action. They may be printed in a bound volume, or not reproduced in any form. They may confer immunity upon a recipient, or have no effect on his legal liability.

This section analyzes some of these aspects of opinion writing. Unless otherwise indicated, all information herein comes from questionnaires or other data submitted by the Attorneys General's offices to the Committee on the Office of Attorney General.

4.1 Form of Opinions

The term "advisory opinion" may embrace formal and informal opinions, letters, memoranda and oral advice.

Generally, formal or official opinions are defined by Attorneys General as those written opinions on subjects of statewide interest or major importance. Another criterion is whether the question involved is likely to recur, or has not previously been presented. Formal opinions are usually included in the published compilation of opinions, if one is issued. Informal or unofficial opinions are also written, but on subjects of more limited interest or importance. In addition, most jurisdictions give some advice by informal letter or memorandum and issue oral advice by telephone or in conference, and may consider such advice as opinions. What is considered an Attorney General's opinion in one jurisdiction might not be in another.

Some jurisdictions make a clear distinction between the status of formal and informal opinions. In California, formal opinions are considered the official opinions of the office while informal opinions are considered only the views of the deputy writing the opinion. California also answers some requests by a simple letter. Formal opinions in North Dakota must be approved by a majority of the staff and signed by the Attorney General, while informal opinions are signed by individual assistants and may not have been approved by others. In Wisconsin, the recipient of an informal opinion not signed by the Attorney General is specifically warned that the opinion represents only the views of the writer and may not be quoted as the official opinion of the Attorney General. Several other jurisdictions follow this policy of limiting expressions of official policy to formal opinions.

Other jurisdictions make no distinction between formal and informal opinions, but consider all opinions to be official. Arkansas and Kentucky are among such states; each issues over five hundred opinions annually, so apparently the general criterion that official opinions must be of statewide interest or major importance is not rigidly applied. Washington considers all opinions to be official statements of the office, and all are approved by the Attorney General. A distinction is made, however, between published and unpublished opinions. The criteria for deciding whether an opinion is to be published are the importance of the question, the likelihood of its recurring, and statewide interest in the opinion.

The distinction between formal and informal opinions may be based on the requestor's position. In Colorado, for example, all written opinions requested by the Governor, legislature and state departments are official and are signed by the Attorney General. Kansas usually issues formal opinions only to the Governor, legislature and elected officials, who account for about half of the requests received. Some offices issue informal opinions to persons who would not be entitled by statute to receive formal opinions.

A few states, including Alabama and Maryland, report that they do not give oral advice, but require that all opinions be written. Other offices routinely give advice by conference or telephone. Some amount of oral advice would appear inevitable in the normal discharge of the Attorney General's role as legal advisor. Such advice, however, is of limited impact, as it is not a matter of record or reference.

It can be argued that all opinions should be official or, conversely, that formal opinions should be used with discretion. The number of each type issued depends largely on the strictness with which guidelines for deciding the type of opinion to be issued are applied. Delaware, which issues from seventy-five to one hundred and fifty formal opinions a year, states that it prefers to formalize as many as possible and to distribute them widely so that all state agencies which are interested in a problem will be advised. Minnesota tried wider use of informal opinions for questions of lesser importance but discontinued the experiment because there was considerable confusion between the status of formal and informal opinions, and copies of some informal opinions were circulated nearly as widely as formal opinions. Iowa has not issued any informal opinions since 1966.

On the other hand, Pennsylvania issues ten or fewer formal opinions annually and says that:

> The bulk of this [advisory] activity is informal in nature and problems are disposed of as they arise. From time to time, broader questions are presented, frequently affecting more than one agency, and the formal opinion of the Attorney General is sought. This results in the issuance of official opinions . . . which serve as valuable precedents not only for Commonwealth personnel but for the Bench and Bar throughout the state.[1]

New Mexico is deliberately using more conferences, letters, and memos to reduce the number of formal opinions. New Jersey, which issued only three formal opinions in 1967 and none in 1968, is an example of another state which sharply restricts the use of formal opinions.

Some states have additional classifications for opinions. Arizona, for example, in 1967 issued 27 formal opinions, 38 letter opinions, 491 informal letter opinions and 37 concurring opinions, which were those written by county attorneys and concurred in by the Attorney General.

The relative advantages of emphasizing either formal or informal opinions may vary from state to state. In some, a formal opinion may be subject to more stringent request and review procedures. Therefore, a formal opinion could not be obtained as quickly as an informal one, but it would be more

1. Pa. Dept. of Justice, REPORT TO GOV., 1964-1966, p. 2.

carefully researched and carry greater weight. Formal opinions would be afforded greater significance if fewer were issued and their importance thereby upgraded. On the other hand, it can be argued that most questions on which the opinion is sought by persons entitled to an opinion are sufficiently important to merit an official opinion of the Attorney General.

Providing for review and publication of opinions minimizes the chance of issuing conflicting advice and allows for wider dissemination. If opinions are binding on recipients or confer immunity from liability they should be carefully prepared and carry the weight of an official opinion of the Attorney General. Obviously, the relative use of formal and informal opinions is a matter of sufficient importance to warrant careful consideration of policy in each jurisdiction.

4.2 Number of Opinions

Any comparison of the number of opinions issued by various jurisdictions must take into account the different definitions of opinions. For example, Arkansas and Kentucky each issued over six hundred formal opinions in 1968, but all opinions are classified as formal in these states. Idaho and New Jersey each issued fewer than ten formal opinions that year, but from one thousand to three thousand informal opinions.

Despite these differences, there is still a great range in the number issued. All but one jurisdiction furnished data on the number of opinions issued in 1967 and 1968. These are shown in Table 4.2. Four do not keep records of the number of opinions issued, but three of these were able to furnish estimates. The number of formal opinions issued in 1967 ranged from one in Connecticut to 659 in Minnesota; informal opinions, in those states which issue them, ranged from twenty in Hawaii to 17,200 in Florida. The 1968 data are equally diverse. New Jersey issued no formal opinions, while Ohio issued 1,012; Hawaii issued seven informal opinions and Florida again rendered over 17,000.

Of thirty-five jurisdictions which reported the number of both formal and informal opinions issued in 1968, eleven issued over one thousand opinions, seven issued from five hundred to one thousand, sixteen issued from one hundred to five hundred, and one issued fewer than one hundred opinions. Seven of these issued only formal opinions. The categories of persons to whom opinions may be rendered does not seem to govern the total number issued, as three of the five jurisdictions with the highest number of opinions do not give them to local officers. Nor does the size of the jurisdiction relate to the number of opinions, as the five states which issued the most opinions included both Idaho and New Jersey. Neither does the number of state agencies employing their own counsel correlate with the number of Attorney General's opinions issued.

The number of opinions issued seem to be increasing in some jurisdictions, while decreasing in others. The number may fluctuate within a single state; in Ohio, for example, the number of formal opinions dropped from about 1,500 in 1957 to 1,063 in 1959, because the Attorney General stopped using written opinions to approve certain contracts. The number continued to decline to a low of 870 in 1967, then increased to over one thousand in 1968.

A few other jurisdictions offer explanations for a significant change in the number of opinions issued. In Arizona, formal opinions decreased from seventy-seven in 1960-61 to twenty-seven in 1966-67, because the budget was not adequate to handle the costs of publishing a larger number of formal opinions. In Minnesota, a decrease from 659 in 1957 to 166 in 1968 was attributed to a backlog of requests when a new Attorney General took office, to the fact that fewer requests are received during years when the legislature is in session, and to greater use of informal opinions on an experimental basis.

4.2 NUMBER OF OPINIONS, 1967 and 1968

	Keep No Records	1967		1968	
		Formal	Informal	Formal	Informal
Alabama				100 (est.)	1,500 (est.)
Alaska				2	(hundreds)
Arizona		(1966-67: Formal-27; Letter-38; Informal-491)			
Arkansas		675 (est.)	0	675 (est.)	0
California		84	203	72	274
Colorado				247	200
Connecticut		1	134	14	163
Delaware		97	0	116	0
Florida		92	17,200	110	17,100
Georgia				204	609
Guam		36	700	32	700
Hawaii		22	20	31	7
Idaho		10	1,000+	6	1,000+
Illinois		67	150	70-80	150-170
Indiana		70	Numerous	54	124
Iowa		607 (1967-68)	0	607 (1967-68)	0
Kansas				300 (est.)	300 (est.)
Kentucky		563	0	616	0
Louisiana	X			2,500 (written)	
Maine		158	200+	172	200+
Maryland		148	1,000 (est.)	160	1,000 (est.)
Massachusetts		125	Numerous	82	Numerous
Michigan		38	166 (est.)	31	302 (est.)
Minnesota		659		166	
Mississippi	X	300 (est.)	1,800 (est.)	300 (est.)	1,800 (est.)
Missouri		455		453	
Montana		12	400+	9	400+
Nebraska		116	1,000-2,000	66	1,000-2,000
Nevada		80	123	96	87
New Hampshire		200 (est)		200 (est.)	
New Jersey		3	2,000	0	3,000
New Mexico		148		112	500 (est.)
New York		44	360	43	401
North Carolina		700 (est.)		700 (est.)	
North Dakota		144	2,500	123	2,340
Ohio		870	65 (est.)	1,012	88 (est.)
Oklahoma		282	0	242	0
Oregon		202		161	
Pennsylvania				10	200
Puerto Rico		607	0	535	0
Rhode Island					
Samoa	X	(est. 6 formal opinions per year)			
South Carolina		250		300	
South Dakota		169	35-40	168	45-50
Tennessee	X				
Texas		175	0	153	0
Utah		185		118	
Vermont		250 (July/67-Dec/69)	325	73 (1966-68 total)	
Virgin Islands		225 (est.)	750 (est.)	300 (est.)	1,000 (est.)
Virginia		345 (1967-68 FY)			200 (est.)
Washington		77 (1967-69)	7,187		
West Virginia		59	190 (est.)	40	220 (est.)
Wisconsin		53	3,000°		3,000°
Wyoming		42		27	

° including letter opinions

4.3 To Whom Issued

The categories of persons to whom opinions shall be rendered are usually defined by statute, and are even set by constitution in a few states. All Attorneys General render opinions to the Governor and to the heads of state agencies. Almost all give opinions to the legislature or either branch thereof, and to individual legislators. Twenty-nine jurisdictions specify that they give opinions to local prosecutors and about half give them to other local officers.

C.O.A.G. questionnaires to incumbent and former Attorneys General asked to whom they thought official opinions should be rendered. Replies are shown below.

The great majority favored issuing opinions to the Governor, state officials and to universities. Both groups almost unanimously opposed issuing opinions to private individuals. They also opposed giving opinions to federal officials or judges, and former Attorneys General opposed giving opinions to individual legislators.

Generally, the statutes specify whether or not opinions will be issued to local officers. Where they are silent, the Attorney General may imply such authority from other statutes. Louisiana believes that the Attorney General's role as legal advisor to various state and local political entities implies that they have the right to request opinions.

Most statutes use the mandatory term "shall" to describe the Attorney General's duty to render advisory opinions. No cases directly in point have been identified, but it would appear that the Attorney General would have to render an opinion if properly requested by an officer who was legally entitled to the same. Robert Toepfer says that:

> . . . being a mandatory duty, the Attorney General could be forced by mandamus to give such advice. However, the court would not by its decision control the substantive contents of the official opinion to be rendered. This is in accord with the general rule that an order of mandamus may be entered ordering an officer to exercise discretion or judgment, but such an order cannot control the course of such discretion. . . . Similarly, it is clear that a court should be able to prevent an attorney general from rendering an opinion if he is acting beyond the scope of power conferred upon him by court or statute.[2]

Only three jurisdictions state that they issue opinions to private inquirers, although others may do so on occasion. North Dakota reports that private individuals usually receive assistance on matters of public interest. Guam states that there are no restrictions on persons to whom opinions shall be issued. Kentucky issues formal opinions to private citizens, but had adopted regulations

2. Robert Toepfer, *Legal Aspects of the Duty of the Attorney General to Advise*, 190 CIN. L. REV. 213 (1950). *But see* Note, *Liability of the Attorney General to Mandamus*, 14 MINN. L. REV. 303 (1929), which implies a contrary view.

Should Opinion be Rendered to:	Former A.G.s		Incumbent A.G.s	
	Yes	No	Yes	No
Governor	112	1	37	0
State Officials	109	1	37	0
Legislature	100	9	35	2
Individual Legislators	42	64	22	15
Local Prosecutors	88	21	(not asked)	
Local Officials	45	64	16	20
Universities	69	40	29	7
Federal Officials	23	86	6	31
Judges	29	80	12	25
Private Individuals	1	108	0	37

restricting such opinions to certain types of questions. Louisiana apparently renders occasional opinions to private persons when there is a state interest involved. Georgia and New York are among the other states which will, as a matter of courtesy, issue some opinions to private persons, although there is no statutory basis for this.

Most Attorneys General will not routinely issue opinions to out-of-state officers or agencies. Of forty-two jurisdictions reporting, only six, Alaska, California, Colorado, Guam, New York, and Puerto Rico, state without qualification that they honor opinion requests from the federal government. Seventeen jurisdictions will not give opinions to federal officers. The other nineteen jurisdictions say that it depends on the nature of the request, or whether it is of concern to the state, or such requests will be honored if the information is readily available. Maryland reports a case which discussed the weight to be given an Attorney General's opinion rendered to a federal agency and which indicated that such procedure was proper.[3]

Of thirty-seven jurisdictions reporting, only three, Colorado, Guam and Puerto Rico, consistently honor all requests from officers or agencies in other jurisdictions. Fifteen jurisdictions do not honor any such requests, and two issue opinions only to Attorneys General. The others decide on an individual basis, depending on the question involved or the complexity of the issue. One state, Maryland, says that it has no policy on the subject.

Attorneys General usually issue some opinions which are not expressly authorized by statute, but most consider that the statutory enumeration of persons to whom opinions shall be rendered is binding. Maine, for example, says that the statute is exclusive and, therefore, will give no written opinions to other persons or groups. Legal assistance may be rendered to county attorneys, in the form of memoranda of law, on the basis of a statute which requires the Attorney General to "consult with and advise" these officers.[4]

In some jurisdictions, the statute itself prohibits the issuance of opinions to persons other than those specified. Oregon law says that "the Attorney General shall not render opinions or give legal advice to others than such state officers listed. . . ."[5] Virginia's statute says that the Attorney General shall give advice and render official opinions in writing only when requested in writing by officers specifically named in the statute.[6] The Attorney General sends out a printed card to private citizens who request opinions, explaining that the issuance of opinions is restricted by statute.

Judge Robert Larson, in his study of the advisory function, points out that:

> An inquiry from an unauthorized party or volunteer should be refused, for in addition to being a practice unauthorized by the law, it would amount to an invasion of the field of private practice reserved for those so engaged . . . it must be remembered, the matter of who is entitled to receive an opinion is not left to the attorney general's discretion, but this obligation, like that of other public officers, is controlled by the law.[7]

A former Attorney General of Texas comments that the effect of a 1918 act "clearly defining those who could and those who could not obtain opinions from the Attorney General . . . was to raise the dignity and status of Attorney General opinions."[8] Statutory restrictions define the Attorney General's advisory obligation and help limit his opinion-writing role.

3. 154 F. SUPP. 747, 756 (D. Md. 1957).

4. ME. REV. STAT. ANN., tit. 5, § 195.
5. ORE. REV. STAT., § 180.060 (2).
6. VA. CODE, § 2.1-118.
7. Robert Larson, *The Importance and Value of Attorney General Opinions*, 41 IOWA L. REV. 357 (1956).
8. Attorney General Will Wilson, *The Attorney General's Contribution*, 20 TEXAS B. J. 470 (1957).

The few jurisdictions which render opinions to private citizens do so on the basis of citizens' rights to obtain answers to questions of general import. Kentucky provides by regulation that official opinions may be rendered to citizens on "questions involving their voting rights, eligibility for public office and their election rights, duties and liabilities," "questions involving licenses and taxation on a state level," and "concerning the official acts and conduct of office of public officials," if the question involves a factual situation and is of general interest.[9] Professor Arlen Christenson compares this with the Wisconsin Attorney General's practice of writing letters to citizens on similar subjects: "the Attorney General, through the opinion process, was performing the ombudsman's function of asserting the citizens' rights against a government agency."[10]

Where opinions are issued to local officers, they usually constitute a substantial share of the total rendered. In Iowa, 55 percent of opinions are to county attorneys, 10 percent to legislators and the rest to state officers. About 75 percent of Attorney General's opinions in Arkansas and 70 percent in Alabama are directed to local officials. A Texas study showed that 46.7 percent of opinions issued from 1939 to 1960 went to county officials.[11] Of the 1,251 opinions issued by Kentucky in 1960, almost half went to local officials and about one-fourth went to private citizens.[12]

Statutes of a few states specify or imply that requests for opinions shall be in writing and must be made by the head of an agency but, otherwise, the form in which requests must be made is a matter of administrative policy. All but five of fifty-two jurisdictions reporting require that opinion requests be in writing. Twenty-five jurisdictions require that the request be signed by the head of the agency involved and two more require that it be signed by the agency head or his deputy. Another says that this depends on the agency, while twenty-two have no such requirement. In all but nine of forty-nine jurisdictions which furnished information, the request must include a detailed description of the facts involved.

In those jurisdictions which issue both formal and informal opinions, the Attorney General or his Chief Deputy usually decide which type of an opinion will be issued in response to a request. In ten of the sixteen jurisdictions from which this information is available, the Attorney General participates in this decision. In others, it is made by his deputy, or by a department or division head.

9. Ky. Adm. Reg. DL-RG-2.
10. Arlen C. Christenson, *The State Attorney General* WIS. L. REV. 337 (1970).
11. Texas Legislative Council, *Opinion Authority of the Attorney General*, in REPORT NO. 57-9, 36 (1962).
12. Ky. Dept. of Law, *The Office of Attorney General in Kentucky*, 51 KY. L. J. 119-S, 120-S (1963).

4.4 Subject of Opinions

Opinions cover a wide range of subjects. Indexes to published opinions list topics ranging from abandonment of wells to zoning of airports and from adoption to workmen's compensation. The subject is generally restricted by statute or constitution to questions of law connected with the performance of official duties. The Attorney General must issue opinions to officials: "on questions of law relating to their official duties and shall furnish a written opinion on such matters, when so requested";[13] "upon any question of law relating to their respective offices";[14] "any question connected with the interest of the state or the duties of any of the departments";[15] "on any subject pending before them or under their control with which they have to deal officially or with reference to their duty in office"[16] or similarly-stated circumstances.

A few state statutes set different subjects on which opinions will be rendered to different categories of inquirers. Thus, the Attorney General of Arkansas must render opinions to heads of state departments "upon any constitutional or other legal question that may concern the official action of said officers"; to prosecuting attorneys "upon any legal question that concerns the financial interests of the state, or any county, and upon any question connected with the administration of the criminal laws"; to legislators "upon the constitutionality of any proposed bill"; to state boards "upon any question connected with the discharge of [their] duties."[17]

Opinions generally are confined to actual, not theoretical, questions and to questions of law, not of fact. Thus, most Attorneys General would decline to answer hypothetical questions, or those merely involving a factual determination.[18] Although these limitations may be expressed or implied by statute, they are more commonly a matter of administrative policy, or are stated by opinion. Thirty-seven jurisdictions reporting require that requests for opinions include a detailed description of facts, while nine do not, and three usually do. Such facts would presumably be sufficient to serve as a basis for deciding the legal question involved.

Most opinions involve the interpretation of statutes, but some Attorneys General decline to issue opinions on their constitutionality. Ten of fifty-three jurisdictions reporting will not render opinions on the constitutionality of statutes and three will not on the constitutionality of bills. Nineteen of forty-eight jurisdictions may not give official opinions on the constitutionality of ordinances. Section 6.13 of this study, however, shows that most jurisdictions review at least some bills before introduction, passage or signing by the Governor. This review does not, of course, usually involve the issuance of a formal opinion.

A 1962 survey obtained information from thirty-eight Attorneys General on whether they considered it desirable to rule on the constitutionality of bills or statutes. Thirty-two felt it was desirable for the Attorney General to rule upon the constitutionality of a bill before final passage; thirty-five, before it was signed by the Governor; twenty-four, after it had been signed but before it had taken effect; and twenty-nine, after

13. VT. CONST., tit. 3, ch. 7, § 159.
14. IDAHO CODE, § 67-1401 (6).
15. GEORGIA CODE, § 40-1602.
16. NEW MEX. STAT. ANN., § 4-3-2 (d).
17. ARK. STAT., § 12-702.

18. *See:* Conrad Goodkind, *Opinions of the Attorney General.* (paper prepared for the Attorney General of Wisconsin, undated); Toepfer, *supra* note 2 at 206.

it had become law.[19] Some Attorneys General felt that it avoided unnecessary litigation and helped prevent the approval or enactment of unconstitutional litigation. Others took the opposite point of view, holding that this was a judicial function, and problems could arise if the Attorney General held that a law was unconstitutional and then later had to uphold it in court. Some Attorneys General thought they should comment on constitutionality before a bill became law, but, once enacted, their policy was to presume its constitutionality until the courts held otherwise. Others felt they should, on request, raise questions of constitutionality, so that the matter could be brought before the courts as expeditiously as possible. Some said that they avoid questions of constitutionality when possible.

Several courts have cited the statement in *Sutherland's Statutory Construction* that:

> . . . interpretation by the attorney general and the legal department of state will have important bearing upon statutory meaning, since the attorney general and his office are required by law to issue opinions for the assistance of the various departments.[20]

Some jurisdictions apparently go even further, and omit an act from the statutes if it is ruled unconstitutional by the Attorney General.[21]

Attorneys General are reluctant to render opinions on matters before a court or an allegation of error in court. Of fifty-one jurisdictions reporting, forty do not give opinions on matters before a court and four others only give such opinions on request of the court or if they are a party to the action, in which case the Attorney General's position would presumably be incorporated into the brief filed and would not be properly considered an opinion. The remaining jurisdictions indicate that they may give such opinions, but do not say if they actually do. Thirty-nine of fifty-one jurisdictions reporting say that they do not give opinions on allegations of error committed in court and one gives such opinions only if the Attorney General appeared in the action. Attorneys General are apparently divided as to whether to issue opinions on their own motion: half of forty-six Attorneys General responding said that they did, while half said that they did not.

19. Texas Legislative Council, *supra* note 8 at 39-49; *see also* Howard, *Research Report and Memorandum Dealing with Powers of the Attorneys General and the Scope of the Power of the Attorney General in Oklahoma* (prepared for the Attorney General of Oklahoma, undated.)
20. 2 SUTHERLAND, STATUTORY CONSTRUCTION 516, § 5105 (3rd. ed.).
21. *See: State ex rel. Nesbitt v. District Court of Mayes County, (Okla.)* 440 P. 2d 700 (1968), which cites an instance where a legislative act was not compiled in the statutes or session laws because it had been held invalid by the Attorney General.

4.5 Preparation of Opinions

The preparation of an Attorney General's opinion places a great responsibility on the author. Opinions do not involve an adversary proceeding nor a formal investigation. The author alone must analyze both sides of the question, research the problem carefully, and reach a conclusion. A Wisconsin study compares an opinion to a law review article, in that it is "a well-documented piece of legal research by an author who is familiar with his subject."[22] The study argues that the opinion procedure is faster, cheaper and more objective than an adversary proceeding, because the decision is not influenced by outside pressures or the skill of advocates. Minnesota's instructions on writing opinions note that this absence of adversary proceedings "puts a heavy burden on the writer to see the question in perspective, to request and evaluate further information when needed, to discern future problems, and to research thoroughly without the prod of potential courtroom embarrassment."[23]

The statutes generally prescribe to whom opinions shall be issued but, otherwise, the Attorney General has full discretion as to how opinions are prepared and distributed. The preparation of opinions usually involves: the receipt and recording of an opinion request; the determination of what type of opinion will be issued; the assignment of the request; the research and drafting of an answer; the review of the draft; and the release and recording of the opinion. In some offices, of course, the Attorney General may simply write and release the opinion himself.

The Attorney General or his deputy usually decides what type of opinion will be issued, and to whom it will be assigned. There are variations from this practice. Massachusetts has established a committee of three Assistant Attorneys General to determine whether a formal or informal opinion is issued in response to a request. In Kansas, the mail receipt desk assigns requests administratively, in accordance with a predetermined subject assignment sheet, subject to re-routing by the Attorney General or a division chief. In most jurisdictions, opinion requests are assigned to the attorney who is responsible for that substantive area. In a few states, such as Washington, one attorney may write a large percent of opinions. Puerto Rico is the only jurisdiction which reports that some staff members are assigned exclusively to opinion writing. The Opinions Division of the Puerto Rico Attorney General's Office renders legal advice and advisory service. Oregon employs a law school professor part-time primarily to assist staff in preparing opinions.

In those jurisdictions where agencies have their own counsel, they generally still request Attorneys General's opinions. A Kentucky study, for example, showed that all but one of the sixteen departments which had house counsel requested Attorney General's opinions in 1960.[24] In those jurisdictions where members of the Attorney General's staff are assigned permanently to and are located with an agency, opinion requests are still directed to the Attorney General. In Washington, for example, an opinion request will be sent from an agency head to the Attorney General, who will probably assign it to the assistant who serves as counsel to that agency, and who may be located in its offices. The assistant drafts the opinion, then sends it back to the

22. Goodkind, *supra* note 18 at 28-29.

23. Asst. Atty. Gen. Will Hartfeldt, (Memorandum issued May 15, 1969, Minnesota Atty. Gen.'s office).

24. Ky. Dept. of Law, *The Office of Attorney General in Kentucky*, 51 KY. L. J. 41-S (1963).

central office for review.[25]

The time required to prepare an opinion ranges from hours to months or even a year. Of forty-one states reporting, thirteen report that the average time from receipt of request to the issuance of an opinion is twenty days or more. On the other hand, Guam, Mississippi and Tennessee report that requests are answered within a week. Thirteen jurisdictions say that requests are usually answered in one or two weeks. Several jurisdictions specify that the time depends on the complexity or urgency of the request. New Jersey reports that some formal opinions have been issued in a day while others have taken "at least two years."

Louisiana has an office rule that all opinion requests must be answered within 48 hours of receipt, although about 2,500 opinions are written annually. In Washington, the person requesting an opinion is usually contacted and asked to consent to a delay if the opinion will take more than six weeks to prepare. Three jurisdictions said the question could not be answered.

25. Interview with Assistant Attorney General Donald Foss, October 7, 1970, Olympia, Washington.

A few jurisdictions have written instructions for attorneys in drafting opinions. California's office manual contains fourteen pages of detailed instructions on answering opinion requests. This covers procedures for: determining the method of reply; acknowledging and numbering requests; assignment; indexing and editing; final approval and press releases; and similar matters. Minnesota has a memorandum covering suggestions for research and writing methods and instructions for preparing headnotes and press releases. Kentucky's office manual concerns opinion writing, among other matters.

Massachusetts has a nine-page multilithed selection of excerpts from prior opinions of the Attorney General, to be used in categorizing particular requests for opinions and formulating answers thereto. This quotes statements in support of such matters as that: the Attorney General is not required to state reasons for his opinion; he accepts facts as submitted; he need not answer hypothetical questions; and similar matters. This compilation not only saves attorneys a considerable amount of research, but undoubtedly helps assure consistency in handling opinion requests.

4.6 Review and Release

Official opinions are reviewed before release in all of the fifty-two jurisdictions reporting. Table 4.6 shows that the Attorney General reviews opinions in all but eight jurisdictions and opinions are also reviewed by other staff members in all but nine. Procedures for staff review fall into the following classifications: review by the chief assistant or deputy; review by a staff member who is made responsible for opinions; review by a special board or committee; and review by some or all of the other attorneys in the office. C.O.A.G. has recommended that all formal opinions should be reviewed by other persons as well as the author and the Attorney General or his designee before they are released.

In eight of the jurisdictions reporting, only the First Assistant or Chief Deputy, in addition to the Attorney General, reviews opinions. In eighteen more, his review is supplemented by that of other attorneys.

Some jurisdictions make one staff member primarily responsible for opinions. In Texas, one assistant is named the Opinion Committee Chairman. He assigns all opinion requests, appoints and supervises opinion committees and conducts their meetings, and readies opinions for the Attorney General's signature. The Chief of the Civil Division in Kansas reviews opinions, as does the Director of the Opinion Division in Puerto Rico.

In some jurisdictions, all staff members review opinion drafts; the number of attorneys ranges from eight to almost one hundred in these offices, so such review could be extremely time-consuming if all staff members actually do review drafts. Wisconsin used to circulate opinion drafts to all staff members, relying on their voluntary comment; now, they are still so circulated, but are also assigned specifically to at least five assistants, the choice of assistants varying with each opinion. These assistants are to comment in depth and not merely give a cursory dissent or affirmation. North and South Dakota both require that an opinion be initialed by each staff member before release.

Some jurisdictions have established a special committee to review opinions. In Indiana, each formal opinion is reviewed by five examiners before it is submitted to the Attorney General. Ohio has a unique system, wherein an "office court" of about fifteen attorneys discusses and, if necessary, amends opinions before they are submitted to the Attorney General for final review. Three or four opinions are discussed at each session of the "court". This procedure serves several purposes. It brings the experience of many attorneys to bear on a question. They, in turn, become familiar with the opinion, and the discussion is an educational process for them. The resulting opinion is of better quality than it might be otherwise. After discussion, those present vote on the opinion. If there is a significant number of negative votes, the Chief Counsel goes over the opinion again.[26]

Deputy Attorney General John B. Bookout of Alabama pointed out the advantages of committee review:

> We have a tremendous volume of opinions and each one is channeled through an opinion committee before publication. We have found the committee system to be much better than review by only the Attorney General or me prior to release. We are frequently questioned about our opinions and it adds to their persuasiveness to be able to say that each opinion has been reviewed by the writer, by a committee of seven senior attorneys, and then by the Attorney General

26. Interview with Chief Counsel Robert D. Macklin, August 14, 1970, Columbus, Ohio.

	Reviewed before Release by—				Signed by—		
	A.G.	Chief Deputy	Review Board	Other	A.G.	Author	Other
Alabama	X		X		X		
Alaska	X	X			X	X	
Arizona	X			3 Assistants	X		
Arkansas	X			Staff	May	X	
California	X	X		4 Assts., incl. Chief	X	X	
Colorado	X	X			X		
Connecticut	X	X			X	May	X
Delaware	X				X	X	
Florida	X		3-man		X	X	
Georgia	X	X		Division Chief	X		
Guam	X	X			X		
Hawaii	X			Staff	X	X	
Idaho	X					X	
Illinois	X	X		Second reader	X		
Indiana	X	X		At least 5 other Deputies	X		
Iowa	X	X		Sometimes other	X	May	
Kansas				Chief of Civil Division			
Kentucky	X			Staff	X	X	
Louisiana				At least 2 assts.	May	X	
Maine	X	X		Chief Adm. Asst.		X	
Maryland	X	X		Division Chief	X	X	
Massachusetts	X	X		Division Chief	X		
Michigan	X°	X°	5-man	(°formal ops. only)	X		
Minnesota	X	X		Asst. Opinion Div.	X	X	
Mississippi					X	AG's assignee	
Missouri	X			Head reviewer & Assistant	X	X	
Montana	X	X		Entire staff	X		
Nebraska	X	X			X	X	
Nevada	X	X		3 Assistants		X	
New Hampshire							
New Jersey	X		5-man		X	X	
New Mexico				Staff	X	X	
New York	X	X			X		
North Carolina	X			A.G. or Chief Assts.	X	X	
North Dakota				Entire staff	X		
Ohio	X	X	15-man		X		
Oklahoma	X			Conf. of all Attys.	X	X	
Oregon	X	X			X		
Pennsylvania	X	X		All Assistants	X	X	
Puerto Rico	X	X		Director of Opinion Div.			
Rhode Island	X				X	X	
Samoa	X				X	X	
South Carolina	X				A.G. or assistant		
South Dakota	X			Each Assistant	X		
Tennessee	X						
Texas	X	X	X	Division head	X	X	X
Utah				1 or more Assistants	X	X	
Vermont	X				X	X	
Virgin Islands	X				X	X	
Virginia	X	X			X		
Washington	X			Assigned deputy	May	X	
West Virginia	X			A.G.'s designee/A.G.	X	X	
Wisconsin		X	5-man	Adm'r-Legal Services Div.	X		
Wyoming	X				X	X	

or myself. . . . [after] they agree unanimously after considerable research and general debate, you usually come out with a good opinion.[27]

Special procedures may be provided for more important opinions. In Kentucky, all "major opinions and lesser opinions of difficulty to the author" are scrutinized by the Review Officer and/or the Review Committee. The Attorney General of Idaho personally reviews those opinions which are of statewide importance or involve statutory construction, although he may not review others. In Utah, opinions normally are reviewed by only one assistant, but major opinions may be reviewed by several.

27. John B. Bookout, Deputy Attorney General of Alabama, *Advisory Opinions in Alabama*, REMARKS TO COMMITTEE MEETING, FEBRUARY 5, 1970, C.O.A.G. 4 (June, 1970).

4.7 Indexing and Filing

Unless pertinent prior opinions can be readily located, they cannot be used as references in answering a current request and may even be inadvertantly overruled. Procedures for filing and indexing opinions vary from merely keeping copies in folders, filed chronologically, to careful cross-referencing, with a published index and headnotes. A few jurisdictions are placing opinions on data processing equipment, so that they can be retrieved automatically by topic or other reference. Washington, for example, has all formal opinions back to 1949 on a computer, and is now adding informal opinions.

Most jurisdictions index opinions by the constitutional or statutory reference and the subject involved. Many also index the opinion under the name of the requesting agency or officer. Some keep a separate chronological record, showing the date the opinion was requested, written, and released. Most offices maintain indexes on 3" by 5" cards, which refer to the opinion by its number. Others make several card indexes: Arizona, for example, indexes by subject, statutory reference, and requestor. The opinion itself is usually filed in a folder, which may also contain related material used in preparing the opinion and the letter of request. In some states, opinions are kept in a loose-leaf binder, along with a running index. In others, copies of the actual opinion may be filed under several headings.

Cross-referencing for filing purposes may be extensive. In Kentucky, for example, one index slip is printed for each addressee, author, subject reference, citation to statute or other authority, prior opinion, and leading case. The information given on the index card may be fairly detailed, or it may merely refer to the opinion number. Some offices, for example, show the conclusion reached and a headnote on the card.

In many jurisdictions, the attorney who drafts the opinion head-notes may also prepare the index items. In others, one attorney is responsible for all indexing. A master list of subject headings may be provided as a guide for indexing. Alabama, Kentucky and Ohio are among the states which Shepardize opinions for reference.

One problem in filing opinions is developing index headings to identify topics. If an attorney searches the file for opinions on liquor laws, but these are filed under alcoholic beverage control, he will miss the pertinent opinions. Good indexing is essential to retrieval. Many states are systematically devising or reviewing their opinion indexes. At the suggestion of some offices, the C.O.A.G. staff prepared a list of index headings as a basis for possible adoption of a uniform index. This would avoid duplication of effort by the individual offices and would facilitate eventual interchange of opinions. The list, of about 1,200 entries, was developed by comparing index terms used by various states, and cross-referencing similar subjects to a single term.

4.8 Publication and Distribution

Table 4.8 gives publication data on fifty-three jurisdictions. In forty-three jurisdictions, opinions are published in volume form.[28] In some, only selected opinions are published. Several jurisdictions which formerly published opinions no longer do so: Guam last published opinions in 1952, Hawaii apparently stopped regular publication in 1939, and Arkansas in the 1930's. Delaware, on the other hand, first began to publish opinions in 1963. Publication was discontinued for many years in New Hampshire, when the legislature failed to provide funds, but was resumed recently.

The frequency of publication ranges from bimonthly to every four years. Almost half of the reporting jurisdictions publish opinions annually or even more frequently, and fifteen publish biennially. One jurisdiction reports that opinions are published "infrequently" and in another the frequency is "unknown". A few offices have a varied publication program: Wisconsin, for example, published opinions annually in a bound volume, but also issues quarterly advance sheets. In Wyoming, opinions are published in mimeograph form at the end of each fiscal year, then are printed in a bound volume every four years. C.O.A.G. recommends that formal opinions should be published at least annually, because of their importance in establishing policy.

Opinions may be published as part of an annual or biennial report, which also contains other information about the office's activities, or as a separate volume. North Carolina does not publish opinions, but includes digests of selected opinions in its report to the Governor. Florida's Biennial Report contains the full text of major opinions and digests of minor ones. In some jurisdictions, opinions are printed by a commercial publisher; in others, they are published by the Attorney General. In Connecticut, opinions are bound and sold by the Secretary of State; important ones are also published when written in *The Connecticut Law Journal*. New Mexico's Attorney General is authorized by statute to sell copies of opinions and to use the proceeds for indexing.

The number of copies printed apparently averages about six hundred, although some states print over a thousand copies. Distribution is frequently prescribed by statute and usually includes copies to state officials, local prosecutors and law libraries. Such distribution is usually complimentary, but private individuals may be charged for copies.

Informal opinions are not usually published, nor are careful records maintained. New Jersey, for example, says that records are maintained in the deputies' files, but there is no central filing or indexing of informal opinions. In a state like New Jersey, which has issued few or no formal opinions in past years, this could mean that advice is not a matter of record. Indiana, which issued 124 informal opinions in 1968, cross-indexes them by numbers and subject matter, as it does with official opinion.

There is no routine procedure for interchange of opinions among states, although various Attorneys General may be preparing opinions on the same subject at the same time. This would be especially true in interpreting Supreme Court decisions or federal law. The National Association of Attorneys General *Newsletter*, which is published every few months, contains digests of selected opinions. It relies wholly on opinions sent in by the states, and the digests are too brief

28. See Lewis Morse, *Historical Outline and Bibliography of Attorneys General Reports and Opinions*, 30 LAW LIBRARY j. 39 (1937) for a state-by-state listing of publications of opinions.

	Are Opinions Published in Volume Form?	Available to the Public?	Are Single Opinions Reproduced?	Are Digests Published?
Alabama	Yes—quarterly (formal only)		No	No
Alaska	Yes—annually	Yes	Yes	No
Arizona	Yes—annually	Yes	Yes	
Arkansas	No		Yes	No
California	Yes—semiannually	Yes	Yes	No
Colorado	No	Yes	Yes	Yes
Connecticut	Yes—infrequently	Yes	Some	No
Delaware	Yes—annually, since 1963	No	Some	No
Florida	Yes—biennially	Yes	Yes	No
Georgia	Yes—annually	Yes	Yes	No
Guam	Not since 1952		No	No
Hawaii	Not regularly since 1939	Yes	Some	No
Idaho	No		No	No
Illinois	Some	Yes	Some	No
Indiana	Yes—annually	Yes	Yes	No
Iowa	Yes—biennially	Yes	Will copy	Monthly
Kentucky	Yes—biennially (some only)	Yes	All	No
Louisiana	Yes—biennially (some only)	Yes	Some	
Maine	Yes—loose leaf	Yes	Yes	No
Maryland	Yes—annually	Yes	No	No
Massachusetts	Yes—annually	Yes	Yes	Annually
Michigan	Yes—biannually (formal only)	Yes	Yes	Yes
Minnesota	Yes—annually (weekly supp.)	Yes	Yes	No
Mississippi	Yes—biennially (some only)	Yes	Yes	Some
Missouri	No	Yes	Yes	Yes
Montana	Yes—biennially	Yes	Yes	No
Nebraska	Yes—biennially	Yes	Yes	Yes
Nevada	Yes—annually	Yes	Yes	No
New Hampshire	Yes—biennially (some only)			
New Jersey	Yes—biennially	Yes	Yes	Yes
New Mexico	Yes—annually	Yes	Some	No
New York	Yes –annually	Yes	Yes	Yes
North Carolina	No—(some digests)	Yes	Yes	Yes
North Dakota	Yes—biennially (some only)	Yes	Some	No
Ohio	Yes—annually	Yes	Yes	Yes
Oklahoma	Yes—annually (since 1969)	Yes	Yes	Yes
Oregon	Yes—quarterly (since 1969)	Yes	Yes	Yes
Pennsylvania	Yes—annually	Yes	Yes	Yes
Puerto Rico	Yes—annually	Yes	Yes	Yes
Rhode Island			Some	
Samoa	No		No	No
South Carolina	Yes—in annual report	Yes	Yes	Yes
South Dakota	Yes—biennially	Yes	Yes	No
Tennessee	No		Yes	No
Texas	Yes	Yes	Yes	Yes
Utah	Yes—biennially (some only)	Yes	All	Yes
Vermont	Yes—biennially	Yes	Yes	No
Virgin Islands	Yes	Yes	No	No
Virginia	Yes—annually	Yes	Yes	No
Washington	Yes—bimonthly (formal only)	Yes	Yes	Biennially
West Virginia	Yes—biennially	No	Yes	No
Wisconsin	Yes—annually	Yes	Yes	No
Wyoming	Yes—every 4 years	Yes	Yes	No

to more than indicate the question involved and the response. Consideration might be given to a more formal system of exchanging opinions and possibly to making the full text of outstanding opinions available.

4.9 Status and Effect of Opinions

The legal status of opinions involves two questions: whether opinions are binding upon recipients, and whether they confer immunity from legal liability on the part of recipients. Case law on both questions is extensive, but apparently only four states confer such status by statute.

Alabama, Mississippi and Pennsylvania confer statutory immunity upon officials who follow an Attorney General's opinion. Alabama law specifies that:

> The written opinion of the Attorney General . . . secured by an officer or agency legally entitled to secure such opinion shall protect such officer . . . to whom it is directed or for whom the same is secured from liability to either the state, county, or municipal subdivisions of the state, because of any official act . . . performed as directed or advised in such opinion.[29]

The Mississippi statute is more restrictive, and does not appear to protect an official who follows an erroneous opinion:

> When any officer . . . authorized by this section to require such written opinion of the Attorney General shall have done so and shall have stated all the facts to govern such opinion, and the Attorney General shall have prepared and delivered a legal opinion with reference thereto, there shall be no liability, civil or criminal, accruing to or against any such officer . . . who, in good faith, follows the direction of such opinion and acts in accordance therewith, unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without any substantial support.[30]

Pennsylvania's statute makes opinions binding and confers immunity upon recipients:

> Whenever any department, board, commission or officer of the state government shall require legal advice concerning its conduct or operation, . . . it shall be the duty of such department . . . to refer the same to the Department of Justice.
> It shall be the duty of any department . . . having requested and received legal advice from the Department of Justice . . . to follow the same, and, when any officer shall follow the advice given him by the Department of Justice, he shall not be in any way liable for so doing upon his official bond or otherwise.[31]

The Pennsylvania court has held that, when the Attorney General gives an opinion regarding the conduct of an official department, the department cannot ignore it merely because it was not requested by the department involved.[32]

Minnesota is the sole jurisdiction which cites a law making opinion binding only upon certain recipients. The Attorney General shall give his written opinion to the Commissioner of Education "upon any question arising under the laws relating to public schools, and on all school matters . . . such opinion shall be decisive until the question involved shall be decided otherwise by a court . . . "[33] Opinions rendered to the Commissioner of Taxation "in reference to the true construction of the chapter relating to the department of taxation . . . shall be in force and effect until overruled" by a court.

The question of the legal standing of opinions has been before the courts of most states, with inconsistent results. The general rule given in *C.J.S.* is:

> An officer who sought an opinion from the attorney general should, it would seem, even though not compelled to do so by statute, follow the advice which is given to him, and when he does so in good faith, he is not, according to some authorities, personally liable to the state . . . However, it has been held to

29. ALA. CODE, tit. 55, § 241.
30. MISS. CODE ANN., § 3834.
31. PA. STAT., tit. 71, § 192.
32. *Commonwealth ex rel. Shockley v. Ross*, 53 Daugh. 329 (1943); *Commonwealth ex rel. Sennett v. Minehart*, 44 D & C 2d 657, 88 Dauph. 279 (1967).
33. MINN. STAT. ANN., § 807.

the contrary that the officer . . . [is] not protected by the fact that the officer's act was in accordance with an official opinion of the attorney general.[34]

American Jurisprudence, however, holds that:

It is a general rule of law that, while the opinions of the Attorney General may be persuasive, they are not conclusive or binding, and the recipient of them is free to follow them or not as he chooses . . . Consequently, a public officer is neither justified in a particular act, nor shielded from its legal consequences, by a written opinion of the Attorney General upholding the legality thereof.[35]

As the divergence between these authorities indicates, case law is in conflict as to the binding effect of opinions and the immunity accorded thereby.

Some courts have concluded that opinions are not binding upon a recipient, nor do they confer immunity. This view argues that officers are entitled to the Attorney General's advice, "but they are not necessarily controlled by that advice in matters committed to their care. If the law were otherwise any executive officer of the state could be controlled by the opinion of the Attorney General specifying what the law requires to be done in that office."[36] Furthermore, the fact that an official was acting upon the Attorney General's advice does not put him in any more favorable position: "If, as we have said, he must act at his peril, that he proceeded upon the advice of others did not relieve him from responsibility . . ."[37] Courts generally hold that an opinion of the Attorney General, "while in no sense binding upon this court, is of the most persuasive character, and is entitled to due consideration."[38] Opinions are held to "serve as important guides to those charged with the administration of the law. They frequently constitute valuable contemporaneous constructions of statutes recently enacted."[39]

A C.O.A.G. survey showed that opinions are advisory only in most states, but are considered to have great weight and would be considered persuasive by the courts. Most jurisdictions believe that the courts would consider that an opinion immunizes the recipient on questions of good faith, negligence, or intent. Only Samoa reports that this is unlikely, since there is no statutory basis for opinions. In some states, the question is unsettled. A Washington case concluded somewhat inconsistently that:

State officials who take official action in accordance with advice of the Attorney General are protected from liability in connection therewith. However, if a court later disagrees with the Attorney General's view of the applicable law, the fact that the state officer relied thereon does not ipso facto validate his unauthorized acts.[39a]

Conversely, some courts take the position that "a letter of the Attorney General affords a complete defense. . . . If it were not so, state officials could not afford to accept the advice of the Attorney General. They would be compelled to act upon such advice at their own peril. Such is not the law."[40] This view contends that an official is protected by following an opinion even if the opinion proves to be erroneous:

If the law were otherwise few responsible administrative officers would care to assume the hazards of rendering close decisions in public affairs. Officers acting in good faith have a right to rely on the opinion of the Attorney General, as he is the officer designated by law to render such service for their guidance and protection.[41]

This same reasoning holds that "it is the duty of public officers with notice thereof to follow the opinion of the Attorney General until relieved of such duty by a court of competent jurisdiction."[42]

Judge Larson, in his study of the value of Attorney General opinions, concluded that:

Attorney General opinions on matters of law, the law's application and construction, while perhaps outside the principle of *stare decisis*, are entitled to careful consideration and respect by state officers, the legislature, the courts, and the general public. Although they are occasionally upset by the courts, the court gives more than a passing thought to them in its effort to reach the final decision . . . The Attorney General, after careful and responsible study, writes and officially issues the opinion for the guidance of other officers of the state, who are bound to respect and should follow it until it is judicially overruled or changed by legislative action.[43]

Formal opinions have been held to carry the force of law in the absence of judicial decisions to the contrary,[44] although they must be overruled when in conflict with conclusions of the court.[45]

The Attorney General of the United States is considered to be acting quasi-judicially in rendering opinions.[46] His opinions are guides for the executive branch of the government and must not be treated as nugatory and ineffective.[47] They are not decisions of a court and do not have the force and finality of such decisions. They have, however, been recognized by the U.S. Supreme Court as establishing policies in operation which should not be disturbed.[48] One authority has said that "The positive protection to be gained by following an opinion (no matter what its legal effect)—assurance of support by the Department of Justice with respect to court action—is no small factor."[49]

An Arizona case held that an administrator was relieved from personal liability on a contempt citation when he followed the Attorney General's advice in refusing to answer questions on deposition. The administrator was acting on the basis of legal advice rendered by a member of the Attorney General's staff, rather than a formal written opinion.[50]

Even in the absence of either statutes or case law, opinions may be considered of great weight. Tennessee thus reports that it is believed an official is protected by following an Attorney General's opinion, although there are no cases in point. New Hampshire says that "there is no statute nor case which specifically provides that formal opinions shall be binding on state agencies, but such has always been our position." Alaska says that all members of the Executive branch are required to follow the Attorney General's advice "as a matter of custom."

The National Association of Attorneys General has recommended

34. 7 C. J. S. *Attorney General*, § 6 at 1224.
35. 5 AM. JUR. *Attorney General*, § 6 at 243.
36. *Follmer v. State*, 94 Neb. 217, 142 N.W. 908 (1913).
37. *State ex rel. Rowe v. District Court*, 44 Mont. 326, 119 Pac. 1107 (1911).
38. *Barber v. City of Danville*, 149 Va. 418, 424, 141 S.E. 126. See also *Leddy v. Cornell*, 52 Colo. 189, 120 Pac. 153 (1912); *Blanchard v. Mitchell*, (La.) 146 So. 2d 50 (1962).
39. *State v. Cadwalader*, 174 A. 2d 786, 227 Md. 21 (1961).
39a. *State ex rel. Day v. Martin*, 64 Wn. 2d 511, 392 P. 2d 435 (1964)
40. *State ex rel. Smith v. Leonard*, 192 Ark. 834, 95 S.W. 2d 86 (1936).
41. *State ex rel. Moltzner et. al. v. Mott*, 1963 Ore. 631, 97 Pac. 2d 950 (1940).
42. *Rasure v. Sparks*, 75 Okla. 181, 183 Pac. 495 (1919).
43. Larson, *supra* note 7 at 359.
44. *Van Riper v. Jenkins*, 140 N.J. Eq. 99, 45 A. 2d 844 (1946).
45. *Hanagan v. Bd. of Co. Com'nrs.*, 64 N.M. 103, 325 P. 2d 282 (1958). An Indiana case, *Lynch Coal Operators' Reciprocal Assn. v. McMahon*, 194 IND. 151, 142 N.E. 213 (1924), held that the court has no authority to issue a writ to compel the Attorney General to withdraw an opinion on the validity of a law relating to a state officer's duties.
46. 6 Op. A.G. 326, 334 (1854).
47. 25 Op. A.G. 301 (1904).
48. *Harrison v. Vose*, 9 How. 372, 384 (1850; *Smith v. Jackson*, 246 U.S. 388, 390 (1918).
49. David Deener, THE UNITED STATES ATTORNEYS GENERAL AND INTERNATIONAL LAW (1957).
50. *Hastings v. Thursta*, 100 Ariz. 302, 413 P. 2d, 767.

that formal opinions of the Attorney General should be binding as law on all public officers unless and until overturned or clearly inconsistent with subsequent law, official opinion, or decision of a court of record. This is consistent with C.O.A.G. surveys which show that twenty-nine of thirty-seven incumbent Attorneys General and eighty-two of 111 former Attorneys General responding believe that opinions should be binding. An even larger percentage of both groups believe that officials who follow opinions should be immunized from criminal liability.

The importance of opinions cannot be overemphasized. A C.O.A.G. questionnaire asked Attorneys General to rank certain activities in terms of the time they devoted to them. Of thirty-six incumbent Attorneys General, sixteen ranked rendering advisory opinions first and fifteen ranked it second. Of one hundred and fifteen former Attorneys General, fifty-seven ranked it first and twenty-seven ranked it second.[51]

In terms of impact on policy, this function is of paramount importance. An analysis of Attorneys General's opinions following the Supreme Court's 1963 rulings on school prayer found that "The opinions of the attorneys general usually attempt to create a balance between popular opinion and the law" and that "the attorney general is at least as useful as the lower courts in the enforcement of Court opinions."[52] The study stressed the importance of his advisory role:

> . . . the attorney general tends to act where there is a need for explanation of a particular area of the law, where judicial review is absent, and where no legislative provision has been made for defining proper state practice. It appears, then, that there is a need for state government officials to know the duties imposed on them by the law if it is to be followed. The attorney general explicates the state of the law, positive and customary. Where it has been struck down, he predicts the consequences. Where it has been obscured, he clarifies its prescriptions.[53]

New duties may devolve upon Attorneys General and new areas of interest emerge, but opinion writing continues to be one of his most important functions.

51. C.O.A.G., Former Attorneys General Analyze the Office, 15.

52. Henry J. Abraham and Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 UNIV. OF PA. L. REV. 820 (April 1969).

53. *Id* at 805.

5. THE STRUCTURE OF LEGAL SERVICES

This chapter examines alternative arrangements for providing legal services to state agencies. These range from centralized legal services, under the Attorney General, to widespread employment of counsel by state agencies. Approximately three thousand attorneys are employed by Attorneys General, 2,760 of them on a full-time basis. State agencies employ about 750 more attorneys. An undetermined number of attorneys are employed as special counsel on a temporary basis. In addition, an increasing number of states are employing attorneys to serve as public defenders.

5.1 The Attorney General's Authority

One of the most important questions involved in the Attorney General's authority is the extent to which he controls the legal services of state government. He cannot serve effectively as the state's chief law officer if he lacks control over most agency counsel. In some states, all counsel are responsible to the Attorney General. In others, he lacks control over most attorneys employed by the state. This chapter examines the issues involved in the structure of state legal services.

5.11 The Attorneys General's Views

The Committee on the Office of Attorney General has taken a strong stand in favor of centralized legal services. It recommended that all state legal staff should be under the Attorney General's supervision; he should determine their salaries and increments, classifications, and otherwise control personnel. It further said that the Attorney General should have sole authority to employ counsel and to represent the state in litigation. These recommendations reflect the Committee's finding that considerations of economy, efficiency and consistency of policy and services indicate that the Attorney General should provide all legal services.

A C.O.A.G. survey of Attorneys General found that twenty-seven of thirty-seven respondents thought the Attorney General should appoint or control all attorneys working for state government. The other ten thought that he should control most attorneys.

If the Attorney General controls all lawyers in state government, twenty of thirty-three Attorneys General responding thought that he should assign them to specific agencies. Twenty-eight thought that they should work out of the Attorney General's office, while only three thought they should be quartered with state agencies. Thus, the great majority felt that, although assistants might be assigned responsibility for specific agencies, they should be part of the Attorney General's office physically as well as administratively.

Former Attorneys General agreed with this view. Of one hundred and ten responding, eighty-three thought that the Attorney General should appoint and control all state attorneys, twelve thought he should control most, and five thought he should control some. Seventy-three thought that attorneys should be assigned permanently to state agencies, while thirty-two disagreed. Sixty-two believed that all assistant Attorneys General should work out of the central office, while forty said they should be located with the agencies served.

5.12 Trends in Attorneys General's Authority

There is no clear trend toward either centralization or decentralization of legal services. At common law, the At-

torney General had exclusive authority to represent the Crown. In the American Colonies, legal authority was generally centralized. Due to the small size of governments and the limited need for legal services, the problem probably was not critical.

The post-Revolutionary era was characterized by a distrust of centralized government. The Attorney General was made an independently elected official in most states, but he was deprived of much of his power over legal matters at both the state and the local level. Legal services, like state government organization, were fragmented.

The 20th Century brought two divergent trends in the provision of legal services to state agencies. Some states, such as Georgia, Michigan and New Jersey, have moved toward centralization. Attorney General Eugene Cook gave the following rationale for Georgia's reorganization in his remarks to a 1953 N.A.A.G. meeting:

> In my state prior to 1932 the Attorney General was nothing more than a nominal legal advisor to the Governor. We had no State Law Department under this office. The legal business of the state was handled primarily by a host of lawyers scattered throughout 159 counties. When Senator Richard B. Russell was elected Governor, he convinced the General Assembly that the Attorney General should be the chief legal advisor and attorney for the entire Executive Department of the State Government, with exclusive jurisdiction in him in all legal matter relating to this division of the government. As a result of his position, the State Law Department was organized and placed under the Attorney General.
>
> For example, it was revealed to the legislature by Governor Russell that the many department heads of the Executive Division of the State Government had more local attorneys and politicians on the state payroll than we had members of the General Assembly—all acting under pretense of handling legal business for the state.[1]

In New Jersey, a 1944 governmental reorganization act created the Department of Law and Public Safety under the Attorney General. By law, all legal services were placed under the Attorney, but some departments continued to hire attorneys because the Department of Law lacked funds to furnish adequate service. Attorney General Kugler, coming to office in 1970, has taken steps enforcing the 1944 act. He has called conferences of department heads to assess their legal needs and has sought successfully to bring their attorneys under his control.

In Oregon, Attorney General George Neuner gained passage of the Department of Justice Act in 1947, giving him exclusive control over the legal business of all the "departments, commissions and bureaus of the state."[2] No department was permitted to hire separate counsel. The Act, however, was not enforced until Attorney General Lee Johnson assumed office in 1969. Attorney General Neuner, removed one attorney from the Highway Department staff but otherwise allowed decentralization to continue. The present Attorney General has established a system of centralized payment of legal salaries and is physically relocating all state government attorneys in the capitol city in one central office.

In Michigan, the Constitution of 1850 gave the Attorney General authority to serve as the sole legal officer of the state. However, legislative enactments granted departments the right to hire counsel. In 1927, according to William L. Steude of the University of Michigan, the Attorney General, by opinion, declared several of these statutes unconstitutional, but several subsequent reorganizations of state legal services were required to place them effectively under the control of the Attorney General. For instance, one change in the early 1950's made the salaries of most Assistant Attorneys General payable through the Attorney

1. *Proceedings*, N.A.A.G. 108 (1953).

2. ORE.REV.STAT., Ch. 556 (1947).

General, rather than the agencies. In another change, the Attorney General gained full discretion to transfer assistants either temporarily or permanently from particular agency assignments.[3] A recent move into a new office building has allowed the Attorney General to move several assistants formerly housed with agencies into his office.[4]

Delaware's 1969 Department of Justice Act consolidated legal services, and almost doubled the appropriation of the former Attorney General's office. The Department reports that "because Delaware government is based upon the commission system, there is a great proliferation of agencies, departments and commissions. The Department of Justice Bill was designed to consolidate all legal services for all of these agencies."[5] Previously, most agencies hired private agencies to represent them. Attorney General David Buckson admitted that:

> I wondered how [the new Act] would work, because you could see that there would be opposition. . . . My first thought was to start by replacing the attorney of a small commission and work our way up, but I took a chance the other way. I took the biggest agency first, the State Highway Commission, and assigned a full-time deputy to it. I got a man who had thirty years experience in the state and had been a former Chief Deputy Attorney General. Because we handled this so well, everyone else fell right into line. In one year, there are only six agencies left which have their own counsel, and these are left by our choice.[6]

Not all states, however, are moving toward centralization of legal services. Kentucky's 1970 General Assembly rejected efforts to limit house counsel. A recent study in Texas, discussed subsequently, recommended continuation of departmental counsel. In a number of jurisdictions, there are more attorneys employed by state agencies than by the Attorney General.

5.13 Present Organization of Legal Services

It is difficult to develop valid classifications as to whether states are centralized or decentralized in the structure of their legal services. In some states which report that legal services are centralized, the Attorney General actually does not effectively control all attorneys. For example, they may be physically located with the agency served; they may be evaluated and promoted by the agency head, rather than by the Attorney General; they may actually be selected by the agency, although technically appointed by the Attorney General. In states which permit house counsel, the Attorney General may have no authority over them, or he may actually handle all litigation for them and exercise a considerable degree of supervision. There is no clear-cut division between "house counsel states" and "non house-counsel states"; rather, there is a series of gradations of control by the Attorney General.

Table 5.13 shows the number of attorneys employed by Attorneys General's offices and by state agencies. To complete the picture of legal services, it also shows the frequency with which special counsel are employed. Table 5.15 shows the agencies in each state which employ counsel and the number employed by each.

In seventeen jurisdictions, no agencies employ counsel. These are Alaska, Connecticut, Delaware, Georgia, Guam, Hawaii, Illinois, Massachusetts, Nebraska, Ohio, Oregon, Samoa, Texas, Utah, Virgin Islands, Washington, and Wyoming. In Nebraska, the Governor

3. William L. Steude, *The Lawyer in Michigan State Government*, 8-9 (1959).

4. Interview with Solomon Bienenfeld, Assistant Attorney General, Lansing, Michigan, December 29, 1969.

5. Letter from Deputy Attorney General Fletcher E. Campbell, Jr., to Attorney General John B. Breckinridge, April 10, 1969.

6. C.O.A.G. REMARKS TO COMMITTEE MEETING, February 5, 1970, 2.

5.13 NUMBER OF ATTORNEYS EMPLOYED BY ATTORNEYS GENERAL'S OFFICE AND BY STATE AGENCIES

	No. of Attorneys Employed by A.G.'s Office (incl. A.G.)		Special Counsel Employed	No. of Attorneys Employed by State Agencies	
	Full-Time	Part-Time		Full-Time	Part-Time
Alabama	19		Seldom		
Alaska	20		Often	0	0
Arizona	22		Often		
Arkansas	14		Often	25	0
California	246		Seldom	150	0
Colorado	28		Seldom	8	0
Connecticut	35		Seldom	0	0
Delaware	10	9	Seldom	0	0
Florida	43		Seldom		
Georgia	28	13	Seldom	0	0
Guam	11	0	Often	0	0
Hawaii	44	0	Seldom	0	0
Idaho	17		Seldom	1	
Illinois	101	223	Often	0	0
Indiana	76		Often	4	0
Iowa	30		Seldom	9	0
Kansas	10		Often		
Kentucky	15		Seldom	75	
Louisiana	17	21	Often	70	0
Maine	25		Seldom		
Maryland	24		Seldom	41	0
Massachusetts	96	18	Often	65	0
Michigan	96		Often		
Minnesota	54		Seldom	32	0
Mississippi	15		Seldom	3	12
Missouri	28	10	Seldom	49	0
Montana	8	3	Often	38	0
Nebraska	9		Seldom	0	0
Nevada	24	6	Seldom	0	0
New Hampshire	13		Seldom	2	0
New Jersey	89	0	Seldom	6	0
New Mexico	13		Often	10	0
New York	462		Seldom		
North Carolina	45		Often	5	1
North Dakota	17		Seldom	15	7
Ohio	140	0	Often	0	0
Oklahoma	16	0	Never	45	0
Oregon	97		Seldom	0	0
Pennsylvania	59		Seldom	0	0
Puerto Rico	164		Often	86	0
Rhode Island	20		Seldom		
Samoa	4		Never	0	0
South Carolina	21	1	Often	4	0
South Dakota	9	6	Seldom	10	0
Tennessee	13		Seldom		
Texas	123		Seldom		
Utah	24		Seldom	0	0
Vermont	16		Seldom	4	0
Virgin Islands	15		Seldom	0	0
Virginia	22	0	Seldom	13	0
Washington	131		Seldom	0	0
West Virginia	29		Seldom	25	0
Wisconsin	41		Seldom		
Wyoming	16		Seldom	0	0

has authority to appoint house counsel, but has not done so. In Texas and Ohio, some agencies employ attorneys, but in an administrative or advisory capacity.

In seventeen other jurisdictions, fewer than five agencies employ counsel. These states are: Arizona, Colorado, Idaho, Indiana, Iowa, Maine, Michigan, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Vermont, and West Virginia. Information is not available on the number of agencies employing counsel or the number of counsel so employed in Florida, but apparently there are few exceptions to centralized services.

Thus, thirty-five of the fifty-four Attorneys General control the great majority of attorneys in their state governments. In some of these states, such as Vermont, the Attorney General actually appoints all or most agency counsel; in others, such as Tennessee, he exercises no control over them. It should be noted that, although only three West Virginia agencies have house counsel, these three employ a total of twenty-five attorneys, only four less than the Attorney General employs.

Of the remaining nineteen jurisdictions, information is not available for Rhode Island. The other eighteen would be classified as having a large number of house counsel. From five to nine agencies employ counsel in Alabama, California, Minnesota, Mississippi, New Mexico, South Dakota, and Virginia. The number of attorneys employed by agencies in these states ranges from only three full-time in Mississippi to one hundred and fifty in California. In eleven jurisdictions, more than ten agencies have their own counsel. These are Arkansas, Kansas, Kentucky, Louisiana, Maryland, Montana, New York, North Dakota, Oklahoma, Puerto Rico, and Wisconsin.

In seven jurisdictions, more attorneys are employed by state agencies than by the Attorney General. In Oklahoma, forty-five attorneys serve as house counsel, compared to sixteen in the Attorney General's office. In Maryland, only twenty-four of sixty-five attorneys employed by the state are in the Attorney General's office. Louisiana's Attorney General employs seventeen full-time and twenty-one part-time attorneys, but there are seventy other attorneys employed in state government. Missouri, Arkansas, South Dakota, and Kentucky also report more attorneys with departments than with the Attorney General. A recent Kentucky report indicates that there are fifteen attorneys employed by the Department of Law, fifty-four by departments, and seventy-three on contract.[7] In these states, the Attorney General obviously cannot function as the chief law officer.

5.14 Basis of Authority

Authority for centralized legal services is found in constitutions, statutes and case law. The common law also supports centralizing authority in the Attorney General.

In all of the states where the Attorney General controls legal services, other agencies are prohibited by law from employing counsel. Georgia's statute, for example, vests the Department of Law "with complete and exclusive authority and jurisdiction in all matters of law relating to every department of the state other than the judicial and legislative branches." Departments are "prohibited from employing counsel unless otherwise specifically authorized by law."[8] The Virgin Islands gives the Attorney General power "to supervise and direct the legal business of every executive department . . ."[9] In Arizona, "no state

7. Legislative Audit Committee, AUDIT REPORT, DEPARTMENT OF LAW, No. 59, 14 (1970).
8. GEORGIA CODE ANN. § 40-1614.
9. V.I. CODE tit. 3, § 114 (a).

agency other than the attorney general shall employ legal counsel or make an expenditure or incur an indebtedness for legal services", except for agencies specifically exempted.[10] Ohio law says that "No state, officer, board . . . shall employ, or be represented by, other counsel."[11]

Similar provisions are found in most state statutes. Seven states also have constitutional provisions saying that the Attorney General shall provide all legal services.

Where agencies employ counsel, they usually do so under specific statutory authority. Kentucky law, for example, says that:

> The Governor, or any department with the approval of the Governor, may employ and fix the term of employment and the compensation to be paid to an attorney . . . for legal services to be performed for the Governor or for such department. Before approving the employment of an attorney the Governor shall consult the Attorney General as to whether legal services requested by departments are available in the Attorney General's office . . .[12]

In most instances, legislatures give specific agencies authority to hire counsel, rather than giving such sweeping authority.

There is extensive case law defining the Attorney General's authority over state legal services. Section 1.3 of this Report, which concerns common law powers, summarizes the major cases. Courts in some states have held that agencies may not hire counsel, but must rely on the Attorney General for legal services. These cases have relied on the Attorney General's common law power. Generally, however, courts have held that legislatures can authorize agencies to hire counsel and, in some cases, have even recognized an implied authority to hire counsel in the absence of a specific statute.

Only Illinois has held that the Attorney General is "the sole official adviser of the executive officers, and of all boards, commissions, and departments" and that the legislature cannot assign these services to others.[13] More typical are court decisions that the legislature may modify the Attorney General's common law powers.

5.15 Agencies Which Employ Attorneys

A review of Table 5.15 shows that there is no perceptible pattern as to which agencies may employ counsel. A few generalizations are possible, however. Agencies which engage in quasi-judicial activities, such as rate setting, are among those exempted from the rule against house counsel in some states. North Carolina's three agencies which may hire counsel, for example, include the Utilities Commission and the Milk Commission. The State Employment Security Commission may employ counsel in a number of jurisdictions. Elective officials have independent counsel in some states. Examples are the Governor in Kansas, Louisiana and Oklahoma, the Secretary of State in Louisiana, and the Auditor in Montana. Georgia authorizes the Governor to appoint two Assistant or Deputy Attorneys General "for such periods of time as he deems advisable to serve the Governor as special counsel."[14]

Fifteen jurisdictions allow the highway department or highway commission to hire counsel, although this department usually requires more legal services than any other in state government. A substantial number provide house counsel for industrial relations and alcoholic beverage control agencies. Another common exemption is one or more agencies concerned with natural resources and conservation.

10. ARIZ. REV. STAT. ANN. § 41-192 (E).
11. OHIO REV. CODE § 109.02.
12. KY. REV. STAT. § 12.210.
13. *Fergus V. Russel*, 270 Ill. 304, 110 N.E. 130 (1915).
14. GA. CODE ANN. § 40-1614.1.

5.15 STATE AGENCIES WHICH EMPLOY PERMANENT COUNSEL

Alabama	Department of Agriculture and Industries (1) Department of Finance (1) Department of Pensions & Security (3) Department of Revenue (6) Department of Industrial Relations (2) Examiner of Public Accounts (1) State Docks: Hire private counsel on a case by case basis University of Alabama (2)	
Alaska	None	
Arizona	Interstate Stream Commission (2) Industrial Commission (2)	(these agencies exempt from prohibition against house counsel)
Arkansas	Department of Highways (10 attorneys) Public Service Commission (1) Department of Revenue (4) Commerce Commission (1) Welfare Department (1) Insurance Department (1) Employment Security Division (2) Game and Fish Commission (1) Labor Department (1) Pollution Control Commission (1) Health Department (1) Alcoholic Beverage Control (1)	
California	Department of Public Works (110) Regents: University of California (10) Division of Labor Law Enforcement (8) Workmen's Compensation Appeals Board (15) Public Utilities Commission (27) State Compensation Insurance Fund (10) Legislative Counsel Bureau (46) Inheritance Tax Department (25) Alcoholic Beverage Appeals Board (2)	
Colorado	Department of Health (1) Department of Insurance (1) Department of Welfare (2) Department of Revenue (4)	
Connecticut	None	
Delaware	None (Univ. of Delaware exempt from prohibition against house counsel)	
Florida	Attorney General may authorize counsel for departments "where emergency circumstances exist" and "when professional conflict of interest is present." Boards of which the AG is a member may retain legal services in lieu of that provided by AG's office. Department of Education Board of Trustees of Internal Improvement Fund	
Georgia	None	
Guam	None	
Hawaii	None	
Idaho	Department of Highways was given authority to hire permanent counsel through a Supreme Court decision.	
Illinois	None	
Indiana	Athletic Commission (1) Toll Road Commission (1) Indiana Port Commission (1) Indiana State Toll Bridge Commission (1)	

Iowa ..... Employment Security Commission (5)
Commerce Commission (4)

Kansas ..... Governor
State Highway Commission
State Department of Revenue
Kansas Corporation Commission
State Property Valuation Department
State Board of Tax Appeals
State Board of Health
State Board of Healing Arts
State Employment Security Division
Board of Optometry
Kansas Turnpike Authority

Kentucky ..... Banking (1)
Child Welfare (1)
Economic Security (4)
Education (1)
Finance (2)
Health (3)
Highways (28)
Insurance (3)
Labor (3)
Mental Health (1)
Motor Transportation (1)
Natural Resources (3)
Public Safety (2)
Public Service Commission (2)
Revenue (9)
Railroad Commission (1)
ABC Board (1)
Aeronautics (1)
Legislative Research Commission (4)
Industrial Relations (2)
Military Affairs (1)
State Fair Board (1)

Louisiana ..... Highway Department (16)
Revenue Department (8)
Department of Labor (1)
Division of Employment Security (2)
Department of Hospitals (3)
Department of Public Works (1)
State Board of Health (1 part-time)
Wildlife and Fisheries Commission (1)
Department of Conservation (2)
State Department of Health (4 part-time)
Secretary of State (1)
State Police (1)
Mineral Board (2)
Department of Agriculture (1)
Tidelands Account (3)
Board of Alcoholic Beverage Control (1)
Milk Commission (1)
Banking Department (2)
Labor Department (1)
Tax Commission (1)
Department of Civil Service (1)
Code of Ethics Commission (1)
Commission on Human Relations (2)
Labor Management Commission (2)
Governor (1)
Legislative Council (2)
Insurance Commissioner (2)
State Land Office (1)
Public Service Commission (1)

State Parks and Recreation Commission (1)
Department of Welfare (2)
Tax Commission (1)

Maine ..... Highway Commission
Public Utilities Commission

Maryland ..... State Roads (18)
Health (2)
Comptroller of the Treasury (1)
Workman's Compensation (1)
Assessments and Taxation (1)
Chesapeake Bay Affairs (1)
Employment Security (1)
University of Maryland (1)
Commissioner of Motor Vehicles (1)
Unsatisfied Claim and Judgment Fund (1)
State Accident Fund (4)
Employees Retirement System—State of Maryland (1)
Education (1)
Forest and Parks (1)
Mental Hygiene (2)
Public Improvements (1)
Social Sciences (1)
Water Resources (1)
Insurance Department (1) (except for Public Service Commission, the AG has "absolute and complete authority")

Massachusetts ..... (total of 65 attorneys)

Michigan ..... Civil Service Commission
The state Universities which are created by the Constitution.

Minnesota ..... Employment Security (9)
Highway (3)
Labor and Industry (10)
Public Service Commission (1)
Division of Securities (1)
Department of Taxation (8)

Mississippi ..... State Highway Department (2)
Public Service Commission (1)
(plus four other agencies)

Missouri ..... State Highway Commission
Public Service Commission (14)
Department of Insurance (5)
University of Missouri

Montana ..... Aeronautics Commission (2)
Auditor (1)
Dental Examiners (1)
Board of Equalization (1)
Fish and Game Commission (1)
Board of Food Distributors (1)
Board of Health (1)
Highway Commission (10)
Highway Patrol (1)
Historical Society (1)
State Hospital (1)
Industrial Accident Board (1)
Liquor Control Board (1)
Livestock Commission (1)
Board of Medical Examiners (1)
Milk Control Board (1)
Oil and Gas Commission (1)
Board of Pharmacy (1)
Plumbing Examiners (1)

Professional Engineers and Land Surveyors (1)
P.E.R.S. (1)
Board of Institutions (1)
Department of Public Welfare (1)
Railroad Commission (1)
Real Estate Commission (1)
Registrar of Motor Vehicles & State Prison (1)
U.C.C. (1)
Water Resources Board (1)

Nebraska ..... May be appointed by Governor (as matter of policy, has not appointed such counsel) or by A.G., if he appoints, he has complete supervisory control.

Nevada ..... Nevada Industrial Commission
Employment Security Department
Legislative Counsel Bureau
Statute Revision Commission

New Hampshire . Department of Economic Security (2)

New Jersey ..... New Jersey Turnpike Authority
New Jersey Garden State Parkway Authority

New Mexico ..... State Engineer (3)
Public Service Commission (1)
State Police (1)
Department of Education (1)
Land Office, Commissioner of Public Lands (2)
Oil Conservation Commission (1)
State Tax Commission (ad valorem taxes only) (1)
Other special assistants are on part-time, usually representing one licensing board or similar agency.

New York ..... Department of Education
Department of Highways
Department of Public Works
Department of Health
Department of Welfare
Treasury Department
Alcoholic Beverage Control Commission
Department of Insurance
Workmen's Compensation Commission
Public Service Commission
(And Others)

North Carolina ... Employment Security Commission
Utilities Commission
Milk Commission

North Dakota ..... *Special Assistant Attorneys General*
State Highway Department (3)
Unsatisfied Judgment Fund (1)
Public Service Commission (1)
State Tax Commission (2)
State Securities Commission (1)
Unemployment Compensation Bureau (1 or 2)
State Water Commission (1)
Bank of North Dakota (1)
Public Welfare Department (1)
Insurance Department (1)
Part-Time Regular Counsel
Health Department
Board of Administration
Livestock Sanitary Board
Motor Vehicle Department
State Laboratories Department
Game & Fish Department
State Auditor

Ohio ..... None—Some departments employ Attorney Examiners, who preside over hearings, but do not practice law.

Oklahoma ..... Governor (2)
Corporation Commission (7)
State Insurance Fund (5)
Oklahoma Tax Commission (3)
Commissioners of the Land Office (6)
State Highway Commission (7)
Grand River Dam Authority (1)
University of Oklahoma (1)
Oklahoma State University (1)
Oklahoma Turnpike Authority (2)
Oklahoma Employment Security Commission (2)
Oklahoma Insurance Department (3)
State Insurance Board (1)
Oklahoma Securities Commission (1)
State Examiner and Inspector (1)
Department of Public Welfare (2, part-time)

Oregon ..... None—All are Assistant Attorneys General

Pennsylvania ..... Pennsylvania Turnpike Commission
Garden State Authority

Puerto Rico ..... Planning Board (9)
Education Department (5)
Department of Health (2)
Department of Public Works (3)
Public Service Commission (9)
Racing Commission (1)
Puerto Rico Labor Relations Board (4)
Department of Agriculture (5)
Social Program (3)
Police Department (6)
Insular State Fund (16)
Industrial Commission (4)
Public Recreation and Parks Administration (2)
Commonwealth of Puerto Rico (5)
Treasury Department (12)

Rhode Island .....

Samoa ..... None

South Carolina .... Insurance Department (2)
South Carolina Security Commission (1)
Health Department (1)

South Dakota ..... Public Utilities Commission (1)
Department of Highways (4)
Department of Revenue (2)
Motor Vehicle Department (1)
Employment Security (1)
Securities Commission (2)
(All are appointed by and responsible to the A.G., but paid by departments.)

Tennessee ..... Public Welfare Department (5)
Employment Security Department (2)
Public Service Commission (2)
(Others employ attorneys who do legal work but have no official status as departmental counsel)

Texas ..... Comptroller (10 attorneys—administrative hearings)
Railroad Commission (8—administrative hearings)
Securities Board (3—administrative hearings)
Education Agency (1—advisory)

	University Systems (2—advisory) A & M Colleges System (1—advisory) Liquor Control Board (1—administrative hearings) Mental Health and Mental Retardation (2—advisory)
Utah	None
Vermont	Highway Department Public Service Board Department of Employment Security Department of Education
Virgin Islands	Urban Renewal Board (employs an Assistant Attorney General)
Virginia	State Corporation Commission State Highway Department Virginia Employment Commission Division of Motor Vehicles° Alcoholic Beverage Control Board° Tax Department° Department of Agriculture° (°—appointed and paid by A.G.)
Washington	None
West Virginia	State Road Commission (17) Workmen's Compensation Fund (6) Department of Employment Security (2)
Wisconsin	Agriculture (5) Insurance (1) Public Service Commission (5) Industry, Labor and Human Relations (29) Veterans Affairs (2) Administration (2) Revenue (11) Secretary of State (2) Revisor of Statutes (3) Legislative Reference Bureau (7) Regulation and Licensing (4) Securities (1) Higher Educational Aids (1) Public Instruction (1) Natural Resources (6) Transportation (3) Health and Social Services (8) (Note: Some attorneys are hearing examiners only)
Wyoming	None

Independent state authorities, created primarily for the purpose of borrowing funds, are often authorized to hire their own counsel. The Pennsylvania Turnpike Commission and the New Jersey Turnpike Authority are examples. In Delaware, the Attorney General allowed some agencies to retain counsel despite a law giving him control over all legal services. The Wilmington Housing Authority was one of the agencies so exempted.

Michigan exempts the Civil Service Commission, presumably on the theory that this assures its complete independence, especially in cases involving the Attorney General's office. Florida provides by law that boards and commissions on which the Attorney General serves as a member may retain outside counsel, thus obviating any conflict in his role.

All but ten of thirty-seven Attorneys General answering a C.O.A.G. questionnaire thought that the Attorney General should control all attorneys in state government. When asked which, if any, agencies should be allowed to hire counsel, they offered a variety of comments. Two named the Governor, one the Governor and the legislature, one the Governor, the legislature, the Supreme Court, the auditor, and the legislative service agency. One thought universities should be able to have counsel, one thought that the revenue department should, and two thought that the highway department should. Several specified that quasi-judicial bodies should be able to employ their own counsel. One Attorney General would restrict employment of house counsel to "agencies set up as hearing officers, or adjudicating agencies to hearing officers, or adjudicating agencies to hear disputes between line agencies and individuals." Another thought the Attorney General should have statutory authority to allow an agency to appoint counsel "in situations where a conflict of interest exists between two agencies and it is appropriate for him to represent both." One thought that any agencies should be allowed to hire attorneys, but that the Attorney General should retain complete control over all litigation.

5.16 Exceptions to Centralized Services

There are, in any state, some attorneys who are employed in a non-legal capacity. Hawaii reports on a C.O.A.G. questionnaire that "although persons working for offices such as the legislative reference bureau may be members of the bar, they are not regarded as counsel but rather as researchers." Employment of attorneys as researchers, hearing officers, or administrators is a general practice. These are not considered as counsel and obviously would not be subject to the Attorney General's supervision. New Jersey's statute prohibiting the employment of counsel by state agencies provides that they:

> . . . may employ an attorney-at-law under full-time employment solely in the performance of administrative functions entailing the hearing of issues and determining facts in order that the said officer . . . may perform his . . . functions as required by law; *provided, however,* that no such attorney shall act in a legal capacity in the prosecution of any charge or complaint before any such officer. . . .

A 1920 Montana case was adjudicated on this precise point. The Montana State Efficiency and Trade Commission was created to investigate the financial and business procedures of state agencies. It hired an attorney to survey the state agencies. The State Auditor refused to compensate him for his services, maintaining that such services must be performed by the Attorney General. The court held that the fact that the claimant was an attorney did not alter the fact that his duties were not those assigned to the Attorney General.[15] This ruling was followed in a subsequent case where the court permitted the commission to employ another attorney to prepare legislation to implement its recommendations.[16] Likewise, the Ohio court ruled that the certification of land titles did not constitute "practice of law" and that the highway department could independently employ attorneys or other persons to do this work.[17]

The Arizona Supreme Court held that the Industrial Commission's attorneys could engage in litigation, because the Commission administered trust fund of insurance premiums. The Commission was exempted from the prohibition against employing an attorney because his fee was paid from

15. *State ex rel. Pew v. Porter,* 57 Mont. 535, 189 Pac. 618 (1920).
16. *State ex rel. Pigott v. Porter* (1920), 57 Mont. 539, 189 p. 619 (1920).
17. *The State ex rel. Doria v. Ferguson,* 145 Ohio 12, N.E. 2d 476, (1945).

the fund, so "was not a state charge and was not paid out of money collected by general taxation."[18]

In addition to attorneys in non-legal jobs, many states allow other exemptions from the rule against house counsel. Only sixteen jurisdictions report that no agencies employ house counsel.

Universities appear to be frequently exempted, even in some states which did not list them as agencies employing house counsel. Available information indicates that state universities are permitted independent counsel in states of Alabama, California, Delaware, Illinois, Missouri, Michigan, New Jersey, Pennsylvania, Oklahoma, Texas, and West Virginia. In some of these, the Attorney General furnishes legal services to state colleges, but not to the university.

Counsel for the University of Illinois was challenged in court because of its independent status. Although the court earlier established the Attorney General's common law power to represent all state agencies, it permitted house counsel for the university:

> [The Board of Trustees] functions solely as an agency of the State for the purpose of the operation and administration of the university for the State. In doing this, it functions as a corporation, separate and distinct from the State and as a public corporate entity with all the powers enumerated in the applicable statutes, or necessarily incident thereto. It has and can exercise no sovereign powers. It is no part of the State or State government . . . by establishing the University the State created an agency of its own through which it proposed to accomplish certain educational objects . . . its contractual powers are so restricted by statutes that it can create no liability or indebtedness against itself as a corporate entity in excess of the funds in the hands of the treasurer of the university at the time of creating such liability or indebtedness and may be specially and properly applied of same . . . No suit can be maintained against it which would adversly affect the rights of the State. As such corporation it may formulate and carry out any educational program it may deem proper with complete authority over its faculty, employees, and students, as well as all questions of policy.[19]

In Delaware, the university is the only state agency authorized by law to employ counsel. In Michigan, the state universities which are created by the constitution are the only agencies except the Civil Service Commission which may hire attorneys.

18. *Industrial Commission v. School District No. 48 of Maricopa County*, 56 Ariz. 476, 108 P. 2d 1005 (1941).

19. *People ex rel. Board of Trustees of University of Illinois v. Barrett*, 382 Ill. 344, 46 N.E. 2d 951 (1943).

5.2 Relationship of Attorneys to the Attorney General

As indicated earlier, there is not always a clear-cut distinction between centralized and decentralized services. This section examines some factors which determine the degree of effective control over attorneys: how they are appointed and compensated, how they are supervised, the location of their offices, and the extent to which the Attorney General determines their duties.

5.21 Activities of Agency Attorneys

Legal services rendered to state agencies encompass a broad range of activities, including both adversary and advisory functions. It may involve representation in court or in administrative hearings; drafting of legal documents; review of bond issues, contracts and other formal matters; and rendering advice on all aspects of the agency's activities and responsibilities.

A June, 1967 study in Wisconsin of attorneys employed by state agencies attempted to give a general description of their duties.[1] This offers an interesting insight into the kind of work performed by house counsel. While most are described as general counsel, some have specialized duties and others do not function as counsel. Of the eleven attorneys employed by Workmen's Compensation, for example, nine are described as hearing examiners. The attorneys employed by the Legislative Reference Bureau are bill draftsmen. The Personnel Division has two attorneys for "employment relations, collective bargaining." The ten Department of Revenue attorneys work includes "legal opinions to line administrators on tax laws, appearances before Tax Appeals Commission." The work of Division of Food and Trade Regulation attorneys is described as "general counsel on trade practices, investigatory work, case work and brief preparation usually handed over to local prosecutors but may involve court appearances."

One measure of effective centralization is the extent to which the Attorney General controls litigation. In some states which have house counsel, the Attorney General represents the agencies in litigation.

Colorado, Minnesota, Virginia, and Wisconsin are among the states where some agencies have attorneys, but which report that the Attorney General handles all litigation. In Arkansas, Kentucky, Louisiana, Oklahoma, and New York, on the other hand, house counsel may handle litigation for their agencies. In Arkansas, a department head may request the Attorney General's assistance in litigation, or may use the agency's own attorneys. A similar situation exists in Kentucky, where the Attorney General handles all litigation for some agencies and some litigation for others. Louisiana reports that three agencies "are virtually autonomous and legal staffs represent those agencies in litigation and render advice." The other agencies which employ counsel, however, often request that the Attorney General represent them.

Chapter 4 of this study discusses the Attorney General's advisory function. Only he is empowered to issue official opinions of the Attorney General; thus, even agencies with their own counsel tend to refer important questions to him for a formal advisory opinion. The role of agency attorneys is not always clearly defined. South Dakota, for example, indicates in response to a C.O.A.G. questionnaire that:

> Permanent counsel was not employed by the various departments, and all attorneys act under the authority of the Attorney General.

1. Wisconsin Department of Administration, *Classified Attorneys in State Service by Department with a General Description of Duties*, 1967 (mimeo.).

However, the Highway, Welfare and Unemployment Compensation Departments and some others also have lawyers, paid out of their funds, who dispose of much legal business. But with regard to attorneys where any questions can be raised, they are under the authority of the Attorney General. Under the law some attorneys could be appointed for a specified period, notably the attorneys for the Public Utilities Commission and for the Revenue Department, both appointed for a fixed period under a statute.

5.22 Appointment and Removal

The Attorney General's relationship to house counsel ranges from absolute authority to a complete lack of liaison. Maryland, for example, reports to C.O.A.G. that "the Attorney General has absolute and complete authority over permanent counsel employed by State departments with the exception of the Public Service Commission," and that he appoints all such counsel. Conversely, Mississippi reports that "we have no knowledge of the number of state agencies employing counsel full or part time . . . the Attorney General has no jurisdiction over such other department counsel."

New Mexico and Montana are both listed as states where a substantial number of agencies employ counsel. In both, however, such counsel are technically under control of the Attorney General. In New Mexico, agencies may hire Special Assistant Attorneys General, but appointments must be approved by the Attorney General, who may also direct their work. The Attorney General of Montana, as chief law officer of the state, must consent to the employment of all agency counsel, and must agree to commission them as Special Assistant Attorneys General. The Attorney General must also approve appointment of counsel in Maine, Nevada, Tennessee, and Virginia.

Nebraska reports that either the Attorney General or the Governor may select house counsel, but that the Governor rarely exercises his prerogative. Arkansas and Tennessee report that the Governor, as well as the Attorney General, must approve appointments. In Alabama, the Attorney General appoints counsel for some agencies, but not for others.

New York reports on a C.O.A.G. questionnaire that "no problems result for the Attorney General from the fact that he has no control over appointment and removal of departmental counsel." California, Missouri, North Carolina, Puerto Rico, Rhode Island, and West Virginia are other jurisdictions where department heads may appoint attorneys without the Attorney General's approval.

5.23 Assignment and Compensation of Staff

Assignment and compensation are matters of critical importance in determining staff orientation. When pay and promotions are determined by the agency, the counsel will have a different attitude than when they are set by the Attorney General. If the Attorney General assigns staff, that staff will respond differently than when the agency must approve such assignment. Whether assignments are considered permanent or are frequently changed is also a factor.

In most states with centralized services, the Attorney General sets the salary of his employees, although this often is governed by a state pay scale. Oregon has instituted a billing system whereby agencies are responsible for the cost of legal services they utilize, but attorneys are paid by the Attorney General. Attorneys record the amount of time they spend on work for particular agencies. The agencies are billed a flat fee, approximately $18 per hour, irrespective of which attorney is used. Formerly, agencies tended to regard the size of their legal staff as a status symbol; now they realize that legal services cost money, so the system serves to encourage economy.

Washington is an example of a state where all attorneys are technically under the Attorney General, but many actually function as house counsel. All attorneys are appointed by the Attorney General and may be removed by him. However, many are assigned to a specific state agency on a full-time basis and maintain office space with the agency. These Assistants are rarely discharged by the Attorney General unless the agency is displeased with the services being rendered. They handle day-to-day business without involving the Attorney General, but normally make decisions on matters involving litigation only with his concurrence. Requests for formal opinions are routed through the central office, even if they are actually answered by an attorney stationed with the requesting agency.[2]

Attorneys General usually make staff members responsible for particular agencies on a long-term basis, whether or not the attorneys are located with the agencies. Table 3.22, showing sections and divisions of Attorneys General's offices, shows that most are structured to handle the work of various agencies. An attorney would be assigned to a division of the Attorney General's office that relates to highway matters, for example, and would thus handle highway department business, even if he were not directly assigned to the highway department.

In some cases, however, assignments may almost confer house counsel status. In Wyoming, for example, agencies may not hire counsel. However, only four attorneys are located with the Attorney General in the Capitol Building. There are ten Special Assistant Attorneys General appointed by the Attorney General with the approval of the Governor and in consultation with agency heads who represent specific agencies. Office space, secretarial services and related costs are paid by the agency. The attorneys are paid by the Attorney General, but he is reimbursed by agency to which they are assigned.

2. Interview with Assistant Attorney General Donald Foss, Jr., Olympia, Washington, October 7, 1970.

5.24 Supervision of Staff

In Alabama, Arizona, Indiana, Maine, New Hampshire, New Mexico, South Carolina, and South Dakota, the Attorney General supervises house counsel. In Maryland, only the Public Service Commission attorneys are exempt from his supervision. In Nebraska, the Attorney General completely supervises those permanent counsel he appoints. Maine reports that the Attorney General "supervises or advises" house counsel. Utah indicates that he has "some supervisory powers." Alabama states that the Attorney General has "supervisory authority as to the legal determinations made by permanent employees of the various departments."

There is apparently no supervision of house counsel by the Attorney General in Arkansas, California, Iowa, Louisiana, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, Oklahoma, Tennessee, Virginia, West Virginia, and Wisconsin. However, Wisconsin states on a C.O.A.G. questionnaire that:

> As the chief law officer of the state, with general supervisory power in all matters of litigation affecting the state's interests and as the final authority in deciding important legal questions for the guidance of the several state agencies, the Attorney General indirectly has jurisdiction over the several attorneys employed by the general state departments. There is no direct supervisory power over the attorneys outside of the Attorney General's office in the employ of the state granted to the Attorney General.

Montana indicates that the Attorney General has supervisory control only to prevent counsel from representing the state in litigation if the Attorney General does not approve. In Kentucky, the Attorney General has supervisory powers over permanent counsel of four

departments. Three other departments have special assistants over whom the Attorney General has supervisory powers also. In Colorado, the Attorney General supervises those counsel who are appointed Special Assistant Attorneys General.

The great majority of New York agencies have staff attorneys. Their duties are to act as legal advisers "up to the point where advice of the Attorney General is sought, and in certain departments, to handle all or part of its litigation." The Attorney General has no jurisdiction over such counsel, except that it is his duty to appear in litigation where questions of constitutionality are involved.

In Vermont, where the Attorney General has authority to hire or dismiss assistants who are assigned to departments full time, "there is an attempt made to provide the assistants with opinions rendered by our office and to discuss with them any important or major projects on which they are involved." However, "there is no formal method of coordination."

In California, the relationship of counsel to the Attorney General's office varies according to the agency. Ten departments, employing about one hundred and fifty attorneys, are independent of the Attorney General's office. The remaining departments "usually employ counsel which are in the nature of house counsel. In such cases, the Attorney General handles all of their litigation and renders opinions as requested." Oklahoma is another state where those departments with their own attorneys initiate litigation upon their responsibility, or after conference with the Attorney General. The Attorney General initiates litigation for all other agencies.

5.25 Location of Staff

The location of staff may have a decided effect on whether they function as house counsel or as members of the Attorney General's staff. An attorney may be hired by and be responsible to the Attorney General, but if he is assigned to and located with a state agency, he may come to consider himself a member of that agency's staff. His attitudes will reflect those of his associates in the agency, rather than his fellow attorneys. He may gradually acquire administrative duties that are not part of his role as counsel. He may not be adequately informed as to policy developments in the Attorney General's office or of activities of other attorneys.

These problems are reflected in a C.O.A.G. survey of Attorneys General. Of thirty-one Attorneys General who answered the question, all but three believed that attorneys should be located in the Attorney General's office, rather than with the agencies to which they were assigned. Sixty-two former Attorneys General thought that all assistants should work out of the central office while forty said they should be located with the agencies served.

A number of Attorneys General are centralizing the location of their staffs. Michigan recently accomplished this as the result of construction of a state office building complex. In Oregon, the State Supreme Court Building is being remodeled and an entire floor will be used by the Attorney General's staff. Staff have been located with and paid by agencies; now, they will be physically consolidated. One result is the consolidation of secretarial services, with all typing done by a central pool.[3]

The New Jersey Department of Law and Public Safety hopes to bring more legal staff into a central office. A management study had recommended that physical facilities be upgraded and staff centralized:

> With the present overcrowding conditions in the offices of the Division of Law, the attorneys cannot perform at their best. Upgrading of the present space should increase the levels of performance. Acquisition of additional space will make it possible to bring in most of the attorneys assigned to, and now physically located with, other departments, divisions and agencies. This will substantially increase the cohesiveness and effectiveness of the division.[4]

In Iowa, the Governor's Economy Committee Report recommended that Assistant Attorneys General be consolidated in one location. It found that "physical separation of various offices creates a communication problem" and that "informal communications are greatly hampered and efficient utilization of personnel, office machines, and reproduction facilities is difficult."[5]

In Washington, space problems are one reason that many attorneys are located with departments. The Attorney General's office hopes, however, to bring more together. It is aiming toward a "cluster complex," bringing together groups of lawyers in related areas into a single office. For example, the highways, motor vehicles and utilities staff might be together. This would effect economies in such facilities as libraries, and would also allow the attorneys to advise with each other. Since the Attorney General employs one hundred and thirty-one attorneys, the "cluster groups" could be very substantial in size.

Some arguments have been made against physical centralization. One is that, if agencies are some distance from the Attorney General's office, attorneys might spend a significant amount of time going from one office to another. A second argument is that the attorney may need continuing access to an agency's files, and that it would be impractical to duplicate the files. A third is that the attorney's presence in the agency facilitates a continuing interchange between him and the administrators.

3. Interview with Deputy Attorney General Diarmuid O'Scannlain, October 6, 1970, Salem, Oregon.

4. Governor's Management Commission, SURVEY REPORT AND RECOMMENDATIONS, 73 (1970).

5. Governor's Economy Commission, REPORT, 32 (1970).

5.3 Evaluation of Centralized Legal Services

Most Attorneys General favor centralization of legal services, for what appear to be cogent reasons. Some observers, however, favor retention of staff attorneys by agencies. This section examines both positions.

5.31 Arguments for Centralization

The arguments against house counsel were well summarized by First Assistant Attorney General Marilyn L. Schauer of New Jersey: (1) they are less objective about legal advice rendered to the agency and tend to conform legal opinions to results desired by the agency; (2) their skills are not as sharp as those of attorneys in a central office because they are not exposed to objective interchange of legal ideas and because they are not in constant competition; (3) their knowledge is often limited to the law which the particular agency enforces rather than a broad knowledge of the principles of general administrative law; and (4) because they are not subject to supervision and training by the Attorney General, administrative agency advice lacks coordination and uniformity.[1]

Placing all attorneys in one agency fosters greater communication and interchange of ideas than if they are subject to direction by individual department heads. A greater sense of professionalism results, with attorneys serving the state rather than a particular agency. Attorneys who are part of a particular agency may develop a "house-counsel mentality" and use their legal skills to implement decisions of agency heads, rather than render objective advice. They become lawyers who seek a legal rationale for decisions of their superiors, rather than assess independently the legal questions involved.

A major argument in favor of centralized services is that central control of legal services will reduce conflict and bring greater cooperation between agencies of the state government. Louisiana reported to C.O.A.G. that "the Attorney General has requested that the legislature consolidate the various legal advisory staff of the state departments under the Attorney General's office in order to secure a greater degree of coordination."

A 1968 Kentucky Efficiency Task Force concluded that "centralization provides an improvement in communication among and between attorneys serving the commonwealth;" and "centralization allows for coordinated back-up services by specialists."[2] The Attorney General maintained on a C.O.A.G. questionnaire that "The Attorney General should be in control of all legal services rendered for state agencies in the interest of economy and efficiency," and unsuccessfully sought legislative authority for such control.

A 1963 Kentucky study illustrates problems of coordinating house counsel:

> Most departmental attorneys reported instances where their legal work had conflicted with, or been inconsistent with, that of the Attorney General. This sometimes resulted from a conflict between a departmental opinion and an Attorney General's opinion. The following statements were made about the relationship of agency counsel to the Attorney General:
>
> The Attorney General has sometimes handed down opinions which were properly within the functions of the department, but the Attorney General's opinion prevails in such cases;
>
> There have been only minor differences between the department legal staff and the Attorney General.

1. Interview with First Assistant Attorney General Marilyn L. Schauer, in Trenton, New Jersey, September 24, 1970.

2. *Report of the Subcommittee on Reorganization of the Department of Law, Commonwealth of Kentucky, to the Kentucky Efficiency Task Force*, Frankfort, Kentucky, (February 20, 1968).

> Where conflicts arise, the Attorney General has the last say;
>
> The attorney respected the Attorney General's opinions, but the latter does not have power to overrule the agency's legal position or judgments.
>
> A recent conflict was solved by the department attorney conceding in favor of the Attorney General.
>
> Departmental attorneys apparently defer to the authority of the Attorney General when conflicts arise, but most acknowledge the existence of inconsistencies and disagreements. Coordination with the Attorney General, as with other legal officers depends on the individual attorney and his department.[3]

A consultant's report in Texas scores the lack of coordination in both litigation and non-litigation activities:

> *No one clearly understands who is suppose to do what at each stage of the litigation process.* On occasion, agency personnel work closely with the Attorney General's people in preparing a case for trial. However, because agency personnel are not accountable to the Attorney General, there is no way of ensuring that satisfactory work is done at each stage of preparation. As a result, the case files the Attorney General receives vary widely in quality and content. Occasionally the Attorney General's staff must redo the work of agency attorneys, at considerable extra expense. And there is now no practical way to prevent this kind of thing from happening again—in the absence of clear assignments of responsibility, it is difficult to determine who is at fault. Moreover, *Guidelines for referring nonlitigation problems to the Attorney General's office are lacking.*
>
> The Attorney General's staff has not been able to concentrate its efforts on those agency problems that deserve highest priority. Some agencies burden the Attorney General with a tremendous volume of routine matters; others fail to consult him until a crisis is imminent. There have also been instances where the Attorney General has not been consulted at all on important problems, because the agency felt the advice of its own outside counsel is adequate.[4]

Centralization of legal staff is generally more efficient. In Oregon, centralization made it possible to reduce the number of state attorneys from one hundred and seven to eighty-seven, and the highway department legal staff was cut by almost 50 percent.[5] A 1970 Kentucky report recommends that all legal services be placed under the Attorney General and gives as one argument the fact that attorneys are not now allocated in accordance with the workload: "some departments and agencies are overstaffed while others are understaffed. This can be remedied through central control of assignments."[6]

Back-up services, such as a law library, are more economically furnished to a consolidated staff. Expertise can be developed and applied to problems wherever they develop, rather than to just one agency. Under most centralized arrangements, an attorney still has specific agencies for which he is responsible. When an unusual problem occurs, he would know which of his colleagues could render the most expert assistance.

A further consideration is that attorneys operating out of the Attorney General's office are more likely to confine their activities to legal matters, and less likely to become involved in administration. An agency attorney, however, will probably acquire administrative duties that are not related to his legal training and that do not require an attorney.

5.32 Arguments for Agency Counsel

Despite these arguments, some authorities favor allowing agencies to retain counsel. They contend that this permits more specialization, makes services more immediately available,

3. Kentucky Department of Law, *Office of the Attorney General in Kentucky*, 51 KY. L. J., 42-s, 43-s, (1963).

4. McKinsey and Co., *Strengthening Legal Representation for Agencies of the State of Texas*, p. 2-3 (May, 1969).

5. Interview with Deputy Attorney General Diarmuid O'Scannlain, October 6, 1970, in Salem, Oregon.

6. Legislative Audit Committee, AUDIT REPORT, DEPARTMENT OF LAW, No. 59, 14 (1970).

and makes attorneys more responsive to agency needs.

A recent management consultant's survey of legal services in Texas recommended a continuation of decentralization there. It felt that ready availability of counsel to the agencies was important, and that it fostered specialization:

> Because the activities and problems of State agencies are so diverse, effective legal representation necessitates specialization in many fields and, in some cases, technical expertise in agency operational areas. For example, the legal staff of the Railroad Commission has attorneys with petroleum engineering backgrounds; members of the legal staff of the Highway Department also have engineering qualifications. In addition, because detailed and complex laws are an integral part of many agencies; day-to-day activities, agency attorneys need to be intimately familiar with their agency's routine problems.[1]

The Texas study concluded that long tenure was required to develop staff specialization and that the Attorney General's office was not able to retain staff for long periods of time.

> In our judgment, the relatively long tenure of house counsel is an important strength in the current agency legal function, and contributes substantially to effective legal representation. Among the agencies we interviewed, the average tenure of the chief attorney was approximately 7 years. This is considerably higher than average tenure in the Attorney General's office.[2]

Some states seem to consider existing arrangements adequate. Montana, which has a large number of house counsel, reports to C.O.A.G. that "generally there are no conflicts or problems of coordination."

A doctoral dissertation on relationship between the Attorney General and agency counsels in New York State concluded that the house counsel system was satisfactory:

> The need for expeditious handling of everyday legal problems and the need for expertise in highly technical areas of the law has enhanced the position of the departmental attorney, so that it is both difficult and impractical for the attorney general to regulate directly and closely the operational aspects of legal services at every level of the state government. Of necessity, he has had to exercise self-restraint. While the factors of personalities and politics cannot be overlooked, certain techniques of coordination, both formal and informal, employed by the attorney general of New York had made his relationships with agency counsels generally satisfactory. Disputes between agency counsels are often submitted to him for settlement. Assistant attorneys general are assigned as departmental counsels. Reports, training conferences and informal consultation have contributed to coordination. Cooperative efforts in drafting legislation, in establishing rules and regulations and in representing parties before administrative adjudicatory proceedings have been beneficial. Thus, although there are problems, structurally and operationally the relationship is sound under the circumstances and should continue to function smoothly if some minor changes are made.[3]

The same author, Robert Gordon, contends that high turnover of Attorney General's staff and problems of dual supervision also foster decentralization in New York.

Professor Arlen C. Christenson of Wisconsin appears to believe that house counsel are necessary:

> It is difficult to dispute the proposition that public administrators should have the benefit of legal advice to assist them in making policy decisions. The Superintendent of Public Instruction considering his department's position regarding school dress codes, the Secretary of the Department of Natural Resources contemplating his department's land acquisition policy, and the President of a State University formulating policy regarding student discipline should have legal

1. McKinsey and Co., *Strengthening Legal Representation for Agencies of the State of Texas*, 2 (1969).
2. *Id.*
3. Robert H. Gordon, *The Relationship between the Attorney General and Agency Counsels in New York State*, (Unpublished Ph.D. Dissertation, Department of Political Science, Syracuse U., 1966).

> advice at the time their decisions are made. It is perhaps less clear that the lawyers providing this advice ought to be totally oriented toward implementing the department's policy objectives as a private lawyer might be. There is validity to the notion that public lawyers ought to have a broader public interest in mind when advising their public clients.[4]

One elective Attorney General responded to a C.O.A.G. questionnaire that his office should be filled by Gubernatorial appointment. The reason he offered was that the Attorney General as counsel for all agencies in his state could effectively tie the hands of the Governor in the administration of state policy if he chose to do so. An Arizona department head contended in a case that if the Attorney General had the exclusive authority to request and defend all state officials he would become "a virtual dictator over other public officers in so far as establishing policies, operating the department and making final decisions."[5]

The advantages of house counsel need not necessarily be lost under a centralized system. Many Attorneys General, for example, are attempting to reduce turnover and achieve greater stability in their staff. Specialization can be developed by a member of the Attorney General's staff if he is responsible for an agency on a continuing basis.

5.33 Conflicts Between Agencies

Special problems arise when disputes develop between agencies. Professor Arlen C. Christenson writes that in Wisconsin:

> The Attorney General as attorney for state departments and legal adviser for district attorneys and county corporation counsels is often called upon to help settle disputes between his clients. Sometimes a dispute is settled by a written opinion. The Attorney General or members of his staff are also called upon to help settle similar disputes by informal conferences and sometimes an informal opinion. The Attorney General might become involved at the request of the parties to the dispute or upon his own initiative or the initiative of an assistant attorney general.[1]

He gives examples, including disputes between two agencies as to their relationship after a reorganization act; concerning procedures for resolving state employee grievances; and similar conflicts in interpreting laws.

A Kentucky study noted that conflicts exist even where agencies have their own counsel. Two conflicting agencies may ask the Attorney General to represent them, rather than hire their own counsel. "The Attorney General's obligation to both departments is the same, even if one employs departmental counsel and the other does not. He could not represent both parties without representing conflicting interests." The article does note that "When an agency followed the Attorney General's advice in taking certain action and litigation resulted, it would appear that the Attorney General should represent the party to whom advice has been rendered, although the statutes are silent on this point."[2]

In some jurisdictions, the Attorney General's staff may represent one agency and a special attorney be named to represent the other. In others, the Attorney General assigns staff to represent both sides in the conflict. Others report that the Attorney General decides the issue and simply refuses to represent one agency.

In a 1947 case, the Kentucky Court of Appeals upheld a state officer's action in employing counsel to defend legislation in a suit brought by the Attorney

4. Arlen C. Christenson, *The State Attorney General*, WISC. L. REV. 333-4 (1970).
5. *State ex rel. Morrison v. Thomas*, 80 ARIZ. 327, 297 p.2d 624 (1956).

1. Arlen C. Christenson, *The State Attorney General*, WISC. L. REV. 333-4 (1970).
2. Kentucky Department of Law, *The Office of Attorney General in Kentucky*, 51 KY. L. J. 34-s (1963).

General, although such employment was not specifically authorized by statute. "It was the duty of the Secretary of State to defend the suit [seeking to have an election law declared unconstitutional], and it was necessary that he be represented by an attorney other than the Attorney General or one of the latter's staff. . . . [he] had no choice except to proceed with employed counsel."[3]

Another area of potential conflict involves the Attorney General's relationship to regulatory bodies. Attorneys General were asked if, when they represent the public before regulatory boards, they should also provide counsel for the boards. The thirty-six respondents were evenly divided. However, only nine of thirty-five Attorneys General thought that the boards should have separate counsel.

This question has been litigated. In Alabama, the Attorney General furnishes counsel for the Public Service Commission. In 1937, however, the Attorney General declined to represent the Commission in an action to uphold its rate determinations, but, instead, joined the City of Birmingham in an adversary proceeding against the Commission. The Commission employed outside attorney with the Governor's approval. The Attorney General interpreted his obligation to be to the public at large, in preference to the agency. He challenged the Commission's use of outside counsel but the Supreme Court upheld such employment.[4]

The Missouri case of *State ex rel. McKittrick v. Missouri Public Service Commission* held that, while the Attorney General had the right to appear before the Public Service Commission representing the state, just as any counsel for a litigant may do, he had no right to intervene in its proceedings. "It is clear the Attorney General has no power to represent, control or impede the Commission in its functioning. And if this be true, he cannot do the same thing by intervention."[5] The statutes provided that the Governor would provide counsel for the Commission, and the Attorney General was therefore barred from so doing.

North Carolina's Insurance Commission is represented by the Attorney General. Under authority of the 1969 Consumer Protection Act, the Attorney General intervened on behalf of the consumer in an automobile liability rate-setting case. The Insurance Commissioner claimed the Attorney General's office had engaged in a conflict of duties:

> It was my understanding that the attorney general's office was supposed to represent the insurance department as a state agency. But in this . . . proceeding we find the attorney general's staff trying to represent the department and the public too. If I come to a decision that the attorney general finds is contrary to the public interest, then who do I turn to for legal advice? . . . It's kind of like me going to a private law firm and engaging one of the partners to represent me, then going into court and seeing another partner in the same firm representing another party in the case.[6]

The Attorney General replied that:

> The commissioner cannot seriously contend that an insurance rate hearing should not be a truly adversary proceeding, with adequate representation by advocates for the insurance industry and advocates for the millions of citizens who are required by law to buy liability insurance presenting both sides of the case to an impartial hearing officer. An administrative officer is exercising a judicial function when he sits as hearing officer in the rate case. He is supposed to be as impartial as a judge. . . . No conflict arises because of the attorney general's duty to advise the Insurance Commissioner and his duty to represent the welfare of the general public because the interest of the Insurance Commissioner and those of the general public do not conflict in a rate case.[7]

Conflicts between agencies can exist under any arrangement and some consideration should be given to how the legal issues involved should best be handled.

3. *Miller v. O'Connell*, 304 Ky. 720, 202 S.W., 2d 406 (1947).

4. *City of Birmingham v. Southern Bell Telephone and Telegraph Co.*, 234 ALA. 520, 176 So. 301 (1937); *State v. Southern Bell Telephone and Telegraph Co.*, 234 Ala. 545, 176 So. 308 (1937).

5. *State ex rel. McKittrick v. Missouri Public Service Commission*, 352 Mo. 29, 175 S.W. 2d 857 (1944).

6. *The News and Observer*, Raleigh, N. C., November 2, 1969, p. 1-3.

7. Attorney General Robert Morgan, Press Release, November 3, 1969.

5.4 Special and Temporary Counsel

Nearly all jurisdictions employ some special counsel to supplement the services of the Attorney General's staff. The Committee on the Office of Attorney General has recommended that the use of special or part-time counsel should be restricted to unusual circumstances, as it tends to be an inefficient method of providing legal services. This section examines some of the issues involved in the use of special counsel.

5.41 Authority for Employment

Every jurisdiction except American Samoa and Oklahoma employs special counsel. Samoa uses only regular staff members, who are subject to federal civil service. Oklahoma's Attorney General has no authority to hire special counsel. In Oklahoma, however, state agencies employ counsel who are not subject to supervision by the Attorney General, and this may include special or temporary counsel.

Thirty-eight jurisdictions report that the Attorney General has full authority to employ special or part-time counsel. The Governor's approval is required in Alabama, North Carolina, Oregon, Tennessee, Vermont, and the Virgin Islands. In Maine, the Governor must approve the counsel's compensation. The Attorney General of the United States may employ attorneys under special retainers for any purposes he deems appropriate.

The Attorney General of Michigan may hire special counsel, but must choose them from a list provided by the Civil Service Commission. In Wisconsin, he may employ special counsel only in case of emergency for short periods of time outside the civil service regulations; however, such counsel may serve no more than twenty days. In Arkansas, the Attorney General may not engage special counsel for office work or advice; however, he has full authority to hire special counsel to collect money due the state and, with the approval of the Governor, to prosecute or defend suits.

In Minnesota, the Attorney General may appoint special counsel to serve a board, commission or officer if he is so requested in writing and if, in his judgment, the public welfare will be promoted thereby. The Attorney General may also hire special counsel to perform duties within his own office if he, the Governor and the Chief Justice of the State Supreme Court all certify in writing to the Secretary of State that it is necessary. The Attorney General of California may not hire special counsel except in escheat matters and in work with district attorneys.

The use of special counsel has been challenged in the courts. An early Mississippi case questioned the authority of the Attorney General to hire counsel to assist him in certain suits in which the state was a party. The Mississippi Supreme Court held that the Attorney General had the power in the name of the state to employ such counsel to assist him whenever he felt such was necessary.[1] The Louisiana courts in two cases in the 1870's held that the Attorney General was authorized to hire a special attorney to assist in criminal prosecutions or to allow the special attorney to conduct the prosecutions alone.[2] The Ohio Supreme Court in 1924 held that, by statute, the Attorney General had authority to appoint a special counsel indefinitely or for a limited period of time, for a particular purpose, or for a designated proceeding, with any limitations that the Attorney General might impose. These included restrictions as to the manner of service and the compensation to be paid. Further, the Attorney General had the authority to dismiss or discontinue the services of any such special attorney at any time.[3]

1. *State v. Mayes*, 28 Miss. 706 (1855).
2. *State v. Russell*, 26 LA. ANN. 68 (1874); *State v. Anderson*, 29 LA. ANN. 774 (1877).

The Mississippi Supreme Court held that the Attorney General could employ special counsel to assist in the appeals from tax assessments but he could not bind the state to pay for such services.[4] The Alabama Supreme Court held that the Attorney General lacked authority to employ an attorney to represent the state for the protection and enforcement of a charitable trust, so the attorney could not recover fees for services rendered.[5] In Missouri, the Supreme Court held that a statute which authorized the Attorney General to employ such assistants as might be necessary gave him authority to employ a special counsel and to obligate the state to compensate the counsel, but not beyond the appropriations which had been made for the specific purpose.[6] In a more recent case, the Delaware Supreme Court held that the employment of special counsel to assist the Attorney General in representing the state before the United States Supreme Court was a proper exercise of his authority to appoint special counsel.[7]

A C.O.A.G. survey of one hundred and fifteen former Attorneys General showed that the overwhelming majority, 90 percent, thought that the Attorney General should be allowed to hire special, temporary counsel, while 7 percent said he should not and the others did not say. Only 24 percent thought the Governor's approval should be required, while 70 percent thought it should not, and the others did not reply. Of thirty-seven incumbent Attorneys General, all agreed that the Attorney General should have authority to hire special counsel, and only eight of these thought that the Governor's approval should be required. The great majority of both groups opposed frequent use of such counsel. Of former Attorneys General, 21 percent said that special counsel should be used frequently, 68 percent said it should not, and 1 percent did not answer. Of incumbent Attorneys General, 84 percent opposed the frequent use of special counsel.

3. *State v. Crabbe*, 109 Ohio 623, 143 N.E. 189 (1924).
4. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 907 (1926).
5. *Ex parte Blackmon*, 238 Ala. 369, 191 So. 356 (1939).
6. *Thatcher v. City of St. Louis*, 343 Mo. 597, 122 S.W. 2d 915 (1939).
7. *Application of Young*, (DEL.) 104 A. 2d 263 (1954).

5.42 Compensation of Counsel

A major problem in the use of special counsel is setting compensation. States follow different patterns in determining compensation. The Attorney General and the special attorney agree on a fee in Alabama, Florida, Mississippi, Minnesota, Oregon, the Virgin Islands, and Washington. Michigan, Puerto Rico, Wisconsin, and Wyoming specify that the fee is set by contract. Colorado, Connecticut, Idaho, Louisiana, Nevada, and New Mexico pay on an hourly basis. Arizona pays some special counsel by the hour, and pays others a monthly salary. In Massachusetts and Vermont, an hourly rate is paid in some cases and a percentage fee in others. Ohio pays one-third of the amount collected in claims cases, and standard fees in others. West Virginia and Colorado specify that fees are set according to the bar association minimum. New Jersey pays in accordance with a predetermined fee schedule. New York reports that compensation for special counsel is determined flexibly, as indicated by the situation involved.

Several court cases have involved compensation of special counsel. The Alabama Supreme Court held that an attorney who was employed by the state to conduct litigation was not entitled to a fee for a year in which an agreed continuance was the only court proceeding.[8] In Pennsylvania, the

8. *Davis v. State*, 216 Ala. 526, 113 So. 580 (1927).

Attorney General, pursuant to statute, appointed special counsel at an agreed fee to represent the state in certain proceedings. The counsel rendered such services but was dismissed by the next Attorney General. He then sued to recover the agreed fee, and the court upheld his claim.[9] The Delaware Supreme Court, in setting compensation for special counsel in one case said that "the compensation must be substantial, but it must also be considerably less than that which would be allowable in private practice."[10]

The National Association of Attorneys General recommends that employment and compensation of special counsel be a matter of readily accessible record, open to the public. This would allow full disclosure of the cost and use of such counsel.

5.43 Circumstances and Frequency of Employment

Although nearly all Attorneys General have authority to employ special counsel, only sixteen do so frequently. They are employed for a wide variety of purposes, as shown in Table 5.43. These include special needs of the particular jurisdiction, such as Minnesota's use of special counsel to contest milk barriers of other states, and Puerto Rico's to handle maritime matters.

Generally, however, the type cases where special counsel are employed fall into several classifications. Nearly all the jurisdictions which report frequent employment of special counsel use them in title and condemnation cases. Collection cases are also mentioned frequently, as are public utility rate cases. Some offices use special counsel in antitrust cases, particularly those in out-of-state courts. A number of Attorneys General report that private attorneys are hired when special expertise is needed or when a case of special importance or notoriety is involved.

Outside counsel may be hired where conflicts between two agencies exist and the Attorney General declines to represent both sides. Washington and West Virginia are among the states which say that special counsel is employed in such cases. Former Attorney General Paul Adams of Michigan commented upon this practice:

> In Michigan, when we run into a situation where an agency does not agree with our view of the law, we give that agency the option of private counsel. We refuse to represent the agency as to that particular situation, but if we feel it is sufficiently important, then we advise the agency that we will afford them private counsel. We have had the problem of defending an agency as to a particular statute, and defending the constitution which I agree is our paramount duty, and in this situation we have set up teams of lawyers, one to represent the agency, one to represent the constitution, and that one of course is headed up by the Attorney General. This has been accepted in our state and is a matter of tradition over a great many years. I understand that in some of the other states—and I think this is also a good procedure—the way that this matter is handled is to hire private counsel to represent one of the viewpoints.[11]

Maryland reports on a C.O.A.G. questionnaire that special counsel was employed in one instance where the Legislature passed two reapportionment acts, with the direction that the Attorney General test their constitutionality. If one were held unconstitutional, the other would become law.

Attorney General Buckson of Delaware gave another example of the use of part-time attorneys:

> We are lucky in that Delaware has several large corporations, and they have large legal departments. Men retire from these legal departments and really don't want to get out of law altogether, so they come on part-time

9. *Beloff v. Margiotti*, 328 Pa. 432, 197 ATA. 223 (1938).
10. *Application of Young*, supra note 7 at 266.
11. N.A.A.G. CONFERENCE PROCEEDINGS, 160 (1961).

5.43 SPECIAL COUNSEL: FREQUENCY AND PURPOSES OF EMPLOYMENT

	Frequency of Use	Purposes for Which Used
Alabama	Seldom	Highway condemnation cases and special litigation.
Alaska	Often	Title, condemnation or collection cases; public utility rate cases; water matters; criminal appeals; admiralty; natural resources; antitrust, and bond litigation.
Arizona	Often	Title, condemnation or collection cases; condemnation suits for highways; public utility rate cases; water and land matters; *quo warranto* annexation cases; tort claims against the state.
Arkansas	Often	To collect money due the state (special license fees, franchise tax, etc.); bringing of escheat actions.
California	Seldom	When specialized services are required or when out-of-state collection matters can be handled more economically by contract attorneys. Civil service laws limit such employment to services not available through civil service procedures.
Colorado	Seldom	May use for whatever necessary subject to budget limitations.
Connecticut	Seldom	Antitrust litigation in out-of-state federal courts.
Delaware	Seldom	Investigation of state departments and agencies.
Florida	Seldom	Special litigation and in "exceptional cases"; drug monopoly cases.
Georgia	Seldom	Contract or revenue cases; a criminal prosecution in a capital case of extreme notoriety.
Guam	Often	Retained in Washington, D.C., as needed; principally used for representation before the Civil Aeronautics Board and the U.S. Maritime Commission; tax counsel and land counsel are hired for full-time services.
Hawaii		A.G. has authority to hire for specialized projects if these projects can meet the costs for such special employment.
Idaho	Seldom	When their expertise requires.
Illinois	Often	Title, condemnation and collection cases.
Indiana	Often	Used in highway condemnation cases; (special or local). No part-time under present Attorney General.
Iowa	Seldom	Mainly for jury trials; have reduced amount spent on outside counsel by 75% in the last two years. Used some in title examinations and condemnation cases.
Kansas	Often	"Frequently employed"
Kentucky	Seldom	Collection cases, bond and indenture issues; antitrust.
Louisiana	Often	Title and condemnation cases; public utility rate cases; discovery and recovery of property; criminal appeals; where a district attorney is disqualified or unable to prosecute.
Maine	Seldom	Title, condemnation or collection cases; public utility rate cases; criminal appeals; antitrust.
Maryland	Seldom	Title, condemnation or collection cases. Extraordinary cases, such as testing a bond issue or a revenue measure.
Massachusetts	Often	May use for whatever is necessary, subject to budget.

Michigan	Often	In title, condemnation or collection cases; condemnation suits for highways; discovery and recovery of property; bond proceedings.
Minnesota	Seldom	Contest milk barriers of other states; public utility rate cases.
Mississippi	Seldom	"In perplexing cases which would impair regular duties of Assistants."
Missouri		To provide regional assistance and in specialized areas, title opinions and water pollution.
Montana	Often	Used frequently in title, condemnation, property, and water rights cases.
Nebraska	Seldom	Where matter involves substantial investigation on a local level or where the regular staff could not, because of the press of business, handle the matter.
Nevada	Seldom	Special prosecutors and special counsel.
New Hampshire	Seldom	Public utility matters and "rare, complex cases."
New Jersey	Seldom	Where there is a unique question involving a matter of public importance which the A.G. determines cannot be adequately handled by a staff member.
New Mexico	Often	In all types of cases.
New York	Seldom	When District Attorney is disqualified and A.G. supplants or intervenes; investigations made on order of the Governor; on rare occasions when a particular specialist is required, and it is impractical to maintain a staff individual with that particular specialized skill.
North Carolina	Often	To search land titles and to aid in highway condemnation cases.
North Dakota	Seldom	Used in public utility rate cases and cases where the A.G. has been disqualified; A.G. has not, in recent years, appointed counsel paid out of his appropriations, but has appointed private counsel for various state boards for litigation, paid by board.
Ohio	Often	Collection of claims due state, and on special assignments such as for state universities and some court cases.
Oklahoma	Never	Not employed.
Oregon	Seldom	Only retained for special situations arising outside of the state such as collection matters.
Pennsylvania	Seldom	Handle matters for which special expertise is required in areas not normally handled by regular staff members.
Puerto Rico	Often	Maritime and general matters out of Commonwealth.
Rhode Island	Seldom	In antitrust and U.S. Supreme Court cases.
Samoa	Never	Not employed.
South Carolina	Often	In title, condemnation, discovery and recovery of property; water matters.
South Dakota	Seldom	Hired in areas outside Capital to handle appeals; highway matters; special court cases to save on expense of sending an attorney from the office on routine matters or when distance is prohibitive.
Tennessee	Seldom	Used in right-of-way condemnation cases—seldom for any other purpose.
Texas	Seldom	"In a few very special cases of great importance."

Utah	Seldom	Title and condemnation cases.
Vermont	Seldom	Title, condemnation cases; conflicts of interest, and some special cases.
Virgin Islands		In cases requiring special skills or expertise, such as condemnation; as circumstances dictate.
Virginia	Seldom	Where it is impracticable or uneconomical for A.G. to render service; employed to handle specific cases; A.G. hires special counsel for eminent domain proceedings but they are paid by the highway department.
Washington	Seldom	Principally in antitrust and bond counsel cases, and in other important litigation in which the A.G. is counsel for the opposing parties.
West Virginia	Seldom	Used for special projects, or in case two state agencies are at odds and the Governor or a department head requests special counsel.
Wisconsin	Seldom	Emergency situations and in certain cases enumerated by statute.
Wyoming	Seldom	To handle specific cases or to represent particular departments or agencies. Employed on contract when particular expertise is required, such as antitrust and interstate water litigation.

with us and enjoy it. It's a new world to them. In the civil field, they are great if you get into a case involving highly technical matters, such as patents.[12]

New Jersey is decreasing use of special attorneys, but has called back some former Deputy Attorneys General on a special counsel basis, to continue on cases they started while with the Department of Law.[13]

A backlog of work and staff overload may also provide a rationale for the use of outside counsel. Nebraska was among the states which give the "press of business" as a reason for hiring contract attorneys. The Florida Reorganization Act of 1969 specified that "the Attorney General may authorize other counsel where emergency circumstances exist."

Bond issues are another area where private attorneys may be employed. For example, a bond counsel might be required to certify the validity of a bond issue, so that financial houses would be willing to purchase the bonds. Few Attorneys General's staffs include such counsel, so a private attorney might be required. Another example would be in an "arranged case", where, for example, a bond counsel might want a court ruling on the validity of a bond issue. The special counsel might then bring action to test the constitutionality of legislation before the bond issue was marketed.[14]

There are numerous areas where the use of special counsel would appear justified, especially in smaller offices which cannot maintain staff expertise in all areas. Another example is the employment of counsel in Washington, D.C. by Guam and the Virgin Islands, to represent those territories before federal agencies.

5.44 Evaluation of Use of Special Counsel

A number of Attorneys General have taken action to curb the use of special counsel. Indiana reports that no part-time attorneys are employed under the present Attorney General. Iowa says that the amount spent on

12. C.O.A.G., REMARKS TO COMMITTEE MEETING, February 5, 1970, 2-3.
13. Interview with First Assistant Attorney General Marilyn L. Schauer, September 24, 1970, in Trenton, N. J.
14. See discussion in 1964 CONFERENCE OF ATTORNEYS GENERAL, 113-115.

outside counsel was reduced by 75 percent in the past two years. North Carolina utilized services of a Washington, D.C. law firm in school segregation cases, paying it over $100,000. Attorney General Morgan terminated this arrangement when he took office.[15] In Utah, condemnation cases were handled by forty-three outside attorneys prior to 1969. Since 1969, such cases have been adequately handled by seven members of the Attorney General's staff, who handle other duties as well.[16]

A Kentucky Efficiency Task Force recommended in 1968 that "the practice of contracting for legal services should be sharply curtailed," and that "contract attorneys should be retained only for certain litigation and title work which can be best handled by particular attorneys in specialized fields." The study estimated that about $500,000 could be saved by curbing use of contract attorneys.[17] A 1967 Arkansas study recommended that the Attorney General discontinue the practice of referring delinquent franchise taxes to special collectors. It estimated that such persons usually collected about 30 percent of the amount due, but that "this total could be increased to 75% if collections were handled by personnel within the Attorney General's office."[18]

Another argument against frequent use of outside counsel is the adverse affect on morale of the regular staff. Outside counsel is generally paid more, but may actually rely partly on the less well-paid permanent staff.

A study of the North Carolina highway commission, commissioned by the Attorney General, showed that special attorneys hired in condemnation cases often relied heavily on the state legal staff in the actual research and presentation of the cases.

> The staff attorney often sees very high fees paid to title attorneys for searching real estate titles and he is even called upon to give preliminary approval of such fees. Though title searching fees are often excessive, they have been approved for payment. The staff and trial attorney likewise sees associate attorneys who have been picked on a political basis, rewarded with very high legal fees, although they have frequently done very little work in the trial or preparation of a particular case. The staff or trial attorney feels almost always justifiably, that he has done all the work but that others have received the compensation for the work. Even if a case is not tried but is settled solely on the basis of the work and efforts of the trial or staff attorney, the associate attorney puts in a bill for his services, usually excessive by any standard, which goes into the file of the case involved and is paid.[19]

Additionally, regular staff attorneys handle much routine and often uninteresting work. When a particularly interesting or important case is given to a special attorney, the regular attorney may feel that he has been slighted. The opportunity to handle such cases may be a major factor in retaining staff; this is lost if they are assigned to special counsel.

15. *Raleigh News and Observer*, February 1, 1969.
16. Interview with Attorney General Vernon B. Romney, in Salt Lake City, Utah, October 19, 1970.
17. Cited in: Legislative Audit Committee, AUDIT REPORT, DEPARTMENT OF LAW, No. 59, 14 (1970).
18. Arkansas Government Efficiency Study Commission, REPORT AND RECOMMENDATIONS, 9 (1967).
19. North Carolina Attorney General's office, *A Study of Legal Representation of the State Highway Commission*, Unpublished manuscript, 1970.

5.5 Public Defense Systems

5.51 Development of Public Defense Systems

It is generally accepted that the American system of criminal justice rests on three basic assumptions. First, that the accused is presumed innocent; second, that the accusing party has the burden of proving guilt which must be established in an adversary proceeding; third, that both adversaries must be aided by capable and effective advocates.[1] Serious commitment to the third principle did not begin at the state level until 1963 when the Supreme Court decided in *Gideon v. Wainwright*, (372 U.S. 335), that the state is obligated to provide counsel in cases involving serious crimes. Since then, many states and localities have begun to devise criminal defense systems.

Two nationwide studies helped to focus attention on the lack of defense services available to the poor. The 1963 Attorney General's Report, known as the Allen Committee Report, is considered a milestone in the study of poverty and federal criminal law. A study of legal defense for the poor in state courts was done by Lee Silverstein for the American Bar Foundation in 1965.[2] The introduction to the A.B.A.'s standards on defense services states the basis for such services:

> At an earlier time our system emphasized only the right to retain counsel, without a guarantee that counsel and auxiliary facilities would be provided to those unable to secure them. However, society has deliberately chosen the adversary system—a vigorous clash of opposing sides—as the mechanism for trying criminal cases. Since this necessarily involves rules of procedure, rules of evidence and other complexities far beyond the grasp even of intelligent and educated laymen and beyond the ordinary experience of most lawyers, a high degree of skill in advocacy is demanded. Because society—not the defendant—has selected the adversary system as its choice of mechanism, our deliberate choice of that kind of system, rather than some notion of benevolence or gratuity to the poor, requires that both sides have professional spokesmen who know the rules, e.g., that they be trained lawyers.[3]

The N.A.A.C. considered the problems of providing an adequate criminal defense system during its conference in the year of the *Gideon* decision. Several Attorneys General expressed concern over the inadequacy of the systems then being used. Attorney General Daniel McLeod of South Carolina stated that those who must turn to public agencies for criminal defense should not be subjected to embarrassment at having to accept assistance. This would apply to those who are able to contribute partially to the costs of their own defense as well as those who are not able to assume any of these costs. General Robert Thornton of Oregon pointed out that anyone with experience in criminal law realized that there have been traditionally two standards of justice: "[T]he standard of justice for the man who can afford a good attorney and the standard of justice for the poor man who can't."[4]

5.52 Standards for Defense Systems

The A.B.A. Standards relating to Providing Defense Services were approved in 1968.[5] They are based on five general principles: (1) that the objective of the bar should be to assure that all persons receive necessary coun-

1. 372 U.S. 335.
2. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963); Lee Silverstein, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965).
3. A.B.A. Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 1 (1968).
4. 1963 CONFERENCE OF ATTORNEYS GENERAL 55-59, 59.

sel in criminal proceedings and that the public be educated as to this objective; (2) that counsel be provided in a systematic and well-publicized manner; (3) that each jurisdiction require by law the adoption of a plan for the provision of counsel and the law allow selection from a range of plans suitable to varying local needs; (4) the integrity of the lawyer-client relationship should be guaranteed, and (5) a plan should provide for investigatory expert and allied defense services.[6]

Standards are given for both assigned counsel and public defender systems, with no preference expressed. The commentary points out that the most serious criticism leveled at the assigned counsel method is that it usually lacks systematic administration, as assignments are designated on an *ad hoc* basis, by the judge sitting on the particular case to be assigned. There is an explicit condemnation of the now-declining practice of assigning lawyers who happen to be in the courtroom when a defendant is brought before the courts. Where assignments are of a substantial volume the standards suggest that full-time staff be employed to give the system centralized guidance. An assigned system should also involve as many members of the bar as possible, so as to insure that the lawyers serve under a system of fair rotation of assignments with reasonable compensation for time and services.[7] The standards emphasize the desirability of creating a career defender service with selection based solely on merit and adequate compensation. The defender officers should be staffed with full-time personnel and equipped with law libraries and other necessary equipment.[8]

The standards stress the importance of independent defender systems to preserve the integrity of the lawyer-client relationship. Independence is assured through the establishment of a board of trustees to act as the governing body for public defender or assigned counsel systems and insulate the program against political influence or undue judicial supervision.[9]

The standards exceed present Supreme Court requirements by suggesting that counsel be provided in "all criminal proceedings for offenses punishable by loss of liberty . . . regardless of their denomination as felonies, misdemeanors or otherwise." The commentary points out that the largest number of people confront the criminal justice system at the level of the minor offense and, if they are to develop respect for the law, they must be treated fairly at this level. The standards would provide counsel at every stage of the proceeding including extradition, mental competency, post-conviction and other adversarial proceedings, whether they may be classified as civil or criminal.

A person who could not obtain counsel "without substantial hardship to himself or his family" would be eligiable for public defense services. Those who are able to pay part of the costs would do so, and the payments would be contributed to the cost of the system. The standards state that the accused should be immediately advised of the right to counsel and, if unable to pay, the right to free counsel. This offer should be made in easily understood language. Failure to request counsel should not be construed to be a waiver; waiver should only be found to have been made when the accused has made an intelligent and understanding choice.

In 1966, the Commissioners on Uniform State Laws promulgated the Model Defense of Needy Persons Act which includes sections pertaining to the right

5. See discussion of A.B.A. Standards in Section 1.75 of this Report.

6. A.B.A. Project, *supra* note 1 at § 1.1-1.5.

7. *Id.* at § 2.1-2.4

8. *Id.* at § 3.1-3.4

9. *Id.* at § 1.4

to representation, notice and provisions of representation, determination of financial need, competence to defend and waiver. The Model Act also includes sections on the administration of local defense programs, both public defender and assigned counsel. While the Model Act's provisions are similar to the A.B.A. standards, it contains somewhat less detail, presumably to facilitate adaptation to a particular state's needs.[10]

The National Legal Aid and Defender Association is a private association organized to advance legal counsel to indigents in civil as well as criminal cases. Its National Defender Project is a grant program designed to establish and improve defender offices. Primary consideration is given to those programs which can serve as a model for the region and other similar communities.[11] The N.L.A.D.A. does not favor either an assigned counsel system or a public defender system, but rather sets forth standards and gives grants to both systems. These standards closely parallel those of the A.B.A. However, the National Defender Project also involves standards for bail projects and evaluations of local needs for defense services.[12]

At the 1965 and 1966 National Association of Attorneys General meetings, Major General Charles T. Decker, Chairman of the A.B.A. Section on Legal Education and the Section on Criminal Law, described the National Defender Project:

> (1) We are hoping to support projects which will provide counsel for every indigent who is unable to employ a lawyer and faces the possibility of the deprivation of his liberty or serious criminal sanction; (2) we hope to afford representation which is experienced, competent and zealous; (3) to provide the investigatory and other facilities necessary for a competent and well-prepared defense. This should not be too expensive if we can work out arrangements between the prosecution and defense for some pretrial discovery; (4) the defense counsel should come into the operation at a sufficiently early stage of the proceedings so that he can fully advise and protect the defendant; (5) he should, of course, be completely loyal to the client; (6) the defense counsel also should be able to take an appeal or prosecute other remedies before or after conviction if he feels it is in the interests of justice; (7) there should be maintained in each county where there is a large volume of criminal cases requiring the assigning of counsel, at least one full-time lawyer to handle the work effectively, or a defender's office—either as a public office, quasi-public or a private organization; and (8) we should enlist the community participation and responsibility . . . we should encourage the continuing cooperation of the bar.[13]

5.53 Existing Defense Systems

The first public defender office was opened in 1914 in Los Angeles County, and the concept has been copied in many urban, county, and statewide systems. Under this plan, one or more salaried lawyers are employed in a full-time, or nearly full-time, defender office. These lawyers are specialists in criminal law, and they do not usually have the distractions of an outside practice.[14]

Minnesota is an example of a statewide public defender system. The state public defender handles only appeals and post-conviction proceedings when directed to by a district or supreme court. He is appointed by a judicial council. District public defend-

10. Commissioners of Uniform State Laws, Model Defense of Needy Persons Act (1966).

11. A.B.A. Standing Committee on Legal Aid and Indigent Defendants and the National Legal Aid and Defender Association, GUIDELINES FOR ADEQUATE DEFENSE SYSTEMS 9, 10 (1964).

12. National Defender Project of National Legal Aid and Defender Association, HOW TO ORGANIZE A DEFENDER OFFICE 3-11 (1967).

13. National Association of Attorneys General, PROCEEDINGS OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 111-112 (1965); PROCEEDINGS OF THE CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 7 (1966).

14. National Defender Project, *supra* note 12 at 13-15.

er systems may be established by the judge of any district by filing an order with the judicial council.[15] A 1963 study of the Minnesota system found some fear that frequent association between the defender and the county attorney might adversely affect objective handling of cases.[16]

Under typical assigned-counsel systems, judges appoint lawyers to criminal proceedings on a case-by-case basis. These lawyers are in private practice and may or may not be familiar with criminal law and procedure, A highly-organized assigned-counsel system has been established by the Houston Legal Foundation in Harris County, Texas. Every attorney in the county under the age of fifty is placed on a rotation list, regardless of his type of practice. Older lawyers are assigned on a limited basis. Computers are used to keep accurate lawyer and case data, allowing judges to match background and experience with the complexity of a particular case. There is also a small investigatory staff and a consultation service by experienced lawyers.[17]

A study made in 1967 showed that assigned counsel was the only system used in 2,750 of 3,100 counties in the Nation.[18] Obviously, this system will continue in many areas, especially in thinly populated rural areas. But as has been noted earlier in the discussion of the A.B.A. Standards, the assignment system is often haphazard and lacks systematic administration.

The following classification of states has been taken from two sources: a 1968 study by the South Dakota Local Government Study Commission (23) and a 1969 study by the National Defender Project. This does not offer any indication of the scope or effectiveness of services provided, but does give a general idea of which system is authorized by the statutes of different states.

States which authorize assigned or appointed counsel only: Alabama, Alaska, Arkansas, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, New Hampshire, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

States which have assigned or appointed counsel, but which authorize public defenders in some or all counties: Arizona, California, Colorado, Georgia, Hawaii, Illinois, Indiana, Missouri, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Tennessee, and Utah.

States which have statewide defender systems or rely almost completely on defender systems: Connecticut, Delaware (supplemented by counsel), Florida (district basis), Massachusetts (assigned counsel for capital cases), Minnesota, New Jersey, New Mexico, Oregon (for appeals and post-conviction proceedings only), Pennsylvania (except Philadelphia), Rhode Island.

There is little doubt that some system of defense is necessary. For instance, in 1962 in Cook County, Illinois, 55 percent of all criminal defendants were indigent[19] and in 1965 in Washington, D. C., of 1510 criminal defendants, 61 percent received appointed counsel.[20] Professor Samuel Dash of Georgetown University sounds a cautionary note to those who might favor the establishment of one defense system to the exclusion of the other. He favors a mixed system of assigned and public defender attorneys, pointing out that "most lawyers who make all or part of their living as defense lawyers in criminal cases receive only small fees and count on a brisk turnover to earn a decent income." Relaxed standards of eligibility for indigents has alarmed these lawyers since they foresee their livelihood disappearing, unless they become public employees. He emphasizes the importance of the availability of a defense attorney in probation segments of the criminal proceeding. An attorney's report which is as detailed as that of the adversary officer, can be crucial to the defendant.[21]

A study of the Michigan assigned counsel for indigent defendants system was made by the state crime commission in 1968. In evaluating the Detroit Defender system, Municipal Judge John Emery also indicated a favorable opinion of the mixed public defendant assigned-counsel system. He commented that no defender system should supplant an assigned-counsel system since, with both approaches existing together, the defender's office could not become so concerned with efficiency that assembly line justice would be the result. The continuation of an assigned-counsel system, along with the defender system, enables all segments of the local Bar to be involved in the criminal law.[22]

5.54 The Attorney General's Role

The Attorney General, as chief law officer of the state, is a leader in setting standards for the quality of the practice of criminal law and procedure. While his role is often that of prosecutor, the criminal justice system rests on three points: prosecution, judiciary and defense. A report of a conference on criminal manpower needs which was held in 1966 emphasized the critical importance of the defense as a part of criminal process, as important to the process as the prosecutor or judge. Providing defense services should be regarded, not as a charity to the recipient, but rather as an integral part of the system "with an important but incidental benefit to the recipient."[23]

The Attorney General can serve in the role of advisor when the public defender question is being considered. For instance, in Missouri, the Attorney General served in a Special Commission to draw up a public defender bill to submit to the legislature.[24] Patrick J. Hughes, Director of Defender Services for the A.B.A.'s Committee on Legal Aid and Indigent Defendants, points out that Attorneys General should be aware of several key problems, such as: whether the Attorney General has an obligation to ensure that not only the prosecution but the defense is vigorous and effective; whether the public defender, if this system is favored, should occupy a position equivalent to that of the Attorney General; and what should be the proper relationship between the two agencies since their interests often overlap.[25]

The Committee on the Office of Attorney General has recommended that the Attorney General should work to assure establishment of a defender system, noting that this would help re-

15. MINN. STAT. § 311.14-611.29 (1967).

16. Yale Kamisar and Jesse Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 110-111 (1963).

17. Clifford Lytle, THE PUBLIC DEFENDER IN ARIZONA 15, 16 (1969); James Brandvik, *Defender of the Poor at the Crossroads*, 50 CHI. B. REC. 275, 280 (1969). For a general review of Houston legal services for the poor, both civil and criminal, see 6 HOUSTON L. REV. 939 (1969).

18. President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS 59 (1967).

19. National Defender Project, REPORT TO THE NATIONAL DEFENDER CONFERENCE 77-96 (1970).

20. Kenneth Pye, *The Administration of Criminal Justice*, 66 COL. L. REV. 286, 288 (1966).

21. Samuel Dash, *The Emerging Role and Function of the Criminal Defense Lawyer*, 47 N.C. L. REV 598, 614 (1969).

22. The Michigan Commission on Crime, Delinquency and Criminal Administration, ASSIGNED COUNSEL FOR INDIGENT CRIMINAL DEFENDANTS IN MICHIGAN 12 (1968).

23. Lester Mazo, Lloyd Weinreb, Richard Green, *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 397 (1966).

24. Joseph Simeone, *The Missouri Public Defender Bill*, 13 ST. LOUIS U. L. J., 284, 287 (1968).

25. Correspondence with Patrick J. Hughes, June 9, 1969.

duce the volume of post-conviction proceedings. It has also suggested that the Attorney General should maintain active liaison with defenders, and include them in his conferences and bulletins for prosecutors.

6. SPECIAL DUTIES AND FUNCTIONS

Many aspects of the Attorney General's powers and duties have come down over the centuries virtually without change. He still serves as the state's chief law officer, advising the government and representing it in court. He still is the attorney for the sovereign, although the sovereign power now rests in the people.

Recent years have witnessed a resurgence of power in the office of Attorney General. Traditional duties have been directed toward emergent needs and the powers of the office redefined to meet current problems. The viable nature of this historic office is illustrated in the recent development of programs in such diverse areas as consumer protection and environmental control and action against organized crime. This chapter examines some of the special duties and functions that are undertaken by some Attorneys General's offices.

6.1 Constitutional and Statutory Review and Revision

The rules promulgated by government, whether constitutional, statutory, or administrative in form, influence every facet of American life.

As the state's legal counsel, the Attorney General has long played an important role in rule-making, both in Great Britain and the United States. William Holdsworth notes the emergence of this role in the 16th Century:

> In Henry VIII's reign the king's attorney is an important person in the House of Lords. In some of the very first entries on the journals of that house he is not only empowered by it to take bills from the Lords to the Commons, but also to amend bills and put them into shape. All through the Tudor period it is the king's attorney who is usually consulted by the government on points of law;...[1].

As the rule-making process has been subjected to evolutionary influence over the centuries, the role of the Attorney General has changed considerably, expanding in certain areas and delegating responsibilities in others.

6.11 Constitutional Revision

American state constitutions have long been the target of criticism. Predominately the product of 19th Century draftsmen, they were designed to govern a society far removed from that of today. Characterized by excessive length and ambiguity, the typical state constitution led David Fellman to remark:

> It makes temporary matters permanent. It deprives state legislatures and local governments of desirable flexibility and diminishes their sense of responsibility. It encourages the search for methods of evading constitutional provisions and thus tends to debase our sense of constitutional morality. . . . It hinders action in time of special stress or emergency. It stands in the way of healthy progress. It blurs distinctions between constitutional and statute law, to the detriment of both. It creates badly written instruments full of obsolete, repetitious, misleading provisions. Above all, it confuses the public....[1]

Constitution revision is inherently a continuing process. No assembly, no matter how qualified, could draft a document that would meet the needs of all future times. As states and society change from generation to generation, so the constitution must be revised to reflect these changes. Constitutions must provide a framework for effective legislation to meet current needs. The written constitution is the core of the American system of government and should serve as the foundation for a dynamic state.

The archaic nature of the constitutions themselves and pressures created by many socio-political factors have led to the rapid growth of constitutional revision activities. Urbanization, population growth and mobility, rapid technological development, and an increase in governmental activities are among the factors which have placed great strain on the old constitutions.

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1. William Holdsworth, *The Early History of Attorney and Solicitor General*, 13 ILL L. REV. 602.

1. David Fellman, *What Should a State Constitution Contain?*, in W. B. Graves, MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 146 (1960).

Between 1959 and 1961, it is estimated that sixteen states were involved in programs of revision.[2] This total increased to thirty-four for the year 1968 alone.[3]

Four basic procedures provide the vehicle for revision of state constitutions: amendment, initiative, convention, and commission action. The first, the amendment process, may result in a fragmented and more lengthy document. In areas of specific subject matter, however, the amendment process has proved beneficial. Generally, constitutional amendments are adopted by the legislature and then must be ratified by the electorate. In 1968, 450 of the 490 amendments considered by state voters originated in the legislature. Of this number, 340 were ratified in forty-one states. Both the number of constitutional amendments proposed by the legislature and those approved by the people seem to be increasing.[4]

A second method of constitutional revision, the initiative, is rarely used and is available in only fifteen jurisdictions. Constitutional conventions, a third procedure, are technically available in every state. During 1968, constitutional conventions, composed of representatives elected from throughout the jurisdiction, were held in seven states: Arkansas, Hawaii, Illinois, Maryland, New Mexico, Pennsylvania, and Rhode Island. There has been a recent trend toward limiting the convention's mandate to consideration of specific sections or subjects of the constitution.

Constitutional commissions have become a significant means of constitutional review in recent years. Usually *ad hoc* in nature, these bodies generally consist of both official and citizen appointees. Created by statute, legislative resolution, or executive order, the commissions are used primarily as arms of the state legislature. During 1968, twenty-six different commissions were at work in twenty-two states.[5]

The new Florida Constitution, which became effective in January of 1969, created a thirty-seven member commission. It is to be organized in 1979, and every twentieth year thereafter. At each of these times, the commission is to undertake a thorough study of the existing Florida constitution and prepare a program of revision. Members of the commission include the Attorney General and appointees of the Governor, Speaker of the House, President of the Senate, and Chief Justice of the Supreme Court.[6]

The past three decades have witnessed a rapid increase in the use of commissions to draft constitutional revisions. During the decade ending in 1949 only seven such commissions were created. That number rose to fourteen during the following ten-year period. In 1968, twenty-two commissions were at work.[7] Several factors led to this growth. Smaller than conventions, commissions are therefore less cumbersome and less expensive to operate. There also exists a much higher degree of legislative control over commissions. The recent defeat of constitutions submitted by conventions in New York, Maryland and Rhode Island has also contributed to this trend.[8]

The Attorneys General have joined constitutional revision activities in several capacities. Florida, Georgia and Vermont report in response to C.O. A.G. questionnaires that the Attorney General is a member of the constitutional revision commission. Louisiana's

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2. The Council of State Governments, 1962-1963 THE BOOK OF THE STATES 5.

3. The Council of State Governments, 1970-1971 THE BOOK OF THE STATES 3.

4. *Id.* at 4-5.

5. *Id.* at 6-8.

6. FLA. CONST., art. 11.

7. Albert Sturm, THIRTY YEARS OF STATE CONSTITUTION MAKING, table 7, ch. 3 (1970).

8. The Council of State Governments, *supra* note 3 at 8.

Attorney General is a member of the Law Institute, which initiates revision activity in that state. Elsewhere, the Attorneys General have offered the general legal services of their offices by rendering opinions, drafting phraseology, and offering advice upon request to conventions or commissions.

Section 1.21 of this study discusses constitutional provisions which apply to Attorneys General. The office is constitutional in forty-four states and Puerto Rico, and is mentioned in an additional state. This section notes that the median jurisdictions mention the office of Attorney General in context of seven different subjects in their constitution. Constitutional restrictions include the length of term, the means of filling vacancies, qualifications and some duties.[9]

These provisions, where absolute or unduly restrictive, may adversely affect the office; for example, several states still limit the Attorney General's term to two years, and one still sets a $6,000 salary limit. In those jurisdictions where the Attorney General is a constitutional officer, he has a direct interest in encouraging review and revision.

Attorney General Arthur K. Bolton of Georgia, Chairman of the N.A.A.G. Committee on Constitutions, surveyed Attorneys General prior to the 1970 Midwinter Meeting to ascertain their views on revision. Most of them felt strongly that revision was necessary; one state, for example, estimated that 48 percent of its constitutional provisions were adequate, 20 percent should be revised and 32 percent repealed. They differed, however, on what is the best method of revision. One Attorney General felt that the deliberate, article-by-article, process of amendment is preferable to complete revision, since an entire proposed constitution might be defeated because of objection to one article. Another state felt that a convention might not have the wisdom that the initial constitution-makers were endowed with, so piecemeal revision was preferable. Others favored conventions because amendments tended to become obsolete, piecemeal revision was inadequate, and amendments did not receive proper attention by the voters. Despite differences in approach, the consensus was that revision was necessary to modernize constitutions.

9. See Table 1.21 Constitutional provisions, for a state-by-state list.

6.12 Bill Drafting

The preponderance of American law today is statutory. The clear, concise and accurate drafting of this law is a matter of great importance.

Bill drafting for state legislatures has changed greatly during the past century. Prior to 1900, most bills were drafted by the legislators themselves. In the majority of states, the office of Attorney General played a key role in advising the legislators and, in many cases, drafting legislation for the executive branch. During legislative sessions, the office of Attorney General became in many senses a bill drafting agency. In addition to actually drafting a great deal of legislation, the Attorney General helped to review bills drafted by other individuals.[1]

In 1900, New York created by statute an official drafting staff, the Legislative Bill Drafting Commission.[2] Wisconsin established a Legislative Reference Library in 1901 to provide bill drafting and reference assistance to legislators. The library was staffed by legally-trained technical experts, each experienced in the drafting of quality legislation. As the Legislative Reference Library became well established in Wisconsin, bill drafting soon became the most popular feature of its work.[3]

1. William J. Siffin, THE LEGISLATIVE COUNCIL IN THE AMERICAN STATES 24 (1959).

2. The Council of State Governments, 1970-1971 THE BOOK OF THE STATES 89.

Hard-pressed to satisfy other important duties, the Attorney General's office gladly relinquished its drafting responsibilities whenever possible, but continued to work in close cooperation with the Reference Library when its services were required. The Library became the means for tapping talents available at the University of Wisconsin and provided legislators with access to studies, reports and other publications from many sources.

Widely publicized and acclaimed, the legislative reference concept began to gain popularity during the first two decades of the 20th Century. Between the years 1907 and 1917, more than thirty such agencies were established.[4] In 1913, the A.B.A.'s Special Committee on Legislative Drafting reported:

> The most important existing permanent public agencies for furnishing information and rendering expert assistance in the preparation of legislative enactments are the state legislative reference bureaus and drafting departments.[5]

However, most Attorneys General continued to offer legislative drafting services.

Another important development took place in 1933 with the establishment of the Legislative Council in Kansas. A continuously-operating body, its major function was the analysis of matters prior to legislative consideration. The Legislative Council was a permanent joint standing committee which formed a coordinated legislative program. Its research staff prepared reports, studies, and with the aid of the revisor of statutes, drafted legislation. Much more oriented to policy than to the mechanics of bill writing and codification, the Council relied heavily upon the legal services of the Attorney General.[6]

By 1969, the total number of legislative councils reached forty-one.[7] A new emphasis was placed on the importance of a coordinated program of well-written legislation and a trend of shifting bill drafting responsibilities from the office of Attorney General proceeded at a rapid pace. By 1954, while the office of Attorney General participated in bill drafting in over thirty states and was the official bill drafting agency in fifteen, in only eleven did it draft more than one-half of the bills introduced. Legislative reference bureaus or councils were considered the official bill-drafting service in twenty-four states. An office of statutory and code revision handled drafting responsibilities in eight jurisdictions.[8]

By 1960, seven of the above-mentioned eleven states had transferred legislative drafting responsibilities from the office of Attorney General to other agencies. Thus, only Florida, Colorado, Mississippi, and North Carolina retained bill drafting as a major function of the Attorney General's office. Although an exclusive function of the office of Attorney General in only four states, as of 1960 bill drafting remained a limited service of that office in more than thirty jurisdictions. In twelve states, as of 1960, the office of Attorney General drafted more than 50 percent of legislation.[9]

3. Charles McCarthy, THE WISCONSIN IDEA 57 (1912).

4. John H. Leek, LEGISLATIVE REFERENCE WORK: A COMPARATIVE STUDY 33 (1925).

5. Committee of the American Bar Association, THE PROBLEM OF LEGISLATIVE REFERENCE AND BILL DRAFTING SERVICE (1913).

6. The Council of State Governments, 1950-1951 THE BOOK OF THE STATES.

7. The Council of State Governments, *supra* note 2 at 59.

8. Belle Zeller, AMERICAN STATE LEGISLATURES 146-147 (1954).

9. The Council of State Governments, LEGAL SERVICES FOR STATE LEGISLATORS, 45 (1960).

	Provides Service	Service Available to: Legislature	Gov.	State Depts.	Other	Percent of Bills Drafted	Basis of Service
Alabama	Yes					1%	
Alaska	Yes		X				Statute
Arizona	Yes	X	X	X		2-5%	Custom
Arkansas	Yes	X			Co. Officers	5%	Custom
California	Yes	X		X		1%	Custom
Colorado	Yes	X				-1%	Custom
Connecticut	No	(N.A.)	(N.A.)	(N.A.)		(N.A.)	(N.A.)
Delaware	Seldom					0%	
Florida	No	(N.A.)	(N.A.)	(N.A.)		(N.A.)	(N.A.)
Georgia	Yes	X	X	X		5%	Custom
Guam	Yes		X	X		50%	
Hawaii	Yes	X	X	X		10%	Statute
Idaho	Yes	X		X		15-20%	
Illinois							
Indiana	No	(N.A.)	(N.A.)	(N.A.)		(N.A.)	(N.A.)
Iowa	Some					-1%	
Kansas	Some	X					Custom
Kentucky	Yes	X	X	X		10%	Statute
Louisiana	Yes	X		X	Local Officers	1%	
Maine	Yes	X	X	X		25%	Statute
Maryland	Yes		X	X		-10%	Custom
Massachusetts	Yes			X		minimal	Statute
Michigan	Yes	X	X	X		5%	Custom
Minnesota	Yes	X	X	X		5-10%	Custom
Mississippi	Yes	X	X	X	A.G. decides	20%	Custom
Missouri	No	(N.A.)	(N.A.)	(N.A.)		(N.A.)	(N.A.)
Montana	Yes	X	X	X			Custom
Nebraska	Seldom						
Nevada	No	(N.A.)	(N.A.)	(N.A.)		(N.A.)	(N.A.)
New Hampshire	No	(N.A.)	(N.A.)	(N.A.)		(N.A.)	(N.A.)
New Jersey	Yes		X		Own Dept.	5%	Custom
New Mexico	Yes	X	X				Custom
New York	No	(Draft own legislative program only)					
North Carolina	Yes	X	X	X			Statute
North Dakota	Yes	X		X		10%	Custom
Ohio	No	(N.A.)	(N.A.)	(N.A.)	(N.A.)	(N.A.)	(N.A.)
Oklahoma	Yes	X				minimal	Statute
Oregon	Yes	X	X	X		10%	Statute
Pennsylvania	Some		X		Own Dept.	small	Custom
Puerto Rico	Yes	X	X	X			Adm. Act.
Rhode Island							
Samoa	Yes	X	X	X		10-15%	Custom
South Carolina	Yes	X	X	X			Custom
South Dakota	Some			X		5%	Custom
Tennessee	Yes	X	X	X		considerable	Custom
Texas	Yes	X				10%	Custom
Utah	Yes	X	X	X		25%	Custom
Vermont	Yes		X	X		10%	Custom
Virgin Islands	Yes		X	X		85%	Custom
Virginia	Some	X	X	X		minimal	Custom
Washington	Yes	X	X	X		5%	Custom
West Virginia	Some	X		X			Custom
Wisconsin	Some			X		15%	Custom
Wyoming	Yes	X	X	X		20%	Custom

Bill drafting became too burdensome for an office continuously facing new and expanding responsibilities. The character of legislation increasingly required a much greater degree of research and expertise. Extensive reference facilities became an absolute necessity if quality legislation was to be drafted. In most jurisdictions, the office of Attorney General did not possess the resources to furnish such services.

Bill drafting must be highly confidential and free from political influence. The office of Attorney General is often incapable of meeting these requirements. Legislators simply will not completely trust a bill drafting agency staffed and directed by members of the opposing political party; and approximately one-fourth of the Attorneys General are of the opposite party as the majority in one house of the state legislature. This factor has served as a stimulus toward shifting legislative drafting responsibilities from the office of Attorney General to other agencies.[10]

As of 1967, the department of law continued to be the major bill drafting agency in only four states: Colorado, Florida, Mississippi and North Caroline.[11] In every other jurisdiction this function was officially the responsibility of a legislative council, reference bureau, or legislative services commission. In 1967, Florida transferred legislative drafting from the office of Attorney General to the Legislative Reference Bureau. Colorado, early in 1969, transferred both drafting and revision responsibilities to other agencies. The Colorado Attorney General remains as a member of the Committee on Legal Services.

At present, only the offices of Attorney General of Mississippi and North Carolina can be classified as their respective states' official legislative drafting agency. In Mississippi, this function is the responsibility of the Revisor of Statutes, who is appointed by the Attorney General.[12] The Division of Legislative Drafting and Codification of Statutes is the counterpart within North Carolina's Department of Law. Section 114-9(1) of North Carolina's General Statutes requires this Division:

> To prepare bills to be presented to the General Assembly at the request of the Governor, and the officials of the state, and departments, thereof, and members of the General Assembly.

During legislative sessions approximately twenty attorneys participate in this function. Of the 2,184 bills and resolutions introduced in the 1967-1968 session of the North Carolina General Assembly,[13] more than two thousand were drafted by the Attorney General's staff. The division works closely with the University of North Carolina's Institute of Government, which provides technical, reference and research services.[14]

The percent of bills introduced which were drafted by Attorneys General's offices are shown in the accompanying table. Seven jurisdictions indicated that 20 percent or more of the bills were drafted by the office of the Attorney General. Fourteen indicated that from 5 to 20 percent of the bills were so drafted. The Attorneys General helped draft from 1 to 5 percent in another fifteen jurisdictions. In ten states apparently there were no bills drafted by the Attorney General's office.

In twenty-nine of the fifty-one jurisdictions reporting, drafting services are provided to the Governor; in thirty, they are provided to state agencies and

10. *Id.*

11. The Council of State Governments, 1968-1969 THE BOOK OF THE STATES 74-77.

12. *Id.* at 88.

13. The Council of State Governments, *supra* note 11.

14. Interview with Deputy Attorney General M. R. Rich, in Raleigh, North Carolina, August 5, 1969.

departments; and in thirty-one, they are provided to the legislature. Additionally, in Arkansas and Louisiana, the Attorney General provides drafting services for local and county officials.

The opposite trend has been witnessed in Great Britain with its cabinet form of government. The cabinet, directly responsible to Parliament, actually prepares almost all major legislation. The English Attorney General has remained very important in drafting legislation and serves on the Legislation Committee of the Cabinet. Professor J. Ll. J. Edwards writes:

> Membership of this Cabinet Committee, moreover, is no mere formality so far as the Attorney and Solicitor-General are concerned. Insofar as the work of the Committee is taken up with consideration of the drafts of all Bills, the law officers must exert great influence both because of their positions and the expectations that the contents of proposed measures will have already been subjected to careful scrutiny within the Law Officers Department. Informal consultation between the Department and Parliamentary Council is constant.[15]

A significant recent development in legislative drafting and reference services is the use of computers. More than thirty states use computers to search statutes, keep track of bills, print indexes and legislative summaries, and insert amendments. Computers cannot actually draft legislation, but bill preparation can use their services. As amendments are made to newly enacted legislation, a computer operator retrieves the section affected and inserts the amended wording. The amended bill can be printed out immediately, saving time as well as avoiding costly mistakes. A substantial number of states use computers for bill preparation.

6.13 Review of Legislation Drafted Elsewhere

The role of the Attorney General in the legislative process has shifted from the initial stage of drafting to the later stage of reviewing bills for form and constitutionality.

The review may take place at several stages, as shown in the Table. Twenty-two of forty-seven jurisdictions report that the Attorney General reviews at least some bills before they are introduced. Seven indicate that bills may be reviewed during some stage of the legislative process preceding final passage.

Twenty Attorneys General clear bills passed by the legislature prior to their signing by the Governor. Ten indicate that they review all bills at this stage. Such service is much more likely to be rendered in those jurisdictions where the Attorney General is appointed by the Governor than where he is not. The Virgin Islands reports that the Attorney General actually drafts veto messages for the Governor.

In his role as state government's chief legal advisor, the Attorney General supplements the Governor's prerogative power of legislative review. This constitutional executive power is present in every American jurisdiction except North Carolina. Although the practice varies somewhat from state to state, the Governor generally must exercise the option of approving or vetoing, within a certain time after passage, all legislative enactments.[1] Thus the Attorney General often occupies a significant position in his advisory role. Difficulties might arise, however, if the Attorney General advises against a particular piece of legislation which the Governor later signs into law. The Attorney General may well find himself defending the constitutionality of legislation which he had advised might be unconstitutional.

The legal basis for the clearance procedures is not known for many jurisdictions. It appears that the basis

15. J. Ll. J. Edwards, THE LAW OFFICERS OF THE CROWN 148 (1964).

1. Albert Coigne, STATUTE MAKING 229 (1948).

	Before Introduction	Before Passage	Before Signing	Comments
Alabama				May, but no statutory basis
Alaska				
Arizona			All	Referred to A.G. by Governor
Arkansas	Some			On request of agency
California			All	A.G. passes on legality
Colorado			Some	On request of Governor (not statutory)
Connecticut		Some		On request of legislators
Delaware	Seldom			
Florida	No	No	No	
Georgia			All	General bills submitted by Governor
Guam				
Hawaii	Some		All	Request of Governor
Idaho				A.G. usually not consulted
Illinois			All	
Indiana			All	Officially requested by Governor
Iowa	A few	A few	A few	On request—no statutory basis
Kansas				Reviews some on request
Kentucky	No			
Louisiana	Some			Request—agency or official
Maine	All	All	Some	Not statutory; applies only to pub. laws
Maryland	Some			Request of Governor, dept., or legislator
Massachusetts	No	Some	Some	Request of Governor or legislature
Michigan	Seldom			
Minnesota	No		Yes	Request of Governor and officials
Mississippi	Some	Some	Some	Request of legally authorized person
Missouri				
Montana				May, but no statutory authority
Nebraska	Seldom			
Nevada	No	No	No	
New Hampshire		Most		Prior to engrossment
New Jersey	Some	Some	Some	Advises Governor as to validity
New Mexico	(Seldom—but some assistants are assigned to Governor & legis. during sessions)			
New York	Some		Most	At request of Governor
North Carolina	No	No	No	
North Dakota	No	No	No	
Ohio	No	No	No	Only bills relating to A.G.'s office
Oklahoma	Some	Some	Some	Infrequently—at request of legislator
Oregon	No	No	No	
Pennsylvania	No	No	All	Based on custom
Puerto Rico	Most	Most	All	Based on administrative action
Rhode Island				
Samoa	Most			Reviews bills
South Carolina				
South Dakota	No	No	No	
Tennessee	Some			
Texas	No	No	No	
Utah	Some			
Vermont	Some	No	No	At request of legislators
Virgin Islands	Some	No	All	Drafts veto messages
Virginia	May		Some	At req. of Gov., legislator, or Stat. Research Bureau
Washington				At req. of Gov., Legis., or state Agency
West Virginia	No	No	No	Bills cleared by Legis. Services office
Wisconsin	No	No	No	No statutory basis
Wyoming	Some	None	All	Referred by Governor

is custom in a number of cases. Only Louisiana cites a constitutional article as authority for reviewing bills; the Attorney General is constitutionally a member of the Legislative Bureau which examines bills as to "construction, duplication, legality, and constitutionality." The reports of the Bureau are advisory only.[2]

The offical manual of the California Department of Law sets forth, in detail, bill review procedures. The manual indicates that most reports are short, and simply stipulate that the bill has been examined and the Department finds "no substantial legal objection thereto." Where objections are raised or where the Governor requests a detailed analysis, a long form is filed. The Attorney General receives a copy of the enrolled bill from the Governor's legislative secretary as soon as the bill reaches the Governor's office. The reports are confidential statements to the Governor and must be completed and sent to the Governor within six days. The bill reports are confined to a discussion of the legal merits of the legislation. The manual states:

> Considerations of policy and desirability are not to be included unless in those exceptional cases where the bill is one especially advocated by the personal authority of the Attorney General . . . or where the Governor requests [such consideration][3]

If a bill is held unconstitutional or otherwise invalid by the reviewing assistant, the report must be personally approved by the Attorney General, his chief deputy, or his chief assistant prior to release.

New Jersey has a form for staff members to use in commenting on pending legislation. The form was developed by the Governor's office, and calls for a brief description of the bill's effect, its desirability and suitability, cost, and departmental comments and position.

Although a relatively recent function of the office of Attorney General, the review of legislation drafted by others has become a significant activity in many jurisdictions.

6.14 Revision, Codification and Publication

With the constant passage of new legislation, a cumulative body of statutory law must undergo a continuous process of codification and publication if it is to remain current. Codification usually entails a "process of collecting and arranging the laws into a complete system of public and private law, scientifically arranged and affirmatively approved by the Legislature itself. . . ." Codification "is more than evidentiary of the law; it becomes the law itself."[1]

Codification may involve both substantive and formal revision. Substantive revision consists of modifying the content and effect of the law. Formal revision refers to the consolidation of overlapping provisions in the law and correction of inaccurate, obscure and conflicting statutes. As state government's chief legal officer, the Attorney General has long been active in both areas of codification.[2]

Prior to the 20th Century most states had a somewhat haphazard system of codification. Generally, the office of Attorney General designated staff members to codify new legislation. This was accomplished by assigning specific title, chapter and section numbers to each bill before passage. Later it was often necessary to draft new legislation removing conflicts, duplication and inaccuracies created by that enactment.

2. LA. CONST. art. 3, § 31.

3. California, OFFICE MANUAL, OFFICE OF THE ATTORNEY GENERAL.

1. Belle Zeller, AMERICAN STATE LEGISLATURES 150 (1954).

2. The Council of State Governments, LEGAL SERVICES FOR STATE LEGISLATURES 6-15 (1960).

It was often the case that this revisor bill, as it was termed, could not be introduced until the next session of the legislature. Somewhat randomly, and often after long periods of time, the entire code was codified to date and republished. Publication was generally handled by special commissions established specifically for this purpose, by the Secretary of State's office, or by a law publishing firm on a contract basis.[3]

As with bill drafting, codification and publication have been gradually shifted away from the office of Attorney General. New York and Louisiana led their sister states in the establishment of independent agencies to handle the substantive revision of the statutory law. In 1934, New York created the Law Revision Commission, located at Cornell University. Consisting of members of the judiciary and code committee of both legislative houses and five additional members appointed by the Governor, of whom four must be attorneys, it has undertaken a thorough program of substantive revision of the state's law. It points out defects in the laws, analyzes these inconsistencies, and recommends specific statutory changes to the legislature.[4]

Louisiana, in 1938, established the State Law Institute at Louisiana State University "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs; to serve the better administration of justice and to carry on scholarly legal research and scientific legal work." The Institute completed and submitted a criminal code, presented a revision of the general statutes, and completed a background study for an extensive revision of the Louisiana State Constitution.[5] New Jersey and California have followed in the establishment of such bodies. Today, in every other jurisdiction except North Carolina, substantive revision is handled by a legislative service agency.[6]

Formal revision has become a routine function of state government during the 20th Century. In 1909, Wisconsin established the Office of Revisor, whose responsibility was to consolidate overlapping provision in the law, correct inaccurate and obscure expressions, eliminate legal conflicts and collect the whole into a logical, compact body without change in effect. As of 1952, one-half of the states had established formal revision facilities and were well underway in making bulk revision of their statutes. Today, most others have done likewise.

A number of these revision agencies also publish statutes. A wide variety of practices still govern this action. The general practice now followed in a majority of states is to have more frequent publications with supplementary pocket parts, volumes or looseleaf replacements issued annually.[7]

By 1960, the vast majority of jurisdictions had transferred the official revision and publication responsibilities from the Attorney General to other offices or agencies. In only four states, Colorado, Florida, Mississippi, and North Carolina, did these remain as official activities of the Attorney General. In Colorado, the Attorney General's office was responsible for both statutory revision and publication until 1969. Until recently, Florida's Statutory Revision Department was in the office of the Attorney General and was staffed by three Assistant Attorneys General and clerical assistants.[8] In Mississippi, the Revisor of Statutes, appointed by the Attorney General, undertook formal

3. *Id.*

4. Legislative Research Commission of Kentucky, THE LEGISLATIVE PROCESS IN KENTUCKY 236 (1955).

5. Zeller, *supra* note 1 at 152.

6. The Council of State Governments, 1970-1971 THE BOOK OF THE STATES, 88-90.

7. Zeller, *supra* note 1 at 152-155.

8. *Office of the Attorney General*, 34 FLA. B. J. 14 (1960).

as well as minor substantive revision. North Carolina's Division of Legislative Drafting and Codification of Statutes is empowered to carry out topical revision of the general statutes. In this capacity, the legislature selects a general area such as the judiciary and the department thoroughly analyzes existing law governing that topic and recommends substantive revision measures.[9]

Information from forty-five jurisdictions indicates that at the present time, only in North Carolina is the Attorney General officially responsible for statutory and code revision.

Twenty-three jurisdictions report that the Attorney General participates in no such revision activities. Nineteen report that some assistance is rendered by the Attorney General in these matters. Vermont and Kentucky Attorneys General indicate that they give"advisory assistance." Idaho and California say this is done "only upon request." New Mexico says it is done upon "request of the Legislative Council;" Samoa, upon request of the "Governor or a government official". Utah indicates that the Attorney General makes a biennial recommendation in this area to the legislature. Delaware states that this is done especially in the criminal law field.

Code revision "may" be done in Illinois, is proposed in New Jersey, and is "often" done in Connecticut. Vermont has recently created a new one-man "Legislative Division" within the Office of Attorney General, which is undertaking an overall revision of the juvenile procedure and drug abuse laws of Vermont.[10]

As with legislative drafting, computers have had a significant impact in the area of statutory revision, codification, and publication in recent years. Twenty-two states have made use of computerized statutory retrieval systems. These include: Massachusetts, Oklahoma, Utah, Connecticut, Florida, Illinois, Iowa, Kansas, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.[11]

Seven states indicate that, at present, the Attorney General is a member of the statutory commission or institute created to carry on codification and publication. In Arkansas, the Attorney General is a member of the Statute Revision Commission; in Colorado, the Commission on Legal Services; in Louisiana, the Law Institute; in Oregon, the Criminal Law Revision Commission; in Tennessee and Virginia, the Code Commissions; and in Wyoming, the Statute Revision Commission. Thus, the trend establishing independent agencies to handle statutory codification and publication has not left the Attorney General completely inactive in this field.

6.15 Substantive Law Revision

After remaining relatively static for more than a century, American statutory criminal law has been subjected to a dramatic wave of revision and reform during the past two decades. The state of the criminal law prior to this recent activity led Professor Herbert Wechsler, of the American Law Institute, to note:

> Our penal codes are fragmentary, old, disorganized, and often accidental in their coverage, their growth largely fortuitous in origin, their form a combination of enactment and of common law that only history explains . . . [Similarly] [d]iscriminations that distinguish minor crime from major criminality, with large significance for the offender's treatment and his status in society, often reflect a multitude of fine distinctions

9. Interview with Deputy Attorney General M.R.Rich, in Raleigh, North Carolina, August 5, 1969.

10. James Oakes, BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF VERMONT 17 (June 30, 1966 - June 30, 1968).

11. The Council of State Governments, *Legislative Research Checklist*, Vol. XII, No. 2 (June, 1970).

that have no discernable relation to the ends that law should serve.[1]

This description ably characterizes the criminal codes in use in virtually every American jurisdiction in 1950. At that time a random sampling would show that the penal codes of Michigan, New York and Texas were adopted in 1846, 1881 and 1856 respectively.[2]

A number of factors have forced the states to abandon piecemeal amendment and turn to the process of substantive revision to completely rewrite their criminal codes. The nation's increasing crime rate placed great strain on the existing systems of criminal justice, pointing out numerous inadequacies. United States Supreme Court decisions dealing with criminal procedures rendered many state provisions unconstitutional. Technological change, including newly developed mass communication and mobility, rendered many sections of the codes obsolete.[3]

Perhaps the greatest stimulus for revision of state criminal law came from the American Law Institute and its Model Penal Code, which was published in 1962. The result of ten years work and an expenditure of $500,000, the code was drafted by a highly qualified group of experts representing every aspect of the criminal justice field. Designed to serve only as a guideline, the code has proved invaluable to state revisors.[4]

A number of procedures have been used to effectuate criminal law revision in the states. Characteristic of the states in which the bar association has played a leading role is Michigan, where a Joint Committee of the State Bar was created in 1965 "to eliminate the structural defects of the present [criminal] law."[5] The Joint Committee worked toward five basic goals: the elimination of inconsistent, overlapping, and obsolete sections, and rearrangement of the remaining provisions; a restatement of basic offenses in modern language without excessive duplication and verbosity; the elimination of potential maladministration; the plugging of all loopholes in the code's coverage; and a harmonizing of penalties in accordance with both the severity of the act involved and the treatment of related offenses. A large group, the Joint Committee included two standing committees of the State Bar Association, district attorneys, judges, police officials, corrections personnel, and representatives of the office of Attorney General. After three years of work the Joint Committee released its widely-praised Revised Criminal Code.[6]

A somewhat different method of revision was used in New York. There, the stimulus for reform came from the state legislature, which created the State Commission on Revision of the Penal Law and Criminal Code.[7] In 1961 this commission established a five-man staff composed of three prosecutors, a practicing attorney, and a law professor which began work on the revised code. The legislature provided the staff with a $150,000 annual budget and the code was completed in 1965.[8] It was based to a large degree on the Model Penal Code.

Data compiled by the American Law Institute shows that, as of April, 1970, revised codes had been enacted in Connecticut, Georgia, Illinois, Kansas, Louisiana, Minnesota, New Mexico,

1. Herbert Wechsler, The American Law Institute: *Some Observations on Its Model Penal Code*, 42 A.B.A.J. 321, 321-322 (1956).

2. W. Page Keeton and William Reid, *Proposed Revision of the Texas Penal Code*, 45 TEXAS L. REV. 399 (1967).

3. J. Philip Johnson, *State Attorney General and the Changing Face of Criminal Law*, 19 WYO. L.J. 2 (1965).

4. Herbert Wechsler, *Codification of Criminal Law in the United States: Model Penal Code*, 68 COLUM. L. REV. 211 (1968).

5. Jerold Israel, *The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code*, 14 WAYNE L. REV. 722 (1968).

6. *Id.* at 772-780.

7. Comment, *The Proposed Penal Law of New York* 64 COLUM. L. REV. 1469 (1964).

8. Richard Denzer, *Drafting a New Penal Law for New York*, 18 BUF. L. REV. 251 (1968-1969).

New York, and Massachusetts. Revisions had been completed but not yet enacted in seven other states and Puerto Rico. Revisions were well under way in twelve other states, and authorized or begun in eight more. Three states were listed as contemplating revisions, and only eleven states were listed as not contemplating any over-all revisions.

As the state's chief law officer, the Attorney General has long been active in criminal adjudication. In this capacity it is only natural that the resources of his office have been drawn upon extensively during the process of criminal code revision. During substantive revision activities the Attorneys General have served on revision boards and commissions, offered extensive legal advice, and made available the resources under their control.[9] The office of Attorney General has initiated revision of the criminal code in North Carolina. In 1969, the Attorney General created an *Ad Hoc* Study Commission, consisting of members of his own staff, to consider reform of the state's criminal law. At present the commission is still at work, having recently submitted a report of preliminary feasibility.[10]

Seven other jurisdictions reported in response to C.O.A.G. questionnaires, that the Attorney General serves as a member of the organization dealing with criminal law revision. In Arkansas and Wyoming, the Attorney General is a member of the Statute Revision Commission. He serves as a member of the Law Institute in Louisiana, and the Code Commissions of Tennessee and Virginia. The Attorney General of Oregon works as a member of the Criminal Law Revision Commission. The Colorado Attorney General serves with the Commission on Legal Services.

9. Johnson, *supra* note 3 at 1.

10. Telephone interview with Russell Walker, Acting Revisor of Statutes, in North Carolina, August 6, 1970.

6.2 Interstate and Federal-State Relations

The critical need to strengthen intergovernmental relationships was stressed by a former Governor, Terry Sanford, in his recent study of state governments:

> Can we afford to let our present governmental relationships change substantially? We are moving into the era of joint responsibilities, the marble cake and the matrix, the partnership for seeking and solving problems, and the shared taxes. But can we allow one part of our federalism to become feeble, to lose position as a political force? The Articles of Confederation provided no power for the Congress, no way for it to withstand the political power of the individual state, no way for it to act for all the states combined into one nation. Consequently, the new nation was falling apart. The adoption of the U.S. Constitution eliminated that weakness. It created the power and authority needed for the states to act in unison. Now the question is, do we go to the other extreme?[1]

The Attorney General is closely involved in many areas of interstate and federal-state relationships. These are discussed throughout this Report, in such substantive areas as criminal justice planning, post-conviction proceedings, organized crime control, environmental protection and others, where state law and administration are closely interrelated to the law and administration of other jurisdictions. This Chapter examines some of the formal channels of cooperation with other states and with the federal government.

6.21 Interstate Cooperation

The recommendations adopted by N.A.A.G. say that the Attorney General should play an active role in interstate cooperation. They specify that he should take the initiative in developing interstate agreements in appropriate areas and in reviewing drafts and working for passage of uniform and model laws where desirable for his jurisdiction.

Various mechanisms for cooperation exist. These include interstate compacts, which may require Congressional consent; adoption of uniform laws, which provide interstate conformity concerning a given subject; participation in interstate organizations and associations, on a regional or national basis; and informal cooperation between states to meet particular problems. Joint legal action, such as filing of *amici curiae* briefs or consolidation of cases, is another form of interstate cooperation.

Most state governments have a commission on interstate cooperation or a similar body. These are usually established by statute and consist primarily of legislators, with some members from the executive branch. In some states, however, the Governor serves as chairman. Such bodies serve as formal channels of communication between states.

The Attorney General is a statutory member of the commission on interstate cooperation in Florida, Kansas, Minnesota, Oklahoma, Rhode Island, Tennessee, Utah, Texas, Vermont, and Wyoming. In Maryland, he serves by law on the Advisory Committee to the Commission on Intergovernmental Cooperation. In Hawaii, he is a member of the Commission to Promote Uniformity of Legislation. This Commission was made part of the Attorney General's office in 1959. Information is available only about statutory memberships; he may be an appointed member in other states.

The primary vehicle for Attorneys General to cooperate informally with other Attorneys General is the National Association of Attorneys General. This is an affiliate of the Council of State Governments, which is discussed in Section 1.73 of this Report. The N.A.

1. Terry Sanford, STORM OVER THE STATES, 8 (1967).

A.G.'s primary activities consist in holding two national meetings a year, plus an annual meeting for each region. Other than secretariat services, no staff exists, which obviously limits the Association's activities.

Two examples of potential interstate cooperation through this organizational structure are the activities of the Midwestern Attorneys General's Association in consumer protection and the activities of the Interstate Commission on Crime. These are illustrative of the type of interjurisdictional activity that could be of substantial impact.

Section 6.6 of this Report describes the activities of the newly-formed consumer protection committee of the Midwestern Attorneys General's Conference. This group of Assistant Attorneys General who operate consumer protection programs has evolved a program of periodic meetings and routine exchange of information. This pooling of ideas and information by specialists in an area could be a highly practical example of interstate cooperation.

Another example is the Interstate Commission on Crime which was established in 1935 to help overcome loopholes in the criminal laws. A major product of the Commission was the publication of a *Handbook on Interstate Crime Control* which was recently reissued in 1966.[2] This sets forth model or uniform acts concerned with the following subjects: supervision of parolees; out-of-state incarceration; the interstate compact on juveniles; detainers; the fresh pursuit of criminals across governmental lines; extradition; rendition of witnesses across state lines, and other interstate crime control acts. Each is accompanied by a commentary or introduction, and by model forms where appropriate, to provide practical assistance. Section 6.8 of this study describes cooperative efforts through the New England State Police Compact to combat crime, and that Compact's subsequent expansion to include other groups. Another example of regional interstate activities is the series of conferences held by the Eastern office of the Council of State Governments, which involved various state officials, including Attorneys General, and were concerned with organized crime control. A sample list of current interstate commissions illustrates the variety of purposes for which they are used: the Delaware River Basin Commission, the Education Commission of the States, the Gulf States Marine Fisheries Commission, the Interstate Oil Compact Commission, and the Northeastern Trust Fire Protection Commission.

2. The Council of State Governments, THE HANDBOOK OF INTERSTATE CRIME CONTROL, (1966).

6.22 Interstate Compacts

Since Colonial times, negotiated agreements have been used to settle interjurisdictional disputes. In 1656, for example, Connecticut and the New Netherlands decided their boundary quarrel with a negotiated agreement. If Colonies were not able to reach agreement, they could submit the dispute to a Royal Commission and ultimately to the Privy Council.[1] Boundaries disputes were the sole subject of interstate negotiations until the 1920's and 1930's, when the New York Port Authority and the Colorado River Commission were established.[2]

The state's reluctance to make more use of the interstate compacts was due in part to the constitutional requirement that Congress approve such agreements.[3] The Supreme Court defined this clause in an 1893 case, holding that

1. Felix Frankfurter and James Landis, *The Compact Clause of the Constitution-A Study in Inter-state Adjustments*, 34 YALE L. REV. 685, 692-93. (1925).
2. Frank Grad, *Federal-State Compact: A New Experiment in Cooperative Federalism*, 63 COL. L. REV. 825, 834 (1963).
3. Art. 1, § 10: "No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State or with a foreign Power."

two types of interstate compacts would require Congressional approval: (1) those which effect political power or influence and (2) those which encroach on the full and free exercise of federal authority.[4] One author notes that this case is somewhat paradoxical, because Congress would not logically consent to a compact which affected such power or intruded on federal authority.[5]

Some conflicts of opinion exist concerning the Congressional consent requirement. Boundary compacts, for example, have not been found to intrude into areas forbidden by the Court, but some authorities hold that land and water boundary settlements do require Congressional approval.

After the 1920's, states began to branch out from the limited concept of compacts dealing only with boundary disputes to compacts dealing with water resources covering vast areas and complex problems.

A 1925 law review article by Felix Frankfurter and James Landis suggested use of compacts to such matters as river basins, taxes, and electrical power.[6] The development of the New York Port Authority, the Colorado River Compact and the Delaware River Basin Compact are examples of compacts for the multipurpose development of water resources. The Delaware River Basin Compact illustrates the complexity of the water resources compacts. It involves four states: Delaware, New Jersey, New York, and Pennsylvania and the Federal Government. Nineteen federal, fourteen interstate and forty-three state agencies are concerned with the water resources of the basin.[7]

Interstate agreements are usually negotiated by commissions which include representatives appointed by the Governors of the states involved. The agreements are then enacted by the states' legislatures and signed by the Governors. Some compacts are devised by professional or interest groups. For instance, the Interstate Compact for the Supervision of Parolees and Probationers was drawn up by the Interstate Commission on Crime, a group composed of Attorneys General and other interested state officials. The "ratification" process was in two steps. The state legislatures passed enabling legislation with the governors' approval and then the state governor had the choice of executing the compact or not. The execution can be compared to the President's ratifying a treaty.[8]

A recent survey noted that there has been an upsurge of interest in compacts concerning environmental and national resource matters, such as the New England Interstate Water Pollution Control Compact, and in broadening compacts to include the comprehensive basin management approach. It also noted that the development of regional compacts concerned with other functions is growing; for example, the Pacific States Marine Fisheries Commission and the Tri-State Transportation Commission were created by compact. Another trend is:

> The spreading enactment by the states of facilitative agreements to provide legal channels for interstate or intergovernmental action . . . The compacts dealing with parole and probation, juveniles, detainers, driver licensing, libraries, mentally disordered, offenders, mental health, civil defense and disaster, and the placement of children are the most notable of the interstate agreements which could be characterized as national facilitative agreements. None establish intergovernmental agencies.[9]

New uses for compacts continue to

4. *Virginia v. Tennessee*, 148 U.S. 503 (1893).
5. David Engdahl, *Characterization of Interstate Arrangements: When is a Compact not a Compact?* 64 MICH. L. REV. 63, 66-86 (1965).
6. Frankfurter and Landis, *supra* note 1 at 685.
7. Grad, *supra* note 2 at 825-26.
8. Frederick L. Zimmerman and Mitchell Wendell, THE INTERSTATE COMPACT SINCE 1925 (1951).
9. Frederick L. Zimmerman and Mitchell Wendell, *Interstate Compacts*, THE BOOK OF THE STATES 1970-71, 253-256.

emerge. For example, Urban America recommends that states should enter into interstate compacts with neighboring states to provide for mutual assistance and sharing of personnel and equipment in the event of civil disorders.[10]

The Multistate Tax Compact is an example of the purposes and procedures involved in a modern interstate agreement. Its purpose is to promote uniformity in the administration of tax laws with respect to interstate business. There are eighteen regular member states and thirteen associates. The compact was put in final form in 1966 by a group of state officials including a special committee of the Council of State Governments, tax administrators, state legislators, and Attorneys General. The Multistate Tax Commission was organized in 1967 to administer the compact and to solve many of the problems involved in collecting state taxes. It is the first compact to include adoption of a uniform law as part of its provisions, although the participating states have the alternative of adopting other tax methods.[11] Other provisions concern the formulation of uniform regulations and forms; interstate audit of taxpayers' records; arbitration of disputed apportionments; and continuing studies.

The Attorney General, or his designees, of each party state is entitled to attend all meetings of the Multistate Tax Commission. The Attorneys General of Missouri, Nevada, Texas, and Utah are statutory members of advisory committees under the Compact. New Mexico law specifies that the Attorney General is counsel to the state's member of the Multistate Commission.

In most states, the Attorney General bears some statutory relationship to specific interstate compacts and commissions. For example, Vermont law requires that the Attorney General be consulted about certain proposed compacts. Missouri authorizes the Attorney General and two commissioners to enter into specified compacts. Nevada statutes name the Attorney General as legal adviser for the Colorado River Commission. The Attorney General of Indiana is required by law to represent the Interstate Port District in all legal actions. The Attorney General of Oklahoma determines if the Interstate Library Compact is compatible with state laws. Such duties undoubtedly will increase as the number of interstate compacts and commissions grows.

Compacts are not the only formal instrument for interstate cooperation. Section 1.74 discusses uniform laws, which achieve a similar result by assuring uniform action. The essential difference between the two approaches is the degree of reciprocity required. Both uniform laws and interstate compacts require legislative approval, but uniform laws do not require any interstate action. With compacts, reciprocity expands to include each additional state that joins the agreement.[12]

Interlocal Agreements

A significant recent development is the application of interstate agreements to local levels. Many major metropolitan areas span state lines, which impedes area-wide action.

A Model Interlocal Cooperation Act has been developed to help meet such problems.[13] It authorizes agreements between any political subdivision or agency of any state and any similar organization of another state. Such agreements "shall have the status of an interstate compact", but it is presumed that they do not extend state authority and do not require Congressional approval. All agreements are

10. States Urban Action Center, ACTION FOR OUR CITIES, 63 (April, 1969).

11. Frederick L. Zimmerman and Mitchell Wendell, *Interstate Compacts*, THE BOOK OF THE STATES 1968-69, 234-35.

12. L LaRue, *Interstate Cooperation and Interstate Judiciary*, 27 WASH. & LEE L. REV. 1, 9-11 (1970).

13. Committee of State Officers on Suggested State Legislation, The Council of State Governments, 1957 SUGGESTED STATE LEGISLATION, 93.

required to be approved by the state Attorney General.

Legislation of this type apparently is necessary to authorize interlocal cooperation. One study found that:

> Numerous states have enacted acts which provide in a general way for interlocal cooperation, but which either say nothing about applying the powers on an interstate basis or are specifically limited to intrastate cooperation. Indications are that even the former type of enactment cannot be applied to interstate agreements, especially since the courts are willing to concede to local units only those powers which are most necessary to the carrying out of any granted functions.[14]

The Advisory Commission on Intergovernmental Relations has a suggested law authorizing interlocal contracting and joint enterprise.[15] It would apply to communities within a single state or in different states. Every agreement that includes as a party thereto an officer or agency of the state or another state must be submitted to the Attorney General. He must approve agreements unless they fail to meet conditions set by law, in which case he must inform the localities specifically of how the agreement is deficient.

A.C.I.R. also suggests a constitutional provision for intergovernmental cooperation.[16] This is very broad, providing only that:

> Subject to any provision which the legislature may make by statute, the state, or any one or more of its municipal corporations and other subdivisions, may exercise any of their respective powers, or perform any of their respective functions and may participate in the financing thereof jointly or in cooperation with any one or more . . . [subdivisions of this or other states or the United States].

The desirability of such a provision would, of course, depend on existing constitutional, statute and case law in each state.

6.23 Federal-State Relations

Attorneys General are more closely involved in federal-state relations than ever before. The 1968 Omnibus Crime Control and Safe Streets Act created new relationships in the criminal justice system. Almost all Attorneys General serve as chairman or members of the state planning agencies that distribute federal funds under this program. The new federal Environmental Protection Agency will work closely with Attorneys General. The Federal Trade Commission and the President's Special Assistant for Consumer Affairs attempt to maintain direct liaison with Attorneys General's offices in consumer programs. A large portion of any N.A.A.G. meeting is typically concerned with federal laws and federal programs.

Many of the state agencies for which the Attorney General serves as counsel administer federal grants. Federal aid has risen to almost $25 billion a year; the number of federal grant programs has been variously estimated at from 581 to 1,050 different programs:

> Most of them have narrow functional goals . . They are often duplicative, overlapping and in conflict with other federal aid programs. Because many state executive structures are fractionated, categorical grants are administered by as many as hundreds of different, nearly autonomous state agencies. Although efforts are under way to centralize state planning and policy-making, the situation up to now has approached chaos.[1]

Federal grant administration has become a major function of state government and one that may involve complex legal questions, interpretations of federal requirements, definition of interagency and intergovernmental relationships, and reconciliation of state and federal

14. John M. Winters, INTERSTATE METROPOLITAN AREAS, Michigan Legal Publications, 93 (1962).

15. Advisory Commission on Intergovernmental Relations, A.C.I.R. STATE LEGISLATIVE PROGRAM, M-48, 31-91-00 (1969).

16. *Id.* at 31-91-10.

1. Rochelle L. Stanfield and Margaret J. Weaver, *Significant Developments in Federal-State Relations*, THE BOOK OF THE STATES 1970-71, 267-8.

requirements. The Attorney General's staff is involved in these problems both directly and as counsel for administering agencies.

A recent study of the impact of federal grants on state planning found that the federal government was devoting increased attention to intergovernmental relations and that major departments were creating internal administrative units to improve such relationships. Despite these efforts, "the need or opportunity for central institutional capabilities, utilizing central authority, has not been met." The report notes further that there is a basic difference between federal and state efforts to improve operational relationships:

> The states have shown a greater tendency to approach the problem of coordination by creating new institutional structures while the federal government has tended to rely more upon existing institutions.[2]

Intergovernmental relationships will be further redefined if revenue-sharing plans reach fruition.

Efforts to assure better federal-state relations include passage of the Intergovernmental Cooperation Act in 1968 and adoption of regulations to implement it. The Act provides for consultation between governments concerning grants-in-aid and requires federal agencies to use whatever substate planning districts are designated by the Governor.

Bureau of the Budget Circular A-95, promulgated in 1969, requires federal agencies to notify the Advisory Commission on Intergovernmental Relations of proposed changes in rules concerning assistance to states and localities. The rules are then circulated to the U.S. Conference of Mayors, the National Association of Counties, the Council of State Governments, the National Governors' Conference, the International City Managers' Association and the National League of Cities for review. This gives affected groups the opportunity to comment on proposed federal regulations prior to their promulgation. The purpose of the Circular was to ensure "that vital Federal assistance programs are made workable at the point of impact."

Many Attorneys General consider that they lack sufficient information about federal programs. In response to a C.O.A.G. questionnaire, nineteen incumbent Attorneys General said that they were adequately informed about federal activity which concerned their duties and operations, while fourteen said they were not. One replied by asking "What's adequate?" The same question was asked former Attorneys General. Of ninety-five respondents, fifty-six felt they were adequately informed and thirty-nine said they were not. There was no discernible pattern to the responses.

Former Attorneys General were asked to specify which of certain sources were most helpful in keeping them informed about federal activity when they were in office. Of one hundred and three responding, seventy named N.A.A.G., twenty said other state agencies, nine said federal agencies and four mentioned other sources. Of incumbent Attorneys General, twenty-two specified N.A.A.G. as the most helpful source, ten said other state agencies, eight said federal agencies, five said other Attorneys General, and two named their state's Congressional delegation. Where an Attorney General checked several categories without ranking them, both responses were counted as first choice, so the total is more than the total number of respondents.

Attorneys General, as a group, have seldom taken action concerning issues pending before the federal government. A staff memorandum by the Director of the C.O.S.G.O. Washington Office, for example, listed twenty-eight issues before the 91st Congress which were of particular interest to Attorneys General. On only one of these issues did Attorneys General testify, as representatives of the Association, although the memo notes that N.A.A.G. could have made a unique and substantial contribution in expositing the legal view of the states concerning all twenty-eight issues. These included some subjects of great concern to Attorneys General, such as the organized crime control bill, air and water pollution standards, and representation of consumer interests before state agencies.

2. Public Administration Service. STATE PLANNING AND FEDERAL GRANTS. A Report to The Council of State Governments, 38 (1969).

6.24 Counsel for the State

The Attorney General represents his state in court and defends the constitutionality of his state's laws. In response to a C.O.A.G. questionnaire, all but two of thirty-eight incumbent Attorneys General said they thought an Attorney General should defend state law where it was challenged on the basis of federal constitutional law. Nineteen of thirty-five thought he should do so even if he believed the position of the state was wrong. One hundred former Attorneys General believed the Attorney General should defend state law from such challenges, while only ten thought he should not. Sixty-seven respondents believed that the Attorney General should defend state law even when it was wrong, although thirty-seven disagreed.

An Attorney General's involvement in interstate litigation consists of two procedures: appearance in the courts of another state to press claims of his own state and actions against another state in the United States Supreme Court.

Some states specified on C.O.A.G. questionnaires that the Attorney General is empowered to conduct litigation on behalf of their own state in the courts of other states; many other Attorneys General probably have this power, but did not so specify. South Dakota said that this power was limited to actions to collect taxes legally due to the state[1] no other state reported a statutory restriction.

Actions between states are governed by the Eleventh Amendment, which states that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

This has generally been held to prohibit suits against states by private parties but to allow suits between states or a state and a foreign country. In actions between states, the United States Supreme Court has original jurisdiction. By rule of Court, Service of process is to be made on the Governor and the Attorney General. These cases have been concerned primarily with boundary disputes and related matters, such as water rights.[2]

Attorneys General represent their states in the federal courts. Cases range from answering habeas corpus petitions filed by state prisoners in federal courts, to appeals from state to federal courts, to cases initiated in federal district courts, to the rare case of original jurisdiction in the United States Supreme Court when one state brings action against another. Recent developments in constitutional law such as school integration and voting rights have involved Attorneys General in extensive litigation in the federal courts to defend their states' actions. Several studies have recognized the Attorney General's major role in desegregation,

1. S. D. COMPILED LAWS ANN. § 10-22-61 (1967).

2. *E.g., Arizona v. California*, 373 U.S. 546 (1963); *Missouri v. Illinois*, 21 S. Ct. 331 (1901); *See also* Note, *Controversies Between States*, 15 HARV. L. Rev. 67 (1901).

whether in support of or opposition to federal policy.[3]

6.25 Extradition

A requisite to the proper administration of criminal justice is the prompt and orderly transfer of persons charged with criminal offenses from one jurisdiction to another, so that no jurisdiction becomes, in effect, a sanctuary for persons charged with crimes elsewhere. The United States Constitution provides that:

> A person charged in any state with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.[1]

Congress enacted in 1793 legislation which has been brought forward, with minor modifications, to the present day:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.[2]

This Act did not cover all the exigencies which might arise and it was recognized that the states might provide for applying the law to matters not covered by the Act.

> Thus the states can legislate upon the method of applying for the writ of habeas corpus, upon the method of arrest and detention of the fugitive before extradition is demanded, upon the mode of preliminary trial, upon the manner of applying for a requisition, upon the extent of asylum allowed a prisoner when brought back to the state from which he has fled, and upon his exemption from civil process; not to mention other points less important which have always been regulated by local law.[3]

The Commissioners on Uniform State Laws took cognizance of the problems occasioned by the "confusion in the execution of the laws on extradition . . . because the laws of the various states are wanting in uniformity . . . " and began to draft a uniform act, which was promulgated in 1936.

The Uniform Criminal Extradition Act[4] provides a degree of uniformity in such matters as the form of requisition and the documents to accompany it; the arrest, prior to requisition as well as after requisition; bail; habeas corpus proceedings; confinement in transit; and the right to withhold extradition while a criminal prosecution is pending in the asylum state against the person claimed, or while he is serving a sentence there. It provides for the extradition of persons who have come into the state involuntarily. It allows requisition of a person already under prosecution or undergoing punishment in another state, so that he might be prosecuted in the demanding state while the evidence is still fresh, but with the understanding that at the termination of the prosecution he will be returned to the state which extradited him.

The Act also provides for the extradition of persons not fugitives from

3. *See* Samuel Krislov, *Constituency vs. Constitutionalism; the Desegregation Issue and Tensions and Aspirations of Southern Attorneys General*, 3 MIDWEST J. OF POL. SCI. 75 (1959); Henry J. Abraham and Robert R. Benedetti, *The State Attorney General: A Friend of the Court?* 117 U. of PA. L. REV. 820 (April, 1969).

1. U.S. Constitution, Art. IV, Sec. 2.

2. 18 U.S.C., § 3182.

3. The Uniform Criminal Extradition Act, 1936 CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 326 *et seq.*

justice in the terms of the Constitution as interpreted by the courts: those accused of the commission of an act in one state which has the effect of constituting a crime in another, even though never present in the latter state. The constitutionality of this provision was upheld by the Oklahoma court, which noted that: "The importance of this provision is easily understood, when thought is given to the vast conspiracies by organized criminals, which may, and often do, involve operations across the borders of several states."[5]

Especially important is the provision of the act which permits the waiver of extradition, since it is actually waived in a majority of the cases, thus eliminating the tedious process otherwise required.

Under the Uniform Act, demand for the extradition of a person charged with a crime must be in proper form and supported by appropriate documents. The Governor of the asylum state may initiate an investigation to determine "the situation and circumstances of the person so demanded and whether he ought to be surrendered." The Uniform Act provides that this investigation be conducted by the Attorney General or any prosecuting officer.

In practice, a Governor receiving a demand for extradition need consider only four questions:

1. Has the demand been made in proper form?
2. Is the person whose extradition is requested identical with the person found in the asylum state?
3. Is he a fugitive from justice, or has he committed an act which intentionally resulted in a crime in the demanding state?
4. Has he been charged with a substantial crime?[6]

The Governor of the asylum state may presume that the request for extradition is valid and is made in good faith, and a hearing is not required, although it is usually granted when requested by the accused.

> The evidence presented at such a hearing is not limited to matter legally admissible in a court of law, nor is the defendant entitled to counsel in such proceedings; the evidence need only be of a type satisfactory to the governor. The governor himself need not personally investigate criminal charges in the demanding state against the fugitive, nor is he bound by his own attorney general's report on the issues in the extradition proceeding itself. At least one state (California) restricts the proceedings before the governor in the asylum state to the presentation of documentary evidence and argument of counsel.
> If the governor of the asylum state answers the four questions presented in the affirmative, he is said to be under a duty to issue a warrant of extradition.[7]

The Uniform Act established procedures for demanding the return of an accused and place on the Governor of the demanding state the duty to facilitate extradition proceedings when requested by the prosecuting attorney or other person so authorized. The United States Supreme Court, however, has held that "[t]he performance of this duty [to extradite] . . . is left to depend on the fidelity of the State Executive . . ."[8]

Hence, Governors may effectively establish and follow their own policies pertaining to extradition matters. For example,

> Governor Blair [of Missouri] as a matter of policy refused to return a husband charged with non-support of his family to the demanding state until the civil remedy available under the Uniform Reciprocal Enforcement of Support Act had been attempted, or until the accused was afforded an option to submit to the jurisdiction of the courts of Missouri for the entry of an appropriate order for support.[9]

4. *Id.*

5. *Ex Parte Bledsoe*, 93 Okla. Cr. 302, 227 P. 2d 680 (1951).

6. The Council of State Governments, *Handbook of Interstate Crime Control*, 147.

7. *Id* at 148.

8. *Kentucky v. Dennison*, 24 Howard 66, 65 U.S. 66 (1861).

9. Richard Watson, LAW ENFORCEMENT IN MISSOURI, 31 (August, 1962).

Extradition under the Uniform Act may be affected if the asylum state has enacted it; it is not necessary that the act be law in the demanding state.[10]

To facilitate uniformity, the Interstate Commission on Crime developed a complete set of forms to be used in the implementation of extradition procedures These include: 1) Application for requisition; 2) Form of requisition; 3) Agent's commission; 4) Governor's warrant; 5) Return to Governor's warrant; 6) Agent's return, and 7) Waiver of extradition.

A National Association of Extradition Officials was established, in cooperation with the Council of State Governments, to foster uniformity. The Association is attempting to obtain more uniformity in the forms used, in procedural matters such as the rules governing hearings and the offenses for which extradition will not be requested, and in the granting or denial of extradition requests by asylum states. The President of the Association, Special Assistant Attorney General Joseph D. Buscher of Maryland, comments that:

> It is the general feeling of the Association that it can, after it catalogs the process now used in all of the states, make recommendations that can be implemented by statutes or regulations which could accomplish this clarification and simplification. The result would make it easier for the accused to defend himself in extradition matters and reduce the redtape and paper work presently required by the states.[11]

Some Governors believe that the extradition process needs major revision. Governor Robert D. Ray of Iowa notes that "it takes a minimum of 30 separate procedural steps and 50 pages of typed and copied material in a **simple** extradition case where no real reason is raised by the defendant, why he should not be returned to the demanding state." He notes that most of this is unnecessary, as items of real importance are telephonically communicated.[12]

The Uniform Act provides that investigation of pending extradition matters be conducted for the Governor by the Attorney General or any prosecuting officer of the state. In most states, this duty is established by statute. Even in the absence of statute, however, it would appear to be an appropriate duty to be performed by the Attorney General in the exercise of his role as legal advisor to the Governor.

In Missouri, extradition petitions are often sent directly to the Attorney General's office prior to submission to the Governor, as a matter of convenience.[13] Mississippi and North Carolina note that where a hearing is held on a petition from a demanding state, the Attorney General represents the demanding state at the hearing, on request. Where a habeas corpus petition is filed by the accused in an attempt to avoid extradition, the Mississippi Attorney General either handles the case or works with the district attorney upon request.[14] This appears to be the common practice in most states. In some states, a representative of the Attorney General's office actually conducts the extradition hearings and makes a recommendation to the Governor. In Maryland, the recommendation is verbal. In other states, such as Virginia, the Attorney General makes a written report of each hearing, which includes his recommendation. In both instances, the Governor almost always follows the Attorney General's recommendation.

Figures establishing the number of extradition proceedings for any given year are available for only a few states, but they serve to establish that this procedure can be a time-consuming matter in some offices. Florida processed 700 petitions, Indiana 184, and Wyoming 38 in 1968 During the 1968-69 biennium, Kentucky rendered 359 opinions as to the legal sufficiency of extradition papers and rendered legal advice and assistance regarding extradition to local officials.

A special problem in securing the return of accused criminals from sister states exists when the accused is already in custody in that state for offenses committed there. The usual method is to file a detainer to assure that on release from custody, he will be available for return.

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. Such detainers may be placed by various authorities under varying conditions, such as when an escaped prisoner or parolee commits a new crime and is imprisoned in another state or when a man not previously imprisoned commits a series of crimes in different jurisdictions.[15]

Concern over the problems in administration of detainers led to the formation of a series of committees beginning in 1948. Involved at various stages in this work were the Parole and Probation Compact Administrator's Association, the National Association of Attorneys General, the National Conference of Commissioners on Uniform State Laws, the American Correctional Association, the Section on Criminal Law of the American Bar Association, the National Probation and Parole Association, the National Association of County and Prosecuting Attorneys, the U.S. Department of Justice, and the Council of State Governments. One result of their work was the Uniform Mandatory Disposition of Detainer Act to deal with the problem of indictments, informations or complaints pending against prisoners in a given state. The basic purpose of this act is to provide to a prisoner:

> . . . a means . . . to clear up detainers which have been lodged against him. It provides that a prisoner, wishing to clear up a detainer based on an outstanding indictment, information or complaint, may make a request for final disposition of the charges against him. If trial on them is not had within a reasonable period of time as defined in the statute, the indictment, information or complaint ceases to be of any further force or effect, and the detainer based thereon is removed with prejudice.[16]

This Act has been adopted in Colorado, Idaho, Kansas, Massachusetts, Minnesota, Missouri, and South Carolina.

Another result was the Agreement on Detainers, an interstate compact which establishes procedures by which a prisoner may initiate proceedings to clear a detainer placed against him in a jurisdiction other than that in which he is in custody. This Agreement also establishes procedures whereby a prosecuting official can secure for trial a person in custody in another jurisdiction; prior to this legislation, the only way that this could be accomplished was by resort to a cumbersome special contract with the executive authority of the incarcerating state. These contracts were seldom used because of the difficulty involved in securing them.

> The Agreement on Detainers makes the clearing of detainers possible at the instance of a prisoner . . . and provide[s] a way for him to test the substantiality of detainers placed against him and to secure final judgment on any indictments, informations or complaints outstanding against him in the other jurisdiction. The result is to permit the prisoner to secure a greater degree of knowledge of his own future and to make it possible for the prison authorities to provide better plans and programs for his treatment. . . . The agreement also provides a method whereby prosecuting authorities may secure

10. *Ex Parte Morgan*, 86 Cal. App. 2d 217, 194 p. 2d 800, aff'd 78 F. Supp. 756 (S.D.Cal. 1948), aff'd 175 Fed. 404 (9th Circ.), *cert. denied* 338 U. S. 827, 70 S. Ct. 76, 94 L.Ed. 503 (1949).

11. Letter from Special Assistant Attorney General Joseph D. Buscher to Attorney General John B. Breckinridge, September 3, 1970.

12. Office of the Governor of Iowa, Press Release dated October 16, 1970.

13. Watson, *supra* note 9 at 30.

14. Joe Patterson, THE BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, 15 (July 1, 1959 to June 30, 1961).

15. The Council of State Governments, 1959 SUGGESTED STATE LEGISLATION, 167.

16. *Id.* at 167-168.

prisoners incarcerated in other jurisdictions for trial before the expiration of their sentences. At the same time a Governor's right to refuse to make the prisoner available (on public policy grounds) is retained.[17]

The N.A.A.G. has been actively involved in effectuating this Agreement and periodically distributes a roster of cooperating officials.

17 *The Council of State Governments*, 1958 SUGGESTED STATE LEGISLATION, 81.

6.3 Administrative and Fiscal Procedures

Statute law, case law and common law do not comprise the entire body of law with which Attorneys General must be concerned. Administrative law, the rules promulgated by administrative agencies, is of increasing importance. Justice Robert Jackson wrote in 1952 that:

> the rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.[1]

A large part of any Attorney General's work involves representation of such bodies and participation in administrative hearings, rule-making, and fiscal matters. This chapter reviews some of these duties which, while routine in nature, may be of great impact.

6.31 Duties Relating to Administrative Agencies

One of the most pronounced developments in state government during the 20th Century has been the growth of the administrative agency, typically defined a

> . . . any department, departmental administrative board or commission, independent administrative board or commission, office or other agency of the Commonwealth, now in existence or hereafter created, having statewide jurisdiction, empowered to determine or affect private rights, privileges, immunities or obligations by regulation or adjudication, . . .[2]

While praised by some and criticized by others, the fact that regulatory boards and commissions have greatly increased in number and power is a phenomenon accepted by all. This growth is due to a number of factors. State government has expanded into areas involving great technical detail. Neither the legislative nor executive branches possess the time or knowledge to exercise the control required for proper supervision, so they have created administrative agencies to wield governmental power. Further, many situations in society are subject to rapid change; specialized administrative agencies have provided a means to deal promptly with these problems.[3]

State administrative agencies are considered a part of the executive branch of government, although they are generally created by the legislature and possess powers of both a legislative and judicial character. The agency acts in a "quasi-legislative" sense while adopting rules. Its action is "quasi-judicial" during the subsequent enforcement of rules and statutory standards. Conservative sources indicate that more than two thousand administrative agencies exist in the states. In a number of states as many as sixty or seventy agencies act independently, each exercising its own degree of control over the health, safety, welfare, or business of millions of citizens. Since the regulatory agencies themselves must somehow be controlled and directed, the states have developed administrative rule-making procedures which govern their actions.

Dr. Kirk H. Porter points out that administrative agencies do not merely administer legislative mandates, but apply statutory directives within the broad context of social policy:

> Part of the task of administration is to devise processes by which rules can be formulated and adopted, violations can be investigated, complaints heard and adjudicated. It is a matter, not simply of doing the main job, but of doing it in accord with public

1. *F.T.C. v. Ruberoid*, 343 U.S. 470, 486 (1952).
2. PA. STAT. ANN. tit. 71, § 1710.2 (b).
3. The Council of State Governments, ADMINISTRATIVE RULE MAKING PROCEDURE IN THE STATES, 1 (1961).

will, and without doing violence to personal and property rights, or in violation of our standards of due process.[4]

He notes that administrative law has developed in response to these problems:

Each year witnesses a further extension of government control over activities that formerly were thought to be matters of private concern. Each time government reaches out, the need arises for writing detailed codes of rules and regulations, for specialized personnel to interpret, to inspect, to investigate, and to apply the rule to specific situations. And always there is the need for proper procedures to protect the interests of those who consider themselves adversely affected. All this is the subject matter of administrative law.[5]

All Attorneys General are involved to some degree with the work of administrative agencies. Some serve on boards or commissions which have rule-making power. Some have administrative responsibility for certain agencies. Some furnish all legal services to administrative agencies and some, additionally, may represent the public before the agency in contested cases. All may be called on by the agencies for official advice. Some draft rules for such agencies, and some approve rules for form and legality prior to promulgation.

Most of an Attorney General's workload concerns services rendered to state administrative agencies. For example, Wisconsin's 1969-71 budget lists the following responsibilities of the Department of Justice:

A. Legal Services rendered at the request of various departments and agencies of state government . . . including representation of the state, its agencies, officers and employees in nearly all civic actions in which the State is interested.

B. Drafting and publishing formal opinions requested by departments and agencies of state government...

C. Providing informal legal advice, including carefully considered informal written opinions, when requested to do so . . .

D. Examination of all state contracts and bonds...

G. In addition to the above duties, various members of the staff of the Legal Services Division are assigned by the Attorney General to serve on numerous boards and commissions either as members of the particular board or commission or as a legal officer on the board. Currently the Attorney General and Assistant Attorneys General serve in one way or another on approximately 60 separate committees and hearings.

The Biennial Report of the Attorney General of Michigan also illustrates the routine nature of much state legal work. The Division of Education and Retirement of the Attorney General's office reported 35 cases closed in various courts during the 1967-68 biennium. This litigation was only a small part of the Division's work, however, as it rendered 21 formal opinions, issued 247 memorandums, drafted 31 contracts and documents and examined 260 such papers, examined 47 agency rules, held 1315 conferences and consultations, attended 165 board and commission meetings, drafted 39 legislative proposals and analyzed 115 such proposals.[6]

As Fritz Marx pointed out in his study of the lawyer in public administration,

. . . the majority of government lawyers spend their time on fairly repetitive assignments. These are more in the nature of 'processing' papers—claims, applications, cases. However, even the least exciting transaction demands careful examination and attention to every relevant detail. Life may be dull, but the lawyer cannot afford to fall asleep.[7]

The lawyer's work consists of interpreting statutes and regulations which concern the agency; conducting litigation in which it is involved; and preparing or reviewing contracts, regulations, and other legal documents. The Attorney General of Vermont characterized the office's work as being "general counsel to state government, with many of the same problems a civil office lawyer would have with a number of substantial business and several personal clients."[8]

The Attorney General's role is not limited to representing administrative agencies; on occasion, he may contest their actions. At the 1962 N.A.A.G. conference, Albert M. Sacks examined the question of whether an Attorney General, acting either on the complaint of a private person or on his own initiative, should have the power to challenge the legality of an administrative agency's action by instituting a court action. He found such action to be appropriate:

Would such power be consistent with the office of Attorney General? The ancient traditions of the office command the Attorney General to represent the public in certain fields, for example, with respect to property dedicated to charitable purposes...

Would such a power be inconsistent with the Attorney General's role as counsel for government agencies in their relations with private interests? Even a private lawyer must learn to say no to his client at times, and the Attorney General's office, even when it acts as counsel, ought to recognize a duty to protect the opposing litigant when it is clear that the government is acting improperly....

Would such a function confer too great a power on the Attorney General? As I previously stated, the power is limited in two important respects. First, the Attorney General would be concerned only with violations of law not with wisdom or propriety of the agency action. Secondly, he could issue no self-executing orders on his own, but must look to the courts to determine the issues and afford appropriate relief.

Would this assignment to the Attorney General be likely to bog down in politics? . . . While there will be an occasional "big case" with political implications that will not be ignored, the typical exercise of this corrective power will go on day by day in a variety of cases, most of which will never appear in the newspapers though they are important to particular persons or groups.[9]

6.32 Administrative Procedures

Administrative procedures include the promulgation and enforcement of rules, and hearings to determine conflicts in adoption or application of rules or statutes by an agency. One author notes that purposes of hearings are:

to inform the agency, to serve as a check upon arbitrary action, and to enable the individuals who will be affected by the decision to confront their opponents and to present their case in its best light.[10]

Another authority emphasizes that:

The central proposition of full hearing is that adjudicative facts—facts pertaining to a particular party—normally ought not to be found without allowing the party a chance to rebut, explain and cross-examine.[11]

An additional consideration is that the parties in administrative hearing, unlike those in a judicial proceeding, contemplate a continuing relationship. This would be expected to affect their behavior in a contested action.[12]

The Model Act

The Model State Administrative Procedure Act was approved in 1946 by the National Conference of Commissioners on Uniform State Laws and was revised in 1961.[13] The Act originated in the Section of Judicial Administration of the American Bar Association, which, in 1937, created a Committee on

4. Kirk H. Porter, *A Critique of the Administrative Structure of Iowa*, 33 IOWA L. REV. 302 (1948).
5. *Id.* at 304.
6. Report of the Attorney General of Michigan, 1967-1968 Biennial Period, 337.
7. Fritz M. Marx, *The Lawyer's Role in Public Administration*, 55 YALE L. J. 508 (1946).
8. *Biennial Report of the Attorney General of the State of Vermont*, 14 (1968).
9. N.A.A.G., 1962 PROCEEDINGS, 62.
10. Paul Oberst, *Parties to Administrative Proceedings*, 40 MICH. L. REV. 378 (1942).
11. Kenneth C. Davis, ADMINISTRATIVE LAW TEXT, 142 § 7.20 (1958).
12. James Donaldson *Opportunities Afforded to the Private Practitioner Before Administrative Tribunals*, 17 ROCKY MT. L. REV. 86 (1944).
13. The Council of State Governments, *Uniform Law Commissioners' Revised Model State Administrative Procedure Act*, in PROGRAM OF SUGGESTED STATE LEGISLATION, 92 (1962).

Administrative Agencies.[14] In conjunction with other committees, it developed a model act. This was officially adopted in 1946, the same year that the Federal Administrative Procedures Act became law. In 1958, it was recognized that ideas with respect to procedures had matured since the model law was promulgated, and a special committee was appointed to revise it. The changes did not affect the purposes or structure of the original act, but were refinements of procedural detail.

The Model Act's provisions are summarized below. It provides a description of the stages involved in administrative procedures. As of December, 1969, the Act as amended had been adopted by Arkansas, Delaware, Georgia, Louisiana, Oklahoma, Rhode Island, West Virginia, and Wyoming. A substantially similar measure had been enacted in Hawaii, Maryland, Michigan, Missouri, Oregon, Washington, and Wisconsin.[15]

Section 1 defines key words. Agency is defined as each state body, other than the legislature or courts, that is authorized to make rules or determine contested cases. This would apply to most agencies.

Section 2 through 6 concern the adoption of rules. Each agency must adopt rules describing its organization and procedures and make these public. At least 20 days notice must be given prior to the adoption, amendment, or repeal of any rules; a written notice must be given to persons who have so requested, and notice must be published. A hearing must be held upon request of twenty-five persons. Emergency rules may be adopted under certain circumstances.

Each rule shall be filed with a designated official at least 20 days before its effective date. The official must publish a periodic bulletin giving the text of rules when feasible. Any interested person may petition an agency to promulgate, amend or repeal a rule. Within 30 days of receiving such a request, the agency must deny it in writing or must initiate the rule-making process. A stated aim of the act is to assure more adequate public information as to agency procedures and provide for effective public participation in rule-making.[16]

Section 7 and 8 provide for declaratory judgments by a court and for declaratory rulings by the agency. A declaratory judgment may be sought if it is alleged that a rule "interferes with or impairs" the plaintiff's legal rights or privileges. A Uniform Declaratory Judgments Act, promulgated by the Commissioners on Uniform State Laws in 1922, has been enacted by forty-two jurisdictions;[17] this does not, however, apply to administrative regulations. The Model Administrative Procedures Act says that the agency must be made a party to the action, but does not require notice to the Attorney General. Thus, his role would depend on whether he provided legal services for the agency.

Sections 9 through 16 of the Model Act provide for hearings in contested cases, which include ratemaking and licensing and in which the legal rights, duties, or privileges of a party are required to be determined. All parties shall be afforded an opportunity after notice containing specified information "to respond and present evidence and argument on all issues involved." A Kentucky analysis of the Model Act recommended adding a section to provide that:

> Where the indispensable and necessary parties compose a large class, any member of the class, upon timely application, shall be permitted to intervene . . . when a statute or regulation confers an unconditional right to intervene or when the representation of the applicant's interest by existing parties is or may be inadequate.[18]

The content of the record in a contested case is broadly defined and oral proceedings must be transcribed on request of any party. Findings of fact are to be based exclusively on the evidence. Incompetent evidence is excluded and the rules of evidence as applied in civil cases in the jurisdiction are made applicable.

This provides a basic procedure to be followed by all agencies. Professor Davis concluded in his authoritative study that, despite the large body of case law relating to administrative due process, there is no universally applicable minimum standard.[19]

The Model Act provides that, when a majority of the officials of the agency who are to render the decision have not heard the case or read the record, no decision adverse to the other parties shall be made until a proposal for decision has been served. This affords each party adversely affected opportunity to present briefs and oral arguments. Final decisions must be written to include findings of fact and conclusions of law. The decision must include a ruling upon each proposed finding of fact submitted by the party adversely affected.

Section 13 attempts to separate the agency's administrative and ajudicative functions. It states that, unless required for the disposition of *ex parte* matters authorized by law, agency personnel assigned to render a decision in a contested case shall not communicate with any person in connection with any issue of law except upon notice and opportunity for all parties to participate. This is a problem inherent in the structure of administrative procedures.

The Act is made applicable to licensing hearings by Section 14. Revocation or suspension of a license must be preceded by written notice to the licensee of facts which warrant such action, and opportunity for him to show compliance with all lawful requirements for retention of the license.

Judicial review is provided under Section 15. Proceedings are instituted by filing a petition within 30 days of the final agency decision. The court review must be confined to the record, except in cases of alleged procedural irregularities. The court may reverse or modify the agency decision if: it violated constitutional or statutory provisions; was made upon unlawful procedure; was affected by an error of law, or clearly erroneous in view of the evidence. Appellate judicial review is provided by Section 17 of the Model Act.

Vermont enacted a version of the Model Act in 1969, and the Attorney General's office indicates that some difficulties have developed in applying it to the existing scheme of legal services:

> The Act does not spell out the precise role of the Attorney General's office in administrative proceedings . . . The question always arises in a contested hearing before an administrative agency as to whether we should give advice to the persons conducting the hearing or whether we should be playing an adversary role . . .
>
> The Act was not reconciled in all instances to previous statutes which set out specific procedures for certain agencies to promulgate rules or regulations . . .[20]

The provision that agencies should set up a procedure for making declaratory rulings "is tantamount to having the agency render opinions on questions of

14. Frank Cooper, STATE ADMINISTRATIVE LAWS, 797-8 (1965).
15. Handbook of the National Conference of Commissioners on Uniform State Laws, 193 (1969).
16. C.O.S.G., *supra* note 13.
17. N.C.C.U.S.L., *supra* note 15 at 244.
18. Kentucky Legislative Research Commission, ADMINISTRATIVE PROCEDURES LAW IN KENTUCKY, 68 (1962).
19. Davis, *supra* note 11 at § 8.02.
20. Letter from Deputy Attorney General Fred I. Parker to Patton G. Wheeler, August 25, 1970.

law, a role that is traditionally the Attorney General's." The provision that all hearings must be transcribed on request may pose a problem if there is a shortage of court reporters. Because of these and other problems, the Vermont office cautions that, "although the Administrative Procedures Act is an extremely valuable tool for state governmental operations, it should be fit precisely into the present operational scheme of existing agencies."

At the 1962 N.A.A.G. conference, the Attorneys General of two states which had adopted the Model Act seemed to agree that it presented both problems and advantages. Attorney General Frank J. Kelley of Michigan noted that the legislature might be reluctant to delegate so much legislative power, while the judiciary might be equally unwilling to delegate; therefore, "as a practical matter the Attorney General of a state that has adopted this act can spend a lot of time trying to educate the legislature, on the one hand, and hoping the judiciary will come along."[21] He concluded, however, that the benefits of the Act had generally outweighed the problems.

Attorney General John W. Reynolds of Wisconsin pointed out that his office was concerned with upholding the constitution, even in opposition to a state agency: "If an agency issues a rule and if we state that the rule is illegal, the rule itself becomes unenforceable."[22] He believed that every state would benefit from adopting the Act to ensure sound administrative procedures.

Procedures Manuals

Some Attorneys General have prepared manuals concerned with administrative procedures. These may cover one aspect of administrative problems or be a general guide to procedures.

The Ohio Attorney General's office has an Administrative Agencies Section which renders legal services to all state agencies. It publishes a manual, with about 34 pages of text and an Appendix which includes various form letters, notices, and similar materials. The Ohio Administrative Procedures Act is discussed, along with relevant case law and related information. Minnesota promulgated a similar manual in 1968, which also includes appropriate forms as an Appendix. The Minnesota manual notes that it is intended to give the adopting authorities "the best idea we can as to form and legality" so that regulations will be "lawful in all respects and immune to legal attack."[23] Michigan's Attorney General's office has prepared a manual to codify procedures in highway condemnation.

6.33 Administrative Rules

Presumably, Attorneys General's staffs take an active part in drafting administrative rules in most jurisdictions, especially where they represent all or most state agencies. This would be part of their general duties as counsel and not necessarily defined by statute. Attorneys General's duties in reviewing rules prior to promulgation is, however, frequently more formal.

Review of rules prior to promulgation is a general requirement. Review may be by the chief executive or his representative, or by the legislature or a branch thereof.[24] On the national level, the rules of several federal administrative agencies are subject to Presidential approval. On the state level, only two states apparently require clearance of administrative rules by the Governor, and then only in certain instances. Review by the Attorney General, as the Governor's adviser, is required in many jurisdictions.

21. N.A.A.G., 1962 PROCEEDINGS, 65.
22. *Id.* at 67.

23. Minnesota Office of the Attorney General, *Manual of Rule Making Procedures*, September, 1968.

	None	All	Some	Comments
Alabama			X	Reviews for legality upon request
Alaska		X		Must review: ALASKA STAT. § 44-060
Arizona				
Arkansas			X	Reviews only upon request
California			X	Reviews only upon request
Colorado		X		Must review: COLO. REV. STAT. ANN. § 3-16-2
Connecticut			X	Must review some: CONN. GEN. STAT. REV. § 4-46
Delaware			X	Done partly under obligation to write opinions
Florida			X	
Georgia			X	Upon request
Guam		X		Reviewed for legal sufficiency
Hawaii		X		Advises agency on form and legality
Idaho			X	Usually assists in drafting and adoption
Illinois			X	May review
Indiana		X		Must review: IND. ANN. STAT. § 60-1505
Iowa		X		Required by statute, but not binding
Kansas		X		Must review: KAN. STAT. ANN. § 77-420
Kentucky			X	Reviews only upon request
Louisiana	X			No apparent authority
Maine			X	Must review some: ME. REV. STAT. ANN. tit. 5, § 2352 (1964)
Maryland		X		Must review: MD. ANN. CODE art. 41, § 9; § 246
Massachusetts			X	Upon request of agency
Michigan		X		Must approve: MICH. STAT. ANN. § 3.560(10)
Minnesota		X		Must approve: MINN. STAT. § 15.0412(4)
Mississippi			X	Upon request
Missouri	X			
Montana			X	Reviews only upon request
Nebraska		X		Must review: NEB. REV. STAT. § 84-905.01 (1969)
Nevada		X		
New Hampshire			X	
New Jersey		X		Approves rules for legal sufficiency and form
New Mexico			X	
New York	X			
North Carolina			X	Upon request—(not statutory)
North Dakota		X		Must approve: N.D. CENT. CODE § 28-32-02
Ohio			X	Upon request—(not statutory)
Oklahoma	X			
Oregon	X			
Pennsylvania		X		Statutory—71 P.S. 1710 21
Puerto Rico				May give opinion under statutory power to advise
Rhode Island	X			
Samoa			X	Upon request
South Carolina			X	Upon request
South Dakota	X			
Tennessee		X		Must approve: TENN. CODE ANN. § 4-502
Texas	X			
Utah			X	Upon request
Vermont			X	Upon request—(not statutory)
Virgin Islands		X		Included under power to direct legal business of agencies
Virginia			X	Reviews only upon request
Washington	X			
West Virginia			X	Upon request
Wisconsin			X	
Wyoming			X	When filed with Sec. of State

Table 6.33 shows the Attorney General's role in review of administrative rules. In nine jurisdictions, he does not review rules; in twenty-six, he reviews some; and in seventeen, he reviews all. This is based on data furnished in questionnaires to C.O.A.G.

In at least twelve states, the Attorney General's review of administrative rules is required by law. The Minnesota statute is typical:

> Every rule hereafter proposed by an administrative agency, before being adopted, must be based upon a showing of need for the rule, and shall be submitted as to form and legality, with reasons therefor, to the Attorney General, who, within twenty days, shall either approve or disapprove the rule.[25]

Kansas requires additionally that the Attorney General determine whether the making of the regulation is within the agency's authority. Alaska, Kansas, Maine, and Minnesota require that he approve both form and legality, while the others refer only to legality.

Some statutes try to avoid undue delay by setting a deadline for review. Alaska requires that the Attorney General give the agency an opinion on the regulation within ten days after the agency so requests. In Maine, approval is presumed if the Attorney General takes no action within a period of thirty days after the proposal is submitted, and Minnesota allows twenty days. Kansas requires that the Attorney General furnish his opinion on the rule "promptly."

Michigan divides responsibility for review, saying that no rule shall be filed with the Secretary of State "until it has been approved by the legislative service bureau as to form and section numbers and the attorney general as to legality."[26] Oregon does not empower the Attorney General to review rules, but does require him to prepare model rules of procedure appropriate for use of agencies in rule-making.

There are both advantages and disadvantages to requiring that the Attorney General review rules for form and legality. The Model Act does not require such review. If the Attorney General provides all legal services for state agencies, attorneys on his staff presumably would have drafted or aided in drafting the rule. In such a case, review would appear a duplication of staff services. Review may constitute an unnecessary delay. It is difficult for the reviewers to consider legality of a rule without any regard for its policy implications.

Conversely, it can be argued that rules and regulations in many jurisdictions are drafted by persons who are not members of the Attorney General's staff. As he must defend the agency and the rule in subsequent action, he should review its legality. He would be aware of legal or formal considerations that would not be apparent to agency personnel.

The alternative to a system providing executive clearance of administrative rules is legislative review. Three approaches to this procedure are followed in the United States. In some states, all rules are submitted to the legislature for its general information and comment. The legislature, however, is not empowered to alter the agency's rule. Elsewhere, regulations are submitted for legislative review and the legislature has the option of amending or annuling the rule within a specified time period. The highest degree of legislative influence is noted in those jurisdictions where the legislature must positively act to approve all rules and regulations. Seven states have incorporated a system of legislative review: Alaska, Connecticut, Kansas, Michigan, Nebraska, Virginia, and Wisconsin.

In contrast to most American jurisdictions, England has disregarded executive clearance of administrative rules completely and relies solely on legislative review. By the procedure known as "laying on the table", all rules must be submitted to Parliament where they are retained for forty days of analysis. Rules become effective at the conclusion of this period if Parliament has not taken positive action to annul them.[27]

The Model Act and many state statutes provide for declaratory judgments by a court as to the validity of administrative rule. The Model Act also provides for declaratory rulings by agencies. Presumably, review prior to promulgation could reduce the need for such rulings. Frank Cooper suggests that a rule may be declared invalid if: (1) it exceeds the authority conferred; (2) it conflicts with the governing statute; (3) it extends or modifies the statute; (4) it has no reasonable relationship to the statute's purpose; or (5) it is deemed arbitrary, unconstitutional, or unreasonable.[28]

6.34 Public Property and Fiscal Administration

The Attorney General's involvement in public property and state fiscal administrative matters varies from state to state depending not only on his specific responsibilities, but on the state's activity. For instance, in Massachusetts, the Contract Division of Attorney Generals office's usually reviewed about 3,000 contracts per year, including construction contracts and leasing agreements for building and highways. The division also represents the state against claims filed by construction contractors. After a new Government Center was constructed, Attorney General Elliot Richardson commented that, "The construction of the New Government Center has led to claims running into the millions of dollars and presenting highly complex questions."[1]

A study of the West Virginia Attorney General's office showed numerous fiscal duties. Bonds issued by the secretaries of the State Boards of Education, Department of Public Safety, the Commissioner of Labor as Commissioner of Weights and Measures, the Commissioner of Workmen's Compensation and any bond required by the Board of Control from state agencies or state employees require the Attorney General's approval. He must also approve the purchase of bonds, securities and notes by the Board of Public Works for its purchase of bonds, securities and notes by the Board of Public Works for its Workmen's Compensation Fund. When any political division authorizes a bond issue by election, the papers relating to the issuance must be sent immediately to the Attorney General who notifies the appropriate governing body of the subdivision of his approval or disapproval of the bond's validity. In the case of a disapproval, any person interested in the bond issue has the option of taking an appeal to the state Supreme Court. The Attorney General must then file material substantiating his position with the Supreme Court. He must approve surety bonds of state personnel. And, finally, the Attorney General furnishes forms for bonds or certificates of indebtedness to municipalities to finance street improvements.[2]

The Attorneys General's memberships on boards and commissions are shown state-by-state in Table 7.3. This shows that the great majority are members of some boards with fiscal duties. In Alabama, for example, it can be assumed that the Alabama Education Authority, the Armory Commission, Board of Compromise, Bridge Finance Corporation, Building Authority, Building Commission, and Highway Finance

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21. C.O.S.G., *supra* note 3.
25. MINN. STAT. § 15.0412 (4).
26. MICH. STAT. ANN. § 3.560 (10).
27. C.O.S.G., *supra* note 3 at 5.
28. Cooper, *supra* note 14 at 250-63.

1. Elliot Richardson, *Office of the Attorney General*, 53 MASS. L. Q. 5, 13 (1968).
2. Lyell B. Clay, THE ATTORNEY GENERAL OF WEST VIRGINIA, 24-26 (1957).

Corporation all concern fiscal matters. The Connecticut Attorney General serves on a number of such boards including the State Bond Commission, the Committee on Bonding of state officers and employees, the Expressway Bond Committee, and the Board of Issuance of Bonds and Notes for Dire Emergencies. In Delaware, the Attorney General is a member of the Board of Bank Incorporation. The Attorney General is a statutory member of a board concerned with insurance or retirement systems in Connecticut, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Ohio, Oklahoma, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. Thus, most Attorneys General are involved in fiscal matters not only through their role as counsel, but through their membership on policy-making boards.

While a state-by-state analysis of fiscal duties is not feasible, a search of the statutes of six states, selected at random, shows a wide range of fiscal responsibilities assigned to the office of Attorney General.

Arizona's Attorney General, in conjunction with the Racing Commission, must approve sureties for all applicants seeking racing permits. He advises the Banking Department and the Superintendent of Banks when acting as receiver of insolvent estates to be liquidated. Municipalities may submit all municipal bonds for financing utilities to the Attorney General, for review of their validity and the regularity of the proceedings authorizing their issuance. The Attorney General answers writs to garnishment of state employees' salaries and approves bonds executed by state officers. He prescribes the form and approves the bonds for the State Treasurer as *ex-officio* custodian of the Unemployment Compensation Fund. In the education field, the Attorney General certifies revenue bonds for junior college districts, passes on the validity of bonds issued for university and state college projects, and institutes action for damages on contractor's bonds. He certifies bonds for financing state highway, city, town, and county public housing and slum clearance and redevelopment.

The Arizona Attorney General's additional responsibilities in the field of public finance include approving bonds for the state purchasing agent, and performance bonds. As a member of the State Disaster Board, he reviews the expenditure of state emergency funds. The Attorney General is empowered to institute actions against illegal withholding of state money, and to enjoin illegal payment. He institutes actions to collect state claims for defaults in payment and actions on bonds issued for taxing bodies which refuse or omit to levy the certified tax rate.

The Attorney General of Kansas approves the registration of municipal bonds and has the authority to approve the early reduction and late increase of municipal bond payments. He directs county attorneys to prosecute suits against board of education officials responsible for nonpayment of bonds or coupons by reason of neglect or refusal. The Attorney General has general responsibility to prosecute or defend all actions on state bonds or contracts when requested by the Governor, Secretary of State, Auditor, Treasurer or State Board of Education.

He is a member of the Committee on Surety Bonds and Insurance, which authorizes the purchase of such bonds. He also approves their form. The Attorney General serves as a member of a Board of Commissioners for the Management and Investment of the Permanent School, State Normal School and State University Funds and advises the commissioners as to the validity of bonds. He also advises the Director of Finance on the validity of special assessments against the state. He brings actions to

acquire land, water and water rights at the request of the Forestry, Fish and Game Commissioner. He approves the title abstracts and deeds conveying real property for the purpose of specific buildings.

Missouri's Attorney General passes on the legality of bonds of surety companies. He approves the form of the bonds entered into by the Director of Welfare and the Supervisor of Savings and Loan Associations, the Commissioner of Finance and his deputy, assistants and examiners, the Director of the Department of Corrections, and the State Auditor. He serves as legal adviser for the teacher retirement system and approves bonds of the State Treasurer in regard to unemployment compensation funds. His activities in the area of state buildings include membership on the Board of Public Buildings and serves as party defendant representing the public interest in suits involving property and funds of school districts. He is named as legal adviser to the state Collector of Revenue and institutes legal actions to collect delinquent taxes, licenses and fees when referred by him.

New Jersey's Attorney General serves as legal adviser to the boards of trustees for the following employees' retirement systems: the teacher's fund, the alcoholic beverage control officers, public employees, policemen and firemen, traffic officers on county roads, and state police. The Attorney General approves the legality of bonds issued for school districts and serves as a funding commissioner for school bond authorization. The Attorney General, with the State Treasurer, institutes actions for unclaimed bank deposits. He authorizes payment or compromises on claims arising from financial assistance loans for higher education. He serves as a trustee for the fund for support of free public schools. The State Treasurer, or Custodian of Funds, transfers through the Attorney General funds of certain administrative boards. The Attorney General and the director of the division of budget and accounting are authorized to approve the Police Training Commissioner's acceptance of grants, bequests, conveyances, etc. The Attorney General authorizes bond issues for state educational facilities. He also serves on the New Jersey Housing Finance Agency.

Tennessee's Attorney General serves as a general legal adviser for the Treasurer and Comptroller and must:

> . . . attend to all business connected with the management of the treasury of the state, or debts due and owing the state or debts or liabilities claimed against the treasury of the state, or suits brought against the comptroller of the treasury before any court in the state . . .[3]

The Attorney General approves titles for land acquired by the Department of Conservation and approves the disposal of surplus state land. He and the Governor approve the state boards of education's leases of public land to fraternities and approve leases of public lands by the Department of Conservation.

The Attorney General of Tennessee approves the form of surety bonds executed by state and county officers and, with the State Treasurer, the form of bonds for banks serving as state depositories. He approves the redemption register for state bonds. The Attorney General serves as legal adviser for the board which administers the Public Employment Retirement System and approves the form of the bond given by the State Treasurer in connection with the Unemployment Compensation Fund. He serves as a member of the State Board of Claims and is authorized to appoint an assistant to investigate claims filed with the Board. He approves refunds made by the Commissioner of Revenue in connection with the administration of alcoholic beverage tax stamps.

Utah's Attorney General approves

3. TENN. CODE ANN. § 8-609.

bonds for the members of the Liquor Control Commission, the New and Used Motor Vehicles Dealers and money order vendors. He also examines issuance and sale of bonds to finance public school campus buildings. He approves leases made by the Director of Finance and must receive notice of claims filed against the state. He serves as a member of the State Board of Loan Commissioners. The Attorney General institutes action in connection with the State Land Board and approves the form of legal documents for the acquisition or disposal of state lands. He also institutes suits for real property which should escheat to the state.

This brief sample of states shows that the Attorney General's financial duties and public property administration are many and varied, with an obvious emphasis on the approval of the forms of various surety and revenue raising bonds. In many cases, however his duties go far beyond general legal advice into the area of financial administration.

Revenue Bonds

Attorneys General play a small but significant role in state debt administration. The importance of this role is apparent in the fact that state debt outstanding at the end of fiscal 1968 totaled $35.7 billion.[4] The Attorney General may be a member of the state agency or authority that handles indebtedness, or he may provide counsel for it.

In Connecticut, for example, the Attorney General is a member of the State Bond Commission which is charged with issuing all bonds of the state. In Alabama, he is a member of the Alabama Building Authority which, among other functions, has the power to issue bonds. Louisiana recently created a State Bond Commission, with exclusive authority for issuing general obligation bonds for the state, and named the Attorney General as a member. The Attorney General of Michigan is a member of the Municipal Finance Commission, which advises municipalities with respect to fiscal questions related to proposed or outstanding indebtedness.

The Attorney General of Florida is authorized by statute to recommend the form of bonds to be issued by county school districts. In North Carolina, the Local Government Commission controls the sale of all bonds and notes and thus provides state assistance for local governmental agencies. While the Attorney General is not a member, the Commission is authorized by law to call on him for legal advice.

Bonds are often issued by local as well as state governments, although some authorities believe that the state should issue bonds for local units, and receive certificates of indebtedness in return.[5] North Carolina, in 1931, and Virginia, in 1950, established procedures of state aid for local bond issues. The Advisory Commission on Intergovernmental Relations suggests legislation providing for state assistance in local borrowing. A state agency would be empowered to: (1) conduct training programs for local officials on debt management; (2) maintain a central file of debt and related data; (3) advise local governments on improving debt management; (4) handle the marketing of security offerings on a request basis; (5) prevent local governments from marketing offerings at an excessive interest rate, and (6) regulate the content of official statements on debt offerings.[6]

Contracts

As legal advisers to state government all Attorneys General probably draft, review or approve legal instru-

4. The Council of State Governments, THE BOOK OF THE STATES 1970-71, 187.

5. Donald F. Reeb, *The State-Local Bond Market*, 47 J. URBAN LAW, 113 (1970).

6. Advisory Commission on Intergovernmental Relations, *State Assistance to Local Debt Management*, in A.C.I.R. STATE LEGISLATIVE PROGRAM, § 33-48-00 (1969).

ments. This may be a general requirement, or limited to specific situations. A few states report to C.O.A.G. that the Attorney General prepares all state contracts; a larger number say that he does so when requested.

Georgia law says that the Attorney General shall prepare all state contracts, and the Alaska statutes direct him to draft legal instruments. In Arkansas, he must review contracts involving construction, student loans, or state lands. In Hawaii, the Attorney General must approve as to legality and form all documents relating to the acquisition of land by the state. The Attorney General of Utah must approve contracts between local government agencies involving state bonds. Illinois requires that he prepare contracts and other writings related to subjects in which the state is interested. As these examples show, most Attorneys General have wide responsibilities in preparation and review of contracts.

Bonds of Public Officers

Public officers are often required to be bonded. W. L. Murfree wrote in *The Law of Official Bonds* that:

> [W]henever a functionary of any grade is endowed by law or ordinance with powers involving the receipt or custody of public money or property . . . that officer, as a rule, is bound to give security that he will faithfully discharge the duties which the law imposes upon him. The bond is universally considered the great safeguard of public interest as well as the surest remedy of private grievances.[7]

He interprets the approval of bonds to be a judicial function; hence, those rendering such approval are protected in acting upon their judgment.

Of thirty-three jurisdictions reporting to C.O.A.G., twenty say that the Attorney General acts to approve some or all bonds. The Oklahoma statute is typical, saying that:

> Except as to official bonds for which the Governor of the State of Oklahoma is the approving officer, no official bond executed . . . may be accepted by any state officer, board, commission, institution or agency, until the said bond has first been approved as to form by the Attorney General. . . . The Attorney General shall notify the officer, board, commissioner, institution or agency transmitting said bond that the bond had been so approved.[8]

The Attorney General's approval may be required only in certain circumstances or for certain officers. In Georgia, the Attorney General approves bonds at the request of certain state officers. In Missouri, he approves bonds for the Auditor, Treasurer, and Director of Industrial Inspections. In West Virginia, he approves bonds as to sufficiency of form and manner of execution.

A Model State Act on Bonding of State Officials and Employees[9] provides for a committee to consist of the comptroller, the treasurer, and the Attorney General to determine which persons should be bonded, other than those named by statute. All bonds would be approved as to form by the Attorney General and filed with the Secretary of State.

6.35 Regulation of Charitable Trusts

Common Law Basis

Enforcement of charitable trusts has consistently been recognized as a common law power of the Attorney General. Professor J. Ll. J. Edwards, in his authoritative study of the Attorney General of England, discusses the Attorney General's responsibilities in relator actions, where he is the Crown's principal agent for enforcing public legal rights, and notes that:

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7. W. L. Murfree, *The Law of Official Bonds*, § 310 (1885).

8. OKLA. STAT. ANN. tit. 74 § 603.

9. Committee of State Officials on Suggested State Legislation, The Council of State Governments, Bonding of State Officers and Employees, SUGGESTED STATE LEGISLATION, 131 (1957).

It has been suggested that the progenitor of the modern relator's action is to be found in the original procedure whereby the Attorney-General, representing the King as *parens patriae,* would proceed by way of information to enforce rights of a charitable nature for the benefit of those interested persons who either declined or were unable to enforce their claims in person.[1]

Professor Edwards notes the "well-established recognition of the Attorney-General as the repository at the public conscience" in connection with charities.

The power to enforce charitable trusts has been traced to the early 14th Century, when legislation was adopted restricting the alienability of land to religious organizations. To evade such limitations, resort was made to the use, the antecedent of the modern day trust. Early common law courts refused to recognize the use; however, the king enforced charitable uses through exercise of his authority as *parens patriae.* In time this power to enforce charitable trusts became vested in the general courts of equity. The process by which this was accomplished has been summarized as follows:

> After the Chancellor's Court of Equity had become distinct from the King's Council, the King would exercise his prerogative to have a charitable trust enforced by authorizing his attorney general to file an information in Chancery. This was the origin of the *cy pres* power and its exercise was not a judicial function of the Chancellor. If the charitable trust was sufficiently definite, an individual with a sufficient interest, such as a trustee, could bring an action in Chancery to have the trust enforced.[2]

No provision was made to require registration of charitable trusts; hence, the King often had no knowledge of their existence. Further, there was no requirement that he enforce even those trusts he did know existed. Parliament took action to offset these deficiencies by enacting the Statute of Charitable Uses in 1601, which specifically gave Chancery power to enforce charitable trusts.[3]

An early Virginia case, *Trustees of Philadelphia Baptist Association v. Hart's Executor,*[4] was decided before it was known in America that charitable trusts had been enforceable in England by equity courts prior to the Statute of Charitable Uses. The court held that charitable trusts were not enforceable in equity since there was no evidence that they had been so enforceable in England prior to the Statute of Charitable Uses. Virginia had repealed the Statute of Charitable Uses in 1792.[5]

Although the decision in the *Hart* case was based on incorrect assumptions, it remained the law of the land until 1844. In that year Mr. Justice Storey, in the case of *Vidal v. Girard's Executors,*[6] held that a charitable trust was enforceable in the equity courts of Pennsylvania. The *Vidal* case established the rule that equity courts in the United States could enforce charitable trusts independent of the Statute of Uses. By 1860, most equity courts enforced such trusts.

Characteristics of Charitable Trusts

In his definitive work on charitable foundations, Marion R. Fremont-Smith notes three distinct characteristics of charitable gifts:

> (1) The privilege of indefinite existence; (2) The privilege of validity even if the gift is in general terms, so long as its objective is exclusively charitable; (3) The privilege of obtaining fresh objects if those laid down by the founder became incapable of execution.[7]

1. John Ll. Edwards, THE LAW OFFICERS OF THE CROWN, 286-7 (1964).
2. Stephen Powers and John E. Watkins, Jr., *The Enforcement of Charitable Trusts,* 18 SYRACUSE L. REV. 618, 619.
3. *Id; See* also, Marion R. Fremont-Smith, FOUNDATIONS AND GOVERNMENT, Russell Sage Foundation (1965).
4. 17 U.S. 1 (1819).
5. SYRACUSE L. REV., *supra* note 2 at 620.
6. 43 U.S. 126 (1844).
7. Marion Fremont-Smith, FOUNDATIONS AND GOVERNMENT, 17 (1965).

The Restatement of Trusts lists as valid charitable goals the relief of poverty, the advancement of education or religion, the promotion of health, governmental and municipal purposes, and "other purposes the accomplishment of which is beneficial to the community."[8] One commentator notes the widespread legal consequences of creating such a trust:

> In the first place, courts will apply liberal rules of construction to sustain trusts which evidence a charitable intent. Once established, charitable trusts are generally exempted from various restrictions applied to private trusts. For example, common-law rules invalidating certain restraints on the alienation of trust property are usually held to be inapplicable to charitable trusts, as are prohibitions against the perpetual duration of trusts and the accumulation of trust income. More important are the tax advantages enjoyed by charitable trusts, including exemptions from federal income taxation and normally from local ad valorem property taxes as well. Federal tax laws actually encourage philanthropic giving by allowing the donor to deduct charitable contributions in computing his income, estate and gift taxes. Finally the *cy pres* power, which permits a court of equity to modify a trust to meet changed conditions is available where the settlor had a general charitable intent.[9]

One characteristic of a charitable trust is that the beneficiaries are not clearly defined. Intended beneficiaries might not be aware of their status or even of the existence of the trust itself. Hence, legislation designed for the enforcement of ordinary trusts is not effective to enforce charitable trusts. Lack of knowledge and lack of informed self-interest makes the typical individual beneficiary ineffective in seeking the redress of abuses. George Bogert, in *Trusts and Trustees,* notes that the society is the real beneficiary of every charitable trust, and that the people are the mere conduits of the social benefits to the public.[10] The important element is finding a manifestation of intent to dedicate the property to a purpose that is accepted as charitable, thus imposing the judiciary duties on the trustee.[11]

The Attorney General's Role

In most American jurisdictions, primary or exclusive authority for the supervision and enforcement of charitable trusts is vested by statute and case law in the Attorney General. In addition, or alternatively, the laws of some reporting states allow for the enforcement of charitable trusts by "donors", "settlors", "representatives of the charity or class of beneficiaries", "any interested party" or "any 10 or more interested parties," to quote terms given in response to a C.O.A.G. questionnaire. Table 6.63a shows the primary enforcement authority.

Marion R. Fremont-Smith points out that it is generally impractical to allow individuals of varying interests and rights to challenge charitable funds designed to promote large public interests. The Attorney General is the proper party to bring suit. While he is the proper party he is not, however, the exclusive one. Members of the public may bring suit when they can establish that they are beneficiaries of the trust with interests beyond those of the general public. The Attorney General is usually considered a necessary party to such suits, however, in those states where he has the duty of enforcing charitable funds under statute, court rule, or precedent. There is no clear-cut rule as to whether the state court will consider him a necessary party, but case law of the jurisdiction must be consulted.[12]

8. The American Law Institute, RESTATEMENT (2d) OF TRUSTS, Sec. 368 246 (1959).
9. Note, *The Enforcement of Charitable Trusts in America: A History of Evolving Social Attitudes,* 54 VA. L. REV. 436 437 (1968).
10. George Bogert, *Proposed Legislation Regarding State Supervision of Charities,* 52 MICH. L. REV. 633, (1954).
11. Austin W. Scott, THE LAW OF TRUSTS, 3rd ed., Sec. 348, p. 2769 (1967).
12. Fremont-Smith, *supra* note 7 at 214, 216.

	Enforcement Power in: Attorney General	Other Officer	Other Party	Att'y Gen. Must Be Party	Basis of Att'y Gen.'s Power
Alabama	Yes	No	Yes	No	Case law
Alaska	No			No	No statute or case law
Arizona					No statute or case law
Arkansas	Yes				Case law
California	Yes	No	Yes	Yes	Statutes
Colorado	Yes			Yes	Case law
Connecticut	Yes			Yes	Statute and case law
Delaware	Yes		Yes	No	Case law
Florida	Yes				Statutes and case law
Georgia	Yes	Yes	Yes	Yes	Statutes
Guam	°	°	°	°	°
Hawaii	Yes	No	Yes	Yes	Statute and case law
Idaho	Yes	No	Yes	Yes	Statutes
Illinois	Yes	No	Yes	No	Statutes
Indiana	Yes	No	Yes	Yes	Statute and case law
Iowa	Yes	No	Yes	No	Statutes
Kansas	No			No	Case law
Kentucky	Yes			No	Case law
Louisiana	°	°	°	°	°
Maine	Yes		Yes	Yes	Statutes
Maryland	Yes	No	Yes	No	Statutes
Massachusetts	Yes			Yes	Statutes
Michigan	Yes			Yes	Statutes
Minnesota	Yes	No	Possibly	Yes	Statutes
Mississippi	Yes	No	Yes	No	Case law
Missouri	Yes			Yes	Statute and case law
Montana	Yes			No	Case law
Nebraska	Yes	No	Yes	No	Case law
Nevada	Yes	No	Yes	No	Statutes
New Hampshire	Yes			Yes	Statute and case law
New Jersey	Yes	No	Yes	Yes	Statute and case law
New Mexico	Yes	No		Yes	Statutes
New York	Yes			Yes	Statutes
North Carolina	Yes	Yes	Yes	Unknown	Statutes
North Dakota	No	Yes	No	Yes	Statutes
Ohio	Yes	No	Yes	Yes	Statutes
Oklahoma	Yes	No	Yes	Yes	Statutes
Oregon	Yes	No		Yes	Statutes
Pennsylvania	Yes	No	Yes	Yes	Statutes and case law
Puerto Rico	No	Yes			
Rhode Island	Yes				Statute and case law
Samoa	°	°	°	°	°
South Carolina	Yes				Statutes
South Dakota	Yes	No	Yes	Yes	Statutes
Tennessee	Yes				
Texas	Yes	No	No	Yes	Case law
Utah	Yes	No	Yes	No	Case law
Vermont	°	°	°	°	°
Virgin Islands	°	°	°	°	°
Virginia	No	No	Yes	Yes	Statutes
Washington	Yes	Yes	Yes	Yes	Statutes
West Virginia	No				
Wisconsin	Yes	No	Yes	Yes	Statutes
Wyoming	Yes	Yes	Unknown	No	Case law

Note: Data from C.O.A.G. questionnaires and Marion Fremont-Smith, FOUNDATIONS AND GOVERNMENT, 464-478.

°No laws on charitable trusts

Of states responding to a C.O.A.G. questionnaire, nineteen say that the Attorney General is a necessary party in suits to enforce charitable trusts, while nine say that he is not. Most jurisdictions also list persons other than the Attorney General who can enforce such trusts; these parties are variously listed as "persons having an interest", "beneficiary or agent in the performance", "private party", "persons interested in estate", "representative of the charity", "settlor" and similar terms, which are not sufficiently specific to allow tabulation.

Of fifty jurisdictions reporting to C.O.A.G., Guam, Louisiana, Samoa, Vermont and the Virgin Islands have no laws on charitable trust. Enforcement authority is vested exclusively in the state's attorney in North Dakota and in the Secretary of State in Puerto Rico. Alaska and Kansas report that the Attorney General has no authority, but do not say who has. Arkansas and Montana say that the Attorney General has common law power to enforce charitable trusts, but no statutory power. In Georgia and North Carolina, the Attorney General shares authority with the local prosecutor. In the thirty-two other jurisdictions, the Attorney General is the only official with charitable trusts enforcement authority.

Many Attorneys General take an active part in regulating charitable trusts and solicitations. Some examples are discussed here.

In 1940, the Attorney General of New Hampshire recommended that registration and reporting by charities be required. A 1943 law followed this recommendation. A Director of Charitable Trusts in the Attorney General's office prepares and maintains a charitable trust register, and may make rules to provide for registration, supervision and enforcement. Two years were required to make a complete register of charities. The Attorney General's office found unsatisfactory administration in 25 percent of cases, due more to ignorance of the law than to fraud.[13] The Director of Charitable Trusts serves part-time, and is appointed by the Governor. The Registrar of Charitable Trusts is appointed by the Attorney General. A directory of trusts is published periodically.

The Massachusetts Attorney General's office has a Division of Public Charities "to enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof."[14] It reviews annual reports of charitable organizations and foundations, investigates complaints and represents the state in such matters as *cy pres* applications and questions of identification of beneficiaries.

Nineteen states report that the Attorney General is a necessary party in any court proceeding involving a charitable trust; eleven states report that the Attorney General is not a necessary party to such proceedings. North Carolina indicated that this question has not yet been decided.

It has been stated that the three essential criteria of effective charitable trust legislation are registration, reporting and enforcement provisions. A fourth criterion which would be essential in the event that public officials did not or could not adequately enforce the charitable trust laws would be to give the beneficiaries of charitable trusts some recognized standing in court.[15]

In 1951 the National Conference of Commissioners on Uniform State Laws was requested by the National Association of Attorneys General to draft a uniform charitable trusts act, which

13. Bogert, *supra* note 10 at 643.
14. Elliot Richardson, *The Office of the Attorney General: Continuity and Change*, 53 MASS. L. Q. 12 (1968).
15. Luis Kutner and Henry H. Koven, *Charitable Trust Legislation in the Several States*, 61 N.W.U.L. REV. 411, 413 (1966).

would require reports to the Attorney General on the existence and the administration of any property held for charitable purposes. At the time of this request, the only state with legislation requiring such reports was New Hampshire.[16] This request was made at the end of a decade of consideration by the National Association of Attorneys General as to how best to codify and effectuate Attorneys General's duty to supervise charitable trusts.

By 1954, when the Uniform Supervision of Trustees for Charitable Purposes Act was promulgated, Rhode Island, Ohio and Massachusetts enacted legislation similar to the Uniform Act. The Uniform Act requires trustees to report to the Attorney General the existence of any charitable trust by filing with him "a copy of the instrument providing for his title, powers or duties" and, in addition, to file "with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof." These reports are to be made according to the Attorney General's rules and regulations. The Attorney General is given enforcement powers in addition to those he exercises otherwise. The Uniform Act makes no provision for enforcement of charitable trusts by anyone other than the Attorney General.

California, Illinois, Michigan, and Oregon have adopted this Uniform Act.[17] Florida, Nevada, New Mexico, North Carolina, Virginia, Washington, and Wisconsin also reported statutes requiring annual reports. Nevada, New Mexico and Washington reported statutes requiring registration of charitable trusts.

Additional information available indicates that at least ten states provide for registration, and at least twenty require some form of regular reports. Ordinarily registration is with the Attorney General or a Division of Charities within his office; reports are similarly made to the Attorney General or one subordinate to him or to the clerk of the court having jurisdiction over the trust.[18]

Only California reports a special budget provision for the enforcement of charitable trust laws. All other states apparently administer the charitable trust laws out of general appropriations for the Attorney General's office.

Existing Enforcement Provisions

Five of the fifty reporting jurisdictions indicate that they have no laws providing for the enforcement of charitable trusts. These are Guam, Louisiana, Samoa, Vermont, and the Virgin Islands.

Virginia reports that no other state official is vested with any authority regarding charitable trusts; authority is vested in "any party having sufficient interest." North Dakota and Puerto Rico report that the duty of enforcing charitable trusts is vested in the State's Attorney and the Secretary of State, respectively. In Georgia, North Carolina and Washington, authority is shared by the Attorney General and local prosecutor. In all other reporting jurisdictions the only official vested with any duty or power concerning the administration or enforcement of charitable trusts is the Attorney General. In most states someone other than a state official can also be heard by the courts in actions concerning charitable trusts.

A majority of reporting jurisdictions are not active in enforcing charitable trusts. The following jurisdictions reported that they had no investigations or actions concerning charitable trusts during 1968 or the first half of 1969; Guam, Idaho, Indiana, Kentucky, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Samoa, Tennessee, Utah, Vermont, Virgin Islands, and Virginia. The Attorney General of Indiana intervened in three actions. Maine and South Dakota each conducted one investigation, but brought no actions. Florida brought one action. In Minnesota, the Attorney General was named as a defendant and counterclaimed to enforce a trust.

Eleven jurisdictions conducted a significant number of investigations or actions during 1968 or the first half of 1969. These were:

California—46 investigations opened, 24 closed; 33 actions opened, 24 closed.

Georgia—1 investigation opened; about 24 actions opened.

Illinois—2,160 investigations opened; 22 actions opened.

Michigan—40 investigations opened, which involved the use of approximately 375 subpoenas; 1 action opened.

Missouri—33 cases opened.

Ohio—16 investigations opened; 52 actions opened, 12 closed.

Oregon—5 investigations opened; 25 actions opened.

Pennsylvania—6 investigations opened; 1 action opened; however, enforcement ordinarily is by review of litigation or accountings, followed by intervention where indicated, and number of cases reviewed is currently in excess of 1,500 annually.

Texas—11 investigations opened.

Washington—6 investigations opened; 1 action opened.

Wisconsin—72 investigations opened; 13 actions opened.

The following states say that charitable trusts are required by law to submit periodic reports: California, Illinois, Michigan, Nevada, New Mexico, North Carolina, Ohio, Virginia, Washington, and Wisconsin. Missouri says that reports, if any, are as required by court decree.

Of thirty-five jurisdictions reporting, the following have no staff for charitable trust enforcement: Delaware, Guam, Kentucky, Louisiana, Nebraska, New Mexico, Samoa, Utah, Vermont, Virgin Islands, Virginia, and Wyoming. Minnesota reports that outside counsel is employed. Staff in the other jurisdictions is shown below:

Only eight jurisdictions report that they have full-time attorneys assigned to charitable trust enforcement.

Twenty-three states indicate that they do have members of the Attorney General's staff assigned to the area of charitable trusts. California, Illinois, Indiana, Ohio, Pennsylvania, Texas, New Jersey and Alabama, report staff members assigned full time to this area; the remaining fifteen states have staff members assigned only part time.

There is, however, continuing activity by the Attorneys General in the area of charitable trusts, especially in California and Illinois. Moreover, it is apparent from the data given that the Attorney General continues to prosecute virtually all cases in this area, either on his own initiative or on the relation of a private party.

Federal-State Relations

The state works in the area of charitable trusts by recourse to the equity courts to bring about enforcement of the trusts for the intended or like purposes; the federal government works in the area of charitable trusts to terminate through the tax power those that violate given standards of conduct.

Through joint effort and cooperation, the National Association of Attorneys General and the U.S. Treasury Department and Internal Revenue Service have been able to arrive at federal tax legislation relating to private foundations which achieves the objectives of the National Association of Attorneys General Stated in a resolution of June 25, 1969, entitled "Concerning the Coordination of State and Federal Activity in the Enforcement of Charitable Trusts." The provisions of the

16. 1954 HANDBOOK OF THE CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 167.

17. *Id.* at 293.

18. Kutner and Koven, *supra* note 15 at 228, *et seq.*

6.352 STAFF FOR CHARITABLE TRUST ENFORCEMENT

State	Attorneys	Clerical	Others
Alabama	1 FT	1 FT	
California	4 FT, 2 PT	4 FT	4 FT Investigators, 12 FT Registrars
Georgia	1 PT	1 PT	
Hawaii	1 PT	1 PT	
Idaho	1 PT		
Illinois	5 FT	6 FT	
Indiana	1 FT		
Maine	2 PT	1 PT	
Maryland	2 PT	2 PT	
Mississippi	1 PT	1 PT	
Missouri	2 PT	2 PT	
New Jersey	1 FT	1 FT	
North Carolina	1 PT	1 PT	
North Dakota	1 PT		
Ohio	2 FT	1 FT	1 FT Legal Aide
Oklahoma	1 PT	1 PT	
Oregon	1 PT	1 FT	1 Registrar
Pennsylvania	3 FT	3 FT	PT Outside Counsel
South Dakota	1 PT		
Texas	2 FT	1 FT, 1 PT	
Washington	2 PT	1 PT	
Wisconsin	1 PT	1 PT	

(FT—Full Time; PT—Part Time)

Tax Reform Act of 1969 relating to private foundations affect the Attorney General of every state and his enforcement of state laws relating to private foundations.

In his report to the National Association of Attorneys General on the contents and effect of this act, Assistant Attorney General Wallace Howland of California states:

> Highlighted among the innovations in federal-state relationships are the following:
>
> 1. Federal reporting of foundation misconduct to Attorneys General and disclosure to them of federal investigative records relating there to that are relevant to any determination under state law.
>
> 2. Mandatory amendment of the governing instruments of foundations to add provisions that specifically incorporate the standards of conduct specified in the Act. The effect of this will be to make such standards enforceable by Attorneys General acting pursuant to state law.
>
> 3. The granting to state Attorneys General of time necessary to "correct" violations of the standards of conduct by appropriate action, thereby avoiding the imposition of heavy second level federal taxes that would, in effect, confiscate the foundation assets involved in the misconduct.
>
> 4. Provide impetus to the settlement of corrective actions by Attorneys General in order that foundation managers and other persons responsible for the misconduct may avoid personal liability for heavy second level taxes for which they would be jointly and severally liable and for which they may not be reimbursed out of foundation assets.
>
> Taken as a whole, these provisions make it financially attractive for a State Attorney General to initiate corrective action under state law. He will be notified of misconduct on the part of a private foundation whenever the federal government imposes the relatively light first level tax because of such misconduct. The misconduct will have become actionable under state law as a result of the provisions inserted in its governing instrument as a condition of its tax exempt status. . . .

This scheme of enforcement thus serves two purposes. It directly rewards those states that utilize state law and state procedures to effectively supervise the affairs of private foundations within their jurisdiction. In those states that fail or refuse to insure that corrective action is taken Congress has insured that the foundation assets will nevertheless be taken and used for a public if not a charitable - purpose by the imposition of confiscatory second level taxes.

At its 1970 Winter Meeting, N.A.A.G. adopted two resolutions aimed at further improving the enforcement of charitable trusts through federal-state cooperation. One urged Congress to promptly enact legislation concerning charitable organizations other than private foundations that will, in purpose and effect, extend tax treatment to all charitable organizations like that afforded private foundations by the Tax Reform Act of 1969. The other urged a "single, common form of annual report to be required of private foundations that will conform to both the requirements of the Tax Reform Act of 1969 and the corresponding laws of the several states." This would minimize duplication of effort by foundations and encourage prompt, accurate reporting habits.

Supervision of Charitable Solicitations

In addition to supervising the administration of charitable trusts, many Attorneys General are charged by statute with the duty of supervising solicitations made by charitable organizations. Traditionally a function of local officials, this duty has now devolved upon these Attorneys General.

Twenty-six states have now enacted specific legislation dealing with this matter. In 17, annual or special financial reports are required from soliciting organizations, and separate reports are called for from paid solicitors or promoters. The special reports usually must be submitted before and after the undertaking of a campaign. Twenty-one states require either a license or registration before solicitation may be undertaken. In three states, Illinois, Ohio, and Massachusetts, reports must be filed with the attorney general; this means that a double reporting requirement is imposed on certain charitable organizations. In Massachusetts and Ohio, regulation of solicitation is conducted by the same state officials who administer the statutory provisions requiring registration and reporting to the attorney general by foundations and charitable trusts. In Illinois, the attorney general's office maintains two separate divisions to administer these programs. A bill introduced in the Washington legislature in 1965 encompasses both the regulation of solicitations and the supervision of trustees.[19]

There is present impetus toward establishing uniform standards of accounting and financial reporting by charitable organizations. A joint committee of the National Health Council and the National Social Welfare Assembly drafted proposed Uniform Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations which were published in 1965.[20]

Fremont-Smith contends that:

> The adoption of such uniform standards is a basic prerequisite to any meaningful supervision, or even public scrutiny, of the reports of voluntary organizations.[21]

The proper administration of charitable trusts is a small part of any Attorney General's duties, yet it is an increasingly important one. The huge sums held by tax exempt charitable trusts invite mismanagement; yet the very size of these sums and the potential good they can create dictate that mismanagement cannot be allowed. Nowhere in the Attorney General's work is he more altruistically responsive to the needs of his people. For, as one Attorney General stated: "You won't find any particular groups that are asking you to regulate or to supervise charitable trusts. It's just something that ought to be done

19. Fremont-Smith, *supra* note 7 at 258.
20. National Health Council, *Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations* (1965).
21. Fremont-Smith, *supra* note 7 at 229.

for the people of your respective states."[22]

6.36 Election Responsibilities

Electoral responsibilities are not a major responsibility of Attorneys General, but are usually the exclusive prerogative of the Secretary of State. In forty-three states, the Secretary of State is the chief election officer[1]; however, he is often aided by the Attorney General. The Attorney General renders opinions on a myriad of questions involving the election laws; he is usually the counsel for the Secretary of State as well as boards and commissions which administer election laws.

The Attorneys General of seventeen states are statutory members of boards or commissions with election duties. These states are Alabama, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Maryland, Minnesota, Montana, Nebraska, New Hampshire, New York, South Dakota, and Wisconsin. Such boards range from California's Election Commission, where voting records are destroyed in disasters, and the California Commission on Voting Machines, to Wisconsin's Board of Canvassers. In three states, Attorneys General serve on boards concerned with redistricting or reapportionment: Arkansas, California and Texas. In Georgia, he serves on the Election Laws Study Committee; in Minnesota, he is on the Voting Machine Commission, and in Arkansas, he is on the Presidential Election Commission. In almost all jurisdictions, he renders opinions on the qualifications of elected officials.

Twenty-eight jurisdictions furnished information to C.O.A.G. concerning enforcement of election laws. Sixteen of these specify that the Attorney General is empowered to prosecute violations: Alaska, Delaware, Florida, Guam, Iowa, Maine, Michigan, Missouri, New Mexico, New York, North Carolina, Pennsylvania, Puerto Rico, South Dakota, Virgin Islands, and Virginia. Florida mentions that the Attorney General does not ordinarily exercise this power; New York and Virginia indicate that prosecutions proceed upon the direction of the Governor.

In Delaware, Nevada and Tennessee, the Attorney General must approve the form of ballots for general elections and in South Dakota and Missouri, he approves the form of referendum questions. The Attorney General performs this duty when requested by the Secretary of State in Alabama, Louisiana, Maryland, and Oklahoma. In North Carolina, the State Board of Elections determines the ballot form, with the advice of the Attorney General.

California offers an example of a variety of elections duties. The Attorney General composes the labels for machine ballots. In conjunction with the Secretary of State, he compiles a digest of all state election laws. He serves on a Reapportionment Commission and on an election commission for counties where disaster destroys voting records. He also serves with the Secretary of State and Governor on the Commission on Voting Machines and Vote Tabulating Devices which examines all voting machines to determine whether or not they comply with the requirements of law.

Most of the Attorney General's duties in relation to state election laws arise from his role as prosecutor for the state and his common law and statutory authority to investigate and prosecute violations of state laws. Thus, he usually acts in conjunction with the state officer who has primary responsibility for elections.

22. Attorney General John B. Shepperd, in National Association of Attorneys General, 1953 CONFERENCE OF ATTORNEYS GENERAL, 158.

1. James Havel, THE OFFICE OF STATE SECRETARY OF STATE IN THE UNITED STATES, 37 (1968).

6.4 Collective Disorders

The increasing prevalence of collective disorders in recent years has thrust new responsibilities on many Attorneys General. They have acted to assist Governors in situations where martial law has been declared. They have called conferences of college officials to help forestall campus disorders. They have acted to meet the legal crises resulting from natural disasters.

6.41 Introduction

In September, 1970, the Committee on the Office of Attorney General issued a draft report on collective disorders. This section constitutes a summary of those parts of the report that have particular relevance to the Attorneys' General's activities. At no time are his services more vitally needed than under conditions of collective chaos, whether it arises from student unrest, civil disorders or natural calamities. The Attorney General's position can be effectually utilized both in restoring order and in lessening the opportunities for disruption.

There is a growing body of information which can be brought to bear on these problems and numerous studies have been conducted. The President appointed an Advisory Commission on Civil Disorders, following an unprecedented number of riots in 1967. It was chaired by Governor Otto Kerner of Illinois and issued a report in 1968. The National Commission on the Causes and Prevention of Violence issued its report in 1969. The 1967 report of the President's Commission on Law Enforcement and Administration of Justice also dealt with some aspects of civil disorders.

The United States Commissioner of Education appointed a Subcommittee on Easing Tensions in Education. Members of the group interviewed college officials throughout the nation. The American Council on Education created a committee to study student unrest. In 1969, the Board of Governors of the American Bar Association authorized the appointment of a Commission on Campus Government and Student Dissent and "charged it with responsibility to develop legal standards, procedures, and administrative guidelines relevant to student unrest and campus violence."[1] Congressman William Brock of Tennessee led fifty Congressmen on a tour of American campuses, while Senator John McClellan's Subcommittee on Investigation of the Senate Committee on Government Operations and Congressman Richard Ichord's House Committee on Internal Security began investigations of groups promoting campus violence.[2] In 1970, the President appointed former Pennsylvania Governor William Scranton to head a nine-member Commission to explore the causes and consequences of campus unrest. The Commission's report, however, was not endorsed by the President.[3]

The Omnibus Crime Control and Safe Streets Act has stimulated much of this study. State crime prevention plans place priority upon various aspects of civil disturbance control. The Act directed that plans give "special emphasis . . . to programs and projects dealing with the prevention, detection, and control of organized crime and of riots or other violent civil disorders."[4]

A permanent research organization, the Disaster Research Center at the Ohio State University, was established

1. REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON CAMPUS GOVERNMENT AND STUDENT DISSENT, 1 (1970).
2. *New York Times*, May 29, 1969 at 25.
3. *New York Times*, June 14, 1970 at 11.
4. United States Department of Justice, FIRST ANNUAL REPORT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 9 (1969).

in 1963 to study many aspects of disasters and disturbances. The Center has field research teams ready to be dispatched to any part of the nation on two-hour notice. These teams have extensively studied response to all kinds of "unscheduled" events.[5]

6.42 Civil Disorders

America has had much experience with civil disorders. During the last ten years, they have been a continuing problem of major proportions and national scope. Recent riots have involved property damage, looting, and violent confrontation between police and rioters. Another kind of civil disorder is characterized by civilians arming themselves with lethal weapons and bombing or otherwise destroying selected targets. Techniques for controlling and preventing violence should take into cognizance the style of violence confronted; whereas massive force might be effective in stopping a disorganized general riot involving looting, it would be inappropriate for dealing with organized terrorist groups.[6]

Characteristics

Civil disorders take place within a general environment conducive to the outbreak of violence. The disadvantaged socio-economic nature of ghetto residents makes disorders a potential phenomenon in these areas. Activities of the Attorney General in protecting consumers and combatting organized crime help control some of these causes of riots.

The dynamics of a typical riot indicate by implication the stages at which disorder can be averted:

(1) An incident, usually involving police-ghetto relationships, precipitates the riot. It may not be a serious incident in and of itself.

(2) The incident provokes rumors, causing people to gather. The National Advisory Commission on Civil Disorders wrote:

> Rumors significantly aggravated tension and disorder in more than 65 percent of the disorders studied by the Commission. Sometimes, as in Tampa and New Haven, rumor served as the spark which turned an incident into a civil disorder. Elsewhere, notably Detroit and Newark, even where they were not precipitating or motivating factors, inflaming rumors made the mob of police and community leaders far more difficult.[7]

(3) Crowd behavior changes from curious observation to activity. Natural restraints within individuals break down. New norms of conduct develop as deviant behavior goes unpunished:

> A crowd moves on courses of action in the early stages when behavioral deviations go unpunished by the various social control personnel in the area. These may be deviation of informal norms such as extreme statements, vehement conversation, threats, and simply walking into the street, or deviations of various legal norms such as window-breaking, looting, burning, and sniping. . . . The verbalized conclusions of the community rumor process, and the heightening of hostility prior to the riot, determine the magnitude and kind of activities.[8]

(4) There is an official response to the crowd disturbance. An emergency is declared, and authorities attempt to quell the disturbance.

Planning

Planning for civil disorders can be aimed at each of these phases.

Precipitating incidents involving police might be lessened considerably if police-community relations are improved. The National Advisory Commission on Civil Disorders recommended intensified recruitment of Negroes for police forces, and a greater community service role for the police in ghetto areas, with emphasis on developing nonadversary contracts on a continuing basis.[9] It recommended operation of community service centers, possibly staffed by retired policemen, in easily accessible ghetto locations. The centers would allow police to put citizens in touch with the proper agency to handle their problems. Urban America, in *Action for Our Cities*, concurred with recommendations for:

> the establishment in every city police department of a community relations planning unit at headquarters level and action units at precinct levels.
>
> The planning unit should be created within the police department's headquarters staff, and should . . .
>
> (1) develop departmental policies and standards for improving police-community relations,
> (2) supervise and coordinate the efforts of the precinct-level action units, and
> (3) develop training programs and instructional material on community relations for members of the force.[10]

Communication is a crucial factor in the spread of civil disorder. If public officials can circulate the facts quickly and effectively, they can quell the rumors before they become inflammatory. The National Advisory Commission on Civil Disorders also pointed out that:

> Sufficient manpower is a prerequisite for controlling potentially dangerous crowds; the speed with which it arrives may well determine whether the situation can be controlled. In the summer of 1967, we believe that delay in mobilizing help permitted several incidents to develop into dangerous disorders, in the end requiring far more control personnel and creating increased hazards to life and property.[11]

Numerous studies of police response time, deployment of manpower, and related matters are underway.

Riots may become interjurisdictional. Recommendations have come from many sources urging interlocal cooperation in planning and pooling resources for riot control. Proper use of local forces can preclude the necessity of calling in state police or National Guard units.

A Public Administration Service study lists several reasons for reliance upon local police in most civil disorders:

> (1) the use of local forces will be less disturbing to community relations;
> (2) the shock effect or psychological value provided by use of state forces will be lost if state forces are regularly relied upon;
> (3) local officials are more familiar with local geography and local sociological factors;
> (4) a local force that can demonstrate its effectiveness in controlling disorder can gain considerable local community respect.[12]

Interjurisdictional Action

Interlocal agreements allow more frequent use of specialized equipment and also provide large enough forces to meet disorder. Successful cooperation in disorder control can foster continuing interchange in other public safety areas. The P.A.S. report set forth the following criteria for interlocal mutual assistance agreements and relationships to meet civil disorders:

> (1) They must be based on adequate riot control planning. Riot control work, even when only one police department is involved, necessitates close teamwork not typically required of police officers. These coordination, command, and procedural problems can become severe when several police forces are engaged in joint activities under emergency conditions. (2) Interlocal compacts must be devised in accordance with state legal requirements. (3) These compacts should be formalized in written agreements seeking to meet such practical problems as finance, fundamental procedures, and the personal status of participating officers. These written agreements should clarify equipment loss and personal injury liability, for instance, and specify the condi-

5. E. L. Quarantelli, *Some Observations on Organizational Problems in Disasters*, Disaster Research Center, The Ohio State University (1969).
6. Morris Janowitz, SOCIAL CONTROL OF ESCALATED RIOTS, 9-12, 17-20 (1968).
7. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 173 (1968).
8. James Hundley, *The Dynamics of Recent Ghetto Riots*, 45 J. URBAN L., 634 (1968).
9. National Advisory Commission, *supra* note 7 at 167.
10. Urban America, Inc., ACTION FOR OUR CITIES, 54 (1969).
11. National Advisory Commission, *supra* note 7 at 173.
12. David Farmer, CIVIL DISORDER CONTROL, 8 (Public Administration Service, 1968).

tions under which participating local governments may withdraw responding forces to cope with situations in home municipalities. (4) Interlocal compacts must provide for adequate joint training in riot control procedures.[13]

Urban America recommended a model state act authorizing "interlocking agreements between local governments permitting pooling of police and fire-fighting forces." The model act provided that a mayor could request aid in the form of personnel or equipment from another municipality. The municipality receiving aid would accept all liability to damage arising out of acts performed in rendering aid and would reimburse the other city for services rendered. Police and firemen assisting other communities would have the same powers, duties, and immunities as if they were performing their duties within the assisting municipality.[14]

The National Advisory Commission on Civil Disorders suggested that the state government has a duty to integrate local and intercity mutual aid plans into a master state plan:

> California, for example, has a master law enforcement mutual aid plan providing for extensive interjurisdictional support during a natural disaster or riot. A community's request for help in controlling a disorder is first referred to the county. If the county is unable to supply the necessary resources, application is then made to a regional coordinator who draws manpower from local governments within a particular geographical area under his control. If this aid is still inadequate, a request is made to the director of the state disaster office who can then transfer to the riot area resources from any jurisdiction in the state.[15]

The Attorney General is a member of the California State Disaster Council.

State plans could also determine the precise role of the state police and national guard in the disaster or civil disorder. The National District Attorneys Association recommended that:

> a readiness plan should be drafted by the Attorney General's office so that there will be no delay in obtaining state police if requested by the Mayor or Police commissioner. Similar liaison plans should be made [by the Attorney General] with regard for the Governor's office in case the National Guard or regular Army units are needed.[16]

The National Advisory Commission on Civil Disorders found that state police functioned essentially as a highway patrol and were of limited assistance in riot situations.[17] However, Arnold Sagalyn, the Associate Director of Public Safety for the Commission, believed that:

> The necessary riot control reserve forces can be found if we build on existing state police forces in the United States. . . . Moreover, strengthening the state police forces and utilizing them as the riot control reserve would avoid the problems, waste and dangers inherent in special purpose riot control units which are common in many foreign countries.[18]

The National Guard is often utilized in civil disturbances. For instance, in 1968 Guard units were called to riot duty on 107 occasions with a participation of 150,000 men.[19] While actual performances have ranged from exemplary to insufficient, the Guard has played a major role in riot prevention and control. The National Advisory Commission on Civil Disorders believed that the state should take major responsibility in developing riot plans, wherein the Guard must be integrated with other groups:

> The planning process must involve all state and local officials who will be involved in the control operations. It cannot be left solely to the Army and National Guard, nor to the National Guard and police departments.
>
> The lack of adequate communication between the Guard and local agencies has been a problem in nearly all instances where National Guard troops have been utilized to assist in controlling a disorder. Proper planning must insure effective communications among the Guard and appropriate local agencies, particularly the police and fire departments.[20]

Other legal problems surround the use of National Guardsmen: these include their law enforcement powers, and the legal protection afforded. There is no uniformity among the states on these questions, and no indication that the laws have been clarified and modernized where necessary.[21] Model legislation developed by several groups specifies that the Governor may, when sending guard troops on civil disorder duty, confer peace officer powers on some or all of them.[22] The Attorney General is responsible in many states for helping to define these issues. In Ohio, he represented National Guardsmen in wrongful death actions brought against them in their official capacities. At the request of the Governor, he also convened a special grand jury to investigate the circumstances of the deaths, which issued twenty-five indictments.

Under extraordinary circumstances, federal troops might be needed to quell civil disturbances. In a 1967 letter to Governors, Attorney General Ramsey Clark outlined the conditions for using federal troops:

> There are three basic prerequisites to the use of Federal troops in a state in the event of domestic violence:
>
> (1) That a situation of serious 'domestic violence' exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is no prescribed wording.
>
> (2) That such violence cannot be brought under control by the law enforcement resources available to the governor, including local and State police forces and the National Guard. The judgment required here is that there is a definite need for the assistance of Federal troops, taking into account the remaining time needed to move them into action at the scene of violence.
>
> (3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. The element of request by the governor of a State is essential if the legislature cannot be convened. It may be difficult in the context of urban rioting, such as we have seen this summer, to convene the legislature.
>
> These three elements should be expressed in a written communication to the President.

Upon receiving the request from a governor, the President, under the terms of the statute and the historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federalization of the National Guard.[23]

The President ordinarily assumes command over anti-riot forces. Conceivably, federal troops could be placed under a Governor's control, but such a situation is discouraged because it might lead to improper use of federal troops. The President has full authority to decide how long troops shall stay in a locality.[24]

6.43 Legal Issues and Problems

The Attorney General's role in a riot situation will depend on his responsibilities in that state, and on his relationships to other state and local officers. It can be expected at least that he will bear a major burden in advising on the legal issues involved.

An example of concrete assistance to local officers is a bulletin issued in November, 1967, by Attorney General

13. *Id.* at 9.
14. Urban America, *supra* note 10 at 139-40.
15. National Advisory Commission, *supra* note 7 at 285.
16. N.D.A.A., GUIDELINES FOR PROSECUTING CRIMINAL CASES DURING CIVIL DISORDERS, 16 (1968).
17. National Advisory Commission, *supra* note 7 at 27.
18. Arnold Sagalyn, *In Riots, Control is a Numbers Game*, in LAW ENFORCEMENT, SCIENCE AND TECHNOLOGY II at 72.
19. 1970-71 THE BOOK OF THE STATES, 433 (1970).
20. National Advisory Commission, *supra* note 7 at 277.
21. Letter from Col. W. D. McGlasson, Executive Assistant, National Guard Association of the United States, to Attorney General John B. Breckinridge, August 21, 1970.
22. SUGGESTED STATE LEGISLATION, § 5 (d).
23. National Advisory Commission, *supra* note 7 at 292.
24. *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV., 642 (1968).

Richard C. Turner of Iowa. It was directed "to all peace officers and other persons charged with law enforcement" and specified that it was "not intended as a substitute for the advice of your county attorney, who should be consulted, and his recommendations followed, as soon as practicable." The ten-page manual covered the following subjects: (1) What is an unlawful assembly? A riot?; (2) How does one suppress or disperse an unlawful assembly or riot?; (3) What punishment may be imposed on the rioters?; (4) What outside help may be obtained? (5) The Governor as the central authority; (6) Emergency communication procedure.

Emergency Powers

The instigation of emergency powers and the enforcement of those powers with area-wide curfews have been recognized as effective measures in curbing civil disorders. The National Advisory Commission on Civil Disorders recommended emergency legislation for all states to permit such action.

Urban America has designed model legislation concerning the emergency powers of the Governor.[25] The Model Act authorizes the Governor to order state police or highway patrolmen into special service in any area of the state to control civil disorder. He may also order fire or police officers of any municipality into riot-control activities. The Governor would designate the person in command. The cost of their service would be borne by the state, unless they were ordered to service upon request of a municipality. The police and firemen would have the same powers, duties, privileges and immunities as if they were acting in service to their own municipalities.

The model law allows the Governor to proclaim a state of emergency and: (1) establish a curfew; (2) limit movement of persons and vehicles in designated areas; (3) close places of amusement and assembly; (4) prohibit the sale of alcoholic beverages; and (5) control sale and possession of weapons, explosives, and flammable materials. The specific conditions and rules proclaimed in the state of emergency must be adequately communicated to the populace. The Governor may call the National Guard into special service and authorize some or all of its members to exercise the powers of peace officers. He may declare an area to be under martial law and request the President to send troops to reinstate order.

Curfews

Curfews have been recognized as effective in the process of controlling disorders. A comment on the 1968 Chicago riots stated that "[T]he widespread use of . . . the curfew arrest returned control of the city streets exclusively to the police department."[26] A very large portion of persons arrested during these riots were arrested for curfew violations.

Curfews may cover selected areas or an entire city. The National Advisory Commission urged legislation which would permit curfews to be enforced in adjoining cities throughout the entire disorder area. However, it warned against unnecessary use of curfews: "The curfew itself may enable criminal elements to close down a town with minimum effort."[27] A city could unwittingly become an ally to violent groups consciously desiring to disrupt its normal activity. Curfews can also be expensive, because of revenue and wages lost.

Several cases have upheld the constitutionality of curfews but have also

25. Urban America, Inc., ACTION FOR OUR CITIES, 134-138 (1969); included with modifications in Committee on Suggested State Legislation, Council of State Governments, 1970 SUGGESTED STATE LEGISLATION, 101.

26. 36 U. CHI. L. REV., 488 (1968).

27. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 290 (1968).

prescribed conditions of their use. A violator of the Washington, D.C., curfew challenged the vagueness of its language, its lack of notice and specific penalties, and its general constitutionality as a restriction upon personal liberty. The District of Columbia Court of Appeals held that curfews were a "usual" riot control mechanism:

> Unhappily, the nation has witnessed in recent years numerous civil disorders and disturbances in American cities which have increasingly had to resort to curfews to deal with such disorders. Since the curfew has become a usual device employed by municipalities to quell riots, we conclude that the curfew applied here was a usual police regulation.[28]

It concluded that unlimited travel within the city would have materially interfered with the safety and welfare of the citizens. The notice of the curfew was given at 5:15 P.M. and it was imposed at 5:30. The court recognized that an early violator would have a good argument concerning lack of notice, but the litigant was arrested three hours later, a sufficient time.

The curfew proclamation stated only that violation was a misdemeanor. As police regulations carry maximum fines of $300 and this was a violation of a police regulation, the court held the penalty sufficiently precise.

A Milwaukee curfew violator likewise challenged the constitutionality of the regulation and a search which attended his arrest. Attorney General Bronson LaFollette represented the state before the Wisconsin Supreme Court. The court upheld the conviction of the curfew violator for a marijuana possession offense, maintaining that the curfew order which precipitated the violator's arrest was constitutional.[29]

Limiting Public Assembly

A Philadelphia ordinance permitted the mayor to declare a state of emergency under which crowds of over twelve persons, even if peaceful, could be prohibited. There was no procedure to review the decree, and it could last up to two weeks, but the mayor was required to state the reasons for imposition of the state of emergency. It was invoked following incidents of the type which often precede riots. A Pennsylvania Superior Court held that the ordinance was constitutional and that judicial review "rests largely upon a determination of whether Mayoral discretion was abused." The court held that it was not. The U.S. Supreme Court dismissed an appeal in this case for want of a substantial federal question.[30]

State Riot Laws

Every state in the Union has a riot law. These laws deal with disturbances that have already begun. They have not actually been utilized in the major riots to any great degree. Four actions are involved in riot laws: inciting, participating, failing to disperse upon command, or failing to render assistance upon command. Before imposition of riot laws, offenders must be notified that the crowd constitutes a riot. There is no great uniformity among state riot laws as to specific definitions or penalties.

Gerald D. Ducharme and Eugene H. Eickholt of the University of Detroit Law School reviewed the riot laws of all states and made the following recommendations for a model provision: common law distinctions and definitions should be eliminated in favor of the term "mob action." If the action causes serious personal or property injury, it would be "aggravated" riot. Penalties for inciting to riot should be more severe than for merely participating and discretion should be allowed to take into

28. *Glover v. District of Columbia*, 250 A. 2d 556 at 560 (1969).

29. *Ervin v. State*, 41 Wisc. 2d 194, 163 N.W. 2d 207 at 210 (1968).

30. *Commonwealth v. Stotland*, 214 PA. Sup. 35 at 46 (1968); *Stotland v. Commonwealth*, 398 U.S. 916 (1970).

account the intention of the inciter. As a deterrent force, the penalties should be communicated to participants prior to enforcement of the law. It should be a felony to "assault, fire upon, or throw any missile" at enforcement authorities or anyone assisting them. Authorities and assistants should be exempt from liability for their actions.[31]

A 1968 federal law defined a "riot" to be:

> A public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the [same].[32]

Penalties were set for inciting, organizing, or commiting an act of violence in furtherance of a riot. The Act specified that the federal law was not meant to preempt any state law or state action which would otherwise have been valid.

Arrest, Bail and Detention

Various arrest policies have been utilized in civil disorders, including indiscriminate mass arrests, selective arrests of an indiscriminate nature, and selective arrests of major violators. Whatever policy is articulated by the police leadership, there seems to have been a great inconsistency in the application of the policies, especially in the major riots. This seems in part to have resulted from communication problems within police departments during the disorder.[33]

Booking procedures must also be streamlined in a riot situation. The National District Attorneys Association stated:

> The police must be able to process large numbers of arrestees in a short period of time. Stand-by personnel should be available for photographing and fingerprinting arrested persons; procedures must be adopted so that the flow of prisoners is not stopped by a mountain of paperwork; thus, for example, short-form booking should be set up in advance. Use of available police detention facilities must be coordinated with other prison space in the area.[34]

Practices in setting bail have varied considerably among areas undergoing civil disorder. However, a pattern of neglecting the primary rationale of using bail only to guarantee appearance at trial has emerged. Judges have requested higher bail than the accused could raise and amounts have been unrelated to the type of offense committed. One reason for imposing high amounts was to use bonds for detention. These policies imposed extra burdens upon detention facilities and engendered a further distrust of the legal system by ghetto residents. Many had jobs which were jeopardized by their extended stays in jail. Proposals for future mass disturbances include, in the main, adherence to normal bail practices of individual treatment and fair bails set to guarantee reappearance. One study noted that alternatives exist:

> These include: release on conditions that forbid access to certain areas or at certain times; part-time release with a requirement to spend nights in jail; use of surety or peace bonds on a selective basis. In cases where no precautions will suffice trial should be held as soon as possible so that a violator can be adjudicated innocent and released; or found guilty and lawfully confined pending sentencing. Finally special procedures should be set up for expedited bail review by higher courts, so that defendents' rights will not be lost by default.[35]

Regular detention facilities are apt to be swamped during riots and the National District Attorneys Association

31. Gerald Ducharme and Eugene Eickholt, *State Riot Laws: A Proposal*, 45 J. URBAN L. 728 (1968).
32. Pub. L. No. 90-284, 62 Stat. 696.
33. 37 GEO. WASH. L. REV., 998 (1969).
34. N.D.A.A., GUIDELINES FOR PROSECUTING CRIMINAL CASES DURING CIVIL DISORDERS, 14 (1968).
35. F. Philip Colista and Michael Domonkos, *Bail and Civil Disorder*, 45 J. URBAN L. 821 (1968).

has singled out this problem for special attention by the Attorney General. "The state Attorney General's office should be responsible for having emergency detention facilities available in nearby state prisons."[36]

The Role of Counsel

Riot situations demand extraordinary amounts of readily available legal talent. The prosecution, the defense, as well as the judicial functions are expanded considerably at this time. Planning for disorder control should include the accumulation of lists of lawyers who are willing to donate services in such situations.

The National Advisory Commission stated:

> The need for prompt, individual counsel is particularly acute in riot situations. This is because of the range of alternative charges, the severity of penalties that may be imposed in the heat of riot, the inequities that occur where there is mass, indiscriminate processing of arrested persons, and the need for essential information when charges are made by the prosecutor and bail is set. The services of counsel at the earliest stage, preferably at the precinct station, are essential. Provision of effective counsel at an early stage will also protect against a rash of post-conviction challenges and reversals.[37]

The Attorney General can exercise leadership in arranging for such services.

6.44 Student Disorders

Attorneys General may play several critical roles in dealing with campus disruption. As the legal officer of the state, he may be required to defend university and other officials for action they take in quelling disorder. Attorney General Paul W. Brown of Ohio was charged with defending the state in two wrongful death actions. Attorney General Bronson LaFollette of Wisconsin defended the imposition of university regulations in disciplinary actions against students. The Attorney General of many states represents university officials in student disciplinary actions. As the legal advisor to state colleges and universities, he has a responsibility to assure that proceedings and regulations are consistent with due process. Many questions arising from proposed legislation on college disorders will confront an Attorney General, and he may be called upon to defend the legislation in courts.

Student unrest has been a frequent occurrence since the 1964-65 disturbances on the University of California's Berkeley campus. It reached a peak in the spring of 1970, when four hundred institutions were closed following the shooting of four students by National Guardsmen at Kent State University.[38] Economic, as well as academic and social, problems were substantial; for example, it is estimated that intentional damage to college campuses amounted to over $3,000,000 in 1968.[39]

This section briefly reviews the background of student disorders and points to suggested causes and remedies, both within the university structure and within the broader state legal structure.

Rules and Discipline

One of the suggested causes of campus unrest has been the impersonality of the large university. Many students mistrust university officials and feel that they are unable to participate in making rules which affect many private aspects of their lives. If the student can participate in and identify with the administrative decision-making apparatus, he will be more reluctant to attack it. Student participation on various boards is increasing:

> Change during 1969 reflected greater em-

36. The N.D.A.A., *supra* note 16 at 15.
37. National Advisory Commission, *supra* note 7 at 186.
38. *In Strike Aftermath Some Costs Are Calculable*, 48 COLLEGE AND UNIVERSITY BUSINESS, 44 (1970).
39. Carol Vance, *Campus Disorders*, 5 THE PROSECUTOR, 173 (1969).

phasis on student representation in bodies such as governing boards and campus senates. Of the 72 institutions changing the nature of student involvement during 1969, 47 percent added student representatives to governing boards. Of special interest is the fact that students gained such participation through special action of state legislatures of three states. . . . Also, two institutions included students on the board as a result of direct appointment by governors.[40]

Some studies have suggested establishing an ombudsman for students.[41]

Disciplinary proceedings must be conducted by universities if they are to maintain their autonomy as institutions. Students can be disciplined for a wide variety of actions. Many are unrelated to protest activity. However, the manner in which the university conducts disciplinary proceedings has an effect upon the general campus atmosphere. The American Council on Education sponsored a survey of disruption on 382 campuses which indicated that disciplinary practices constituted a protest issue at almost half of those experiencing violent protests in 1968-69.[42]

In the past, disciplinary procedures have not consistently conformed to constitutional guarantees of due process. Rather, they have been part of a system where the university performed *in loco parentis*. Many of these procedures linger on. Jerome H. Skolnick, of the American Bar Foundation, wrote:

> Most of the disciplinary procedures in American universities were developed when students were themselves committed primarily to traditional roles; such procedures were designed to deal with the excesses of student highjinks. . . . a quasi-informal disciplinary body with vague standards and even vaguer procedures could nevertheless command the allegiance of students.
>
> This concept of authority is fast becoming anachronistic in American higher education. In line with the changing character of the university, the basis of the internal legal order of the campus must undergo a difficult and complex transition from the concept of 'discipline' to that of 'due process.'
>
> The development of workable internal mechanisms of order and justice is critical, since the alternative is recurrent outside intervention.[43]

Due process requirements were extended to campus disciplinary procedures in a 1961 case. Six students participated in sit-in demonstrations at a lunch grill over a two-month period. Following an investigation, the State Board of Education voted to expel the students, without placing formal charges or granting them hearings. The U. S. Court of Appeals required the board to give notice and opportunity for hearings before the students could be expelled. The court, however, did not extend rights to a full judicial hearing to the students. The court emphasized that principles of fairness should apply. "Disciplinary rules must not only be fair and reasonable, but they must be applied in a fair and reasonable manner."[44]

Students should have a general understanding of what is and what is not permissible conduct prior to application of disciplinary action. For this reason, the National Commission on the Causes and Prevention of Violence felt that it was essential that codes of conduct should be adopted by all institutions and, if already adopted, they should be reviewed and improved.[45]

A student conduct code must be more than mere admonitions, yet should not be too specific:

> It is probably both impossible and unwise to attempt too detailed a code of prohibited conduct to maintain public order. Detailed inclusion may lead to objections that conduct clearly not conducive to public order has been excluded because it was not specified.[46]

Two federal court cases view the question from opposite perspectives. In *Esteban v. Central Missouri State College*, the U. S. Court of Appeals, Eighth Circuit, held that a college regulation asking students to adhere to "standards of conduct which befit a student" and warning against mass involvement conform to due process requirements. The case involved the appellant's participation in disruptive demonstrations and his refusal to return to his dormitory upon request of a college official. Subsequently, he was suspended from the college.

The court found that the college regulations were not void for vagueness and that they were not "at all difficult to understand." The court said:

> We must assume that Esteban ... can read and that [he] possesses some power of comprehension.... We see little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct. Certainly these regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than specific terms.[47]

A different view was presented by the U. S. District Court of the western district of Wisconsin in a case in which Attorney General Bronson LaFollette argued for the university. *Soglin v. Kauffman* concerned disciplinary proceedings based upon alleged "misconduct" rather than upon violation of any express regulation. Plaintiff students sought to enjoin university disciplinary processes against students who had occupied a university building, intentionally denying its legitimate use by others. The campus police chief ordered the building cleared, but the students did not comply.

The university contended that the acts constituted "misconduct" and a violation of university policies. Wisconsin law gave the regents the power "to confer upon the faculty by by-laws the power to suspend or expel students for misconduct or other cause prescribed in such by-laws." Plaintiffs contended that the term "misconduct" was unconstitutionally vague as was the provision regarding authorized university sponsored activities. The judge concluded that:

> The constitutional doctrines of vagueness and overbreadth are applicable, in some measure, to the standard or standards to be applied by the university in disciplining its students and that a regime in which the term 'misconduct' serves as the sole standard violates the due process clause . . . by reason of its vagueness.[48]

While not granting an overall injunction prior to university action. The judge enjoined the university from using the disruption regulation against the students and also admonished the university not to build its case solely upon the "misconduct" rule.

Enforcement

The procedures by which the code is enforced are equally important. The right to notice and a hearing was established in the *Dixon* case. Other rights which are fundamental in a criminal trial, such as counsel, cross examination and juries, have not yet been extended to college proceedings. The American Bar Association's Commission on Campus Government and Student Dissent offered several recommendations in this regard. First, it maintained that the university should apply rules equally to all students. This does not mean, howev-

40. Ray Muston, *Governing Boards*, 48 COLLEGE AND UNIVERSITY BUSINESS 12 (March, 1970).

41. *See: e.g.*, Luis Kutner, *Habeas Scholastics: An Ombudsman for Academic Due Process—A Proposal*, U. MIAMI L. REV., 23-107 (1968).

42. A. E. Bayer and Alexander Astin, *Violence and Disruption on the U.S. Campus: A Survey Analysis*, POLITICS 70 at 23 (1970).

43. Quoted in *Memorandum on Student Problems*, C. Kenneth Grosse, Assistant Attorney General, State of Washington, May 3, 1970.

44. *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (1961).

45. Grosse, *supra* note 43.

46. John Crary, Jr., *Control of Campus Disorders: A New York Solution*, 34 ALBANY L. REV. 85 (1969).

47. 415 F. 2d 1077 (1969).

48. 295 F. Supp. 978 (W.D. WISC., 1968).

er, that a university is required to refrain from prosecuting some offenders because there are others who cannot be identified or who are not presently being tried for some other valid reason. Secondly, the accused student should be given "timely notice of the specific charge against him." Thirdly, the person trying the facts should be impartial. However, the Commission believed there should be no requirement that the hearing tribunal be composed of any particular segments of the university community.[49]

U. S. Senator William Saxbe wrote while Attorney General of Ohio:

> In the composition of the hearing body some universities have provisions for student membership. Although the inclusion of students in a hearing body finds favor in the old English principle calling for a 'judgement of his peers' as found in the Magna Carta, caution is necessary. As a practical matter these students have a tendency to be harsher and more arbitrary in judgment of their contemporaries, and therefore there should be considered the counterweight of balanced and mature judgment through parallel faculty membership or review.[50]

He further wrote:

> To maintain complete impartiality, no member of the hearing body should be a party to any prior investigation of the case against the student, nor should he be placed in the position of developing or prosecuting the case. If any member is unavoidably involved he should be allowed to disqualify himself.[51]

The A. B. A. Commission recognized that the presence of lawyers may give the hearing an atmosphere of a criminal trial and this would be "unfortunate;" it said, however, the hearing should be recognized as an adversary proceeding where "sanctions of substantial severity" can be imposed upon the student.[52] Attorney General Saxbe, on the other hand, not only recognized the right of the student to have counsel but urged such representation:

> [T]he student should be urged to consult with some faculty member or other student, and if he does not choose to obtain one, the university officials might well consider assigning one in cases where the penalty may be suspension or dismissal. The reason is that the student may not sufficiently comprehend the seriousness of his position by himself to the extent that he may neglect the full exercise of the rights available to him. If a student demands the right to be represented by a lawyer, he should not be denied such right although the lawyer may not be accorded any greater privileges as counsel at the hearing than any other person chosen by or assigned the student.[53]

Assistant Attorney General C. Kenneth Grosse indicated that the Attorney General's office in Washington "will appear for the college and prosecute every case unless other adequate arrangements are made within the context of the code."[54] Fair disciplinary procedures can lessen the burdens upon the Attorney General by lessening student grievances which might spark disruptions and, additionally, by removing causes for suits against colleges.

Recognizing the interdependence of rules of campus discipline and campus disorders, Attorney General Andrew Miller of Virginia called a conference of college officials in June, 1970, to review "existing disciplinary codes to be sure they are not arbitrary, that they will be enforced and that they will not be vulnerable to legal attacks." College administrators from all state supported institutions in Virginia as well as from twenty-four of thirty-three private colleges in the state attended the conference. The Attorney General reviewed Virginia laws pertaining to colleges as well as recent cases. Campus disciplinary proceedings, rights of students to assemble and speech and freedom from

49. A.B.A. Commission, *supra* note 1 at 22-23.
50. William Saxbe, Attorney General, Ohio, *Student Discipline at State Universities*, Office of Attorney General, Columbus, Ohio (August, 1967).
51. *Id.*
52. A.B.A. Commission, *supra* note 1 at 24.
53. Saxbe, *supra* note 50.
54. Grosse, *supra* note 43.

search were discussed by the participants and they were given copies of recent opinions which dealt with the jurisdiction of campus police and searches of dormitories. A model code for student rights formulated by the student division of the A. B. A. was also distributed.

Campus Police

Campus police play an increasingly important role. Their changing nature is exemplified in a recent ad in *The Police Chief* for a supervisor of police for a large campus:

> ...Historically, the police force has had a plant protection rather than law enforcement orientation, but this orientation is to be changed as rapidly as possible....Minimum acceptable qualifications: administrative ability, supervisory ability, knowledge of criminal law and law enforcement, university graduation....[55]

Across the nation, campus security forces have been expanded and are better equipped. Few campuses have given credence to student demands for disarmed police. But campus police are also attempting to provide a better image of authority than has been the case in the past. Many schools have raised educational requirements and give police psychological tests. They also have them work closely with student groups planning rallies and other legitimate activities.[56]

In Georgia, the University campus police force is composed of students working toward a degree. Deputy Assistant Attorney General Wade Mallard reports that:

> It has been our experience that these campus police provide excellent and motivated police services, relate well to the other students and do not tend to overreact to a given situation.

Campus forces are often deputized as special policemen under state statutes, which may give them authority to enforce state laws either on or off campus, or may give them only limited authority. The powers of such police, both on and off campus, should be clarified before crises develop.

The use of outside police on campuses is an unsettled issue. There have been fears that civil police intervention is repressive and damaging to education and that the presence of such police to quell disorder gives rise to greater disorder. Others argue, however, that prompt use of police may minimize disorders.

Actions Against Disruption

A basic question confronting university officials is whether to take criminal action against student disruptors. Where property has been destroyed and physical injury inflicted, officials have no choice but to enforce the criminal law. All states have statutes dealing with criminal trespass and destruction of property.

Campus disturbances such as sit-ins or strikes may pose different problems. The criminal law affords great protection for the accused and its processes are slow. Rights to confront witnesses and rules of evidence compound the difficulties of gaining decisions against the disruptors. The appeals process may be lengthy and higher courts may render decisions on points of law quite apart from the guilt or innocence of the accused.

Civil remedies may be utilized to avoid the problems inherent in criminal actions. The A.B.A. Commission on Campus Government and Student Dissent outlined the advantages of using injunctions:

> An injunction can be narrowly drafted to deal with a specific disturbance with much more precision than a general statute, thus responding more effectively to the disruption while avoiding unduly broad limitations upon freedom of expression. The injunction constitutes a public declaration by the courts of the unlawful nature of the actions taken or threatened by the disrupting stu-

55. 37 THE POLICE CHIEF, 65 (September, 1970).
56. *New York Times*, May 17, 1970 at 68.

dents. The issuance of an injunction may generate a favorable public reaction to the position of the university. It may persuade moderate students to refrain from participating in the disruption. It imposes restraint upon the disrupting students by a non-university governmental entity. Students may obey a court order when they would ignore the orders of a university official. The injunction may provide students with an opportunity to end a disruption without losing face.[57]

The use of the injunction also has the advantage of allowing a cooling-off period since there is no immediate use of police and the courts become the official mediators. The sanctions for violation of injunctions may in many cases be preferable since they are less severe. Contempt citations could often serve as a remedy where criminal proceedings would be considered unnecessary. While courts will not issue injunctions for purely criminal acts, injunctions are issued when civil or property rights are violated which is often the case in campus disorders.[58]

Disadvantages to this approach include: the difficulty of determining the defendants; delays in preparing pleadings; the unavailability of judges after court hours; proper service of the order, and the need to carry the order through to its conclusion, which would include issuing criminal contempt citations.

Certain procedures can compensate for such disadvantages. One is the use of form pleadings. Assistant Attorney General Robert M. Montecucco of Washington prepared a set of form pleadings for distribution at a conference of Western Attorneys General in May, 1970. These included summons, complaints for injunction, motions for temporary restraining order, affidavits in support of motions, certifications of attorneys and temporary restraining orders and orders to show cause. In addition to saving time during campus crises, the use of form pleadings will greatly lessen the chances for legal errors which could negate the opportunities for restoring situations conducive to calm on campus. Once the language in an injunction pleading has been accepted by the courts, the colleges could be assured of the efficacy of action they were taking by using the identical language in further pleadings.

Civil actions for damages also constitute a method for dealing with disorders. This approach permits students and taxpayers to take action if university officials do not.

Attorney General Theodore Sendak filed a complaint in behalf of the state of Indiana against certain officials, trustees, employees and students to recover damages to state-owned property at Indiana State University. Prior to the disturbances, the Attorney General had mailed to each trustee an official opinion outlining the duties of the trustees, officers and faculties of the state universities, including the power to expel or suspend students. The opinion also included a list of Indiana criminal laws "which have conceivably been violated at a number of campuses recently according to the elements reported and recorded in the news media."[59]

Planning

University officials and civil authorities collectively possess a sufficient body of experience with student disorders to negate excuses of unfamiliarity with riot problems. However, action must be taken to bring the body of experience to those that are involved in maintaining order on campuses.

Attorneys General can take the lead in planning for disorders. As noted, the Attorney General of Virginia has sponsored conferences with university officials to discuss disorders.

Ohio Attorney General Paul W. Brown held a two and one-half day seminar for campus police, university administrators, and university attorneys, who are special Assistant Attorneys General. The State Highway Patrol participated in supervising the seminar.

The thirteen separate sessions included talks by experts on:

(1) Organization of militant groups, aims and purposes;

(2) The function of the State Highway Patrol for enforcement of state laws on campus;

(3) Practical considerations learned at the Columbia University disturbances;

(4) Methods of containing and quelling disorders;

(5) Student-administration relations;

(6) Drugs and narcotics on the campus;

(7) Student-campus police confrontations and associated problems;

(8) Jurisdiction and powers of campus police;

(9) Law of arrest, search and seizure;

(10) Enforcement and injunctive action;

(11) Intelligence briefing.

Robert Macklin, Chief Counsel in the Ohio Attorney General's office, commented that the purpose of the seminar was to prepare the institutions for possible student disorder and to standardize instructions. He felt that plans for use of injunctions were particularly effective. He stressed the need for liaison between universities and Attorneys General:

> Continuously updated staff study of the legal aspects of student disorders and intelligent dissemination of resulting information to campus administrators and their legal counsel....
>
> All state entities are in need of intelligence information with regard to the identity and activities of out-of-state radical agitators, and this information should be disseminated liberally. Overly protected intelligence files are of little practical service.[60]

National and state legislators have responded to the challenge of student disorders with a myriad of bills. By the summer of 1970, thirty-two states had enacted such legislation.[61]

Congress led the way with the Higher Education Amendments of 1968, which deny federal aid to students convicted by any court of any crime involving the use of force, disruption of a college, or seizure of college property, or willfully refusing to obey a lawful regulation or order of the institution. Many state laws follow the federal law. For instance, California provides that any student receiving state financial aid will be ineligible for such aid for two years if convicted of taking part in a campus disorder. Similar acts were vetoed in New York, Maryland and Rhode Island.[62]

Much of the new legislation proscribes disorderly or riotous conduct and then indicates sanctions to be applied. Acts also specify that students or faculty involved in disorder shall be dismissed by the institutions.

The Attorney General can play a part in helping to assure that such legislation meets constitutional requirements so that it helps to solve problems, rather than to create additional ones.

6.45 Natural Disasters

Natural disasters evoke many legal questions that may not have previously occurred, yet which require immediate response.

Attorney General A. F. Summer of Mississippi was abruptly confronted with this fact hours after a hurricane ripped into his state. He related:

> By virtue of being on the scene the first day, we were able to have conferences with

57. A.B.A. Commission, *supra* note 1 at 27.

58. Robert Rosenthal, *Injunctive Relief Against Campus Disorders*, 118 PA. L. REV., 746 (1970).

59. Attorney General Theodore L. Sendak, Official Opinion No. 5, May 13, 1969.

60. Letter from Chief Counsel Robert Macklin, to Patton G. Wheeler, July 24, 1970.

61. *New York Times*, June 28, 1970 at 41.

62. The Council of State Governments, 1970-71 THE BOOK OF THE STATES, 315.

municipal and county officials. It became readily apparent to us that many far-reaching and perplexing legal problems were then confronting the State and local governments, the merchants, manufacturers and the private citizens in general.[63]

His experience indicates the Attorney General's potential role as the nexus of both public and private legal efforts to mitigate disaster conditions. Some states recognize this role formally. California, for example, has established a State Disaster Council. The Attorney General is a member of this Council, along with the Lieutenant Governor, and one representative for all city governments, one for county governments, one for the Red Cross, and one for fire departments. The Council serves as an advisory body for the Governor during times of war or disaster, "in order to minimize the effect of such occurrences by recommending appropriate action. In addition, it has the duty to adopt plans for use in the event of such disasters."[64]

The Attorney General bears a great deal of responsibility for furnishing answers to the emergent legal questions. There are not enough lawyers on his staff to do this and he must seek assistance from other public officers and private attorneys. Through the bar association, he can be influential in recruiting lawyers for emergency service. General Summer stated:

> I met with the President, Vice-President and Secretary of the Mississippi State Bar to discuss the problem of providing legal aid to those who needed it.
>
> Lawyers from all over the State volunteered their time. Some came and stayed several weeks, donating their time and services and paying their own expenses.
>
> Legal aid offices were set up at points closest to the people with signs to announce the services. I promised two full-time lawyers from my office to help coordinate their services with the public agencies.[65]

The Attorney General met with county attorneys in the stricken area for a "brain storming" session. He then assigned several of his assistants to begin anticipating the legal problems that might arise. This included review of statutes relating to the powers of local and state governments to act in the situation and determination of which local authorities would be empowered to raise revenue to cope with the disaster. When it was apparent that the law enforcement situation was too big for local authorities, the Attorney General advised the Governor to declare martial law, and prepared the necessary executive order. He helped the Governor draft a daily message to the people of the area explaining the martial law and helped local officials prepare necessary proclamations. As the legislature was in session, he drafted bills to meet immediate problems.

The Mississippi Civil Defense Council issued an "after action" report following the hurricane which indicated that at least twenty-nine separate state agencies participated in the relief effort. These agencies normally dealt with a wide variety of matters. Jurisdictional disputes over the roles of each inevitably emerged, especially when combined with action by local government agencies and private groups such as funeral directors or the Red Cross.[66]

Some agent has to bring these groups together and make sure they coordinate their tasks. Disaster situations make inter-organizational cooperation difficult at best. E. L. Quarantelli, Director of the Disaster Research Center at the Ohio State University, wrote that:

> Difficulties may develop along a second dimension, that of communication between organizations. The reason for potential problems here appears to be twofold. In normal, everyday, routine contact between organizations, much of the interaction proceeds on an informal basis.
>
> Officials will often be talking with known persons, if not friends. When a disaster occurs and there are changes in the organizational structure, the informal basis of communication may not suffice. Contact may have to be established and maintained with unfamiliar individuals occupying official positions in other organizations.
>
> Furthermore, community emergencies typically precipitate relationships between organizations not normally in contact with one another, so that groups have to forge new links with previously unrelated organizations and develop contacts they have not had before the disaster. This is difficult to do, particularly under the pressures of a disaster situation. Communications between organizations will frequently not proceed smoothly under such circumstances.[67]

Arnold Parr added:

> Major problems of inter-organizational coordination and control often arise during the early hours of a community crisis. In addition, there is frequently a very rapid and unexpected increase in organizational demands accompanied by a high degree of organizational impairment.[68]

In Mississippi, some disputes among organizations emerged concerning such matters as release of health reports, burial of bodies, and the evacuation of hospitalized aged persons. The Attorney General rendered on the scene advice on these questions.

Planning and organizational coordination was a major theme of several recommendations by the Mississippi Civil Defense Council:

> (1) There should be a chain of command through the various State Agencies which could be used as a basis of assigning personnel to areas of responsibility for which they are best qualified.
>
> (2) Representatives of all State Agencies should meet at least once every three months with the State Civil Defense Director to discuss disaster operation and resporsibilities as they pertain to their area.
>
> (3) That all State Agencies with an interest in a disaster area should be included in the planning for the redevelopment of the area.
>
> (4) That liaison and/or staff assistance be provided to the public officials of a political subdivision.
>
> (5) That teams should be formed by the various State Agencies which can move into and provide management for the smaller communities affected by a disaster.
>
> (6) That a single office be designated prior to the emergency and be of sufficient space for use by the Governor and his emergency operations staff.
>
> (7) That a planning session be held by the various agencies with an emergency assignment when a disaster is imminent. It is further recommended that this session be closely coordinated with their counterpart in local organizations having related function.[69]

Major disasters usually prompt requests for federal aid. Rare is the state that can survive a major natural disaster and find its financial resources not strained beyond capacity. Federal participation is essential, but the lack of coordination that typifies many state approaches is often exhibited on the federal scene. For example, a report on the Alaska earthquake of 1964 said that sixteen federal agencies were involved by the time rescue and recovery operations were in effect.[70]

Federal relief funds are given only if states can give assurance that the funds will be utilized in such a fashion that the best potential of the region is realized. For this reason, state agencies must be designated for administration. Attorney General Summer suggested that the approach taken in Mississippi be copied elsewhere:

> Because of the enormous legal and financial problems facing Mississippi, the President

63. Speech by Attorney General A. F. Summer, to Midwinter Meeting of the National Association of Attorneys General, Washington, D.C. Feb. 5, 1970.
64. CAL. MIL. & VET. CODE § 1510 (West 1955); and C.O.A.G. Preliminary Questionnaire.
65. Summer, *supra* note 63.
66. MISSISSIPPI CIVIL DEFENSE COUNCIL, AFTER ACTION REPORT: OPERATION CAMILLE AUG. 17 TO SEPT. 7, 1969 (1969).
67. E. Quarantelli *supra* note 5.
68. Arnold Parr, Organization Response and Group Emergence, 13 AM. BEHAVIORAL SCIENTIST 427 (1970).
69. Mississippi, Defense Council *supra* note 66 at 11-12.
70. *Alaska Quake Poses Question of Nation's Disaster Planning*, 29 COUNTY OFFICER 213 (1964).

and the Governor agreed that all subsequent long-range Federal funds for the restoration of public and private properties should be channeled through one agency . . . the Governor by Executive Order established the Governor's Emergency Council to consist of ten outstanding persons from all sections of the State. This agency was created within the Governor's statutory powers, primarily civil defense laws, and its purpose was to formulate and develop plans for affording the maximum benefits to private and local governments with Federal funds made available, and to mobilize every possible resource to restore Mississippi to a tax base and economy superior to that which existed before Camille. My office rendered an opinion on the authority of Governor Williams to create such an agency with broad powers and obvious ultimate effect. The Governor's authority in creating the council was inherent executive power, and the Civil Defense Statute of the State. The President issued an order that all Federal agencies should coordinate their activities through this council and assigned a member of his White House staff as a liaison man to cut the red tape.[71]

Planning, coordination, rendering legal services, and administering relief, are essential in disaster situations and, in all of them, the Attorney General can play a vital role.

71. Summer, *supra* note 63.

6.5 Environmental Control

6.51 Introduction

Environmental control has become a paramount concern of policy makers at all levels of government:

> The great question of the seventies is, shall we surrender to our surroundings, or shall we make our peace with nature and begin to make reparations for the damage we have done to our air, our land and our water?
>
> Restoring nature to its natural state is a cause beyond party and beyond factions. It has become a common cause of all the people of America . . . clean air, clean water, open spaces—these should once again be the birthright of every American. If we act now—they can be.[1]

Recommendations adopted by N.A.A.G. say that the Attorney General should have primary responsibility for enforcement of anti-pollution laws and should create a special section or division of his office to handle environmental matters. This statement recognizes that the current public concern with environmental problems facilitates efforts to secure enactment of strong laws and to enforce them actively. Attorneys General should give pollution control special emphasis in their own offices and through their role as agency counsel.

At the 1970 Winter Meeting, N.A.A.G. adopted a resolution stating that, although environmental quality is a proper concern of the federal government, "The states must retain leadership and authority to establish environmental control standards that may be stricter than those set by the federal government." Interest was reiterated by action at the 1971 Winter Meeting in naming a subcommittee of the Committee on Environmental Control to join with the National District Attorneys Association in working out a coordinated program for environmental protection enforcement efforts.

6.52 Federal Legislation

This Report is concerned with the state Attorneys General's role in pollution control, not with federal programs. Some reference to federal legislation is necessary, however, as it has an increasing impact on state activity. Federal involvement developed initially because of the interstate nature of air and water pollution, whereby one state may suffer from problems which originate in another.

Federal tools can now be applied to such situations. Early in our nation's history it was established that Congress had jurisdiction over commerce on navigable waters. Now the commerce clause of the Constitution is applied to pollution. Sidney Edelman writes that:

> It has long been settled that the necessary and proper clause adds to the basic commerce power of the Congress the power to regulate an instrumentality operating within a single state if its activities burden the flow of commerce among the states . . . While pollution may be purely local in character, if it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.[2]

He suggests that the federal government can apply its enforcement procedures directly against intrastate pollution as well. Even if the injurious effects of the pollution are local, the air currents which carry the pollution are interstate.[3]

Current federal laws rely heavily on the states for enforcement, and call for unilateral federal action only when the problem is clearly of interstate scope or is of emergency proportions. Where

1. President Richard M. Nixon, *State of the Union Message*, January 23, 1970.

2. Sidney Edelman, *Federal Air and Water Control: The Commerce Power to Abate Interstate Pollution*, 33 GEO WASH. L. REV. 1067 (1965).

3. *Id.* at 1086.

federal funding is an essential part of pollution abatement, the constitutional provision that Congress has power to levy taxes to provide for the general welfare may be utilized. The spending power provisions will not sustain federal activity which is primarily regulatory, but facets of activity entailing outlays for construction of abatement facilities and research into abatement procedures can be sustained on this basis.[4]

Water Pollution Control

The most important early federal pollution control law was the Rivers and Harbors Act of 1899.[5] The Act prohibited the creation of any "obstruction" to the navigable waters of the United States unless authorized by Congress. The Act further made it unlawful to discharge "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" into navigable waters. Other early acts treated specific problems. For instance, the Oil Pollution Act of 1924 applied to the sea within the territorial jurisdiction of the United States and to waters which were navigable in fact.

The Federal Water Pollution Control Act[6] of 1948 created a Water Pollution Control Advisory Board in the Department of the Interior. It functions to advise, consult with, and make recommendations to the Secretary on water pollution policy matters. The Act also authorized federal grants to interstate, state and local agencies and to other persons for research, development, and demonstration of waste-treatment facilities. Federal funding under the Act has continued to expand. Planning activities are coordinated on a river basin-wide basis. Fourteen river basin offices operate to help tie together all governmental activities on river pollution in the basin area.

The Act, as amended by the 1965 Water Quality Act, provides for basic federal enforcement procedures and specifies that state abatement actions shall not be superseded by federal activity except in certain circumstances. States are required to adopt water quality standards and a plan for their implementation. If the Secretary of the Interior determines that the state plan is consistent with the purposes of the Act, it is adopted as federal as well as state standards. If the standards are rejected, the Secretary promulgates standards for the waters within the state.

The 1966 Guidelines issued by the Secretary of the Interior, suggested that no standard should be approved which would provide for "less than existing" quality or for the sole or principal use of any stream for transporting waste.[7] After a violation has been discovered the Secretary of the Interior must give the polluters at least 180 days notice before requesting the Attorney General to take action. If the pollution is entirely within one state, the Secretary must have the permission of the Governor before he takes action. Administrative problems have been summarized as: (1) the extent of financing; (2) which institutions for financing will best serve the program; (3) what devices will be used to monitor pollution; (4) what penalties should be levied; and (5) how will overlapping efforts best be coordinated.[8]

The *Yale Law Journal* reports that, as of November, 1969, no federal cases had reached court under the F.W.P.C. Act. That report, however, credits the Act with establishing standards throughout the nation upon which state action could proceed, and upon which private

4. 3 WATER AND WATER RIGHTS, § 103 (1967).
5. 33 U.S.C., § 403, 406, 407, 411.
6. 33 U.S.C. § 466-66; (1964).
7. *See* Gilbert F. White, STRATEGIES OF AMERICAN WATER MANAGEMENT (1969).
8. *Id.*

parties could prosecute successful nuisance actions.[9] The Act also specifies that federal law does not preempt state actions against common law nuisances. Moreover, many 180-day notices have been given to large industries, as the first step in correcting major abuses.[10]

A 1970 Act increases the powers of the federal government to deal with oil pollution from any vessel upon navigable waters of the United States. Provisions also regulate sewage disposal from vessels. The Secretary of the Interior is authorized to enter into agreements with states or interstate agencies for projects demonstrating the economic and technical feasibility of eliminating acid and other mine waters resulting from active or inactive mines. Demonstration grants are provided for projects to clean up the Great Lakes.[11]

Air Pollution Control

Concern for unobstructed and clean water led to federal legislation as early as 1899, but the federal role in air pollution abatement was not initiated until a half century later. The Federal Air Pollution Control Law of 1955 authorized the Surgeon General of the Public Health Service to "prepare or recommend research programs for devising and developing methods for eliminating or reducing air pollution"[12] and to make the results of studies available to state and local governments. He was also empowered to study any pollution problem confronting a state or local government if it requested him so to do.[13] Funds were appropriated to the Department of Health, Education and Welfare for research.

In 1956, Congress empowered an interstate sanitation commission created by New York, New Jersey and Connecticut to study smoke and air pollution in that tri-state area.[14] The 1959 Congress extended provisions of the Federal Air Pollution Control Law until 1964 and declared it to be the intent of Congress that all federal agencies should cooperate in pollution control.[15] In 1960, Congress authorized the Surgeon General to make a study of the effects of automobile exhaust upon health.[16] In 1962, Congress further extended the 1955 law and authorized the Surgeon General to study the substances discharged in automobile exhaust.[17]

The above acts represented the federal effort to control air pollution prior to 1963. Reliance for enforcement of abatement was placed entirely in the hands of the state and local governments and with very few exceptions these jurisdictions failed to take any action. By 1963, the pollution problem had grown much worse and action toward abatement was very limited. Only fifteen states had real control programs by 1963. One writer decried the fact that rurally-dominated legislatures did not worry about urban pollution, while cities adopted instead a "go slow" approach so as not to antagonize manufacturers.[18]

In 1963, Congress passed legislation which accelerated research and expanded the federal role in air pollution abatement.[19] The Act provided financial incentives for the operation of local programs; at least eighty local air pollution programs were created and forty others strengthened. If the air pollution was of an interstate nature,

9. Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE L. J., 102, 106 (1969).
10. Interview with Theodore Rogowski, Assistant Solicitor, U. S. Department of the Interior, in Washington, D. C., June 2, 1970.
11. 33 U.S.C.A., § 1151 *et seq.* (1964 Supp. 1970).
12. 42 U.S.C.A., § 1857 (1964).
13. 14 U.S.C., § 654 (1964).
14. Pub. L. No. 84-946 (1956).
15. 42 U.S.C.A., § 1857d (1964).
16. 42 U.S.C.A., § 1857 (1964).
17. 42 U.S.C.A., § 1857d (1964).
18. Charles Schaeffer, *Politics of Air Pollution*, NATION, 421 (May, 1963).
19. Air Pollution Control Act of 1963, 42 U.S.C.A., § 1857 *et seq.*

the Secretary of H.E.W., at the request of a state not the originator of the pollution, would notify officials in the source state of the problem. The Secretary would convene a conference to make recommendations. If no action was taken after six months, a board would again examine the evidence and make recommendations. The Secretary could again order the polluters to comply. If there was no compliance, the Attorney General was authorized to bring suit, at the request of the Secretary of H.E.W. As one reviewer of the Act noted:

> the course of the proceedings is entirely beyond the control of the complaining state, lying within the discretion of the Secretary at every stage. Moreover, the various time periods written into the statute establish a theoretical minimum of one year and six months from the date of the complaint to the initiation of the judicial process; a more realistic estimated minimum time lag would be two years.[20]

If the problem was intrastate, the same procedure was generally followed, except that suit could not be initiated without a request from the Governor.

The federal Act was inadequate overall for three basic reasons:

(1) There were no standards established for industry; uncertain of future acceptable levels of pollution output, manufacturers were not motivated to control themselves.

(2) There were delays before action could be taken by federal authorities. A three-week notice preceded the original conference; another six months followed his recommendation before he could go to the hearing board. The action of the hearing board was followed by an additional six months before the Attorney General could take the polluter to court. Even then, there was no assurance that the action would be given precedence on the court docket, and that the court would not grant further delays. Administrative action in the first case to go to court began in November, 1965 and court action was not closed until May, 1970, four and one-half years later.[21]

(3) No federal action could be taken to abate an intrastate problem if the Governor did not desire such abatement.

In 1965, the Clean Air Act[22] was amended to authorize standards for automobile pollution control. Experience had demonstrated that the individual automobile was responsible for a major share of air pollution and some states had begun to prepare legislation to control the problem. Manufacturers, realizing the difficulty they would have if they had to comply with fifty separate sets of regulations, urged the passage of uniform federal standards.[23] The Secretary of H.E.W. set automobile emission standards for 1968 and future models. The standards did not affect older cars, and no inspection programs were set.

The Air Quality Act of 1967[24] was intended to correct these weaknesses. It required the Department of Health, Education and Welfare to define air quality control regions and to issue standards for each region. After designation of the region and receipt of D.H.E.W. publications on air quality criteria and control technology, a state has a certain period of time in which to set standards for quality and to file an enforcement plan. If a state fails to file or its plan is inadequate, D.H.E.W. may set standards, after holding conferences and hearings as required by law. Under certain circumstances, D.H.E.W. may proceed with enforce-

20. Lewis C.Green, *State Control of Interstate Air Pollution*, XXXIII LAW AND CONTEMPORARY PROBLEMS, 319 (1968).

21. *U.S. v. Bishop Processing Co.*, 423 F. 2d 469 (4th Cir.), *cert. denied* 398 U.S. 904 (1970).

22. Clean Air Act of 1965, 42 U.S.C.A., § 1857 *et seq.*

23. James Marshall, THE AIR WE LIVE IN, 75 (1968).

24. 42 U.S.C.A., § 1857; *see also* Robert Martin and Lloyd Symington, *A Guide to the Air Quality Act of 1967*, 33 LAW AND CONTEMPORARY PROBLEMS, 239 (1968).

ment, but it is primarily a state responsibility. Planning funds were made available to a single agency in each state, as designated by the Governor. Up to two-thirds of the cost of developing or improving programs and one-half the cost of maintaining them was to be assumed by the federal government. Provision was made for funding of interstate planning and states could also qualify for funds to develop automobile emission devices and inspection programs.

No attempt can be made here to provide even an adequate summary of the 1967 Act. The federal law, however, increased state responsibilities rather than diminishing them. The National Air Pollution Control Commission was responsible for designating regions, but the states were to develop quality standards. The fact that only twelve abatement actions were initiated by federal authorities between 1965 and 1970 also indicates that air pollution control remains primarily a state and local responsibility.[25] The Act has been criticized for not clearly defining federal authority to promulgate standards applicable to individual industrial plants.[26]

The Clean Air Act was amended in 1970[27] to strengthen federal authority. The amendments made the following changes:

(1) extended funding for research and planning through 1973;

(2) authorized the Secretary of H.E.W. to inspect and test automobiles coming off production lines to assure that they are properly equipped with pollution control devices;

(3) provided for the establishment of standards for fuels and allowed prohibition of the manufacture or sale of fuels that are injurious;

(4) provided for setting national ambient air quality standards. The states are required to follow the standards and to design plans to implement them. The implementation plans may include emission standards, provisions for intergovernmental cooperation, and provisions for updating in case national standards are altered;

(5) authorized the Secretary to set stationary source standards if emissions contribute substantially to endangering public health and welfare and can be prevented or substantially reduced, and to regulate new source performance standards;

(6) if air quality falls below standards, and state or interstate control agencies do not take corrective action, the Secretary, upon notice and after a 30-day waiting period, may request the U.S. Attorney General to institute a suit in the appropriate district court to enjoin the polluter.

Environmental Protection Agency

The 1969 National Environmental Policy Act was designed to assure that the federal government would not, through the activity of its agencies, contribute to a lessening in the quality of the environment. A Council of Environmental Quality was created in the Executive Office of the president to review federal activities and to make recommendations.[28] This Council was subsequently designated as the Office of Environmental Quality under the Environmental Quality Improvement Act.[29]

The Act provided that federal agencies would insure the use of natural and social sciences in making plans and decisions which might have an impact on the environment. They would also include in every major federal action which would significantly affect the en-

25. Center for the Study of Responsive Law, TASK FORCE REPORT ON AIR POLLUTION, VI-9 (1970).

26. Green, *supra* note 20 at 315, 320.

27. 42 U.S.C.A., § 1857 *as amended* by 84 Stat. 1676.

28. 42 U.S.C.A., § 4331 *et seq.*

29. 42 U.S.C.A., § 4371, *et seq.* (1964, Supp. Sept. 1970).

vironment a detailed statement by responsible officials on its environmental impact.

In December, 1970, an executive order was issued which consolidated responsibility for environmental control into a single agency.[30] All environmental functions, responsibilities and authority were transferred from the Department of the Interior and the Department of Health, Education and Welfare to a new Environmental Protection Agency. Five offices were established in the new agency: Water Quality, Air Pollution Control, Pesticide, Radiation, and Solid Wastes. There are four Assistant Administrators, for Planning and Management, Standards and Enforcement, Field Coordination, and Research and Monitoring. Ten regional offices were established, using the same regions as are used for other federal programs. William D. Ruckelshaus, Administrator of the E.P.A., pointed out to a February, 1971, meeting of the N.A.A.G. Committee on Environmental Control that the regional offices will serve as contact centers for state and federal environmental protection efforts.

6.53 Common Law Actions

The C.O.A.G. draft report on environmental control which was released in June, 1970, contained a discussion of common law actions and remedies. That discussion is omitted from this Report, which is limited to the Attorney General's role in pollution control.

The draft report pointed out that the primary common law grounds for action against polluters are nuisance, trespass, negligence and liability. It noted that courts have in some cases "balanced the equities", or related the harmful effects of the particular operation to its beneficial effects. In other cases, however, courts have denied such balancing tests in favor of stopping pollution. A third approach has been to require that the polluter install the most effective pollution control equipment consistent with the existing state-of-the-art. Orlando Delogu points out that:

> This compromise takes the form of granting damages for past injury and, though not issuing an injunction, ordering the polluter to install equipment or take other measures designed to minimize the future air polluting effects of his activities. If this approach to the problem were more widely used, the nuisance action might become a more effective pollution control mechanism.[31]

Private Actions

While recognizing the necessity for legislation, many authorities feel that the efforts to deal effectively with pollution must involve private as well as public action.

The American Trial Lawyers Association has created an Environmental Law Committee. The Association writes editorially:

> . . . the most effective and, most important, presently available factor for immediate action is the common law. Trial lawyers brought the actions, processed the cases, and handled the appeals which established the strict liability of manufacturers in the field of defective products, and, in so doing, provided a strong incentive for manufacturers to make safe products.
>
> Similarly, we can make it more expensive and more burdensome for those who would pollute our air and degrade our streams and defile our lands.
>
> Only imaginative legal action on the part of the general public in class actions for declaratory judgments and injunctive relief will get the story told and lay the matter before the conscience of the community in a form where the conflict can be resolved and evidence tested in cross examination . . . Litigation seems the only rational way to focus the attention of our legislators on the basic problems of human existence.[32]

30. Reorganization Plan 3 of 1970, 35 Fed. Reg. 15623 (1970).

31. Orlando Delogu, *Legal Aspects of Air Pollution Control and Proposed State Legislation for Such Control*, 1969 WISC. L. REV. 884.

32. Editorial, TRIAL (August, 1969).

Professor J. C. Juergensmeyer points out that assertion of private rights has control consequences in it that leads to injunctions against future pollution or to damages from polluters. This can make pollution such an expensive proposition that industry is economically motivated to correct its abuses.[33] Other attorneys suggest that private action can proceed on the basis of the trust principle when public lands are affected by pollution; the public has a right in such lands and, consequently, has a property right in clean water and air. If the courts recognize such public rights in lands, actions can be brought against persons or government agencies disturbing those rights. They also suggest that a variety of private actions be used, such as cases charging lung damage to pollution.[34]

While a variety of approaches may be available under the common law to individuals, there are practical limitations. Litigation is expensive and the cost stems from the difficulty of proving the source or sources responsible for a particular injury, among existing sources of pollution.[35] In today's urban environments, injuries usually result from a combination of contaminants, rather than one polluter. It has also been noted that nuisance remedies were designed for local application at a time when the source of pollution could be readily determined. Now, pollution is seldom strictly local, and abatement procedures may be of little benefit.[36]

Objective and uniform standards for environmental control cannot be developed and applied through such an uneven mechanism as litigation. They must be established by legislative and administrative action, not judicial decisions. Courts are not generally able to render action quickly. Several years may elapse between the time action is brought and a final verdict is rendered. Finally, there is a great need for research into pollution control and this requires positive action by private and public agencies, not court decisions.

Pollution control laws may specify that private actions are not prohibited. Oregon's air pollution law created administrative machinery for control, but specified that it did not "prevent the maintenance of actions or suits relating to private or public nuisances brought by any other person."[37] South Carolina's air and water pollution control act specifies that "nothing herein contained shall abridge or alter rights of action in the civil courts or remedies existing in equity or under common law or in statutory law . . ."[38] Indiana's law, however, did not contain such a provision. While the State Board of Health, which administers the law, holds that private parties may proceed under the common law, the courts have not so ruled.[39]

Colorado statutes specify that:

> The basis for proceedings or other actions that shall result from violations of any standards inure solely to and shall be for the benefit of the people of the state generally and it is not intended to create in any way new or enlarged private rights or to enlarge existing private rights, or to diminish private rights . . . Nothing in this article contained shall abridge or alter rights of action or remedies now or hereafter existing nor shall any provision of this article . . . be construed as estopping individuals, . . . the state or duly constituted political subdivisions thereof from the exercise of their respective rights to suppress nuisances.[40]

33. Julian C. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L. J. 1126.

34. See Bernard S. Cohen, *Legal Defense of Environmental Rights*, TRIAL 27 (August, 1969); Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). Paul Rheingold, *Lawsuits as Social Action*, TRIAL, 11 (October, 1966).

35. Rogers and Sidney Edelman, *Air Pollution Control Legislation*, 2 AIR POLLUTION 428 (1962).

36. Sidney Edelman, THE LAW OF AIR POLLUTION CONTROL, 4 (1970).

37. ORE. REV. STAT., § 449.280.

38. 1970 S.C. Acts, No. 1157, § 27.

39. Anita Morse and Julian C. Juergensmeyer, *Air Pollution Control in Indiana*, 2 VALPARISO L. REV. 296 (1968).

40. COL. REV. STAT., § 66-29-16.

Such provisions preserve the rights of public officers and private citizens to proceed against pollution, and assure that new legislation enlarges, rather then restricts, existing remedies.

Legislation can be either beneficial or detrimental to common law actions. If a private party can demonstrate that the nuisance or trespass he complains of not only caused injury to him, but also violated a legislative standard for quality, his opportunities for recovery are greatly improved. Technical control manuals may go beyond legislation in defining for courts, as well as for industry, what is the state-of-the-art in a particular industry. Conversely, the fact that legislation has committed a problem to the authority of a particular administrative agency may make courts less receptive to private actions.

The Attorney General's Role

Section 1.33 of this Report analyzes the Attorneys General's common law powers and points out the wide variation in the extent to which these powers have been recognized. Section 1.34 discusses the common law power to prevent air and water pollution, noting that the Attorney General's authority to abate such nuisances has been recognized for almost a century. This authority, however, is subject to continuing revision by both judicial and legislative action.

C.O.A.G. questionnaires indicate little environmental control activity based primarily on the Attorney General's common law powers. Iowa reports that the Attorney General is engaged in a common law action alleging that certain transmission lines and poles interfere with the plan of the Capital building and constitute an aesthetic nuisance. Missouri's Attorney General filed a petition to intervene in a private suit to enjoin construction of a charcoal plant on the grounds that it will constitute a public nuisance.[41] His petition is based on his common law powers. Michigan reports that the Attorney General has utilized his common law authority to abate nuisances in a number of cases involving environmental problems.

Idaho's Attorney General's office has suggested using the common law doctrine of *parens patriae* as a basis for action against polluters:

> The individual citizen, although damaged either directly or indirectly by injury to a state's environment, is without adequate funds and/or motivation to pursue such a suit against major industry. The Attorney General of the individual states initiating a parens patriae claim is, therefore, clearly the most appropriate method of dealing with the problem.
>
> This claim, additionally, obviates the need for what could not help but prove to be a rather cumbersome class action. Thus, absent enabling legislation, it is suggested that a parens patriae suit would be a proper method for a state attorney general to enter into the vital area of environmental control.[42]

The Attorney General's common law power to abate a nuisance has been made statutory in many states. For example, Utah's statutes say:

> Whenever in the opinion of the Governor any person is maintaining a public nuisance . . . he may direct the attorney general to institute action in the name of the state to abate such nuisance.[43]

Illinois law requires the Public Service Commission to report to the Governor every nuisance committed in violation of the water pollution act and say that "Thereupon the governor shall cause the attorney general to institute proceedings."[44] Wisconsin's Attorney General has been held by the Supreme Court of that state to have no common law powers. The statutes, however, provide that he may on his own initiative commence an action to abate a public nuisance.[45]

In California, the Attorney General's common law powers were curtailed by a 1963 decision which held that the legislature, in enacting a comprehensive scheme of regulation, had pre-empted his common law powers over water pollution. Subsequent legislation, however, expressly restored the Attorney General's common law authority in both water and air pollution control.[46] Maryland reports to C.O.A.G. that the common law action to enjoin a nuisance has been incorporated into the statutes governing both air and water pollution. It is noted that a court proceeding is instituted to enforce an administrative order only when voluntary compliance is not obtained.

In Illinois, the effect of legislation on common law is considered beneficial.[47] The Attorney General has statutory authority to bring suits seeking either injunctive relief or a writ of mandamus in any circuit court in cases where pollution had occurred or was about to occur, regardless of whether any administrative agency was involved. A 1969 statute gave him strong authority:

> The Attorney General has the power and authority, notwithstanding and regardless of any proceeding instituted or to be instituted by or before the Air Pollution Control Board, Sanitary Water Board or any other administrative agency, to prevent air pollution or water pollution within this State by commencing an action or proceeding in the circuit court of any county in which such pollution has been, or is about to be, caused or has occurred, in order to have such pollution stopped or prevented either by mandamus or injunction. The court shall specify a time, not exceeding 21 days after the service of the copy of the petition of mandamus or injunction for answer, and in the meantime the party shall be restrained from continuing such pollution pending hearing before the court.

A study co-authored by two Kansas Assistant Attorneys General concluded that the Attorney General not only had the power to bring an injunction action, but could bring a damage action to protect state property and recover on behalf of the state losses caused by pollution in the form of public nuisances. The authors say that: "A suit for damages might be the only effective remedy available to the state should an action in abatement be commenced after the real damage has occurred."[48]

6.54 State Legislation

Despite increasing federal participation in environmental control, the states continue to have primary responsibility in this area. All states have anti-pollution laws, most of which preceded federal legislation.

Legal Basis for State Action

At common law, air contaminants were not considered to be a nuisance *per se*. It was necessary to prove in each case that the pollution was offensive and that it affected a large number of persons. Early legislation, notably municipal ordinances, had the effect of defining pollution as a nuisance.

The courts have applied common law principles to legislation, but have been primarily concerned with whether the laws are a valid exercise of police power. For example, in upholding a Missouri statute on air pollution the Supreme Court of the state declared that:

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41. Suggestions in support of motion to intervene in case of *Adams v. Horner*, Circuit Court of Taney County, Missouri, submitted February 6, 1970, by Attorney General John C. Danforth.
42. Memorandum from Assistant Attorney General Richard Greener to Attorney General Robert M. Robson of Idaho, May 28, 1970.
43. UTAH CODE ANN., § 76-43-7 (1954).
44. ILL. REV. STAT., ch. 100, § 2 (1969).
45. WISC. STAT. § 280.02.
46. *People v. New Penn. Mines, Inc.*, 212 Cal. App. 2d 367 (1963); CAL. WATER CODE § 1002 (c); ch. 73, 1970 STATS.
47. ILL. STAT., Public Act 76-205 (1969); Letter from Assistant Attorney General Henry H. Caldwell, Chief, Air-Water Pollution Control Division, Illinois Office of Attorney General, to Patton G. Wheeler, June 4, 1970.
48. Edward G. Collister, Jr., Richard F. Hayes; and William R. Sampson. *Legal Muscle for the Fight Against Pollution*, 9 WASHBURN L. J. 342 (1970).

The power of the General Assembly to pass all needful laws, except when restricted by the state or federal constitution, is plenary, and the Legislature has the power to declare places or practices to the detriment of public interest, or to the injury of the health, morals, or welfare of the community, public nuisances, although not such at common law. The General Assembly, in the exercise of the police power, may declare that a nuisance which before was not a nuisance.[49]

Early statutes and ordinances dealt with dense smoke. Subjective standards had to be utilized to determine the extent of the pollution, until an instrument for measuring the density of smoke, the Ringelinum Scale, was developed. A 1916 case upheld a city ordinance which prescribed limits of density based upon the Scale, even though it required the remodeling of practically all the furnaces in the city:

So far as the federal constitution is concerned we have no doubt the state may by itself, or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interest, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance.[50]

This case firmly established the right of cities and states to impose reasonable regulations on the emission of dense smoke injurious to the common welfare. Although no fixed rule can be cited for determining reasonableness, Harold Kennedy, representing the Los Angeles Air Pollution Control District, asserted that:

If any set of facts may be supposed as to which a law or ordinance is reasonable, and if reasonable minds may differ on the question, the enactment will be sustained . . . Where the ordinance or statute passes this test, a naked violation of the ordinance is all that need be shown.[51]

Legislation may remove elements of proof essential in nuisance actions, notably demonstrations of injury, and may attack abuses that individually were so minor as to escape nuisance penalties, yet which contribute to a major pollution problem.

Constitutional Provisions

State legislation in Michigan rests on an explicit provision of the 1963 constitution:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.[52]

Other states are considering constitutional amendments which would firmly establish public rights to control pollution. The Hawaii Legislature considered an amendment "to express the right of the people to preserve environmental quality." Arizona proposed a constitutional amendment that would guarantee to each person a fundamental right to a healthful environment and would provide that violators of that right would be enjoined or held liable for damages.[53]

Model state legislation for both air and water pollution control has been available to the states for several years. These model laws provide a basis for considering issues involved in any state legislation.

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49. *State v. Tower*, 185 Mo. 79 at 91 (1904).
50. *North Western Laundry v. Des Moines*, 239 U.S. 486 (1916).
51. Harold Kennedy, Fifty Years of Air Pollution Law, paper presented at the 50th Annual Meeting of The Air Pollution Control Association, St. Louis, Missouri, June 2-6, 1957.
52. CONST. OF MICH., Art 4, § 52 (1963).
53. The Council of State Governments, *Special Report on Environmental Legislation* (March 16, 1970).

Model Acts

The Model State Air Pollution Control Act was adopted by the Committee of State Officials on Suggested State Legislation in 1966. National Air Pollution Control Administration has offered commentary on the Model.[54] Air pollution is defined as "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is or tends to be injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or property." This definition is broad enough to allow preventive action, before injury results.

Several alternatives for administration are provided. One consists of a board representating various interests, public and private. Another places authority in the department of health. Another provides a commission composed of the heads of the department of health, commerce, labor, conservation and agriculture and two other members appointed by the Governor. A fourth alternative includes the department heads and five other commission members, one of whom is a physician, other representatives of industry and local agencies, a professional engineer, and one member at-large.

The Commission has power to hold hearings, secure scientific information, gain access to emissions data, prepare comprehensive plans, set ambient air standards, and advise other governmental units and interested persons. The Act provides for the classification of contaminants and a system for certifying new construction. The Commission may require installation of certain equipment to lessen the likelihood of pollution.

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54. Committee of State Officials on Suggested State Legislation, The Council of State Governments, *State Air Pollution Control Act*, 1967 SUGGESTED STATE LEGISLATION.

N.A.P.C.A. would provide instead that the Commission: (1) "may prohibit the installation, alteration, or use of any machine, equipment, device, or other article which is intended primarily to prevent or control the emission of air pollutants, unless a permit therefor has been obtained;" (2) "may require that applications for such permits shall be accompanied by plans, specifications, and such other information as it deems necessary;" (3) "shall provide for the issuance, suspension, revocation, and renewal of any permits which it may require."

The Model Act provides for inspection of premises where a contaminant source is located. It also permits the establishment of emission control requirements and establishes enforcement procedures. Notices of violations are followed by hearings only if requested by the alleged violators. Emergency orders may be issued and hearings held within twenty-four hours of such orders.

The Model Act authorizes applications for variance. N.A.P.C.A. disagrees, arguing that:

Although variances will be appropriate from time to time, the law should contain standards or guidelines to restrict the number and duration of variances. (The variance provision should operate continuously as an instrument for improving control measures through surveillance of effects to ready the requirements imposed by the law or regulations pursuant to law.) Otherwise, variances can quickly degenerate into a crutch for those who eventually could comply with the law if pressed to do so. The law should make abundantly clear that variances are not a mechanism for maintaining the status quo.

Judicial review is provided, and the confidentiality of records is established. Local programs are provided for, and procedures for handling funds established. Penalties are set for noncompliance with the Act.

The Public Health Service has prepared a Suggested State Water

Pollution Control Act.[55] Pollution is defined as:

> contamination, or other alteration of the physical, chemical or biological properties of any water of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the State as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

Pollution is declared to be a public nuisance. A control board is created, including heads of departments concerned with health, agriculture, conservation, fish and game and commerce, plus four citizens appointed by the Governor. It appoints an executive secretary who shall be fully "trained and experienced in water pollution control," and is authorized to retain counsel.

The boards' duties include the development of comprehensive prevention and abatement programs, administering federal grants, encouraging research, disseminating information, promulgating water quality standards and other rules. It may issue orders or permits to prohibit or abate pollution. It may hold hearings and take testimony under oath. It may adopt standards, after holding hearings. If standards are violated, a complaint will be served and corrective action will be ordered. Appeal to the courts is provided. The Attorney General, on the request of the board, has the duty to bring an action for an injunction. Injunctions will be issued without the necessity of showing a lack of adequate remedy at law if it is demonstrated that the Act is being violated. It is specified that the Act does not restrict existing rights or remedies.

55. Printed in Emmett Clark, 3 WATER AND WATER RIGHTS, § 233.2 (1967).

State Laws

Many types of legislation are involved in environmental control. All jurisdictions have laws concerning water and air pollution control. All regulate solid waste disposal. An increasing number regulate the use of pesticides. Those with substantial mining operations regulate reclamation of mining land, while many of the coastal states have enacted laws to regulate the special problems of the coastal zone. Some have or are considering laws to regulate noise pollution. States regulate the oil and gas industries to prevent waste and spills. Radiation and nuclear control is regulated by the law of many states. While an analysis of state laws is beyond the scope of this Report, some particular provisions are examined subsequently as they relate to the Attorney General's role in enforcement.

Some current trends in environmental control laws should be noted. Since 1968, at least eight states combined pollution control agencies into a single agency. These were Delaware, Florida, Maryland, Minnesota, New Jersey, North Carolina, South Carolina, and Washington.[56] Some states have broadened their statutory definition of pollution to include the presence of contaminants without proof of injury. Virginia, for example, amended its air pollution law in 1970 to declare it the Commonwealth's policy to achieve and maintain such levels of air quality as will protect human health, welfare, and safety, prevent injury to plant and animal life and property, foster the comfort and convenience of the people and their enjoyment of life.[57] The Air Pollution Control Board is charged not only with enforcement of standards, but in maintaining present quality in any region which has an air quality superior

56. *See:* The Council of State Governments, THE BOOK OF THE STATES 1968-69, 441; THE BOOK OF THE STATES 1970-71, 462-466.

57. VA. CODE ANN., § 10-17.10 *et seq.*

to the standards.

In 1969, Maine enacted a law requiring a permit from the Environmental Improvement Commission before construction or operation of a development which may substantially affect local environment.[58] The Commission consists of ten members appointed by the Governor with the consent of the Executive Council.

Federal law requires that federal agencies consider the effect of their actions on environmental problems and some states are taking similar action. Virginia's 1970 legislature requested the Governor to direct department heads to report on their contribution to pollution. The Governor appointed an environmental council of state agency heads to coordinate state activities in this regard. California's Governor has designated the major state agencies involved in environmental control as a State Environmental Policy Committee for the purpose of establishing and implementing a long-range program and priorities. An Executive order in Pennsylvania directed all agency heads to abate and prevent environmental pollution. Many states note on C.O.A.G. questionnaires that state agencies are subject to pollution control laws, as are private parties. Nevada's Attorney General's office reported that agencies with environmental responsibilities joined together, at the Governor's request, to study their needs and propose legislation. Concerned persons and agencies outside of state government were invited to join the committee and close cooperation with legislators was maintained.

Some states have special bond issues for environmental matters. The Pennsylvania Constitution authorizes the Commonwealth to issue bonds of up to $500 million for a Land and Water Conservation and Reclamation Fund to be used for reclaiming mining lands, acquiring and developing recreational lands, constructing sewage plants, and related purposes. An additional $70 million in bonds is authorized to acquire lands for conservation, recreation, and historical purposes. Wisconsin recently approved a $200 million bond program for conservation, some $144 of which was for water pollution control.

Continuing review of statutes and administration is necessary to meet developing problems. Massachusetts, for example, notes:

> . . . the increasingly harmful effects of noise pollution. A quick examination of our laws shows us that we do not have the adequate legal tools or standards with which to engage and join this new battle. We are in process of contacting various specialists in this field for advice by way of preparation for filling legislation. In addition, the areas of thermal pollution and radioactivity are being discussed with the appropriate agencies to determine future requirements.[59]

58. 38 ME. REV. STAT. ANN., § 481-488.

59. Health, Education and Welfare Division of the Office of the Attorney General of Massachusetts, *Report-Pollution, 1969-1970.* (mimeo: no date).

6.55 Administration and Enforcement

Enforcement of pollution control laws at the state level will be by the Attorney General unless the control agencies have their own counsel. Table 5.15 lists agencies which employ their own counsel in each state.

Traditionally, a new board or commission has been created each time a new pollution control law was passed. Georgia, for example, has a Water Quality Control Board, a Board of Health, and a Coastal Marshlands Protection Agency, each with environmental responsibilities. Idaho reports that the State Department of Health, the Air Pollution Control Commission, the Department of Agriculture and the Water Resources Board are concerned with pollution control. Iowa lists five

separate councils or commissions which are concerned with environmental control.

The current trend is toward consolidating these functions. In Delaware, for example, responsibility for environmental matters is being centralized in the Department of Natural Resources and Environmental Control. Mississippi has an Air and Water Pollution Control Commission. South Carolina created a Pollution Control Authority which will be an autonomous agency. New Jersey, in 1970, created a Department of Environmental Protection, which assumed the regulatory responsibilities of the Department of Health and the Department of Conservation relating to pollution control and conservation. In 1970 Washington combined various environmental control activities into a Department of Ecology. In each instance, the Attorney General is counsel for the agency and institutes enforcement proceedings. One survey found that, in the 1967-1969 biennium, six states created consolidated conservation agencies. A department of natural resources was established in Colorado, Florida, Maryland and Wisconsin. California created a Resources Agency and Massachusetts an Office of Environmental Affairs.[60]

Enforcement Provisions

The effectiveness of laws depends on their enforcement. Authorities differ as to whether civil or criminal penalties are preferable.

Harold Kennedy favors the criminal penalty, pointing out that it gives a local plant manager a persuasive argument with which to convince his superiors that they should make funds available to comply with the law. He criticizes civil remedies, specifically injunctions:

> The injunction is a fine legal tool for many purposes. It is still the 'big gun' when one is dealing with a large and continuous violation. As a basic or sole remedy to defeat air pollution, we have found it to be almost useless. The chief defect in this remedy is that it takes too long. The period between the decision to file and the entry of a final judgment is seldom less than a year, and often is much longer. In the meantime, the process has been changed, or the control system altered. The plant may have changed hands. The result is that little is accomplished, compared with the energy and money expended.
>
> The conclusion to be drawn from these factors is that any effective rule must rest finally upon a possible criminal penalty. Ordinances usually provide for such a penalty. If 'administrative' rules are employed, then basic legislation may have to be secured to provide for the criminal penalty.[61]

Another expert, Alexander Kovel, advocates the use of civil penalties. He says that "A whole range of civil penalties are available, most of them indistinguishable in force from their criminal counterparts, which are easier to apply, and are very much more appropriate to the character of the offense." He believes that juries are unwilling to place the stigma of moral blame that accompanies criminal guilt upon a polluter. "We may regret that the moral sense of the community is not sufficiently developed to consider pollution morally wrong, but until then there is little sense in unnecessarily handicapping regulatory efforts."[62]

Civil actions have certain procedural advantages. Pleading is simpler than in criminal action and there is no necessity to show probable cause. Pretrial hearings need not be held. There are no venue requirements; suit can be brought

60. The Council of State Governments, STATE EXECUTIVE REORGANIZATION 1967-69, RM-473, 13 (1969).

61. Harold Kennedy, *The Mechanics of Legislative and Regulatory Action*, Speech before the National Conference on Air Pollution, Washington, D.C., December 11, 1962.

62. Alexander Kovel, *A Case for Civil Penalties: Air Pollution Control*, 46 J. URBAN L. 153-5 (1969).

whenever the defendant can be served. If the defendant is absent in a civil suit, a default judgment can be rendered. Certain constitutional protections for the accused in criminal trials are not available for the civil defendant. His right to a jury and to confront witnesses are more limited in a civil case. Depositions may be taken, and expert witnesses need not come to court. A preponderance of the evidence will suffice for a verdict rather than proof beyond all reasonable doubt. The civil defendant does not have an appeal by right. Whereas the government cannot appeal criminal verdicts, it is permitted to appeal adverse rulings in civil cases.

A civil action cannot be predicated upon the notion of punishing the defendant. Rather, it must proceed on the basis of regulating a practice which the government has authority to regulate. The government must demonstrate that the verdict it asks is reasonable in order to accomplish the regulatory purpose desired.

Another type of regulatory action is a permit system. The model state air pollution control act provides for a form of a permit system by requiring that all new construction must be approved as to pollution control plans. N.A.P.C.A. suggested a more complex permit system which would apply to existing as well as new facilities. Jerome Sax commented affirmatively upon the permit provision of the model state water pollution control act:

> Potentially one of the most effective techniques for control of water pollution is a permit system, under which discharges of wastes into any waters of the state are prohibited except as permitted by the agency after examination of plans, specifications and other data. Through this means the agency can either prohibit discharges altogether or condition their approval on treatment adequate to protect legitimate water uses.[63]

Harold W. Kennedy writes that experience in Los Angeles County has clearly shown that the most effective and positive weapon in the arsenal of air pollution control officers is the power to grant or deny permits.[64] Probably no serious urban air pollution problem can be effectively dealt with on a continuing basis without some sort of licensing system. The effect of such a program is to prevent air pollution, in contrast to some of the other approaches which seek by injunction or prosecution to cure existing emissions. When it is properly applied, such a program should eventually bring under the scrutiny of the air pollution engineers each source of contamination and each control device. This is considered preferable to litigation.

The thirty-nine jurisdictions reporting to C.O.A.G. all indicate that they can institute civil action against polluters and that injunctive relief may be obtained. Criminal sanctions are not available in all jurisdictions. Sixteen reported that imprisonment is a possible penalty. Kansas is the only jurisdiction to specify that a business license may be revoked.

Time Involved in Actions

Jurisdictions report generally that environmental cases must await their turn on court dockets. The time required to dispose of a typical case varies considerably. Colorado says that most are disposed of in nine months; Maine says that it may take up to a year; Missouri reports that from a year to a year and a half may be required; and Pennsylvania indicates that up to two years may be required to dispose of a pollution case.

Illinois, on the other hand, reports that it can usually move to an early hearing in its environmental cases. Tennessee says that on a show-cause order a case can be disposed of within six weeks. New Jersey's Governor has statutory authority to proclaim an air pollution emergency and to order

63. Jerome Sax, WATER LAW, 296 (1965).

64. Kennedy, *supra* note 60.

cessation of certain activities. The California Disaster Act provides for the declaration of a "state of extreme emergency" by the Governor in the event of severe air pollution.

Suggestions have been made that specialized courts be created to deal with environmental problems. This would allow faster action and would allow the judges to develop expertise in the special problems involved. The Illinois Attorney General's office reports to C.O.A.G. that it informally asks the chief judge of the county to consider assigning pollution matters to selected judges who are familiar with similar cases. The development of judicial expertise in pollution cases has been encouraged in New Jersey by the filing of most environmental suits before one of the state's eleven chancery judges. Missouri reports to C.O.A.G. that the case load is probably not sufficient to justify a separate court, because most violators comply voluntarily. It says further that temporary restraining orders have always been granted when requested.

Questionnaire data indicate that emergency procedures are available in California, Colorado, Delaware, Georgia, Idaho, Illinois, Maryland, Missouri, Montana, Pennsylvania, Puerto Rico, South Carolina, Utah, Vermont, Virginia, and Wyoming. They are not available in Arizona, Arkansas, Maine, Mississippi, and Nevada. New Jersey reports that air pollution control suits are heard summarily on order to show cause and most are disposed of within a month. New Jersey also has an Emergency Control Act which empowers the Governor to proclaim an air pollution emergency and order the cessation of a wide variety of activities.

Hearing Procedures

The model pollution control acts provide for hearings that generally incorporate adversary procedures, with testimony taken under oath and a verbatim transcript made.

All reporting jurisdictions, except Vermont and New Jersey, specify that hearings are held prior to filing of changes on pollution matters. In New Jersey, administrative orders may issue upon a determination by the Department of Environmental Protection of a violation of certain air pollution laws; other laws require a preliminary hearing. According to information furnished on questionnaires to C.O.A.G., court room rules of evidence are followed generally in Georgia, Iowa and Washington. In Colorado, Mississippi, Missouri, and South Dakota, the rules are followed in a lenient fashion, and they are not required to be followed in Delaware. In Arizona, Maryland, South Carolina, and Virginia, administrative law procedures are followed. Guam, Illinois, Maine, Montana, New Jersey, Pennsylvania, Puerto Rico, and Tennessee report that their hearings do not follow court room rules of evidence. Puerto Rico explains that, in the absence of any statutory requirement that the rules of evidence be observed, "the trend is to admit all relevant and useful evidence."

Idaho says that hearings are held after administrative abatement orders are issued if the party to whom the order is directed so requests. It notes that admissibility of evidence and other matters are governed by the state's general administrative procedures law; this is undoubtedly true of environmental hearings in other jurisdictions.

Fifteen states report that testimony is taken under oath: Arizona, Colorado, Delaware, Idaho, Iowa, Mississippi, Missouri, New Jersey, Nevada, Pennsylvania, South Dakota, South Carolina, Tennessee, Virginia, and Washington. Illinois reports that testimony under oath is "not necessary." Maine and Puerto Rico report that there is no testimony under oath. Montana "usually" requires testimony under oath.

Staff and Budget

Of thirty-nine reporting Attorneys General, four said that their office had a separate appropriation for pollution control. There was some indication however, that the appropriation was actually to the control agencies, rather than to the Attorney General's office, so these data are not considered reliable.

All but three reporting jurisdictions indicated that members of Attorneys General's staffs spent some time on environmental control. Arkansas, Guam and Puerto Rico indicated that no attorneys were assigned to environmental matters. The number of Attorneys assigned full-time (F.T.) or part time (P.T.) to environmental control in other jurisdictions is shown below:

TABLE 6.551 ATTORNEYS ASSIGNED TO POLLUTION CONTROL

State	F.T.	P.T.
Arizona		2
California	30	
Colorado		1
Delaware		1
Georgia		5
Idaho		1
Illinois	15	
Iowa	1	1
Kansas		1
Kentucky		1
Maine	2	
Maryland		10
Massachusetts	2	2
Michigan	6	
Minnesota	9	10
Mississippi		1
Missouri	1	2
Montana		1
Nevada		1
New Jersey	7	
New Mexico		1
North Carolina	1	1
Ohio	1	1
Oregon	1	1
Pennsylvania		7
South Carolina		3
South Dakota		1
Tennessee		1
Texas		7
Utah		2
Vermont	2	
Virginia	2	
Washington	3	
Wisconsin	3	
Wyoming		1

Of the thirty-eight states reporting, sixteen have attorneys assigned full-time to environmental control. California notes that of a total legal staff of about 270, approximately thirty can be characterized as spending full time on environmental matters, and a number also work in the environmental area on a part-time basis.

Some Attorneys General have set up special sections or divisions for environmental matters. Attorney General Louis J. Lefkowitz of New York established a division to review public complaints against polluters and to investigate, attempt to mediate, and to prosecute directly if necessary.[65] Attorney General Fred Speaker of Pennsylvania set up a Pollution Strike Force of young attorneys, who were given six months leave of absence from the private firms by which they were employed. They worked solely with pollution matters, under the direct supervision of the Attorney General.[66]

Attorney General Douglas Head of Minnesota created a special task force on pollution in his office, and wrote to the state's law schools to solicit student assistance in writing briefs and doing research. Wisconsin's Attorney General initiated a program called Students to Oppose Pollution (S.T.O.P.). About twenty-five college students, some with advanced degrees, were hired to investigate citizens complaints about pollution and report to a team of assistant Attorneys General.

In addition to regular members of the Attorney General's staff who are assigned to pollution matters, Wisconsin has an Assistant Attorney General who is designated as public intervenor. The statutes provide that the intervenor shall, on his own or at the request of any legislative committee, formally intervene in all such proceedings where such in-

65. *New York Times*, April 18, 1970.

66. Interview with Attorney General Fred Speaker in Harrisburg, Pennsylvania, September 22, 1970.

tervention is needed for the protection of "public right" in water and other natural resources"[67] Personnel at the Department of Natural Resources must make investigations upon his request and personnel of all state agencies must cooperate in carrying out his intervention functions. Formal intervention is by filing a statement to that effect with the examinor or other person immediately in charge of the proceeding. This unique arrangement not only dramatizes environmental problems, but allows for initiative that is not available in an Attorney General's normal role as counsel.

Number of Actions

Information obtained from the C.O.A.G. questionnaires on the number of environmental control cases filed in each jurisdiction for 1969 is not all complete nor in comparable form. It does, however, give some indication of the extent of Attorneys General's activity in this area. It should be kept in mind that only a fraction of anti-pollution activity reaches the stage of court action. As the Connecticut Department of Agriculture and Natural Resources reported:

> A good indication of the level of cooperation which has been experienced is the number of public hearings requested by municipalities and industrial or private polluters. There have been only 106 of these out of a total of 830 orders. Of this total, final determinations have been made in 80 cases. Again, just 6 of this number decided to appeal the decision of the Water Resources Commission to the courts and 3 of these were subsequently dropped. There has been 1 decision in the remaining cases, and this was favorable to the Water Resources Commission. One of the other cases will probably be settled out of court in the very near future.[68]

The following jurisdictions reported to C.O.A.G. that no cases were filed in 1969: Delaware, Guam, Idaho, Kansas, New Mexico, North Carolina, South Dakota, Washington, and Wyoming. Three of these, however, indicated that action was planned. Arizona and Maine reported that the Attorney General had brought actions, but that the number was not available. Utah reports that many actions were filed by local agencies, but that figures are not available. Arkansas and Mississippi each reported that a local prosecutor had brought an action, but that the Attorney General had not. Nevada said that three cases were filed by citizens, but none by public officials.

Data from the other jurisdictions is given below, as reported to C.O.A.G.

California. Approximately twenty-five actions have been filed, or will soon be filed, in the environmental field by the Attorney General. Many other cases are filed by local governments and by private citizens.

Colorado. Two air and three water pollution cases were filed and twenty air and eighteen water pollution hearings were held. Additionally, Denver filed one hundred air pollution cases and five water pollution cases.

Georgia. Of the thirteen cases turned over to the Attorney General's office in 1969, injunctive action was filed in one. Polluters complied with the board's order after hearings in two cases, complied after suit was threatened in seven cases, and legal action was probable in the remaining three cases.

Illinois. From September, 1969 to May, 1970, the Attorney General filed thirty cases under his own authority and eighteen cases as attorney for administrative boards.

Iowa. Five cases were filed before the Water Pollution Control Commission by the Attorney General.

Kentucky. Two court actions were filed by the Attorney General. The legal staff of the respective control agencies held thirteen administrative hearings and forty informal conferences.

Maryland. Nine air pollution and three water pollution court cases were filed or continued. There were 277 administrative enforcement actions concerning water pollution and six hearings and considerable informal negotiations concerning air pollution. All of the actions were filed by the Attorney General.

Michigan. There have been approximately eighty-five to one hundred cases, most of them filed by the Attorney General on behalf of the people or on behalf of state agencies.

Minnesota. Records are not kept, but approximately ten cases were heard in a six-months period.

Missouri. The Attorney General filed four cases during the year at the request of the State Air Conservation Commission. The office also participated in one abatement appeal, three variance applications and six pre-hearing abatement meetings. Two water pollution cases were pending.

Montana. The Attorney General filed one injunction case. Some private cases were filed.

New Jersey. The office of Attorney General prosecuted approximately two hundred water, air, and solid waste court actions in 1969, as well as one hundred and twenty administrative hearings on behalf of state agencies.

Ohio. The Attorney General had filed five cases within the year.

Oregon. Three decisions were rendered by the Appeals Court concerning environmental control in the past year, but the number of actions in other courts is not known.

Pennsylvania. The Department of Health referred 179 cases concerning environmental control to the Department of Justice in 1969 for enforcement action. Additionally, numerous criminal actions were initiated by regional staff of the Department of Health.

Puerto Rico. One case was filed.

South Carolina. The Attorney General has two court actions pending. A local citizens council had filed two court actions within the year.

Tennessee. The Attorney General had filed two suits in the year.

Vermont. The Attorney General had filed about one hundred cases; others had been filed by local government representatives.

Virginia. The Air Pollution Control Board was considering action. The State Water Control Board conducted numerous hearings in 1969 and filed three cases. In the first half of 1970, it had conducted a number of hearings and filed two suits.

Wisconsin. The Attorney General's office had filed about 150 cases in the past three years, virtually all of which were handled through a consent decree and fined. No other officer files such actions on behalf of the state.

Some Attorneys General are filing *amici curiae* briefs in environment cases. Idaho, Illinois, Maryland, and Pennsylvania reported that they had filed briefs in a Minnesota federal court case, which concerns the licensing of a power project by the Atomic Energy Commission, and Missouri and Vermont were considering such briefs. Fifteen states joined in a suit charging automobile manufacturers with conspiring to delay and obstruct development of pollution control devices. The Attorney General of California has joined as *amicus curiae* in a number of California cases involving such issues as tidelands easement, oil drilling platforms and public access to beaches.

Education Programs

Pollution control efforts will not be successful unless they are firmly supported by public opinion. A C.O.A.G. survey of thirty-eight Attorneys General showed that twenty-one thought the Attorney General should develop public education programs in environmental control. Thirty out of thirty-nine thought that he should take leadership in developing legislative programs in this area. Seventeen of the thirty-nine jurisdictions returning the C.O.A.G. environmental control questionnaire,

67. WISC. STAT., § 165.07.

68. Connecticut Department of Agriculture and Natural Resources, News Release, March, 1970.

however, said that the Attorney General was not involved in any public information efforts concerning the environment.

Other jurisdictions generally confine such efforts to speaking engagements for civic groups or educational institutions. For instance, Illinois reports speeches at educational institutions from primary grades up to the university level. Missouri indicated that the Attorney General participated in college environmental teach-ins. Illinois also mentioned alerting the public through press coverage of law suits filed. The Oregon Attorney General has coordinated a conference on environmental problems for leaders in the State. Vermont, through an organization called the Vermont Environment Center, Inc., appears to have an active public information program, with seminars, conferences and hearings. Texas indicates that, in addition to speaking engagements, a manual on the environment is being prepared at the University of Texas for use by local government officials.

Interstate Cooperation

Pollution is not confined to the borders of any one state and would seem, therefore, a logical subject for interstate compacts. Recently, there have been a number of interstate developments concerning environmental quality.[69] An example is the New England Interstate Water Pollution Control Commission, established about twenty years ago by six states. The compact provides for setting of standards for interstate water bodies which are then enforced by the individual states. The Commission has recently acquired additional power to certify treatment plant personnel and some member states have enacted statutes to give it limited enforcement authority.

The great majority of states responding to C.O.A.G.'s questionnaire listed interstate compacts to which they are a party. Most of these concerned water quality, like the Ohio River Valley Water Sanitation Compact, to which eight states belong, and the Great Lakes Commission, also with eight member states. Some states list a number of such memberships; Pennsylvania, for example, lists seven, all concerned with water quality.

Such commissions may be multipurpose. The Interstate Sanitation Commission to which New York, New Jersey and Connecticut belong, for example, was originally formed to combat water pollution, but expanded its activities to include air pollution problems.

The Committee on Suggested State Legislation of the Council of State Governments has published a Model Air Pollution Control Agreement.[70] This would establish a committee, consisting of the heads of the states' pollution control agencies, to coordinate interstate activities and to render advice and assistance. Such an agreement would presumably not require Congressional consent, as does a compact. Problems in obtaining such consent have limited the effectiveness of compacts, although federal legislation encourages interstate cooperation in pollution control.

69. *See:* Frederick L. Zimmerman and Mitchel Wendell, *Interstate Compacts*, THE BOOK OF THE STATES 1970-71, 252-255.

70. Committee of State Officials on Suggested State Legislation, The Council of State Governments, 1970 SUGGESTED STATE LEGISLATION, 186.

6.6 Consumer Protection

Consumer protection has generated more interest among Attorneys General in recent years than any other single area of activity. The National Association of Attorneys General recommends that each state's consumer protection agency should be located in the Attorney General's office. It also recommends that the agency should be adequately staffed and funded, and should have adequate statutory authority. Even a decade ago, responsibility for consumer protection might not have been so recognized.

The C.O.A.G. staff prepared a questionnaire on consumer protection for each of the fifty-four Attorney General's offices. Forty-six jurisdictions returned them. Unless otherwise cited, all data in this report came from these questionnaires or from other information furnished by Attorneys General's offices.

6.61 The Attorney General's Role

The Attorney General has exercised leadership in initiating the consumer protection programs of most states, and continues to do so. C.O.A.G.'s survey showed that thirty-one of thirty-eight Attorneys General believed that the state's consumer protection activities should be primarily under their jurisdiction. Thirty-five thought that the Attorney General should take leadership in developing legislative programs concerning consumer protection and thirty thought that he should develop public educational programs in this area. This contrasts with a C.O.A.G. survey of former Attorneys General, of whom sixty-nine said that the state's consumer protection activities should be primarily under the Attorney General and thirty-nine said they should not.[1]

1. Committee on the Office of Attorney General, FORMER ATTORNEYS GENERAL ANALYZE THE OFFICE, 15 (September, 1970).

Senator Warren Magnusen defined the problems facing today's consumer in his book *The Dark Side of the Market Place:*

> Our concepts of consumer protection, though rapidly changing, have not yet caught up with the twentieth century. Our laws, our government regulatory agencies, our self-regulation by business itself—in short, our total approach to consumer problems—have not been modernized to cope with the recent explosion in consumer buying and credit and the changing conditions in technology and marketing. Most regrettable, that ruthless medieval philosophy "caveat emptor" is in some instances still too much with us.[2]

Caveat emptor was a valid concept when the consumer and seller were on a face-to-face basis. The consumer understood the nature of the product he was buying and could realistically evaluate it. He could always find another supplier were the price or quality not acceptable. If the purchase proved defective, he could seek out his supplier and demand an equitable adjustment. The practical economics of today's marketplace make such dealings as archaic as the cracker barrel. A prospective buyer cannot squeeze a cracker box to determine the freshness of the contents, nor can he smell a canned peach. The housewife cannot fathom the complexity of credit arrangements nor evaluate the electronic components of her household appliances. With today's marketing concepts, the advantage moves to the seller in most transactions.

These problems exist even with honest merchants. The dishonest merchant who sells and runs and employs the weapons furnished him by established concepts of negotiable paper complicates the plight of the modern consumer. The white-collar offenses of price-fixing and unjustified utility

2. Warren Magnusen and T. Carper, THE DARK SIDE OF THE MARKET PLACE, ix (1968).

rate increases also victimize the consumer.

During the last decade, there has been a great growth in state programs and legislation to protect the consumer. New laws have been enacted and earlier statutes have been brought to bear on problems of consumer fraud and deceptive business practices. The long-established concept of requiring an individual to obtain a license before engaging in certain occupations is being reevaluated in the consumer protection context. Common law fraud statutes and remedies such as class actions and multiple damage suits are being reconsidered.

Attorneys General have taken the lead in creating consumer protection agencies and in pressing for enabling laws. Where they are unable to secure specific legislation, they have used such measures as lottery laws and printer's ink laws to combat practices unknown to those laws' authors. They have sought specific statutory powers to allow them to deal with such practices as referral selling, deceptive advertising, bait and switch sales and the setting back of automobile odometers. Certain provisions of the Uniform Commercial Code and the newly-promulgated Uniform Consumer Credit Code have been used to benefit the consuming public.

Alternative legislative approaches are described subsequently. Because this is an ever-changing area, there is no single "best" approach. Even those jurisdictions which have enacted strong legislation will need to review it constantly in light of its administrative effectiveness and in light of other states' experience. Review is also necessary to handle new and infinitely more subtle consumer fraud schemes as they appear.

The C.O.A.G. recommended that a strong consumer protection agency be established under the Attorney General. In addition, however, it recommended that the Attorney General should be empowered to file any action he deems necessary to protect the public interest, as a class action if necessary, and, subject to approval of the court after due notice and hearing, to effectuate settlements binding upon the parties and the class. This latter recommendation involves questions that still have not been settled by legislative action in most states.

Initiating Activities Without Specific Statutory Authority

Although a legislative mandate is certainly desirable, much can be done through administrative action. A Wisconsin study discussed various proposals that had been introduced in the 1968 legislature and concluded that "although the impetus for expanding consumer protection activities was not carried through by the enactment of these bills, some of these proposals have been transformed into administrative rules, Attorney General's opinions or procedures of the departments".[3] For example, the Department of Agriculture had promulgated comprehensive rules regulating the freezer meat and home improvement industries. The Attorney General had issued an opinion on referral sales which declared some of these plans illegal under the state lottery laws. The Attorney General had also successfully prosecuted a retail store for charging usurious interest rates under public nuisance laws. These and other examples show the possibilities for action without specific statutory direction.

New York is recognized as a pioneer in the field of consumer protection activities. Attorney General Louis J. Lefkowitz initiated action against consumer frauds in 1957, utilizing existing statutes which permitted him to seek injunctions against partnerships or unincorporated associations which committed persistent acts of fraud or illegality, and to annul the charter of a corporation under certain conditions, including the conduct of business in a persistently fraudulent or illegal manner.[4]

3. Wisconsin Legislative Reference Bureau, CONSUMER PROTECTION BY THE STATE OF WISCONSIN, Informational Bulletin 68-5, 9 (August, 1968).

Armed primarily with these two civil law provisions, the Attorney General started a program aimed at full exercise of these powers and of his basic common law powers to combat widespread consumer frauds. He also worked for the passage of legislation to strengthen his program. A 1958 statute allowed injunctions against bait advertising and another law allowed injunctive proceedings against individuals as well as corporations for "repeated fraudulent or illegal acts", "persistent fraud" or "unconscionable acts".

By 1969, the New York consumer protection agency was serving more than 100,000 consumers annually and effecting annual recoveries in excess of $1,000,000 for aggrieved consumers "through adjustment of purchases, refunds on goods and services and in helping the consumer to get full value for his dollar." Subsequent legislation includes 1970 acts which allow him to obtain injunctions against deceptive practices and to receive restitution.[5]

The Attorneys General of Michigan, Missouri, Ohio, New Mexico, Pennsylvania, Texas and North Carolina are others who started active consumer protection programs without specific legislation. Some now have legislation, but the practical experience and forward impetus achieved while working under less formal authority contributed immeasurably to the effectiveness of the new statutes. Making it apparent that there was wide-spread consumer fraud activity undoubtedly aided in obtaining passage of a consumer protection Act.

Attorney General Lefkowitz has advocated that states wishing to undertake active consumer protection programs do so under their common law powers, rather than wait for legislation:

> I feel that all of you, whether by decision or otherwise, do possess common law power. In my opinion, you act as the people's lawyer. You are the protector of the public. And I think . . . if you have difficulty getting statutory authority, it is worth the chance to exercise it [common law power] on the ground that you are acting for the people and in the interest of the public . . .[6]

Kentucky and North Carolina are among the states where a consumer protection program was started by Attorney General's directive. In neither of these two states can it be said conclusively that the Attorney General has effective common law power, but apparently his power to establish such a program was not challenged. Rather, Kentucky's then-Attorney General noted in 1966 that "as soon as we showed interest in this field of activity, we found that not only did we have the fundamental law, but also the important thing, the big stick of public opinion and the business community."[7]

Interstate Cooperation

The National Association of Attorneys General has taken an interest in consumer protection for many years, and has had a standing committee on the subject. In 1969, N.A.A.G. held two workshops on consumer protection, to afford members of Attorneys General's staffs a chance to acquire in-depth information on the subject.

The Midwest Conference of Attorneys General has pioneered in developing effective interstate cooperation in consumer protection. The Conference consists of Illinois, Iowa, Indiana, Kansas,

4. Attorney General Louis Lefkowitz, *Consumer Protection—Meeting the Challenge*, 4 NEW ENG. L. REV. 67 (1969).

5. Bureau of National Affairs, ANTITRUST AND TRADE REGULATION REPORT, A-24 (March 17, 1970).

6. N.A.A.G., 1967 CONFERENCE OF ATTORNEYS GENERAL, 77.

7. N.A.A.G., 1966 CONFERENCE OF ATTORNEYS GENERAL, 66.

Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin, each of which has an Assistant Attorney General who devotes at least some of his time to consumer protection activities. In 1969, it formed a Consumer Protection Committee which meets during the annual Conference of the Midwest Attorneys General. The Committee trys to have an additional fly-in meeting during the year.

The Committee implemented an information exchange program in which half the Midwestern offices now participate. Each participating state is to send directly to each of the others the following information within a week of its issuance: (1) copies of all lawsuits filed; (2) copies of all injunctions obtained; (3) copies of all news releases issued; (4) copies of all monthly or annual reports issued; (5) specific reports naming companies and individuals under investigation for consumer fraud which might be operating in other states. Assistant Attorney General Douglas R. Carlson of Iowa reports that:

> . . . although still in the beginning stages this information exchange program has proved to be very valuable. In several instances lawsuits initiated by one state have led to similar consumer protection suits being started in another state using the form of action and authorities already developed by the other state. Also, in several cases, direct cooperation between consumer protection personnel has led to the quick exchange of information in regard to deceptive companies moving into other midwestern states and a number of companies were stopped before they started.[8]

It is to be anticipated that exchange of information among Attorneys General's offices, on both a formal and informal basis, will accelerate in other regions as well.

6.62 Legislation

Consumer protection can involve many types of statutes. To illustrate the wide range of laws with consumer protection applications, a Florida legislative study committee recommended revision of the following statutes: redefinition of false advertising; revision of packaging and labeling laws; a complete study of trading stamps; increasing vocational training in auto and appliance repairs; strict licensing of mechanics and repairmen; requiring full disclosure of all limitations on warranties; specific prohibition of odometer settings; regulation of "give-away-games"; statutory definition of "free" vacations; revision of auction laws; requiring a cooling-off period for door-to-door sales; prohibition of unfair practices in franchise operations; provision for full disclosure in condominium sales; study of the mobile home industry; thorough study of consumer credit and laws; strengthening the public service commission; control of hazardous substances; inspection of seafood; redefinition of charitable organizations; regulation of non-public schools; authorization of class actions and award of punitive damages; a program of consumer education; creation of a consumer protection agency; and establishment of a standing legislative committee.[9] All of these could be considered as consumer protection laws.

Uniform and Model Laws

Many states have enacted or considered enacting at least some of the various model acts that have been developed which relate to consumer protection. These include: The Unfair Trade Practices and Consumer Protection Law developed by the Federal Trade Commission and adopted by the Committee of State Officials on Suggested State Legislation; the Uniform Deceptive Trade Practices Act and the Uniform Consumer Sales Practices Act, both promulgated by the the National Conference of Commissioners on Uniform State Laws; the Uniform Commercial Code, which has some application to consumer protection, and the Uniform Consumer Credit Code, both promulgated by the Commissioners on Uniform State Laws. These models have been carefully developed and most have been enacted in enough jurisdictions to offer some guide to their practical effect.

Table 6.62 shows the type of consumer protection statute in each jurisdiction that has such laws, and the location of the enforcement authority.

Model Unfair Trade Practices and Consumer Protection Law

The Committee on Suggested State Legislation of the Council of State Governments has recommended a Model Unfair Trade Practices and Consumer Protection Law.[10] It was originally published in 1967 and was amended in 1969 and 1970. The model law was initially developed by the Federal Trade Commission.

The act offers three alternative forms for Section 2, which defines unlawful practices. Alternative Form No. 1 is usually termed a "Little F.T.C." act, as it prohibits use of those "unfair methods of competition and unfair or deceptive acts or practices" which are prohibited in interstate commerce by the Federal Trade Commission Act. This approach is favored by the F.T.C. and has been adopted by Hawaii, Maine, Massachusetts, North Carolina, Vermont, and Washington. This is a far-reaching law which:

> . . .enables the enforcement official to reach not only deceptive practices which prey upon consumers, but also unfair methods which injure competition. This form will reach price-fixing arrangements, boycotts by suppliers, coercion of retailers, and other trade restraints which tend to create monopoly and enhance prices.[11]

For states which have sufficient legislation to deal with anticompetitive practices, Alternative Form No. 2 is suggested by the Committee. It declares that "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." This alternative is similar to the consumer fraud laws of several states which enable the Attorneys General to investigate and obtain court injunctions against fraudulent and deceptive selling practices. Such laws have been enacted in Arizona, Delaware, Illinois, Iowa, Kansas, Maryland (but without subpoena power), Minnesota, Missouri, New Jersey, and North Dakota.

The third alternative, which is called a deceptive trade practices act (D.T.P.A.), prohibits thirteen specific practices. Twelve of these correspond to practices prohibited in the Uniform Deceptive Trade Practices Act promulgated in 1964, which applies only to private persons. The thirteenth practice, added in 1969, prohibits "any other act or practice which is unfair or deceptive to the consumer." Rhode Island enacted this language in 1970. *Suggested State Legislation* notes that Alternative No. 3 "is somewhat narrower in scope than the language of either Alternative No. 1 or Alternative No. 2."

A sizeable number of states have legislation of this type, authorizing investigative and enforcement action by a public official to prevent specific practices. These include Colorado, Connecticut, Florida, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia. There are many variations as to the practices specified, the scope of any "catch-all" phrase which exists, and the Attorney General's enforcement powers. In addition to a specified list of practices, Pennsylvania proscribes "any other fraudulent conduct which creates a likelihood of confusion or misunderstanding." Alaska's 1970 law prohibits

8. Letter from Assistant Attorney General Douglas R. Carlson to Patton G. Wheeler, January 18, 1971.

9. Florida Joint Senate-House Committee, CONSUMER PROTECTION IN FLORIDA, 61 (March, 1970).

10. The Council of State Governments, 1970 SUGGESTED STATE LEGISLATION, 141.

11. *Id.* at 142.

	Enforcement Authority	Type of Law and Date
Alabama	(no special program)	
Alaska	Attorney General	D.T.P.A. (1970)
Arizona	Attorney General	Consumer Fraud (1967)
Arkansas	Attorney General	
California	Attorney General	Specific Statutes
Colorado	Attorney General	D.T.P.A. (1969)
Connecticut	Dept. of Consumer Protection	D.T.P.A. (1965)
Delaware	Attorney General	Consumer Fraud (1965)
Florida	Department of Agriculture	D.T.P.A. (1970)
Georgia	Comptroller General	
Guam	Attorney General	D.T.P.A. (1967)
Hawaii	Office of the Governor	Little F.T.C. (1965 & 1969)
Idaho	Attorney General	
Illinois	Attorney General	Consumer Fraud (1961)
Indiana	Department of Commerce	
Iowa	Attorney General	Consumer Fraud (1965 a. 1970)
Kansas	Attorney General	Consumer Fraud (1968)
Kentucky	Attorney General	
Louisiana	(no special program)	
Maine	Attorney General	Little F.T.C. (1970)
Maryland	Attorney General	Consumer Fraud (1967)
Massachusetts	Attorney General	Little F.T.C. (1967 & 1969)
Michigan	Attorney General	Specific Statutes (1966)
Minnesota	Attorney General	Consumer Fraud (1969)
Mississippi	(no special program)	
Missouri	Attorney General	Consumer Fraud (1967)
Montana	(no special program)	
Nebraska	(no special program)	
Nevada	(no special program)	
New Hampshire	Attorney General	D.T.P.A. (1970)
New Jersey	Attorney General	Consumer Fraud (1960 & 1967)
New Mexico	Attorney General	D.T.P.A. (1967)
New York	Attorney General and Consumer Protection Board	D.T.P.A. (amed. 1970) Specific Statutes
North Carolina	Attorney General	Little F.T.C. (1969)
North Dakota	Attorney General	Consumer Fraud (1965)
Ohio	Attorney General	
Oklahoma	Dept. of Consumer Affairs	
Oregon	Attorney General & Gov. office	D.T.P.A. (1965 & 1967)
Pennsylvania	Attorney General	D.T.P.A. (1968)
Puerto Rico	Separate Agency	(1968)
Rhode Island	Attorney General	D.T.P.A. (1968, am. 1970)
Samoa	(no special program)	
South Carolina	Attorney General	
South Dakota	Attorney General	Specific Statutes (1969)
Tennessee		
Texas	Attorney General	D.T.P.A. (1967 & 1969)
Utah	Attorney General	
Vermont	Attorney General	Little F.T.C. (1967 & 1969)
Virgin Islands		
Virginia	Attorney General and Department of Agriculture	D.T.P.A. (1970)
Washington	Attorney General	Little F.T.C. (1961 & 1970)
West Virginia	Attorney General	
Wisconsin	Attorney General	Specific Statutes (am. 1970)
Wyoming		

D.T.P.A.: Deceptive Trade Practices Act.

twelve specific practices or "any other conduct creating a likelihood of confusion or misunderstanding and which misleads, deceives, or damages any buyer or competitor in connection with the sale or advertisement of goods or services." New Hampshire says that coverage is extended to any unfair method of competition and any unfair or deceptive act or practice, including but not limited to those specified. Colorado, Florida, Oregon, and Virginia do not have a catch-all phrase. In some jurisdictions, the breadth of coverage will be settled ultimately by the courts.

The published commentary on the Model Law says in summary that:

> The common feature of these laws is that they enable an enforcement official, usually the attorney general, to investigate alleged or suspected deceptive and unfair trade practices, and to obtain court injunction when violation exists. The enforcement official is given power to accept an assurance of voluntary compliance, when he considers that method of disposition appropriate. This, along with the authority to proceed when 'in the public interest,' protects him from contentious complainants and from the necessity of pursuing every matter, regardless of its relative importance, to formal litigation.[12]

Because of this Act's importance, a summary of provisions following the alternatives set out in Section 2 is given below.

Section 3 states the legislature's intent that "due consideration and great weight" be given to interpretations of the F.T.C. and the courts regarding the F.T.C. Act. The Attorney General is authorized to promulgate rules consistent with the F.T.C. and the courts. These provisions make a body of case law and administrative law immediately available to the states, thus obviating the need for uncertainty in interpretation.

Massachusetts law, for example, says that the Attorney General may make rules and regulations interpreting its provisions and adds that "in construing . . . this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts [to the F.T.C. Act]."[13]

Section 4 exempts from coverage actions allowed by other state or federal laws and insulates advertisers who do not have knowledge of the false, misleading or deceptive nature of any advertising they might disseminate unless they actually prepared the advertisement or have a financial interest in the sale or distribution of the product or service so advertised.

Sections 5 and 6 allow the Attorney General to obtain injunctions against proscribed acts and to secure through additional orders or judgments of the court restitution for injured consumers.

Section 7 specifically provides for the revocation of business licenses of convicted offenders and the appointment of receivers to collect and distribute the assets for the benefit of general creditors and damaged consumers.

Section 8 provides for private enforcement of the act through individual or class actions by aggrieved consumers. Provision is made for the recovery of the greater of $200.00 or actual damages, attorneys fees and costs. In addition, the court may, in its discretion, award punitive damages and other equitable relief. Such actions are facilitated by the provision of Section 8 (c) that orders of a court made in actions brought by the Attorney General shall be *prima facie* evidence of a violation of the act. Ordinarily the amount involved in a consumer transaction is not sufficient to interest a private practitioner, with the result that thousands of consumers suffer small losses, without remedy or relief being available.[14] This section remedies this situation and provides,

12. *Id.*

13. *See* Robert L. Meade, *The Consumer Protection Act of Massachusetts*, 4:12 N. ENG. L. REV. 123 (1969).

14. The Council of State Governments, *supra* note 10 at 144.

in private actions, another front on which objectionable businesses practices can be combatted.

Section 9 limits the holder in due course doctrine in the case of commercial paper. The commentary states that:

> It is important and desirable to provide for the negotiability of commercial paper to the fullest extent practicable. But very often the finance company which purchases consumer paper knows, or should reasonably have known, of the existing defenses, such as nonperformance of the seller or defect in the merchandise, and it places an unreasonable burden on the consumer to prove that the finance company had knowledge. It is suggested that the consumer should be given the benefit of the doubt in such cases, by enabling him to assert all defenses against the finance company that he could have asserted against the original vendor or lessor of the goods or services.[15]

Some reporting jurisdictions have noted that this provision is included in the U3C and is more properly considered there as part of an overall reevaluation of commercial paper with a view to providing additional safeguards for the consumer. They would, therefore, arbitrarily exclude this provision as a part of their basic consumer protection law.

Sections 10 through 14 provide for assurances of voluntary compliance and authorize the Attorney General to require the filing of reports, to issue subpoenas, to examine persons under oath and to obtain relevant material.

Section 15 sets penalties of up to $25,000 for violating an injunction and up to $2,000 for willful violation of Section 2. Section 16 authorizes forfeiture of corporate charters.

Section 17 is new, and says that "it shall be the duty of the county and city attorneys to lend to the attorney general such assistance as the attorney general may request in the commencement and prosecution of actions," or such officers "with prior approval of the attorney general may institute and prosecute action hereunder in the same manner as provided for the attorney general," but must make a full report to him.

15. *Id.*

Uniform Consumer Sales Practices Act

In August of 1970, the Commissioners on Uniform State Laws completed a Uniform Consumer Sales Practices Act designed to, in the language of the Act,

> (1) simplify, clarify, and modernize the law governing consumer sales practices;
>
> (2) protect consumers from suppliers who commit deceptive and unconscionable sales practices;
>
> (3) encourage the development of fair consumer sales practices;
>
> (4) make state regulation of consumer sales practices consistent with the policies of the Federal Trade Commission Act; and
>
> (5) make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact it.[16]

This act is to be administered by an "appropriate administrative official" who might well be the state Attorney General. The act defines prohibited deceptive and unconscionable trade practices and empowers the administrator to conduct research, hold public hearings, make inquiries and studies, and to make rules proper to implement the proscriptive sections of the act. The administrator is given subpoena power. He may terminate action with the acceptance of a written assurance of voluntary compliance or, at his option, he may bring court action for injunction or other penalties. In addition, provision is made for individual and class actions by individual consumers. Remedies are stated to be "in addition to remedies otherwise available for the same conduct under state or local law."

The Midwestern Conference of Attorneys General at its 1970 meeting adopted a resolution opposing the Uniform Consumer Sales Practices Act because:

> the public interest is not served when legislation as this is drafted without extensive consultation with appropriate public officials;
>
> this Act was passed without due consultation with representatives of state enforcement officials;
>
> there remains serious question whether this Act, in its present form would be in the best interests of the consuming public and an effective enforcement tool in that the Act: (1) would substantially reduce the scope and coverage of existing deceptive practice laws; ignores the needs of small businessmen and first-time investors by restricting coverage to consumer transactions; and requires burdens of proof and enforcement conditions which would materially restrict efficient protection of the consumer and business sectors.[17]

It has also been criticized for failing to reach all of the unfair methods of competition or deceptive practices which, in interstate commerce, violate the Federal Trade Commission Act.

Mr. William J. Pierce, Executive Director of the National Conference of Commissioners on Uniform State Laws notes that some Attorneys General have expressed concern about the act, but believes that:

> There is some misunderstanding as to its impact upon direct regulatory legislation with intervention by government officials. The Uniform Consumer Sales Practices Act is designed to provide both an administrative and private proceeding in order to protect consumers against fraudulent trade practices. . . . [it] represents an additional approach to that previously adopted by the Commissioners on Uniform State Laws with respect to the Uniform Deceptive Trade Practices Act. In many situations similar language is used, but the arsenal of weapons is increased including provisions for class action.[18]

It is not feasible, within the scope of this report, to evaluate the Uniform Consumer Sales Practices Act. Representatives of the Consumer Protection Committee of the Midwestern Conference of Attorneys General and Attorney General Francis B. Burch, President of N.A.A.G., met with a committee of the National Conference of Commissioners on Uniform State Laws on December 11 to discuss their objections to the Act. These objections were subsequently set forth in writing and may be obtained from the Midwestern Attorneys General. It was the consensus of those Attorneys General that little could be done by way of piecemeal amendment to correct deficiencies in the Act, but that it should be withdrawn from the recommended list of uniform laws.

The Act has been withdrawn for further study and revision.

Uniform Commercial Code

The Uniform Commercial Code promulgated by the National Conference of Commissioners on Uniform State Laws in 1951 and 1961 has been enacted into law, either as promulgated or in modified form, by fifty-one of our fifty-four jurisdictions.[19] Several times in recent years courts have extended provisions of this law to provide protection for consumers victimized by fraudulent or unconscionable schemes.

The New Jersey case of *Unico v. Owen* presents a well-reasoned argument for denying holder in due course status to an assignee of a negotiable promissory note in consumer goods transactions where:

> . . . the seller's performance is executory in character and when it appears from the totality of the arrangements between dealer and financier that the financier has had a substantial voice in setting standards for the underlying transaction, or has approved the standards established by the dealer, and has agreed to take all or a predetermined or substantial quantity of the negotiable paper

16. National Conference of Commissioners on Uniform State Laws, *Uniform Consumer Sales Practices Act*, § 1.

17. Midwestern Conference of Attorneys General, *Consumer Protection Resolution*, adopted at Annual Meeting, August 30-September 2, 1970, Brainerd, Minnesota.

18. Letter from William J. Pierce to Patton G. Wheeler, November 18, 1970.

19. The Council of State Governments, THE BOOK OF THE STATES 1970-71, 106-07 (1970).

which is backed by such standards, the financier should be considered a participant in the original transaction and therefore not entitled to holder in due course status.[20] This case was actually decided prior to the effective date of the Uniform Commercial Code in New Jersey under N.J.S.A. 7:1-1 et seq., but the court expressly stated that the principle on which it rested its holding is consistent with Sec. 3-119 of the Uniform Commercial Code.

A subsequent New Jersey case, *Toker v. Perl*, decided after the effective date of the Uniform Commercial Code, applied the unconscionability provision of Sec. 2-302 to preclude collection of payment for an item which was sold for a price two and one-half times its market value. In this case the court also found that fraud was present in the sale and prevented the enforcement of the contract. The court stated:

> Although the courts of this State have never been asked to apply this section of the Uniform Commercial Code to the price term of a contract, our sister state of New York has recently held that 'excessively high prices may constitute unconscionable contractual provisions within the meaning of section 2-302 of the Uniform Commercial Code.'[21]

While the result reached in Toker was affirmed on appeal,[22] it should be noted that the court reached the same result without discussing the issue of price unconscionability and Sec. 2-302. In a 1970 case, *Kugler v. Romain*,[23] the Attorney General sought to couple Sec. 2-302 of the Uniform Commercial Code with the statutorily delegated authority to enforce all laws, (see N.J.S.A. 52:17A-4 (h)), as a basis in challenging certain retail pricing practices. Although the trial court found fraud had been established in the twenty-four cases presented and awarded restoration and civil penalties, it was held that the Attorney General could not assert price unconscionability within either Sec. 2-302 or N.J.S.A. 56:8-2 absent express statutory language authorizing the same. An appeal from this decision is now pending.

Iowa law[24] specifically denies the protection of holder in due course status to a bank or finance company that purchases paper that has been created by the use of referral selling techniques.

Uniform Consumer Credit Code

In 1968, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Consumer Credit Code.[25] The official commentary on the act says that its purpose is "to regulate credit, not to regulate sales practices, quality of products sold, misleading advertisements, or other non-credit matters; however, the 'U3C' spills over to regulate a type of sale often associated with credit which has caused particular abuses. This is the 'home solicitation sale.'"

Other abuses often associated with consumer sales dealt with by the U3C include "false or misleading advertising concerning the terms or conditions of credit with respect to a consumer credit sale or consumer lease," "the use of negotiable instruments other than a check as evidence of the obligation of the buyer or lessee," "balloon payments," and "referral sales." The U3C also established the right of a buyer to cancel a home solicitation sale within three days. It restricts deficiency judgments and garnishment. Enforcement authority is vested in a separate agency, or "administrator," created by the act. This Uniform Law is designed to complement the federal Truth-in-Lending Act and covers the broad field of consumer credit. A summary of the provisions of

20. *Unico v. Owen*, 50 N.J. 101, 232 A. 2d 405 (1967).
21. 103 N.J. Super. 500, 247 A. 2d 701 (1968).
22. 108 N.J. Super., 129 (App. Div.).
23. *Kugler v. Romain*, 110 N.J. Super., 470 266 A 2d. 144 (1970).
24. IOWA CODE § 713.24 (2b), (1971).
25. National Conference of Commissioners on Uniform State Laws, *Uniform Consumer Credit Code.*

the model code appears at pages 5011-5016 in the Commerce Clearing House *Consumer Credit Guide.*

Virtually all jurisdictions have considered the U3C; most are deferring action pending further study. An Arizona legislative study committee was perhaps typical in recommending that no action be taken by the next legislature toward adoption of the Code "unless the leading proponents and opponents of the Code resolve many of their differences." The committee reported that "while certain aspects of the U.C.C.C. have merit and are worth consideration at some future time, insufficient data exist at the present time to warrant complete endorsement of the proposed legislation.[26]

As of January, 1971, Oklahoma and Utah are the only states which have enacted the U3C. In Oklahoma, a Department of Consumer Affairs administers the U3C with a staff of five examiners, one investigator, one educational director, an administrator, one attorney, and supporting secretarial personnel.[27] The agency has received about four hundred complaints in its first year of operation. In Utah, the U3C is administered by the Commissioner of Financial Institutions, who also regulates banks and various loan associations.[28] Legal assistance is provided by the Attorney General. Emphasis in administration has been on registration and investigation of lenders and on collecting the prescribed fees. Where abuses have been found to exist, they have been referred to the Attorney General for action.

The consensus of those responsible for consumer protection programs is that the Uniform Consumer Credit Code is not properly considered as consumer protection legislation. Assistant Attorney General Robert V. Bullock of Kentucky, for example, says that:

> The UCCC is basically a consumer loan and credit law with incidental consumer protection benefits. These incidental consumer protection benefits cannot be construed as a substitute for a consumer fraud or "Little F.T.C. Act" which would normally be enforced by an Attorney General.[29]

Deputy Attorney General Jean A. Benoy of the North Carolina Department of Justice states that:

> Insofar as North Carolina is concerned, an enactment of the UCCC Act is not consumer protection legislation, in my personal opinion. Certainly a cooling off period should be allowed for door-to-door contracts and home improvement contracts when negotiated should provide for all the defenses against the holder of the note which would be available to the principal parties to the contract. However, this should be provided for in separate legislation.[30]

On the other hand, Assistant Attorney General Irvin D. Parker of South Carolina is "convinced that the U3C provides many benefits for consumers not attainable in a Little FTC Act."

Licensing Laws

Licensing of persons as a prerequisite to providing services has long been used to assure that they are adequately qualified. It protects the public from quack practitioners and allows for continuing supervision over licensees. In the event of abuses, the administrating agency can suspend or revoke licenses and thereby effectively forestall future abuses.

26. Arkansas Legislative Council. Interim Committee on Uniform Consumer Credit Code and Creditors Rights. REPORT 5 (1969).
27. Telephone interview with Richard Wheatley, Director, Oklahoma Department of Consumer Affairs, October 12, 1970.
28. Telephone interview with William Wideman, Deputy Administrator, Department of Financial Institutions, October 12, 1970. For an analysis of administrative questions, *see* Barbara A. Curran, *Administration and Enforcement under the Uniform Consumer Credit Code*, 33 LAW AND CONTEMPORARY PROBLEMS, 737 (Autumn, 1968).
29. Letter from Assistant Attorney General Robert V. Bullock to Patton G. Wheeler, January 21, 1971.
30. Letter from Deputy Attorney General Jean A. Benoy to Patton G. Wheeler, January 29, 1971.

Reporting jurisdictions state that licensing is required in such service fields as heating and air conditioning, eyeglass dealers, used car salesmen, realty subdividers, collection agencies, debt pooling managers, pest control companies, barbers, beauty parlor operators, escrow agents, insurance brokers and agents, egg inspectors, employment agencies, automobile repairmen, correspondence and vocational schools, television and radio repairmen, hearing aid dealers, health and reducing clubs, private business, trade and technical schools, foreign land sales, abstracters, healing arts practitioners, detectives and funeral directors.

It has been contended by representatives of state licensing agencies that licensing alone is a sufficient protection for the consumer against fraudulent and deceptive practices. The argument is made that the licensing agencies' power to suspend or revoke licenses is enough control over the businessmen concerned and, hence, that consumer legislation should exempt businessmen subject to licensing laws from its provisions. This argument does not take into account the need for restitution to the damaged consumer. Neither does it recognize the fact that licensing agencies are often subject to undue pressure and control by the licensees since these agencies are usually composed of members of the trade or profession licensed.

Evaluation by Attorney General's offices of the effectiveness of licensing as a consumer protection tool runs from the belief that "[I]t's one of the best methods of protecting the consumers" to its value as a method of protecting consumers is "nil". A Council of State Governments study pointed out that:

> . . . licensing is viewed by government as a regulatory device. From the standpoint of private groups it may be seen as a means of employing government to standardize admission requirements and minimize competition while at the same time protecting the public from injury to its health and welfare.[31]

Licensing requirements may serve their greatest purpose in the initial step by requiring certain basic qualifications to practice a trade or profession. Beyond that, some jurisdictions believe that licensing may well be "no help at all." The shortcoming lies in the fact that boards can generally do no more than revoke or suspend the license of offenders; the individual consumers are left without remedy. At least one Attorney General's office believes that licensing "acts more as a protective vehicle for the general industry than it does for the ultimate consumer."

Criminal and Civil Fraud Statutes

The consensus among reporting jurisdictions appears to be that criminal fraud statutes are not of major value in protecting the consumer. There is very little private litigation in the area of consumer fraud since it is very difficult to prove common law fraud. The Nebraska Attorney General's office comments that: "as a practical matter, the worst offenders leave the state before they can be reached by a private litigant. Further, the small amount usually involved makes litigation unprofitable. Finally, recovery by a few such litigants is often not sufficient to deter a profitable fraudulent operation".

In a great many instances of actionable fraudulent conduct, the financial loss to an individual consumer is not large enough to make individual litigation practical.[32] Litigation today is an expensive process and few consumers can afford the luxury of suing to vindicate principle when the possible recovery is insufficient to defray the costs of litigation. One lawyer has observed:

> The sad thing is that those people that get cheated often have the legal right to get a judgment against the company. The problem is how to enforce those rights. Since in New Jersey the paperwork for a $150 claim is the same as for a $10,000 claim I just have to turn people down who have lost small amounts.[33]

This situation is not peculiar to New Jersey; the economics of law practice is such that this comment constitutes the rule, not the exception.

A study of consumer fraud coauthored by Senator Warren G. Magnuson discussed five practical problems which limit the efficacy of trial to protect the defrauded consumer. These problems can be defined and summarized as follows:

First, a criminal conviction requires proof of intent to defraud beyond a reasonable doubt. "No matter how distasteful the scheme nor how many hundreds of consumers were cheated, if the jury doubts that the perpetrators sincerely *intended* to defraud, then they must find the defendants not guilty."[34]

Second, prevailing practice appears to be against criminal prosecution of the businessman. 'Even when a law enforcement official believes that a particular scheme has been made actionable by statute, he often does not prosecute because of a widely held belief that, except in the most egregious circumstances, fraudulent operators should not be treated like criminals. Lawyers, business leaders and prosecutors have stated that "judges, juries and district attorneys do not like to put businessmen in jail.' "[35] This position appears to be reinforced by the attitude that civil remedies exist and should be employed in such cases.

Third, the primary purpose of criminal laws is to punish and even a successful criminal prosecution might not benefit an aggrieved consumer. "[E]ven if the criminal statutes could be enforced . . . it is doubtful that society's [or the consumer's] purpose is but served by only putting a swindler behind bars. The sentence is usually short after which the wrongdoer is set free to spend his ill-gotten money, and the cheated consumer, who understandably wants no justice so much as his money back, is left to suffer without restitution."[36]

Fourth, the use of criminal prosecutions to control consumer fraud is inefficient and prohibitively expensive.

> [T]he hit-and-miss proposition of locking up criminals who defraud the public is inefficient in halting consumer fraud on a broad scale. Only one operator can be put out of business at a time, after long, costly court proceedings, while thousands of other gypsters—perhaps associated with the same company or swindle—are allowed to flourish. And even after a short prison term, the ex-convict can start up a new racket, using the same fraudulent techniques, and rob Americans of a fortune while local authorities once again gear up their machinery to start the slow, painful process of gathering evidence against him on a new charge.[37]

Fifth, persons in poverty hesitate to seek recourse through the courts, and tend to distrust the law. The poor person may have little reason to consider the law his guardian and often is unaware of his legal rights.

A memorandum from Iowa's Department of Justice to county attorneys notes the difficulties in establishing proof of criminal fraud. It suggests, alternatively, that prosecutions be brought under a section of the Iowa Consumer Fraud Act that prohibits fraud and deception.[38] This section does not provide a penalty, but other sections of the statutes provide that when any act is prohibited by statute

31. The Council of State Governments, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES, 5 (1952).

32. Joseph Tydings, *S-1980-The Class Actions Jurisdictions Act*, 4 N. ENG. L. REV. 83 (1969).

33. Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966).

34. Magnusen, *supra* note 2 at 16.

35. *Id.* at 30.

36. *Id.*

37. *Id.*

38. IOWA CODE § 713.24(2), (1966).

and no penalty is imposed, the violation will be subject to certain stated penalties.[39] It is much easier to prove violations under the Consumer Fraud Act than under general fraud statutes, and use of the general penalty section makes this effective.[40]

Individual Action

The typical consumer fraud programs in effect in the various jurisdictions tend to place primary, if not exclusive, enforcement authority in a state agency and fail to provide any private remedy for the individual consumer. The individual consumer needs privately enforceable remedies for two reasons: first, some state programs do not allow for restitution to an injured consumer; second, no state program can realistically hope to pursue to prosecution every valid complaint.

There exists a need to provide for effective private prosecution of consumer complaints in addition to state-level action. Attorney General Robert Quinn of Massachusetts points out that the Attorney General need not prove intent in order to stop a deceptive practice, but the private consumer must offer such proof. General Quinn believes that:

> If the remedy is a realistic one providing for attorney's fees, class actions and a minimum recovery and punitive damages where intent is a provable factor, then we shall see a host of new consumer protectors: the lawyers of the Commonwealth. It was, after all, primarily the failure of the legal system to provide adequate remedies which led to the great consumer movement of the past decade with the resultant deluge of new laws.[41]

The legislation which General Quinn was advocating became law in August 1969, giving Massachusetts consumers a right to private and class actions against deceptive and unfair selling practices, the first law of its kind in the nation.

Massachusetts has been operating under a "little F.T.C. Act" since March 27, 1968. The 1969 amendments provide for individual causes of action with possible recoveries of treble damages or $25, whichever is greater. This Act makes the plaintiff's task easier by providing that any permanent injunction or order of the court for any violation of any injunction obtained by the Attorney General under Section 4 of the basic act "shall be *prima facie* evidence that the respondent used or employed an unfair or deceptive practice which is declared unlawful by Section two of this chapter."

The argument advanced for passage of this addition to the Massachusetts law is that such a provision would serve to deter the types of conduct proscribed by the basic law, relieve the state of sole responsibility for enforcement of the law, provide a remedial action designed to benefit the consumer and, in the words of one author, "restore the balance of power that once existed between merchant and buyer."[42]

North Carolina's "little F.T.C. Act" has a specific provision for individual civil action by the person injured with provision for treble damages.

Amendments in 1969 to Hawaii's "little F.T.C. Act" enable any person who is injured in his business or property by violation of the Act to recover not less that $1,000 or threefold the amount of his damages, whichever is greater, plus cost and attorneys' fees. Amendments in 1969 to Vermont's "little F.T.C. Act" enable any consumer who is damaged by a false or fraudulent practice prohibited by the Act or regulations issued thereunder, to recover damages

39. IOWA CODE § 687.6, 687.9 (1966).

40. Memorandum to members of County Attorney Association from Consumer Protection Division, Iowa Department of Justice, November 5, 1970.

41. Robert Quinn, *Consumer Protection Comes of Age in Massachusetts*, 4 N. ENG. REV. 72 (1969).

42. H. Peter Norstrand, *Treble Damage Actions for Victims of Unfair and Deceptive Trade Practices: A New Approach*, 4 N. ENG. L. REV. 175 (1969).

and a penalty of not more than $1,000. In Washington, a person injured by a violation of the "little F.T.C. Act" may recover actual damages, plus, in the discretion of the court, treble damages up to $1,000 with costs and attorneys' fees, pursuant to amendment of 1970.

Arizona favors private remedy provisions since actions in small claims court might be faster than through the consumer protection division and because such provisions would add another front on which the wrongdoer can be attacked. Texas appears to take the position that private civil remedies should not be tied into the state program since they "would 'muddy up' all our cases," but adds that a private cause of action would be beneficial to the consumer where a large enough amount is involved.

The 1970 revision of the Unfair Trade Practices and Consumer Protection Law provides for private and class actions. It allows recovery of actual damages or $200, whichever is greater, and allows for punitive damages and other equitable relief in the court's discretion. Rhode Island amended its deceptive trade practices act to include this provision May 7, 1970.

Colorado in 1969 and California in 1970 enacted laws authorizing private action by consumers to recover damages, plus costs and attorneys' fees, with respect to a specified list of deceptive selling practices; and the California enactment also authorizes class actions, with minimum recovery therein of $300. The New Hampshire deceptive trade practices act of 1970 authorizes any person who has been defrauded by a violation of the act to recover damages plus costs, expenses and interest from date of institution of the action.

The Uniform Deceptive Trade Practices Act provides for "a private injunctive remedy to persons likely to suffer pecuniary harm for conduct involving either misleading identification of business or goods or false or deceptive advertising." However, the Uniform Act allows only for injunctive relief and, possibly, attorneys' fees. This can hardly be considered adequate relief for consumers. This Act is intended primarily as a means for businessmen to combat deceptive conduct constituting unreasonable interference with business; it is aimed at unfair competition rather than at what are generally considered deceptive or fraudulent injuries to the consumer.

Class Actions

C.O.A.G. has recommended that the Attorney General be empowered to file any action he deems necessary to protect the public interest, as a class action if necessary and, subject to approval of the court after due notice and hearing, to effectuate settlements binding upon the parties and the class. Some general laws, such as the Uniform Consumer Sales Practices Act, provide for class actions. Some authorities believe, however, that class action legislation should be separate from a consumer fraud law.

It has been contended that the availability of class actions provides too great an opportunity for frivolous suits. The Massachusetts class action law obviates this problem by requiring that plaintiff give respondent thirty days notice of demand for relief prior to instituting action; if the respondent offers restitution which a court later finds to be fair, the plaintiff is limited to the relief tendered.[43] The Uniform Consumer Sales Practices Act provides that the prevailing party in such action may be awarded reasonable attorneys' fees if the court finds " . . . that the consumer. . . has brought or maintained an action which he knew to be groundless. . . ." A 1970 Alaska private class action provision gives even greater protection for the seller by providing that such actions can be brought only with the approval of the Attorney General and requiring that the plaintiff post bond of "not less

43. MASS. GEN. LAWS ch. 690, § 9(3), (1969).

than$5,000" to cover court costs and attorney fees which might be awarded the defendant should he prevail.[44]

Specific Statutes

Most states have some statutes aimed at preventing specific practices. These may be the only consumer protection laws, or they may exist concurrently with a broad statute. This piecemeal approach is obviously limited, but such statutes can be helpful if broad legislative authority is lacking. For example, virtually all jurisdictions have long-standing "printer's ink" statutes, which declare false advertising to be a misdemeanor. Most have anti-lottery laws, which might be used against referral sales.[45]

Many states have specific statutes which apply to consumer fraud. These include: denying or limiting holder in due course status; limiting the use of waiver of defense clauses, confessions of judgment clauses, and delinquency judgments in consumer transactions; providing for cooling-off periods in consumer contract; prohibiting chain merchandising referral sales; prohibiting odometer resetting, and prohibiting the sending of unsolicited credit cards or merchandise.

California, for example, has no single consumer fraud law, but has developed legislation on a piecemeal basis. Particular practices such as chain merchandising, referral selling, and deceptive advertising are prohibited by various statutes. Particular services, such as dance studios and health studios, are regulated by other statutes. There are many other statutes licensing sales and service industries; over 900,000 people are so regulated in their trades and professions. The Unruh Retail Sales Act and the Reeslevering Act together cover many consumer problems.

Recent Trends in Legislation

Some Attorneys General have been unable to obtain strong statutes, but most apparently plan to continue working for them. In Kentucky, for example, three separate consumer protection bills were introduced into the 1970 General Assembly, but none passed. The legislature did, however, create a study commission on this subject. Virginia's legislature did not pass a "little F.T.C. Act", but did refer the matter to a legislative advisory committee for study. Similar results were reached in Arkansas, Idaho, Louisiana, Michigan, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, and West Virginia. Indications are that these states, plus Alabama, Georgia, Mississippi, Nevada, Oregon, and Utah, plan to continue working toward strong consumer laws.

Some states were more successful. Maine, for example, enacted a "little F.T.C." statute in 1970. New York, which has had a consumer fraud law for years, strengthened it by authorizing the Attorney General to obtain injunctions against deceptive practices and to receive restitution for defrauded consumers. Iowa amended its Consumer Fraud Act in 1970 to outlaw referral sales. Assistant Attorney General Douglas R. Carlson reports that the Consumer Protection Division has interpreted this to apply to multi-level distributorships as well, and that the court, in one case, ruled such a distributorship to be in violation of the referral sales provisions. New Hampshire enacted a deceptive practice law in 1970. In 1969, North Carolina enacted a "little F.T.C." statute. Violation of the act and proof of injury entitles injured parties to treble damages.

6.63 Enforcement of Legislation

States with similar laws may, in practice, have very different consumer protection programs. The actual program depends on the emphasis placed on different methods of enforcement,

44. ALASKA STAT. § 45.50.531(b).

45. N.A.A.G., *Summary of Consumer Protection Seminar*, Baltimore, Maryland, May 27. *See Also* 1967 CONFERENCE OF ATTORNEYS GENERAL, 84. However, Ohio reports that her courts have refused to outlaw referral sales as lotteries in *Yoder v. So-Soft of Ohio, Inc.*, 300 O. 2d 566, 568 (1963).

the size of staff and budget, and the Attorney General's view of consumer protection objectives.

Emphasis in Administration

Once the legislative framework for consumer protection has been established, questions of administrative policy remain. States differ in the relative emphasis they give to handling individual complaints or to preventing deceptive practices. Some states stress records of recoveries, which usually far exceed the cost of consumer protection programs. North Carolina, for example, had a budget of $300,000 in the 1969-70 fiscal year, and recovered more than twice that amount. In Washington, expenditures of $360,000 resulted in recoveries of more than $480,000, for the same period. The New York Attorney General recovered $690,319 for consumers during the first half of 1970. Washington reports that $404,621 was recovered in the first eight months of 1970.

Attorney General John C. Danforth of Missouri said to a C.O.A.G. meeting that:

> I think that there are basically two theories for the operation of a consumer protection program. One . . . is that the objective of such a division is to procure refunds for consumers who complain to the division from businesses which may have engaged in deceptive practices. The other alternative is to view the consumer protection division less as an agency to procure restitution and more as an agency to prevent deceptive practices.[46]

Missouri adopted the second approach, partly because of limited manpower and partly because "The Attorney General, as chief legal officer of the state, has a broad responsibility to protect the public interest which can best be fulfilled by stopping those practices most likely to cause substantial injury in the future to the citizens of the state."[47]

California takes a similar position, saying in a C.O.A.G. questionnaire that:

> The Attorney General's office is not an adjustment agency, and we do not mediate individual complaints. We are concerned with the protection of the public as a whole and with the bringing of actions necessary to prevent deceptive practices. Since a very small percentage of customers who are deceived ever report such deception to any agency, the most fraudulent seller could make a fortune by adjusting complaints and continuing his illegal practice.

Other administrators contend that a good consumer fraud program must involve both restitution to individual complainants and the prosecution of offenders. They note that settlement without prosecution may be viewed merely as a cost of doing business, while prosecution without recovery discourages complaints and may leave the defrauded consumer without any remedy.

Evaluation of Specific Enforcement Provisions

The following evaluative comments on specific enforcement provisions available under the various consumer protection laws are drawn from states' questionnaire responses.

(1) Mediation. Mediation appears to be the process most often relied upon to settle consumer complaints. It is the cheapest course of action for the enforcement agency and probably the fastest. Honest businessmen like it because it gives them the chance to right wrongs and retain customer goodwill; dishonest businessmen like it because it avoids publicity. Consumer protection staffs note that mediation can often halt fraudulent activities, in addition to obtaining recourse for the consumer, if it is made clear to the violator that he is being allowed to settle the first com-

46. C.O.A.G., REMARKS TO COMMITTEE MEETING FEBRUARY 5, 1970, 15.

47. *Id.*

plaint, but that future complaints will result in prosecution. This is especially effective in dealing with a business which cannot afford the publicity of being sued by the state for fraud.

(2) Assurance of voluntary compliance. The ability to accept an assurance of voluntary compliance or discontinuance is considered important because it allows resolution of the problem without court action. It tends to protect consumers from the same or similar abuses by the offender concerned as well as to provide redress for the immediate complainant.

(3) Subpoena power. Some Attorneys General have broad subpoena powers that apply to other areas as well as to consumer protection. Others have specific authority under consumer protection laws. In any case, this greatly facilitates investigation by making necessary information and documents available to determine whether a violation has occurred.

(4) Civil investigative demand. A hybrid *subpoena duces tecum*, this provision greatly facilitates the handling of complaints by giving the consumer protection agency access to the records of the alleged violator and reducing the need for original investigation. The often concomitant rule of confidentiality, however, has been criticized as placing severe limitation on the agency's ability to apply "leverage" in effecting consumer satisfaction. Subpoena power is needed as a supplement to obtain explanation of the records which are produced and to obtain information needed from persons other than the alleged violator.

(5) Rules and regulations. Some states report that the lack of rule-making power does not hamper their effectiveness; others say that they have such power but have not used it. Those who have used this power have found it very helpful. New Mexico, for example, promulgated a regulation to allow the use of assurance of discontinuance. Regulations interpretative of the basic consumer protection law can also be a valuable guide to both the consumer protection agency and the honest businessman, as in Massachusetts.

(6) Injunction. The only enforcement tool available under the Uniform Deceptive Trade Practices Act, the injunction provides sure relief against the practices enjoined; it does not usually result in redress to the consumer. Requiring access to the courts, it can prove time-consuming and expensive. The "consent injunction" appears common in consumer fraud cases. Authority to obtain a temporary injunction strengthens this remedy.

(7) Hearings. The ability to hold hearings and to exact administrative penalties based on these hearings is an effective measure which may obviate the necessity for court action. Under a New Jersey statute, the Attorney General employs hearing officers and exacts administrative penalties.

(8) Civil penalties. Many statutes provide for the assessment by the courts of civil penalties for violation of an injunction penalties vary, but are as high as $25,000 in Alaska. The incentive to the businessman to comply with the terms of an injunction is apparent. Other states, such as California, permit recovery of civil penalties for initial violations.

(9) Cancellation of corporate charter. Several statutes provide that the court can dissolve local corporations and revoke the charters of foreign corporations in event of violation of the basic consumer protection laws. Some states, like New York, have used regular statutory powers to annul corporate charters for *ultra vires* acts to deal with offending corporations.

Missouri's Consumer Protection Division noted the benefits of cooperation with other officials in applying various sanctions:

> A criminal fraud suit . . . is ultimately the most effective weapon against the intentional use of fraudulent practices. Our office has no direct criminal law enforcement powers, but we do work with and encourage local prosecuting attorneys to take action under the various stealing or confidence game statutes. . . . In addition, we were having difficulty cleaning up referral sales practices . . . until we told the companies that we were drafting model criminal information to be furnished to the prosecuting attorneys.[48]

6.64 Intervention Before Regulatory Agencies

The Committee on the Office of Attorney General has recommended that the Attorney General should, when appropriate, appear before regulatory boards to represent the public. The Attorney General serves as counsel for such boards in most jurisdictions. An increasing number of Attorneys General are assuming the additional responsibility of representing the public before such groups when this appears necessary to ensure a proper presentation of the facts and issues involved.

Answers to C.O.A.G. questionnaires indicate that most Attorneys General do not appear before such boards on behalf of the public. Michigan, Nebraska and Nevada indicate that such appearances are made, but do not indicate how often. The Ohio Attorney General "regularly" appears before regulating agencies, and New Mexico's Attorney General sends a representative to insurance rate hearings "on occasion." Guam and Wyoming state that the Attorney General has authority to appear before such boards but does not do so. Maine reports that the Attorney General probably could make such appearances, but does not.

On the other hand, Oklahoma reported that the Attorney General lacked specific statutory authority to intervene on behalf of the consuming public before regulatory boards, but has done so on his common law authority to protect the people.

Kentucky, similarly, lacks specific authority, but the Attorney General has appeared in rate hearings. Kentucky's response to a C.O.A.G. questionnaire said that:

> The appearance before regulatory boards or agencies offers the promise of providing a new opportunity for the Attorney General to protect the public interest in consumer matters. This opportunity, if pursued properly, would ensure the consuming public of a more effective voice in rate hearings and in matters involving misfeasance or malfeasance of companies or industries regulated by such boards or agencies.

New Jersey states that within the Attorney General's office a specific position of rate counsel has been established with the express purpose of representing the public's interest in public utility rate making hearings. This function is exercised independently of the authority to appear before other regulatory agencies. The Attorney General of New York appears before the Public Service Commission "Where necessary to protect the public."

North Carolina has taken a strong lead in this approach to consumer protection activity. Long empowered by statute to appear before the Utilities Commission on behalf of the consumer, the North Carolina Attorney General successfully sought authority from the 1969 Legislature to appear before any regulatory agency. In a law review article, he explained his reasons for seeking this authority:

> The very nature of the adversary system of our common law jurisprudence requires that there be a spokesman for the consumer. Where there is no consumers' advocate, rate increases requested by regulated industries follow as a matter of course whether justified or not. Without a consumers' advocate, all that need be done by the counsel seeking a rate increase is to make the necessary filing requesting the increase and introduce a bare minimum of evidence necessary to back up the request. Enlightened self-interest dictates that the evi-

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48. Letter from Christopher S. Bond, Chief Counsel, Consumer Protection Division, to Patton G. Wheeler, March 10, 1970.

dence to be used by the industry should be marshalled in a light most favorable to the industry . . . . [W]ithout an adversary, counsel representing regulated industries was formerly quite possibly the happiest man engaged in the practice of law. His witnesses and evidence went unchallenged. His victories were as regular as clockwork. The consumer was possibly the unhappiest man around—he paid the higher rates and had to pay, in addition, the legal fee of his adversary's counsel.

Within the context of the adversary system it is improper for the regulatory board itself to act as the consumer's advocate. The regulatory board has the function of sitting as an impartial trier of the facts. If the only facts in evidence are on the side of the regulated industry, then the regulatory board must grant the relief requested. . . .

The consumer's advocate has the opportunity of giving the other side of the picture, of presenting a different viewpoint backed up by other evidence. There is also the benefit to the consumer of cross-examination of utility witnesses, which should measurably increase the regulatory board's capacity to view the matter from a balanced perspective. In theory, the resulting decisions from truly adversary proceedings should be fair both to the industry and to the public, for both sides of the matter will have been presented. It is felt that an added dividend will be the restoration of public confidence in the adversary regulatory system.[49]

To date, the North Carolina Consumer Protection Division has employed its new statutory powers to represent the consuming public at an automobile liability insurance rate increase, hearings involving proposed modifications of fair trade orders by the State Milk Commission, and other instances.

Virginia's 1970 Legislature established a Division of Consumer Counsel in the Attorney General's office, which is to "appear before governmental commissions, agencies and departments, including the State Corporation Commission, to represent and be heard on behalf of consumers' interests, and investigate such matters relating to such appearance."[50]

6.65 Administration of Programs

The function of consumer protection is not a new one and many governmental agencies include significant consumer protection activities among their existing responsibilities. Some consumer protection activities fall within the purview of the state agencies regulating banking, insurance, small loans, installment credit, home improvement or automobile financing, weights and measures, fair packaging and labeling, food and drugs, hazardous products, issuance of stocks and bonds, sale of securities, and the licensing of consumer service operations.

Placement of Administrative Responsibility

A study of the state consumer protection programs by Assistant Attorney General Douglas R. Carlson of Iowa states the function of a specific state consumer protection agency:

A State Consumer Protection Division provides the facilities for positive action in handling complaints of alleged consumer fraud. Such an agency has the authorization and the facilities to investigate the complaint . . . After the investigation, if the complaint is found to be justified, the Consumer Protection Division will then make a decision as to what procedure it will use in handling the matter . . . Along with this most important feature of providing positive action to handle complainants' problems, another important aspect is that such action by the state to halt violations of the Consumer Protection Statutes involve no cost to the complainant. Another important reason for a State Consumer Protection Program is that it provides for centralization of consumer problems. The keeping of accurate files on consumer frauds throughout the entire state enables the spotting of widespread problems that appear to local officials to be minimal.[51]

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49. Attorney General Robert B. Morgan, *The People's Advocate in the Market Place*, WAKE FOREST INTRAMURAL L. REV. (1970).

50. VA. CODE ANN. § 2.1-133.1.

51. Assistant Attorney General Douglas R. Carlson, Iowa Department of Justice, *Consumer Protection at the State Level 1970* (Mimeo.), 16-19 (1970).

Concurrent with the decision to create a specific consumer protection agency within state government is the decision where to place this function. Of the thirty-six reporting jurisdictions with consumer protection agencies, twenty-nine have placed the function of preventing fraudulent, deceptive and unfair selling practices under the Attorney General. Florida now has placed it in the Department of Agriculture. Wisconsin gives the Attorney General and the Department of Agriculture concurrent authority. Hawaii has placed consumer protection under the Governor. Connecticut, Oklahoma, Minnesota, and Puerto Rico have created separate agencies to administer their consumer protection programs.

The basic reason for placing consumer protection programs under the Attorney General is well-stated by Michigan in a C.O.A.G. questionnaire:

The Attorney General is the only state officer with the necessary authority to rapidly and effectively deal with consumer fraud problems. Only the Attorney General, as this state's chief law enforcement officer, presents an imminent threat of litigation to those who choose to engage in deceptive and fraudulent practices. Since an effective consumer protection program requires constant legal analysis of various problems and legal decisions regarding possible litigation, said program should clearly be under the direction of the state's chief law enforcement officer.

Vermont supports the basic argument with this statement, also from a C.O.A.G. questionnaire:

Inasmuch as the Attorney General's office cuts across every aspect of State government, it is possible by having the Consumer Protection Bureau in the Attorney General's office to bring consumer interests to the forefront of many agencies. This would not be possible if it were wholly a separate agency. In addition, the legal expertise available in the Attorney General's office is more accessible to a fellow Assistant Attorney General.

Also of great importance is the fact that the Attorney General has great influence on reform for proposed legislation. Working from within the Attorney General's office the Consumer Protection Bureau can, therefore, be certain that consumer interests are reassured by legislative proposals.

Another reason for making the Attorney General responsible for consumer protection is that he performs related duties in many states, such as enforcing state antitrust laws and representing the public before regulatory agencies. The Director of Pennsylvania's Consumer Protection Bureau adds the further argument that a separate agency might get too big and lose the active, dedicated approach that characterizes many present agencies. She feels also that the fact the Attorney General is behind the consumer protection staff adds great weight.[52]

Massachusetts' experience is significant. The Attorney General's office entered the consumer protection field around 1960, but dissolved its division when the 1962 legislature established a separate consumer protection agency. Experience showed that the new agency was an effective tool for public and legislative relations, but less so as an enforcement agency. In 1967, the Attorney General's Consumer Protection Division was reestablished to enforce the laws, while the independent agency continues to operate to develop legislation.

President Nixon's 1969 Message to Congress on consumer interests urged that each state establish "a strong consumer protection statute and an effective mechanism for enforcing it." He said further that "every State should be encouraged to explore the need for an adequately financed Division of Consumer Protection as part of its State Attorney General's office."[53]

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52. Interview with Bette Clemens, Director, Consumer Protection Bureau in Harrisburg, Pa., September 22, 1970.

53. Message from the President of the United States transmitting Recommendations Concerning the Protection of the Interests of Consumers, October 30, 1969.

A further argument for placing consumer protection activities under the Attorney General is that they were initiated there in most states. Some Attorneys General have many years experience in this field. For example, the Antitrust and Consumer Protection Division of the Attorney General of Washington's office was created in 1961. By 1963, the staff consisted of five attorneys and two investigators and its activity was said to "run the gamut from false, misleading or deceptive advertising to price-fixing, monopolies, mergers, etc." It reported that "we are using our formal enforcement tools somewhat sparingly and relying to a considerable degree upon information and education. . . . Later, as businesses became more aware of their responsibilities under these laws, our attitudes may change."[54] This considerable body of experience has been developed by and in Attorneys General's offices.

Connecticut illustrates the separate agency approach. A department of Consumer Protection was established by law in 1959 to enforce various laws relating to consumer protection. Its divisions include: food, drugs, pharmacy, and weights and measures, as well as consumer frauds. However, orders to cease and desist issued by the Department in consumer fraud matters do not carry any penalty unless the Attorney General brings action to enforce them in court.

Advisory Councils

Some states have established consumer organizations and advisory councils to study the problems, make recommendations and, in many instances, actively lobby for legislation. The existence and activity of these consumer-oriented groups also effectively demonstrates the interest of citizens in securing action in this area.

Connecticut, Kansas, Kentucky, Michigan, New Jersey, Puerto Rico, and South Dakota report that they have councils. Kentucky listed three separate groups: the Attorney General's Consumer's Protection Council, the Governor's Consumer Committee, and the Legislative Research Commission's Consumer Committee. North Carolina indicated that the Attorney General had authority to appoint such a committee but had not completed these appointments as of the reporting date. Pennsylvania is currently activating its consumer council.

The 1970 New York Legislature created a State Consumer Protection Board as an agency of the Executive Department. Its members are: the Chairman of the Public Service Commission; the Superintendent of Banks; the Superintendent of Insurance; the Commissioner of Agriculture and Markets; the Commissioner of Commerce; the Commissioner of Health; the Secretary of State; and an Executive Director, who serves as Chairman. The Attorney General is directed to coordinate the enforcement powers of his office with the Board's activities. Its functions include coordinating the consumer protection activities of state agencies, receiving complaints and referring them to the appropriate agency, making studies and recommendations, conducting education programs, and representing consumer interests before federal, state and local administrative and regulatory agencies.

Staffs and Budgets

Only with growth of consumer protection activities in Attorneys General's offices and concommitant budget increases could anything approaching adequate staffing be provided. Available data indicate, however, that consumer protection activities are generally short of both staff and funds. Information reported by Attorneys General's offices on staff size for consumer protection activities is shown below: The most striking fact is the small size of staffs. Of thirty-five reporting jurisdictions, only eight have more than five attorneys assigned to consumer protection. Generally, consumer programs employ more investigators than attorneys.

By far the largest staff reported is that of Puerto Rico. The total of 266 persons assigned to consumer protection duties includes 7 lawyers, 75 investigators, 23 accountants, 20 economists, 12 engineers, 31 administrative personnel, 68 clerical personnel and 68 others. Most agencies operate with only a few attorneys, a somewhat larger number of investigators, supporting

54. Letter from Assistant Attorney General Nicholas B. O'Connell, Jr., to Attorney General John B. Breckinridge, April 26, 1963.

6.651 STAFFING OF CONSUMER PROTECTION AGENCIES

	Attorneys	Investigators	Clerical	Student Aides
Alabama	1 PT			
Alaska	0	0	0	0
Arizona	1 FT	1 FT	1 PT	
Arkansas	2 PT			
California	6 FT, 4 PT	4 FT	4 FT, 4 PT	
Colorado	1 FT	1 FT	1 FT	1 FT
Georgia	1 PT			
Hawaii	3 FT	5 FT	4 FT	2 FT
Illinois	14 FT, 3 PT	7 FT	14 FT	
Indiana	1 PT			
Iowa	2 FT	2 PT	2 FT	1 PT
Kansas	1 PT	1 FT, 3 PT	1 PT	
Kentucky	1 FT		1 FT	1 FT
Maine	1 PT	2 PT		
Maryland	2 FT	3 FT, 1 PT	3 FT	8 FT
Massachusetts	4 FT	9 FT	4 FT	5 FT
Michigan	2 FT	1 FT	3 FT	
Minnesota	1 FT	1 PT		
Missouri	1 FT, 1 PT	2 FT, 1 PT	3 FT, 1 PT	1 PT
Nebraska	1 PT			
New Jersey	2 FT	15 FT	13 FT	3 PT
New Mexico	2 PT	2 PT	1 PT	
New York	12 FT	3 FT	4 FT	
North Carolina	6 FT	4 FT	10 FT	3 PT
North Dakota	1 PT			
Ohio	1 FT	5 FT		2 FT
Oklahoma	2 PT			
Oregon	1 PT			
Pennsylvania	3 FT	11 FT	6 FT	
Puerto Rico	7 FT	75 FT	68 FT	(116—Other)
South Dakota	1 PT	1 PT		
Texas	5 FT	1 FT		
Virgin Islands	8 PT			
Washington	6 FT, 2 PT	5 FT, 1 PT	3 FT, 9 PT	
West Virginia	1 PT	1 PT		
Wisconsin	1 FT, 1 PT	1 FT	3 FT	4 FT

FT: Full Time
PT: Part Time

clerical personnel and perhaps a student aide. Colorado, for example, has one of each.

Some innovative staffing arrangements are worthy of attention. North Carolina acquired its four investigators by a special arrangement with the Department of Revenue, which transferred these men and their supporting budget to the Attorney General in exchange for the latter's agreement to handle tax fraud prosecutions. Pennsylvania reports that it prefers to hire investigators who have military training and experience in investigation. Some offices employ student aides. Under the Federal Education Act of 1964 and 1965, the federal government will pay approximately 80 percent of the salaries of qualifying students who work with either a public or private non-profit organization. Maryland employed ten such students in 1969.[55] New York and Pennsylvania have used student volunteers from law schools and political science curricula. Volunteer housewives in New York State work as discoverers of new or prevalent forms of harmful consumer practices.[56] From two to five women in each county report to the state consumer fraud agency any fraud they might learn about either from personal experience or by hearsay.

A developing trend is the use of local prosecutors as enforcement officials. The 1970 revision of the Unfair Trade Practices and Consumer Protection Law provides for their use. New Mexico's statute similarly provides for the use of local district attorneys; Kentucky's Attorney General's proposed law makes the same provision.

In Washington, attorneys of the Office of Economic Opportunity centers worked with the Attorney General's office in handling consumer complaints. If O.E.O. received a standard complaint, it would be referred to the Attorney General's staff, although the legal services attorney usually wrote a letter also. The consumer protection staff, conversely, would refer to O.E.O. cases which involved a dispute of fact and in which they felt the customer qualified for free legal service.

Most Attorneys General's offices report that the amount included in their budget for consumer protection cannot be identified separately. The following jurisdictions reported the amount included in their 1970-71 fiscal year budget for consumer protection: California—$203,591; Illinois—$550,000; Maine—$34,123; Maryland—$131,289; Missouri—$82,000; New Jersey—$358,875; New Mexico—$25,000; North Carolina—$200,700; Pennsylvania—$404,158; South Dakota—$22,860; Vermont—$23,878. These figures do not include sums for antitrust suits.

Processing Complaints

Most Attorneys General receive complaints, whether by mail, telephone, or personal visit, only at their central office. Some, however, actively encourage the filing of complaints by operating branch offices, travelling agents, and working with other agencies and organizations.

A number of Attorneys General have branch offices in large cities. Some of these handle various duties, while others are concerned solely with consumer protection. New Jersey's consumer protection staff is located in Newark, although the main Attorney General's office is in Trenton. Similarly, the Washington Attorney General's office is in Olympia, but the main consumer protection office is in Seattle, with branches in Tacoma, Olympia, Spokane, Vancouver, and Everett. One Washington Assistant Attorney General is assigned to a governmental "Multi-Service Center" in downtown Seattle, which houses various agencies concerned with poverty-related programs. Pennsylvania has branch offices in four cities.

Maryland sends an investigator to visit eight different cities for a day each month to hear complaints, and, during the summer, to spend about four hours a day at police community centers in Baltimore. An investigator visits Fort Meade, a military base, twice a month to handle servicemen's complaints. The Maryland office has always given high priority to complaints from service personnel. Illinois, in addition to a branch office in Chicago, has two mobile units to collect complaints and has separate offices in the Negro and Spanish areas.

The Attorneys General of Delaware, Virginia, Pennsylvania, and Washington have toll-free telephone lines so that citizens can call in complaints. Prior to installation of this system, a Washington staff member "rode circuit" in the less populous part of the state to receive complaints.

In addition to receiving complaints from consumers, many offices receive complaints from sources such as better business bureaus, chambers of commerce, local prosecutors, police, and social workers. New Mexico uses state and local police as liaison officers for receiving complaints. Colorado makes similar use of district attorneys, providing them with copies of the basic consumer protection law and blank forms for consumer complaints, referred to as "Requests for Investigation." Arizona reports that all agencies of state and local government regularly refer citizens to the Department of Consumer Frauds.

Available data indicate that most jurisdictions follow generally the same steps in processing complaints. The following procedure is a composite, and is not necessarily the exact pattern followed by any one jurisdiction.

Complaints are received by letter, telephone or in person at an intake center. An intake officer takes the complaint, or assists in taking it, using a standard form. The information requested usually includes the name and address of the complainant, the name and address of the party complained about and a concise statement of the facts giving rise to the complaint.

A file number is assigned to each complaint form and it is cross-indexed by file number, complainant, party complained against, and subject matter. The numbering system used may be coded to show such information as: whether the complaint concerns regulated industries, an antitrust matter or deceptive practices; the specific area of the complaint; and the order of receipt. A records search may be made to locate any previous complaints involving the same company or practice. Pennsylvania maintains a master file of complaints from its branch offices at the central office.

The file is assigned to an investigator or attorney who makes a preliminary assessment of the complaint's validity, in the light of any previous record of similar complaints against the same concern. If the complaint is without basis or is not within the agency's jurisdiction, the agent so advises the complainant. He may suggest that the complainant contact a private or legal aid attorney if the matter appears possibly to warrant private suit. The file is then closed. If this preliminary review indicates that the complaint is valid and is within the office's jurisdiction, the agent next contacts the party complained against.

The agent advises the party complained against of the purpose and scope of the investigation, requesting pertinent information to resolve the questions presented, and giving him opportunity to present information in explanation of the questioned practices. The identity of the complainant may or may not be disclosed, dependent on the nature and severity of the allegations.

55. N. A. A. G., PROCEEDINGS, 63RD ANNUAL MEETING, 59.

56. N.A.A.G., 1967 CONFERENCE OF ATTORNEYS GENERAL, 78.

Upon receipt of the requested information from the party complained against, evaluation is completed and the decision is made whether or not to continue action. If a negative decision is reached, the agent advises the complainant that the office can do nothing further for him, giving the reasons for this decision.

Depending on the nature, seriousness and frequency of indicated violation, the agent may, with approval of the supervising attorney, attempt to mediate the dispute, acquire an assurance of discontinuance of voluntary compliance, secure a consent order, or otherwise resolve the matter without resort to litigation. If these efforts meet with success and appear adequately to protect the public interest, the file is closed.

If voluntary or consent procedures fail to resolve the matter, or are inappropriate due to flagrancy of the violation, an action is filed seeking injunction or other appropriate relief.

There are, of course, many variations on this general pattern. Kentucky reports that, if the complaint concerns a deceptive practice that is readily recognizable, the company is asked to provide the following information: a list of names and addresses of all Kentucky purchasers within a given time period; a list of sales personnel; a list of promotional material and copies of sales presentation outlines used in the state, and the basis of any claim or representation used that might be deceptive. Pennsylvania reports that court action may be initiated without prior attempts at mediation if the office has previously taken action against the person complained of.

Disposition of Complaints

Several jurisdictions refer complaints to other authorities. Missouri says that complaints are regularly forwarded to federal authorities and that those which apparently involve criminal conduct are sent to local prosecutors. In Oregon, if an informal letter produces no results, serious cases are referred to district attorneys. Wyoming refers complaints which seem to be valid to the district attorney and, in other cases, advises the individual to see a private attorney. Ohio checks with Chambers of Commerce, police and other groups concerning the alleged violator's reputation; if legal action is indicated, the complaint is referred to the appropriate state or federal agency.

With respect to disposition of cases, Kentucky reported that 70 percent of complaints were settled by mediation, 5 percent involved an assurance of discontinuance, 5 percent were referred to other agencies, and 20 percent were found groundless or referred back for private action. In Pennsylvania, 65 percent of 9,156 complaints were settled by mediation, 10 percent referred to other agencies, 15 percent referred for private suit and 10 percent found groundless. Maryland, with about 1,500 complaints a week, settled 40 percent through mediation, referred 10 percent to other agencies, and found the other 50 percent groundless or referred them for private suit. Iowa, for the 11 months ended November 30, 1970, had received 1,616 new complaints, closed 1,362, recovered monies in amount of $316,660, and filed 23 lawsuits. California, Hawaii, Illinois, Massachusetts, Michigan, Missouri, New York, Washington, and Wisconsin have similar active programs to effect positive correction of unlawful practices. Texas secured an injunction in 5 percent of cases, referred 30 percent to other agencies, found 15 percent groundless, and referred 50 percent back for private action.

New Jersey reported in 1968 that the office interviewed 3,418 individual complainants. Cases against 360 business firms reached the formal conference level, 97 went to administrative hearings, one case involving 475 complainants went to Superior Court, and two went to Municipal Court.[57] In a C.O.A.G. questionnaire, the New Jersey office reported that 70 litigations were commenced between December, 1968, and January, 1970. Of these, 45 sought only the assessment of civil penalties, while the others sought injunctive, penalty and restorative relief in varying combinations. The largest cash recovery ordered through litigation was $24,000;[58] additionally, approximately $80,000 in consumer obligations were rescinded as a result of this case.

Education Programs

The value of a well-planned and executed educational program, properly geared to reach people on their own level and in their own language, is stressed by virtually all experts in consumer protection. New York's Attorney General Louis J. Lefkowitz stated that "an educated public is the best deterrent against consumer frauds." He has set up a comprehensive educational program which includes pamphlets distributed with the cooperation of banks, department stores and chambers of commerce warning consumers to beware of dealing with people who call at their homes or who call on the telephone;[59] a course on consumer education offered to high school seniors; personal appearances by representatives of the Attorney General's office, and a specially prepared film on consumer problems which is shown on request at service clubs, church groups and schools.[60]

Maryland's educational efforts were described by Attorney General Francis B. Burch in an article in *State Government*.[61] These include visiting high schools where he and staff members have talked to a total of more than 25,000 students; developing a comprehensive four-week course on consumer education in cooperation with the Baltimore schools; offering counselling services at store-front offices; publishing a brochure for mass distribution; using billboards and ads in buses. In cooperation with the state's largest radio station, the Division prepared a series of eighty spot announcements. Each was about three minutes long and described a specific type of fraud. It concluded with the warning "Buyer Be Aware" and a suggestion that listeners contact the Attorney General's office about their consumer problems.

Maryland's consumer protection division also maintains a speakers' bureau in which personnel are assigned to discuss consumer problems with various civic, charitable, religious and social groups. In three and a half years, over two hundred speaking requests have been met. Assistant Attorney General Norman Polovoy, Chief of the Consumer Protection Division, points out that the speakers program "not only gives us the chance to get out and move around the state and meet people; but of even greater inportance, to learn where various types of consumer frauds and deceptions are originating."[62]

The following states publish pamphlets on consumer protection; Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Missouri, New Jersey, New Mexico, New York, Ohio, South Dakota, Pennsylvania, Washington, and Wisconsin. Such publication programs range from

57. New Jersey Department of Law and Public Safety, 1968 ANNUAL REPORT, 5.
58. *Kugler v. Bernstein* (unreported).
59. N.A.A.G., 1959 CONFERENCE OF ATTORNEYS GENERAL, 75, 78.
60. N.A.A.G., 1968 CONFERENCE OF ATTORNEYS GENERAL, 106.
61. Attorney General Francis B. Burch, Maryland's "Action" Program in *Consumer Protection*. STATE GOVERNMENT, 161 (Summer, 1969).
62. Letter from Assistant Attorney General Norman Polovoy to Patton G. Wheeler, January 25, 1971.

a single pamphlet to a series of publications on various subjects. Pennsylvania, for example, distributes eight booklets, including *The Franchise Trap, Come into my Classroom, Said the Shyster to the Scholar, Conrad Consumer's Sock-it-to-'Em Survival Manual* and *Home Improvement without Headaches.* As the titles imply, these are written in catchy language, profusely illustrated, and designed for mass distribution.

A number of Attorney Generals report that they prepare a periodic newspaper column on consumer matters. These jurisdictions include Illinois, Kentucky, Michigan, New Mexico, Massachusetts, Minnesota, and North Dakota. Other states, such as Iowa, issue frequent press releases on particular practices. Most Attorneys General's offices report that staff members make frequent talks and radio or television appearances. Minnesota reports that it prepares two audiotapes per week for radio and one television tape per month.

6.66 The Federal Role

In a message to Congress on March 15, 1962, President John F. Kennedy defined the consumer's "bill of rights":

THE RIGHT TO SAFETY—to be protected against the market of goods which are hazardous to health or life.

THE RIGHT TO BE INFORMED—to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling or other practices, and to be given the facts he needs to make an informed choice.

THE RIGHT TO CHOOSE—to be assured, wherever possible, access to a variety of products and services at competitive prices and in those industries in which competition is not workable and government regulation is substituted, to be assured satisfactory quality and service at fair prices.

THE RIGHT TO BE HEARD—to be assured that consumer interests will receive full and sympathetic consideration in the formulation of government policy, and fair and expeditious treatment in its administrative tribunals.[63]

President Lyndon B. Johnson, in his 1968 State of the Union message, called on Congress to ". . . make this truly a new day for the American consumer. . . ."[64]

President Nixon pledged his administration to carry on the fight on behalf of the consumer. In a 1969 Message to Congress, he spoke of the buyer's right to "make an intelligent choice among products and services;" to have "accurate information on which to make his free choice;" to "expect that his health and safety is taken into account by those who seek his patronage;" and to "register his dissatisfaction and have his complaint heard and weighed, when his interests are badly served." The President recommended that:

(1) a new Office of Consumer Affairs in the Executive Office of the President with new legislative standing, an expanded budget, and greater responsibilities be created.

(2) a new Division of Consumer Protection be created in the Department of Justice, to act as a consumer advocate before federal regulatory agencies in judicial proceedings and in government councils;

(3) a law be enacted to enable consumers either as individuals or as a class to go into court to obtain redress for damages.

(4) powers of the Federal Trade Commission be expanded.

(5) a National Commission on Consumer Finance be activated to investigate and report on the state of consumer credit.

(6) consumer education activities, including government review of product-testing processes, a new *Consumer Bulletin*, and the release of certain

63. President John F. Kennedy, H. R. Doc. No. 364, 87th Congress, 2d Sess. (March 15, 1962).

64. President Lyndon B. Johnson, H. Doc. No. 211, 90th Congress, 1st Sess. (1968).

government information regarding consumer products, be expanded.

(7) stronger efforts be made in the field of food and drug safety, including a thorough re-examination of the Food and Drug Administration and a review of the products on the "generally regarded as safe" list.

(8) other reforms be carried out including an expansion of consumer activities in the Office of Economic Opportunity and greater efforts to encourage the strengthening of state and local programs.[65]

In December, 1970, a consumer office was created in the Department of Justice, with an initial staff of about ten attorneys. Legislation to create a consumer division had not achieved passage.

Congress has recently enacted a Fair Labeling and Packaging Act (Truth - in - Packaging)[66] *Consumer Credit* Protection Act (Truth-in-Lending);[67] Wholesome Meat Act;[68] Wholesome Poultry Products Inspection Act;[69] a Fire Research and Safety Act;[70] established a National Commission on Product Safety;[71] enacted an Interstate Land Sale Act;[72] passed legislation outlawing the sending of unsolicited credit cards and placing a limit on the amount for which the holder of a stolen credit card can be held liable;[73] enacted the Truth in Credit Reporting Act, regulating the uses of credit bureau reports. A Consumer Advisory Council has been established and the office of Special Assistant to the President on Consumer Affairs created.

Many federal agencies are concerned with consumer matters. From the point of view of state consumer protection agencies, the most important are the U. S. Department of Justice, the Post Office Department, the Federal Trade Commission and the President's office of Consumer Affairs. Frauds perpetrated via the mails and frauds involving use of radio, television, or wire communications violate federal criminal statutes and are subject to prosecution by the postal authorities and the U. S. Department of Justice. Frauds and deceptions used in interstate commerce are subject to action by the Federal Trade Commission.

Deputy Attorney General Frank C. Hale of Hawaii, a veteran of thirty-five years experience with the Federal Trade Commission, spoke to the 1964 N.A.A.G. Conference about cooperation and liaison between the Federal Trade Commission and Attorneys General.[74] He pointed out that the Federal Trade Commission, with its broad authority to stop unfair methods of competition and unfair or deceptive acts or practices, was described as the logical agency to provide guidance for state enforcement officials. Its fifty years of experience, considerable body of law, and expertise in investigation and litigation could be of great assistance to the states. The Commission was qualified to assist the new-comers to the field of consumer protection in developing educational programs, preparing legislation and structuring programs for enforcing such legislation. The Commission was described as an ideal clearing house for the exchange of information regarding unfair business practices and source of information about the effective handling of individual cases. In 1967, Gale P. Gotschall, Assistant General Counsel for Federal - State Cooperation of the F.T.C. stated:

65. President Richard M. Nixon, H. Doc. No. 188, 91st Congress, 1st Sess. (October 30, 1969).

66. 15 U.S.C. § 1451 (1964, Supp. II, 1965-66).

67. 15 U.S.C. § 1601 (1964, Supp. IV, 1965-68).

68. 21 U.S.C. § 601 (1964, Supp. III, 1965-67).

69. 21 U.S.C. § 451 (1964, Supp. V, 1965-69).

70. 15 U.S.C. § 278 (1964).

71. 15 U.S.C. § 1262 (1964, Supp. II, 1965-66).

72. Title 14, House and Urban Development Act of 1968.

73. 84 Stat. 1114 (Supp. 1970).

74. N.A.A.G., 1964 CONFERENCE OF ATTORNEYS GENERAL, 82.

[W]e are looking for opportunities to improve our service to the people through the Attorney General, to whom we look at the state level as the proper official with whom we should conduct liaison and endeavor to coordinate law enforcement activity.[75]

The Federal Trade Commission established an office of Federal-State Cooperation in 1965. It has worked to encourage states to adopt "little F.T.C." acts and to foster inter-jurisdictional cooperation. Assistance in drafting proposed legislation, providing research and training assistance, and access to records of commission proceedings together with continual advice regarding the activities of consumer protection agencies, both state and federal, throughout the nation, descriptions of various fraudulent and deceptive schemes presently occurring around the nation and the distribution of copies of pleadings in important state consumer cases are activities of the Federal Trade Commission that have proven more than helpful to the states in the administration of their programs.

A recent program of the Federal Trade Commission that has met with strong support by participating state agencies is the creation in major metropolitan areas of consumer protection committees composed of federal, state and local enforcement agencies to fight "consumer fraud in all its most virulent forms."[76] Specific goals of these committees include:

Bring to bear federal, state and city laws to stop fraudulent practices;

Pool information to establish priorities for efforts in both education and enforcement;

Give consumers essentially a one-stop complaint service in that a complaint filed with any of the major agencies will be transferred automatically to the right one without further effort by the consumer;

Determine the patterns of violations, if any;

Avoid duplication of effort among consumer protection agencies and develop a "quick response" liaison system among them.

The committee's method of operation is to utilize computer capability to provide participating agencies monthly printouts designed to:

Identify the specific business concerns that generate the complaints;

Identify the nature of those most complained about businesses;

Identify the most common deceptive practices in the area;

Identify those deceptions which are in interstate commerce;

Keep tabs on the current status of each complaint filed by consumer.[77]

Data are provided to the system by participating agencies, which include area F.T.C. offices. Attorneys General, U. S. Attorneys, local prosecutors, postal inspectors and any other agencies engaging in major consumer protection enforcement activities. Printouts are confidential and are, by policy, available only to participating law enforcement agencies.

Proposed eventually for the fifteen largest cities, the program is now operative in Chicago, Los Angeles, San Francisco, Boston, Philadelphia, and Detroit. Attorney General Frank J. Kelley is Chairman of the Committee at Detroit. Data from this source can prove an effective enforcement tool through prompt identification of problem areas and potential offenders and improve correlation of activities at various levels of government.

The President's Special Assistant for Consumer Affairs, Mrs. Virginia Knauer, told a 1969 N.A.A.G. Conference of her office's interest in assisting the states and of plans to set up a telecommunications system to put the states' consumer protection agencies in touch with each other, with her office coordinating the program. This program remains in the planning stage, due to the lack of funding. No decision had been made on the nature and scope of data to be stored, identity of contributors, or agencies entitled to receive information through the system. It was projected that a pilot program involving participation by a few states would be needed to determine the feasibility of such a program and its exact manner of operation. The use of telephonic communication had been effectively ruled out; the risk of confusion, misunderstanding and resultant errors in data dissemination by voice communication without written records was considered too great.[78]

In 1970, the Special Assistant established an office of Federal-State Relations to foster more effective intercommunication with state and local consumer agencies. This office distributes informational material to the states, and is preparing a compilation of state consumer protection statutes. The Special Assistant for Consumer Affairs lacks enforcement authority, but is a valuable source of information and research materials. The office's "Consumer Legislative Monthly Report" on the status of recent and pending federal legislation is distributed to all Attorneys General, Governors and consumer agencies.

Attorney General Robert B. Morgan, in a talk to the Committee on the Office of Attorney General, defined the basic challenge that consumer protection presents to the states:

When I first became Attorney General of North Carolina . . . we had almost no consumer protection activity at all. We quickly changed this, for to me, this is one of the most important areas to be dealt with by any Attorney General's office. I believe very strongly that if we do not deal with it quickly and effectively the federal government is going to. . . . I believe that we as Attorneys General who are directly responsible to the voters of our states—voters who in most states have the right to remove us from public office whenever our actions displease them—are in a much better position to represent the public's interest in our state than attorneys from Washington.

We should not give any member of the Congress a chance to point a finger at our states and use us as an example of why more power should be concentrated in federal agencies. If we want to preserve states' rights—and I do—we must act responsibly to represent the interests of the consuming public before our state and federal regulatory bodies. In this day, consumers throughout America demand such representation and have every right to receive it.[79]

If the states strengthen their efforts to protect the consuming public, they can retain responsibility for consumer protection, and develop constructive relationships to the federal role.

6.67 Regulation of Securities

N.A.A.G. recommends that the Attorney General should actively enforce securities laws or should assist in their enforcement. The recommendation noted that the Attorney General is rarely responsible for Blue Sky law enforcement but that he provides legal service for enforcement agencies in most jurisdictions. Except for Delaware, Samoa and the Virgin Islands, all of the jurisdictions embraced in this study have laws regulating to some extent the sale of securities within their borders.[1]

State Regulation

It has been argued that this field should be preempted by the federal

75. N.A.A.G., 1967 CONFERENCE OF ATTORNEYS GENERAL, 80.

76. Casper A. Weinberger, Chairman, Federal Trade Commission, in address to Ohio State Bar Association, Akron, Ohio, May 14, 1970.

77. Federal Trade Commission, Press Release dated March 25, 1970.

78. Interview with Betty Bay, Director of Federal-State Relations, September 25, 1970.

79. C.O.A.G., *supra* note 16 at 8.

1. Edward Hayes, *State Regulation of Securities Issues*, 17 DRAKE L. REV. 170 (1968). It is interesting to note that Delaware in 1931 had a one-paragraph statute which authorized the Chancellor, at the instance of the Attorney General, to enjoin fraudulent sale or exchange of securities. (37 DEL. L. 1931, c. 260; DEL. REV. CODE sec. 4369 (1935).) This statute was dropped from the new Delaware Code of 1953. Louis Loss and Edward Cowett, *Blue Sky Law*, (Boston: Little, Brown and Company, 1958), p. 17. "It is understood that the Delaware codifiers omitted the old section on the theory that it was purely procedural and that the chancellor had jurisdiction to enjoin without benefit of legislation." *Id.*, n. 3, p. 17.

government because, since the federal government has assumed responsibility, there is no need for the states to continue to regulate securities. Further, it is said that state regulation of securities is "an anachronism," is largely ineffective and "constitutes an unnecessary interference with the interstate securities markets."[2] Conversely, it is said that the states are better able than the federal government to evaluate those dealers in and issuers of securities within their borders.[3] A drafter of the 1956 Uniform Securities Act contends that:

> The state has ready access to the persons who might best be able to attest to the person's character and reputation. State police files are available. Personal interviews can be conducted without great inconvenience or expense. Examinations, either oral or written, can be more easily scheduled. Through publicity appearing in the local newspapers, the administrator may keep advised of the activities of those persons. And, investors who have been victimized by a particular broker-dealer or salesman may be more apt to file a complaint with a local official than a federal official.[4]

Regardless of the validity of either argument, the simple fact is that the federal legislation does not preempt the field,[5] but many persons engaging in the securities industry operate as though state laws did not exist. This may be because the operator takes a calculated risk and disregards the existence of state laws, on the theory that the cost of complying with them more than offsets the risk of sanctions thereunder. More often, it appears that the failure to attempt to comply is the result of inadvertent failure to realize that the transaction is within the scope of applicable state laws.[6] One commentator states:

> This lack of awareness of the blue sky laws is both alarming and paradoxical. Alarming, because of the flood of resultant violations. Paradoxical, because (i) the blue sky laws considerably antedate the corresponding federal legislation, (ii) Congress specifically preserved to the respective states their power to regulate interstate securities activities, and (iii) by and large, the blue sky laws are broader in scope than the corresponding federal legislation, both as to coverage and as to intensity.[7]

These comments do not apply to all jurisdictions; Missouri, for example, notes that its securities laws are not broader than the corresponding federal legislation. The Kansas statute of 1911 was the first comprehensive licensing system, although a few states have earlier laws regulating certain types of securities. It was in Kansas that the term "Blue Sky Law," was first used:

> A definition of 'Blue Sky Law' is necessary. The State of Kansas, most wonderfully prolific and rich in farming products, has a large proportion of agriculturists not versed in ordinary business methods. The State was the hunting ground of promoters of fraudulent enterprises; in fact their frauds became so barefaced that it was stated that they would sell building lots in the blue sky in fee simple. Metonymically they became known as blue sky merchants, and the legislation intended to prevent their frauds was called Blue Sky Law.[8]

By 1917, twenty-seven states had enacted Blue Sky laws. Many of these early statutes bore little resemblance to today's federal and state legislation. Between 1914 and 1916 several of these statutes were struck down in court tests. In 1917, however, the Supreme Court's rulings[9] that the Blue Sky statutes of Michigan, Ohio and South Dakota did not violate the Fourteenth Amendment and did not unduly burden

2. J. Sinclair Armstrong, *The Blue Sky Laws*, 44 VA. L. REV. 713 (1958).
3. *Securities Regulation in New Jersey*, 17 RUTGERS L. REV. 602, 603 (1963).
4. Edward Cowett, *Federal-State Relationships in Securities Regulation*, 28 GEO. WASH. L. REV. 303 (Footnote 72), (1959).
5. Securities Act of 1933, 15 U.S.C. § 77r (1964).
6. *Op. cit.*, p. 288.
7. *Id.*, p. 289.
8. Thomas Mulvey, *Blue Sky Law*, 36 CAN. L.T. 37 (1916).
9. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568 (1917).

interstate commerce removed all doubt that the states could regulate the sale of securities.[10] By 1933, every state except Nevada had enacted such laws.[11]

A Uniform Sale of Securities Act was promulgated in 1929 and adopted in whole or in part by a few states. In 1944, this Act was stricken from the list of approved uniform acts.[12] The present Uniform Securities Act was promulgated and approved by the National Conference of Commissioners on Uniform State Laws on August 25, 1956[13] and amended in 1958.[14] By 1968, twenty-five jurisdictions had enacted the Uniform Act, with amendments.[15]

Characteristics of State Laws

State Blue Sky laws characteristically adopt an approach protective of the investor. The administrator may deny registration of a proposed stock issue he considers unsound. "This means that if he is asked to register an issue he can prevent sale of unsound securities; it also means that a conservative or parochial administrator may be a roadblock to the successful promotion of a new idea."[16] Violation is usually a criminal offense. Injunctive proceedings and civil prosecution for damages are also usually provided. Rescission is often available to injured purchasers and, sometimes, sellers. Damages are sometimes available to an injured purchaser.

In his work on securities laws, Louis Loss summarizes Blue Sky laws as follows:

> There are three distinct types of regulatory devices: (1) antifraud provisions; (2) provisions requiring the registration or licensing of certain persons engaged in the securities business; and (3) provisions requiring the registration or licensing of securities.
>
> Each of the three regulatory devices represents a somewhat different philosophical approach toward the same end of protecting the investing public. Antifraud provisions are intended to enable the administrator to issue public warnings, to investigate suspected fraudulent activities, to take injunctive or other steps to stop them, and as a last resort to punish them. Registration of brokers, dealers, agents and investment advisors is intended to prevent fraudulent or unqualified persons from entering the securities business, to supervise their activities within the state once registration has been achieved, and to remove them from registration if they fall below any of the statutory standards. Registration of securities is intended to give the investor 'a run for his money' by excluding from the state those securities which do not satisfy the statutory standards.
>
> Although the three regulatory devices might have developed in a mutually exclusive way, they have instead been used to support each other. . . . Everywhere at least two of the devices, and most commonly all three, are combined in the same act.[17]

The Uniform Securities Act is in four parts. The first three parts represent these three basic philosophies and are designed to be enacted separately or in any combination. The fourth part contains the general provisions which are essential in varying degrees under any approach, including definitions, exemptions, judicial review, investigatory, injunctive, and criminal provisions.[18]

Administration of Securities Laws

Table 6.67 shows who is responsible for administration of securities laws in forty-three reporting jurisdictions. Only in Alaska, New Jersey and New

10. Louis Loss, *Securities Regulation*, 2d ed., Vol. 1, (Boston: Little, Brown and Co., 1961), p. 28.
11. Cowett, *supra* note 4 at 289.
12. Hayes, *supra* note 1 at 170.
13. 1956 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 182.
14. 1958 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 257.
15. Alabama, Alaska, Arkansas, Colorado, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Puerto Rico, South Carolina, Utah, Virginia, Washington, Wyoming. 1968 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 293.
16. Hayes, *supra* note 1 at 170.
17. Loss, *supra* note 10 at 33-34.
18. 1956 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 182.

6.671 ADMINISTRATIVE AUTHORITY FOR SECURITIES LAWS

Vested in	Delegated To	Advised By A.G.
Alabama ..... State Securities Commissioner		Yes
Alaska ..... Attorney General		
Colorado ..... Securities Commissioner		
Delaware ..... No securities laws		
Florida ..... Comptroller		Yes
Georgia ..... Secretary of State	Asst. Cmmr., Securities Division	Yes
Guam ..... Dept. of Revenue & Taxation	Securities Division	Yes
Hawaii ..... Director of Regulatory Agencies		Yes
Idaho ..... Dept. of Finance	Securities Commissioner	Yes
Indiana ..... Secretary of State	Securities Commissioner	Yes
Iowa ..... Commissioner of Insurance		Yes
Kansas ..... State Corporation Commission	Securities Division	
Kentucky ..... Division of Securities		Yes
Louisiana ..... State Banking Commissioner		No
Maine ..... Bank Commissioner	Director, Securities Division	Yes
Maryland ..... Division of Securities	Securities Commissioner	Yes
Massachusetts ..... Dept. of Public Utilities		Yes
Minnesota ..... Securities Commissioner		Yes
Mississippi ..... Secretary of State	Deputy Sec. of State	Yes
Missouri ..... Secretary of State	Cmmr. of Securities	Yes
Montana ..... Office of the Investment Cmmr.	State Auditor	No
Nebraska ..... Department of Banking		Yes (1)
Nevada ..... Secretary of State		Yes
New Jersey ..... Attorney General	Chief, Bureau of Securities	Yes
New Mexico ..... Division of Banking	Securities Commissioner	Yes
New York ..... Attorney General	Asst. A.G., Bureau of Securities; Director of Condominium Syndication Financing Bureau	
North Carolina ..... Secretary of State	Deputy Secretary of State	Yes
North Dakota ..... State Securities Commissioner		Yes (3)
Ohio ..... Department of Commerce	Division of Securities	Yes
Oklahoma ..... Security Exchange Commission	Administrator	Yes
Oregon ..... State Corporation Commissioner		Yes
Puerto Rico ..... Secretary of Treasury	Securities Office	No (2)
Samoa ..... No securities laws.		
South Dakota ..... Securities Commissioner		No (3)
Tennessee ..... Dept. of Insurance & Banking		Yes
Texas ..... State Securities Board		
Utah ..... Dept. of Business Regulation		Yes
Vermont ..... State Commission of Banking and Insurance		
Virgin Islands ..... No securities laws.		
Virginia ..... State Corporation Commission	Securities Division	No
Washington ..... Dept. of Motor Vehicles	Chief, Prof. Licensing Div.	Yes
Wisconsin ..... Commissioner of Securities		Yes
Wyoming ..... Secretary of State		Yes

(1) Nebraska: Director of Banking employs special Asst. A.G. to advise him.
(2) Puerto Rico: Legal services provided by Legal Dept. of Treasury.
(3) North Dakota and South Dakota: Securities Commissioner is attorney.

York is primary responsibility vested in the Attorney General. In most jurisdictions, however, the Attorney General provides legal services to the enforcement agency.

Twelve jurisdictions reported that the Attorney General has authority to prosecute violations of securities laws. He prosecutes all such violations in Guam, Idaho, Indiana, New Jersey, and Wyoming, and shares this duty with the local prosecutor in Colorado, Missouri, New York, North Dakota, South Dakota, and Washington. In Puerto Rico, the Attorney General has authority to prosecute, but the Treasury Department actually does so. The local prosecutor handles all violations in Georgia, Hawaii, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Ohio, Oklahoma, Oregon, Tennessee, and Texas. Georgia, Hawaii and Ohio report that the Attorney General prosecutes civil cases, but not criminal. In Nebraska, county attorneys handle violations with the Attorney General's assistance. In Florida, Montana, North Carolina, and Virginia, a state officer other than the Attorney General prosecutes violations. Utah reports that private counsel handles such violations.

Generally, states are not active in prosecuting violations of securities laws. Of twenty-nine jurisdictions reporting, eight had not brought any actions in either 1968 or 1969, and either others had not brought any criminal actions. The number of criminal actions brought by reporting jurisdictions during this two-year period was: Maryland—1; Missouri—1; New Jersey—1; New York—5 (1969 only); North Carolina—13; North Dakota—4; Ohio—6; Oregon—2; Puerto Rico—1; South Dakota—4; Washington—1, and Wisconsin—1. Colorado, Hawaii, Indiana, and Maryland each brought one civil action during this two-year period. The other jurisdictions reporting that they brought civil actions were: Idaho—3; Minnesota—14; New Jersey—2; New York—53 (1969 only); North Dakota—2; Ohio—2; Oklahoma—8; Oregon—10; Virginia—25, and Washington—4. Wisconsin also reported that 14 administrative actions were brought. New Jersey reports that it has significantly increased its prosecutions of violations of Blue Sky laws in 1970; in 1968-69, it reported 19 administrative actions.

Most of the jurisdictions reporting said that no separate appropriations were made for securities law enforcement. Those that did report an appropriation did not specify whether it was to the Attorney General or to another enforcement agency. Nine jurisdictions reported significant appropriations for 1969. These were: Maryland—$78,589; Minnesota—$203,632; Nebraska—$80,000; New Jersey—$87,750 (for 1969-70); New York—$1,107,716; North Dakota—$115,719 (1969-71); Oregon—$120,000; South Dakota—$46,935, and Wisconsin—$490,000.

The C.O.A.G. survey asked how much of the Attorney General's time was spent on securities law matters, and most answered that they spent an insignificant amount. Nebraska was unusual, estimating that 10 percent of the Attorney General's time was so spent. Only four states reported that they had one or more attorneys assigned full-time to securities regulation: Maryland had one, Minnesota and North Dakota each had two, and New York had twenty-nine. Ohio, New Jersey and Washington said that an assistant Attorney General spent about half his time on security law matters, and Georgia reported the equivalent of a half-time attorney. No other jurisdictions said that any assistant Attorney General spent more than 30 percent of his time on these matters.

The Attorney General of New York has a large securities staff, consisting of twenty-nine attorneys, thirteen accountants, forty-two clerical employees, one analyst, eight investigators, one realty consultant, and two architects, all full-

time. Staffing of securities agencies in other jurisdictions from which data are available is shown in the accompaning table.

6.672 STAFFING OF SECURITIES AGENCIES

	Attorneys	Clerical	Other
Georgia	0	3 FT	1 PT investigator
Guam	0	1 PT	1 PT section chief
Hawaii	0	2 PT	1 FT investigator; 1 PT administrator
Idaho	1 PT		
Kentucky	2 FT		
Maine	1 PT	1 PT	
Maryland	1 FT	2 FT	1 FT Deputy
Minnesota	2 FT	7 FT	1 legal aide; 5 examiners; 1 investigator; 1 assistant
Mississippi	1 FT, 1 PT	1 FT, 1 PT	Commissioner (all FT)
Missouri	3 FT	3 FT	1 auditor
Nebraska	1 FT, 1 PT	1 FT, 1 PT	
New Jersey	1 FT	7 FT	3 investigators; 2 accountants
North Carolina	1 FT	2 FT	1 FT licensing clerk
North Dakota	1 FT	2 FT	1 FT accountant
Ohio	1 FT	1 FT	1 legal aide
Oklahoma	2 FT	10 FT	4 FT accountants
Oregon	4 FT	4 FT	3 FT, 1 PT accountants
Puerto Rico		2 FT	1 director; 3 accountants; 2 economists (all FT)
South Dakota	1 FT	3 FT	
Virginia	1 FT	1 FT	1 director; 1 deputy, 3 examiners (all FT)
Washington	1 PT	5 FT	1 legal aide; 2 auditors; 1 examiner (all FT)
Wisconsin	2 FT	7 FT	5 FT examiners
Wyoming	1 PT	2 FT	2 FT administrators

FT: Full Time; PT: Part Time

Regulation of securities is a continuing responsibility of most states, despite federal activity in this field.

6.68 Antitrust

Recent actions such as the plumbing fixture cases, the childrens' book cases, the electrical company cases and the drug company cases indicate an increased interest on the part of the states in enforcement of the antitrust laws. This interest at the state level is recent; before 1961, only Missouri, New York, Texas, and Wisconsin had shown any degree of continuing antitrust enforcement activity since the years preceding World War I. Elsewhere, there has been occasional private litigation, but otherwise the state antitrust laws have lain dormant until recent years, when many Attorneys General have become active in enforcement.

State Antitrust Laws

The states actually preceded the federal government in antitrust legislation. Kansas enacted the first antitrust statute in 1889; Texas and Missouri also enacted similar legislation in the same year.[1] Congress did not pass the Sherman Act until the following year and it was intended to supplement, rather than supplant, state power.[2] Senator Sherman made this clear in these remarks on the federal legislation:

1. Julian O. von Kalinowski, State Antitrust Laws, 29 A.B.A. SECTION OF ANTITRUST LAW 256 (1965).
2. *Antitrust Handbook*, an unpublished manual prepared by the U.S. Department of Justice, 4-6, March 26, 1969.

6.681 EXISTENCE AND ENFORCEMENT OF STATE ANTITRUST STATUTES

	State Laws	Actively Enforced(1)	Enforcement Authority (2) A.G.	Enforcement Authority (2) Other
Alabama	Yes		Yes	
Alaska	Yes		No	
Arizona	Yes		Yes	County and city attorneys
Arkansas	Yes		Yes	
California	Yes	Yes	Yes	District attny; injured party
Colorado	Yes		Yes	Injured party
Connecticut	No			
Delaware	No			
Florida	Yes	No	Yes	State attny; county solicitors and prosecutors; injured party; Dept. of Agriculture
Georgia	Yes			Injured party
Guam	No			
Hawaii	Yes	Yes	Yes	County attnys. assist with investigations
Idaho	Yes	Yes	Yes	Injured party; Dept. of Commerce and Development
Illinois	Yes	Yes	Yes	
Indiana	Yes	No		Injured party
Iowa	Yes	No	Yes	County attorney
Kansas	Yes		Yes	
Kentucky	Yes		No	Injured party
Louisiana	Yes	No	Yes	District attorney
Maine	Yes	No		
Maryland	No			
Michigan	Yes			
Minnesota	Yes		Yes	Injured party; co. or city atty.
Mississippi	Yes	No	No	District attorney
Missouri	Yes	Yes	Yes	Pros. atty; injured party
Montana	Yes		Yes	
Nebraska	Yes	No	Yes	County attny.; injured party; Director of Agriculture; State Tax Cmmr.
Nevada	No			
New Jersey	Yes		Yes	
New Mexico	Yes	Yes	Yes	District attorney
New York	Yes		Yes	District attorney
North Carolina	Yes		Yes	Superior court solicitor
North Dakota	Yes	Yes	Yes	States attorney
Ohio	Yes	Yes	Yes	
Oklahoma	Yes	No	Yes	District attorney; special counsel employed by Governor.
Oregon	Yes		Yes	
Pennsylvania	No			
Puerto Rico	Yes	Yes	Yes (3)	
Samoa	No			
South Carolina	Yes	No	Yes	
South Dakota	Yes	No		
Tennessee	Yes	No		
Texas	Yes	Yes	Yes	
Utah	Yes	No	Yes	Injured party
Vermont	Yes		Yes	

Virgin Islands	No			
Virginia	Yes	Yes	Yes	Commonwealth Attorney
Washington	Yes	Yes	Yes	Injured party
Wisconsin	Yes	Yes	Yes	Department of Agriculture; District attorney
Wyoming	Yes	Yes	Yes	County attorneys

(1) This determination was made by the responding jurisdictions.
(2) No effort is made to distinguish between the different types of antitrust laws. Persons named may enforce one statute or all statutes.
(3) Puerto Rico: Office of Monopolistic Affairs of Dept. of Justice enforces antitrust laws.

This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the Federal Courts within the limits of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States.[3]

Federal and state laws alike were designed to promote and protect competition:

Fundamentally, our basic antitrust policy, as interpreted by the Supreme Court . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our political and social institutions.[4]

An article about antitrust activities of the Attorney General of Illinois points out the expanded goals of antitrust programs, which include: (1) protecting state and local government, especially the taxpayer's dollar, from collusive bidding practices; (2) combatting organized crime in its efforts to take over legitimate business; and (3) protecting the general business community.[5] Illinois is an example of a state where antitrust activity has undergone revival because of recent legislation. For seventy-four years Illinois had an antitrust act but not a single action was brought to enforce it. Since 1909 there had not been one successful suit by a private litigant under the act.

In 1965, a new antitrust law was enacted with the support of the Attorney General's office.[6] The Act is modeled after the Sherman Act but includes personal services as well as commodities. The Attorney General is given exclusive authority to initiate civil and criminal action to enjoin violations and he may request that the court terminate or suspend corporate charters. Private litigants may rely on judgments obtained by the Attorney General as prima facie evidence of antitrust violations in private suits. The Act has recently been amended to give the Attorney General subpoena power to obtain books and records and to obtain witnesses' testimony under oath. Attorney General Scott indicates that he plans to apply its provisions against organized crime by attacking the allocations of territories, markets and customers.[7]

Some states are now reconsidering the scope of their antitrust laws in

3. 21 CONGRESSIONAL RECORD 2457 (1890).
4. John J. Hanson and Julian O. von Kalinowski, *State Antitrust Laws*, 15 WEST. RES. L. REV. 9, 29 (1963); see also: Bruce Wilson, *The State Antitrust Laws*, 47 A.B.A.J. 160 (1961); Lee Loevinger, *The New Frontier in Antitrust*, 39 TEXAS L. REV. 865 (1961), and Will Wilson, 1959 CONFERENCE OF ATTORNEYS GENERAL 72.
5. Robert Egan, *Antitrust Enforcement Objectives of the Illinois Attorney General*, 11 ANTITRUST BULL. 629, 630-632 (1966).
6. Antitrust Act, Chap. 121 ½, Sec. *et seq.*, ILL. REV. STAT. 1969.
7. Robert Atkins, *The Illinois Attorney General's Role in Consumer Protection*, XV THE ANTITRUST BULLETIN, 367, (1970).

relation to consumer protection. Others continue to separate antitrust enforcement from consumer protection activities. The major area of activity, however, is state treble damage actions under federal law.

State antitrust statutes are substantially similar, because they "are largely a codification of common law principles on monopoly and restraint of trade."[8] The Florida Supreme Court has observed that state antitrust statutes "indicate a policy to extend and confirm rather than restrict the common law principles" and that:

The industrial and governmental conditions here do not require a relaxation of the just principles of the common law in reference to monopolies and restraint of trade; but, on the contrary, the spirit and purpose of our government and institutions, and the commercial conditions of the country require the maintenance and enforcement of those principles for the protection of freedom in trade and equal opportunities to all under like conditions so that the welfare of the public or any considerable portion thereof may not be unjustly subordinated to the purpose and advantage of one or more individuals.[9]

Forty-two of fifty reporting jurisdictions state that they have antitrust statutes. These include broad antitrust statutes covering all restraints of trade and more limited statutes relating only to specific practices such as price discrimination and sales below cost. Two states, Georgia and Maryland, state that they have no antitrust laws but report constitutional provisions declaring contracts and agreements which defeat or lessen competition illegal and void[10] and fair trade laws[11] and unfair sales laws.[12] Fair trade laws and unfair sales laws are not properly considered antitrust laws, however, since "their primary goal is to control, rather than to promote, competition."[13]

Uniform and Model Laws

Several attempts to arrive at an acceptable model antitrust act have been unsuccessful. Although at least two such suggested statutes exist, there is no record of any state having adopted either. Hawaii, New Jersey, Puerto Rico, and Illinois have enacted comprehensive antitrust statutes within the past few years but none of these appear to be patterned after any generally accepted model. The Illinois Act has been favorably received by other states; Kentucky reports that a bill modelled thereon is under consideration for submission to the legislature. The Hawaii and Puerto Rico laws have been criticized as frustrating attempts to achieve some degree of uniformity between jurisdictions to aid businessmen in attempting to conform to a multitude of state statutes.[14]

Attorney General Santiago C. Soler-Favale points out that circumstances in a particular jurisdiction may make a uniform law undesirable:

Puerto Rico is a civil law jurisdiction with an underdeveloped economy which must mold and fashion its antitrust doctrines to fit its very unique situation. We must harmonize civil law doctrines with common law principles, federal antitrust policies with an economic policy which is geared to the structuring of a directed economy. . . . Our antitrust statute is patterned after the federal antitrust statutes, but will be interpreted and is being interpreted to help solve our particular competitive problems, which means that under certain circumstances mainland precedents need not be followed.[15]

In a 1961 article, Richard H. Stern, now Chief of the Patent Unit, Antitrust

8. James Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753 (1961).
9. *Stewart v. Sterns and Culver Co.*, 56 Fla. 570, 48 So. 19 (1908).
10. *Georgia Constitution*, Art. IV, Sec. IV, par. I (GA. CODE ANN. § 2-2701).
11. MD. ANN. CODE, Art. 83, § 102-110 (1957); MD. CONST., Declaration of Rights, Art. 41.
12. MD. ANN. CODE, Art. 83, § 111-115; § 116-127 (1957).
13. Rahl, *supra* note 9, p. 753.
14. Kalinowski, *supra* note 1, p. 256.
15. Letter from Attorney General Santiago C. Soler-Favale to Attorney General John B. Breckinridge, May 20, 1970.

Division, U.S. Department of Justice, argued for state antitrust enforcement and presented a comprehensive uniform act. He considered state enforcement a necessity despite federal activity in the field because: (1) there are important areas where the problem presented is intrastate and hence outside the scope of federal action; (2) there are areas of concurrent jurisdiction where the state may well be better equipped to act; and (3) the limited resources of the U.S. Department of Justice do not allow federal action in all instances of abuse. To allow the states to operate effectively in this area, he considered the adoption of uniform legislation a necessary first step.[16]

This argument has been advanced by several other authorities on the basis that existing state statutes are antiquated and, in some instances, result in the "strangulation of basic antitrust objectives." Yet the case law that has developed under these statutes "has been surprisingly good overall and fairly uniform in approach." And there are "discernible common threads" in these statutes. "These factors provide a sound basis or starting point for a uniform law."[17]

William Barnett, in an article supporting a uniform act approved by the A.B.A. Committee on State Antitrust Laws on April 8, 1965, describes the difficulties of a businessman attempting to comply with inconsistent antitrust laws. He concludes that a uniform act is the only practical solution to the problems of businesses subjected to conflicting antitrust enforcement. He argues that:

> . . . two features of the proposed act are essential: (a) it must be closely patterned after federal laws, and (b) it must be a *uniform* act as distinguished from a so-called *model* act. Unless the act contains both of these features, state and federal authorities will continue to enforce conflicting standards of antitrust conduct and little will have been accomplished. For example, if each state should select a few provisions from a *model* act and add to them a variety of others, compliance difficulties would be greatly increased.[18]

Barnett concludes that:

> Adoption of the proposed uniform act would at least mean that state and federal authorities would be enforcing substantially the same standards of antitrust conduct, and that activities designed to comply with one antitrust law would no longer be in violation of another. Hence, the highest achievement of the proposed uniform act would not be legislative uniformity, but legislative fairness.[19]

In 1960, the National Association of Attorneys General adopted a resolution urging those states which were not then exercising antitrust jurisdiction to enter the field and enact laws which would "enable them to join in the drive against forces undermining our competitive economy."[20] The N.A.A.G. Antitrust Committee worked closely with the A.B.A. Committee during the early stages of development of this uniform act but twice rejected proposed versions. The Committee voiced a preference for a model act format so that states would not be bound to the provisions of a standard statute but could accept only those provisions considered suitable and add supplementing provisions as the individual state considered appropriate.[21]

Soon thereafter the N.A.A.G. Committee, although continuing to work with the A.B.A. Committee, appointed a subcommittee to draft its own model act. Preliminary work thereon was completed prior to the 1967 National

16. Richard H. Stern, *A Proposed Uniform State Antitrust Law: Text and Commentary on a Draft Statute*, 39 TEXAS L. REV. 717 (1961).

17. Hanson and Kalinowski, *supra* note 4, p. 32.

18. William Barnett, *Conflicts in State and Federal Antitrust Enforcement*, 29 A.B.A. SECTION OF ANTITRUST LAW 285, 300 (1965).

19. *Id.*, at 300.

20. 1960 CONFERENCE OF ATTORNEYS GENERAL 197.

21. 1965 CONFERENCE OF ATTORNEYS GENERAL 172, 177.

Conference,[22] and a draft was circulated to the full N.A.A.G. Antitrust Committee in February, 1968.

There are no data available to indicate that any one of these three acts has been adopted in any form by any jurisdiction.

Enforcement of Antitrust Laws

When a state government has purchased goods from corporations charged with conspiracy to fix prices in violation of the Sherman Act, The Attorney General may initiate treble damage actions on behalf of the state, as the state is treated as any other consumer. The Attorney General's standing to bring such actions on behalf of citizens and consumers of the state is less clear.

The doctrine of *parens patriae* has been used to justify the Attorney General's intervention on behalf of consumers in federal antitrust treble damage actions. In a 1945 case, the United States Supreme Court held that the state of Georgia could successfully institute a claim against the defendants for both injunctive and monetary relief as *parens patriae*.[23] Subsequent cases in lower courts have not elucidated this holding, but have indicated some conflict in the courts view of this concept.

The number of actions brought under state laws are limited. No such actions were reported for 1968 or 1969 by Alabama, California, Kentucky, Maine, Minnesota, Montana, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Texas, Vermont, and Wyoming. The following states reported actions under state law during 1968 and 1969: Arizona—"several"; Missouri—1; Illinois—1; New York—6; North Carolina—6; Puerto Rico—11; Utah—2; Washington—2; Wisconsin—7.

Seventeen jurisdictions reported that they had brought treble damage actions under federal law during 1968 and 1969. These were: Arizona—"several"; California—3; Idaho—"some"; Kentucky—6; Minnesota—"some"; Missouri—2; Montana—1; Nebraska—1; New Jersey—10; New York—18; North Carolina—1; Pennsylvania—"several"; Puerto Rico—1; South Dakota—2; Texas—4; Virginia—"several"; Wisconsin—9.

Of the fifty jurisdictions reporting antitrust laws, fourteen claim actively to enforce these laws. Twelve state that these laws are not actively enforced.

Alaska, Kentucky, Mississippi, and Virginia state that the Attorney General does not enforce the antitrust laws. Mississippi and Virginia antitrust laws are enforced by the local prosecutor. Kentucky antitrust laws are enforced by the injured party. All other reporting jurisdictions state that the Attorney General is the primary enforcement authority, but in many of these jurisdictions the injured party, the local prosecutor and some other official are empowered to bring actions under the antitrust laws. (See Table 6.61, *supra.*) In many instances, there are several antitrust or related statutes which are enforced by differing authorities. For example, one statute may be enforced by the Attorney General and another by the local prosecutor.

Only four jurisdictions reported separate budgets for enforcement of antitrust laws. California reported an annual budget of $462,518; Illinois reported an annual budget of $200,000; North Carolina reported an annual budget of $100,000; New Jersey reports an initial budget of $100,000 with revolving fund provisions. Most other reporting jurisdictions indicated that there was no separate budget for antitrust enforcement but that funds for this purpose were included in the Attorney General's general budget appropriation.

Arizona amended its antitrust laws in 1970 to allow the Attorney General

22. 1967 CONFERENCE OF ATTORNEYS GENERAL 147.

23. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

to employ counsel on a contingent fee basis for antitrust cases. The law also established a revolving fund, under the Attorney General, for costs and expenses of antitrust enforcement. In no jurisdiction was any significant proportion of the Attorney General's time devoted to antitrust matters.

Of the reporting states which have antitrust laws, Alabama, Maine, Mississippi, Oklahoma, and Wyoming have no staff for antitrust enforcement. Washington reports that there is no full-time staff specifically for antitrust, but members of the consumer protection staff are sufficiently cognizant of antitrust law to handle complaints, and special counsel are hired for litigation. New Jersey reports that it is not yet fully staffed under its new law. Staff for antitrust law enforcement in the other jurisdictions is shown below.

6.682 STAFF FOR ANTITRUST ENFORCEMENT

	Attorneys		Clerical		Legal Aides		Other
	F.T.	P.T.	F.T.	P.T.	F.T.	P.T.	
Arizona		3		2		1	
California	7		6				4 F.T. investigators 1 F.T. economist
Colorado		1					
Florida		2	2				
Georgia		4.5					
Hawaii	2	1				2	
Idaho		1					
Illinois	6	2	1			2	2 F.T. investigators
Indiana		1			1		
Iowa		2		2		1	
Minnesota	2	1	2	1			
Missouri		2		1			
Montana		2					
Nebraska		2					
New Mexico		1		1			1 P.T. administrative assistant
New York	12		1				2 F.T. investigators 1 F.T. economist 1 F.T. accountant
North Carolina	1	2	1	1		1	
North Dakota		1					
Ohio	5		2		1		
Puerto Rico	5		7				3 F.T. economists 1 F.T. accountant
South Dakota		2					
Texas	5	3	1		1		
Utah		1					
Vermont		1	1				
Virginia		1					
Wisconsin		4	1	1			

F.T. = Full Time P.T. = Part Time

Some Problems of Enforcement

The most commonly mentioned deterrents to effective enforcement include: (1) federal preemption; (2) reliance exclusively on federal law; (3) inadequate state statutes and case law; (4) lack of money and staff; and (5) lack of interest in enforcement.

Federal preemption can no longer be considered a bar to state action. Courts have recognized state jurisdiction and applicability of state antitrust statutes to interstate commerce so long as there is a substantial connection of some kind with the state.

The best illustration of the dual role of state and federal jurisdiction in antitrust is seventy years of concurrent jurisdiction, beginning with the cases against the Standard Oil Trust. Between 1892 and 1906, 11 states brought 24 cases against the members of the Standard Oil Trust. . . . at the same time the federal government brought its action which culminated in the landmark decision, *Standard Oil Co. v Unites States*, 221 U.S. 1 (1911). In most of these state enforcement actions, the defense made the argument that state law had been preempted—but never in a state's antitrust prosecution has this argument prevailed.[24]

Some antitrust matters, however, are not interstate in nature and do not materially affect interstate commerce, so only the state has jurisdiction. Services such as laundries, dry-cleaning establishments, barber shops, building trades, employment agencies, real estate brokers and funeral directors are generally considered state problems. Reliance on federal law to take care of all antitrust problems is unrealistic for this reason, and because of practical limits on the federal authorities' financial and manpower resources.

There are large substantive gaps in many state antitrust statutes, but this should not preclude enforcement of those provisions that do exist. Missouri, for instance, does not include services in its antitrust prohibitions.[25] Legislation can always be sought to close such gaps. Adverse court decisions should not be considered an absolute barrier, since most of today's state supreme courts probably would "be reasonably sympathetic toward state antitrust law provisions . . . ."[26]

Lack of personnel and money is a key problem but one that can be overcome with applied effort. One authority sums up the situation:

> The key to the enforcement problem probably is the lack of personnel and money required to do the job. Most states make no provision for a special antitrust assistant attorney general, or for any special branch. The creation of such a special enforcement office, however, has played a leading role in the stepped up activity in New York and Wisconsin and is being tried elsewhere.
>
> Candor would seem called for at this point. Effective antitrust enforcement is not a job for amateurs, nor for skilled attorneys who are charged with simultaneous enforcement of numerous other laws. Antitrust enforcement requires knowing what to look for, having the skill, time and money required to find it, and having the ability to establish this special kind of case in court. These qualities are not super-human, but they do not come automatically packaged with a license to practice, nor are they likely to come with the general kind of experience acquired in a political career.[27]

He believes that the chief problem is lack of interest in enforcement, not lack of an ideal statute.

Federal-State Relations

The past decade has seen a concerted effort on the part of the federal authorities to assist Attorneys General in establishing strong antitrust enforcement programs. The Antitrust Division of the U. S. Department of Justice has held several conferences to assist the states in the implementation of effective antitrust enforcement programs. Assistance has also been given

24. *Antitrust Handbook*, *supra* note 2, p. 6.

25. *International Harvester Co. v. Missouri*, 234 U.S. 199 (1914).

26. Rahl, *supra* note 9 at 760-63.

27. *Id.* at 746.

in drafting of state legislation, where requested.

The Justice Department has adopted certain procedures designed to facilitate effective treble damage actions by the states. In some circumstances, the Department has refused to enter into a consent decree unless the decree prohibited the defendant from denying an antitrust violation in treble damage actions brought by states subsequent to the entering of the consent decree, thereby assisting the states in establishing liability in damage actions. This policy was applied in *United States v. Lake Asphalt and Petroleum Company*[28] and such clauses came to be known as "asphalt clauses". They have not appeared in recent consent decrees. In *United States v. Brunswick-Backe-Collender Co.*, [29] one District Court ruled against the use of such a clause, where the defendant objected to its inclusion in the decree. Apparently the Antitrust Division might attempt to employ such a clause or something similar in appropriate future cases, although these circumstances would be very unusual. It is expected that the Division will object to *nolo contendere* pleas in some criminal cases where the entry of such a plea would tie the hands of plaintiffs, especially states, in subsequent treble damage actions. Further, if the trial judge accepts such a plea over the Division's objection, the Department would seriously consider seeking a civil decree in an effort to facilitate matters for treble-damage plaintiffs.[30]

In discussing the Justice Department's policy on approving *nolo contendere* pleas during a 1970 federal-state conference on antitrust, Bruce B. Wilson, of the Department of Justice Antitrust Division stated that:

The Division would ordinarily oppose pleas of *nolo contendere* in cases where a guilty plea or a conviction after trial would be of meaningful aid to states or private parties who may have suffered substantial damages as a result of the offense. This, however, is a general proposition and it is subject to a number of qualifications.

First, we believe that we should consider the nature of the violations. Where the violations are blatant and reprehensible, the likelihood of Division opposition to the entry of *nolo* pleas is increased. In this connection, we will weigh the duration and economic effect of the violation, the extent to which predatory and secretive activities were involved, the extent to which there was consciousness of guilt, the previous antitrust record of the companies involved, and the extent of any coercive activities which may have taken place.

Second, we believe that we may properly consider that the liberalization of the discovery and class action rules has reduced the historical disparity in strengths between the large number of small plaintiffs and the smaller number of financially strong defendants.

Third, we believe that we may properly consider the financial strength of the companies offering the *nolo* pleas—particularly whether the impact of substantial treble damage recovery might have possible anti-competitive results by forcing small companies into bankruptcy.[31]

Another policy of the Justice Department designed to assist Attorneys General is to file proposed consent decrees thirty days in advance of actual entry, so that criticism of the decree may be evaluated and warranted changes made. This policy has been favorably commented upon by the N.A.A.G. Antitrust Committee,[32] and has resulted in proposed modifications of decrees being incorporated in at least one case. The Justice Department also sends every Attorney General copies of complaints, indictments and judgments as filed. Certain other documents, including briefs and memoranda

28. 1960 Trade Cas. 77,271 (Civ. D. Mass. 1960).
29. 203 Fed. Supp. 657 (Civ. D. E. Wis. 1962).
30. Richard McLaren, *"The Government and the Private Antitrust Suit,"* an unpublished speech presented before the Antitrust Committees of the Federal Bar and the Philadelphia Bar Association, December 11, 1969.
31. Wilson, *Federal Assistance to State Treble Damage Plaintiffs*, a speech presented to the Federal-State Conference on Antitrust, Washington, D. C., April 8, 1970.
32. 1962 CONFERENCE OF ATTORNEYS GENERAL 274.

of law, are provided upon request subject to availability.

The Justice Department publishes annually a report to the President and Congress, listing bidders on federal, state and local government projects who submitted identical bids. Entitled *Identical Bidding in Public Procurement*, this report is distributed annually to all the states and to other interested parties.[33]

The reaction of Attorneys General to these policies are reflected in resolutions passed by expressing appreciation to the Justice Department and encouraging continuation of the use of "asphalt clauses"[34] and the annual federal-state conferences.

The major reported problem in federal-state relations arises in the area of grand jury transcripts and documents. Private plaintiffs, including states, have often sought disclosure of grand jury records and been frustrated in their efforts by the objection that grand jury proceedings are secret. In discussing the Justice Department's policy in this regard, Robert B. Hummel of the Antitrust Division pointed out that the secrecy of grand juries was based in both common law precedent and Rule 6 (e) of the Federal Rules of Criminal Procedure. By court decision, transcripts can be opened up only when there "is a 'compelling necessity' in response to a 'particularized need'."[35] Hummel pointed out, however, that there might be indirect methods of securing these transcripts:

It has been held in a number of cases that where a witness is evasive and his memory is bad, a judge may examine the transcript in order to decide whether the witness' current deposition is inconsistent with his grand jury testimony. Thereafter counsel may have the opportunity to examine the transcript and use it in examining the witness.[36]

Attempts by private litigants to secure lists of grand jury witnesses, copies of grand jury documents, grand jury testimony of particular witnesses, and copies of government memoranda based on grand jury evidence, have met with mixed results, as a great deal is left to the discretion of the judge.

Another possible source of grand jury data is the presentencing memoranda which some district judges invite from the government. These might be expected to contain factual data not otherwise available to the states. The Ninth Circuit has held that these are not protected by grand jury secrecy; however, a California district judge later decided that the question was one subject to the trial court's discretion and refused to release the memorandum.[37]

Baddia J. Rashid, Director of Operations, Antitrust Division, Department of Justice, has indicated that although the department will not release grand jury transcripts without court order upon showing of particularized need, they will support the release to requesting states of the names of grand jury witnesses and grand jury documents if the owners of the documents be given a chance to be heard prior to the release of the documents. Results of civil investigative demands cannot be released since they are by statute not

33. Pursuant to Executive Order No. 10936, issued April 24, 1961.
34. Resolution No. 7, "Federal Antitrust Consent Decrees", 1961 CONFERENCE OF ATTORNEYS GENERAL 195; Resolution No. 21, "Antitrust Consent Decrees", 1962 CONFERENCE OF ATTORNEYS GENERAL 220.
35. Robert B. Hummel, *Recent Developments in Treble Damage Litigation*, a speech presented to the Federal-State Conference on Antitrust, Washington, D.C., April 8, 1970, citing *United States v. Proctor & Gamble*, 356 U.S. 683.
36. *Id.*
37. *Id.* citing: *U.S. Industries, Inc. v. U.S. District Court*, 345 F. 2d 18 (1965), *cert. denied* 382 U.S. 814, and *Hancock Brothers, Inc. v. Jones*, 293 F. Supp. 1229 (N.D. Calif. 1968).

disclosureable.[38] He indicated that the Justice Department wanted to cooperate fully with the states but would continue to favor non-disclosure of grand jury transcripts except where particularized need is shown, since secrecy is an important factor in acquiring and protecting sources of information.

Interstate Liaison

Efforts are now underway under the leadership of the N.A.A.G. Antitrust Committee to achieve greater cooperation between the states in the development and prosecution of antitrust actions. California enacted in 1968 a statute designed to facilitate such cooperation by allowing the Attorney General to act as counsel for other states and to employ public counsel of other states to represent California.[39] This statute also allows the Attorney General to represent any political subdivision of the state in antitrust actions and to be reimbursed by such political subdivision for expenses incurred. Expense-sharing contracts with private as well as public co-litigants are authorized.

California reports that these statutory provisions grew out of experience:

> in the so-called Western Pipe cases in which almost 300 governmental entities were parties plaintiff. The United States, California, Hawaii, Oregon and Washington, together with subdivisions and public agencies of these states, were able substantially to reduce the expenses of this litigation as the result of forming an *ad hoc* informal organization to act as a common fiscal agent. By cooperative agreements, major litigation expenses were shared proportionately, specialists and experts employed, and solution found for the difficult problems involved in fairly allocating among the successful plaintiffs the $33 million recovery.[40]

Giving new emphasis to the need for greater cooperation between the states in antitrust matters is the 1968 Multidistrict Litigation Act which states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district court for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.[41]

Under this provision, twenty-three drug cases from nine districts were transferred to the federal district court in New York where at least sixteen others had been pending. This was done over the objection of some plaintiffs, notably California. The court found that the extra expense caused California litigants by the transfer "will be more than offset by savings from and convenience of coordinated or consolidated pretrial proceedings directed by the transferee judge."[42]

A civil damage action brought by the Justice Department against these manufacturers filed in the District of Columbia was transferred, over government objection, to New York for consolidated pre-trial rulings.

The present climate in antitrust law enforcement, under both state and federal laws, dictates the need for Attorneys General to work cooperatively in two different directions: (1) horizontally with other states and federal government in cases of common interest; and (2) with subordinate political subdivisions and public agencies within their own states.

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38. Baddia Rashid, *Panel Discussion on the Disclosure of Grand Jury Transcripts—Pros and Cons*, Federal-State Conference on Antitrust, Washington, D. C., April 8, 1970.
39. CAL. BUS. & PROF. CODE, § 16750 *as amended* by AB 518, February 17, 1969.
40. Letter to Attorney General John B. Breckinridge from Assistant Attorney General Wallace Howland, California, dated September 4, 1969.
41. Title 28 U.S.C. 1407 (a).
42. *In re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs*, 1960 Trade Cas. 72,663.

6.7 Public Aid Programs

The Attorney General's unique common law heritage often leads to his exercising functions far beyond the statutory scope of his legal duties. Some activities in support of the public interest, such as consumer protection, are described elsewhere in this Report. This chapter concerns Ombudsmen, compensation for victims of violent crime, and other programs for assisting members of the general public.

6.71 Public Aid Activities

Presumably, most Attorneys General handle some complaints from private citizens. The Attorney General of Wisconsin, for example, wrote at least thirty letters in a six-year period explaining to citizens their legal rights relating to open meetings and records of public bodies.[1]

In 1967, then-Attorney General Elliot Richardson established a Citizens' Aid Division in the Attorney General's of Massachusetts office. The Division receives complaints and acts as liaison between the individual and the state or local agency which best could assist him. All types of problems are handled and all legitimate requests are treated individually. Legal advice and interpretations of the law are not provided, but if the situation requires professional counseling, it is suggested that a lawyer be contacted. In the case of indigent persons, the address of the local legal aid office is provided. In addition, students and educators regularly contact the Bureau on specific topics and are supplied with all available publications to aid them in their research.[2]

6.72 Ombudsman

The office of Ombudsman is conceived of as an independent office separate from state executive offices, such as the office of Attorney General. While the Attorney General can, and often does, act as spokesman for citizens, his basic role is often as the state's chief legal officer. This role might conflict with any attempt to serve as Ombudsman.

Historical Development

The Ombudsman's origins are ancient ones. Under Germanic tribal law a law-breaker was given the choice of being declared an outlaw or of paying a fine to the aggrieved party. The fine was collected from the wrongdoer's family by a neutral agent; "he was the OM-BUDS-MAN—'Om' being and 'About'; 'Bud' being the messenger collecting the 'fine.'"[1]

Sweden, whose legal system has its roots in Germanic law, established the first contemporary Ombudsman in 1809 by creating the office of *Justitie-ombudsman* who supervised courts and administrative agencies and had authority to institute proceedings against any officials committing wrongs in office. His military counterpart was established in 1915.[2] Finland established its Ombudsman in 1919. The concept did not gain wide recognition until Dr. Stephen Hurwitz influenced the Danish legislature to insert the office in the Constitution in 1953 and subsequently became Denmark's first Ombudsman. Dr. Hurwitz popularized the office outside his own country by delivering a paper on the subject at a 1959 United Nations session. Norway and New

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1. Arlen C. Christenson, *The State Attorney General*, WISC. L. REV. 337 (1970).
2. Commonwealth of Massachusetts, REPORT OF THE ATTORNEY GENERAL, 12 (1968).
1. Stanley Anderson, OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS 2 (1969).
2. Alfred Bexelius, *The Origin, Nature, and Functions of the Civil and Military Ombudsman in Sweden*, 377 ANNALS 10-12 (1968).

Zealand established civil Ombudsman in 1962 and Great Britain established an office similar to that of Ombudsman in 1967.[3]

Canada, Holland, India, Ireland, and the United States are among the nations which have considered establishing an Ombudsman.[4] As of February, 1968, some forty-seven of the fifty state legislatures had considered creating an Ombudsman or a similar position.[5] Only Hawaii has established the office of Ombudsman. A nationwide system has been contemplated by Congressman Henry Reuss who has introduced an Ombudsman bill in Congress.[6]

With the recent interest in the concept of an Ombudsman, the term has become confused in that any complaint or appeal officer is referred to as an "Ombudsman". Professor Donald Rowat of Carleton University, Ottawa, sets forth three essential features necessary for an officer to be called an Ombudsman:

(1) The Ombudsman is an independent and non-partisan officer of the legislature . . .

(2) He deals with specific complaints from the public against administrative injustice and maladministration; and

(3) he has the power to investigate, criticize and publicize, but not to reverse, administrative action.[7]

In Sweden, the modern Ombudsman is elected by a Parliamentary committee; his chief duty is to assure that judges and other officials act according to law. He may investigate official actions through requesting information from the officials or through hearings. Officials are required to cooperate in supplying any requested documents. Most investigations begin with a citizen's complaint, although the Ombudsman can initiate his own investigations. After the investigation is completed the Ombudsman issues his opinion. If the official malfeasance involves a punishable breach of duty, a prosecution may be initiated.[8]

Attorney General Robert B. Morgan of North Carolina visited the Ombudsman of Sweden to study the applicability of the system to American problems. The Ombudsman has two assistants, plus about seventeen young attorneys, who usually serve with him for several years. They handle about one thousand complaints a year. General Morgan found that all the Ombudsman had to do in most cases was to make his findings a matter of public record; they did not require further action, because public opinion was so strong, and the prestige of his office was so great. Last year, the Swedish Ombudsman handled 229 complaints relating to the court. Of these complaints, 69 were dismissed as frivolous; no criticisms were found after investigations in 132 cases; one was referred to another agency; and admonitions were issued in 27 cases. The Ombudsman can, of course, go to court if necessary.

Role of the Ombudsman

The basic argument for an Ombudsman is that administrative and bureaucratic machinery has become so complex, specialized and impersonal that the citizen has no one to hear his grievances. Ake Sandler in "An Ombudsman for the United States" argues that an Ombudsman would be a "post office for all kinds of complaints by irate or injured or disturbed citizens who feel that some government agency has treated them unfairly—whether or not the complainant is mistaken." Sandler states that there should be no reason

3. Hing Cheng, *The Emergence and Spread of the Ombudsman Institutions*, 377 ANNALS 21 (1969).
4. Donald Rowat, THE OMBUDSMAN: CITIZEN'S DEFENDER 7 (1968).
5. Walter Gellhorn, *The Ombudsman's Relevance to American Municipal Affairs*, 54 A.B.A. J. 134 (1968).
6. Anderson, *supra* note 1 at 14-17.
7. Rowat, *supra* note 4 at XXIV.
8. Bexelius, *supra* note 2 at 12-17.

to fear the Ombudsman because his authority would be delineated by the legislature and would not go beyond the power to investigate, recommend, and publicize.[9]

Jesse Unruh, in discussing bureaucracy, writes of:

> . . . an obsession among administrative agencies with the binding and inflexible authority of departmental decisions, precedents and forms, irrespective of how badly or with what hardships they may work in individual cases . . . . [and] an indifference on the part of some officials toward the convenience of feelings of individual citizens . . . .[10]

The complexity of state administrations was also emphasized in a recent article by Ralph Nader, which pointed out that Kentucky, for instance, has thirty-three constitutional and statutory departments with one hundred fifty subordinate boards, divisions and bureaus, eighty independent agencies and nine inter-state agencies. Among these agencies, two hundred seventy-two have the authority to promulgate rules and regulations.[11] An Ombudsman can assist the citizen in dealing with these agencies, and they would tend to perform better if they were conscious of a watchdog overlooking their actions.

Those arguing against Ombudsmen often suggest that states already have effective complaint-handlers: the legislators. Jesse Unruh points out, however, that the legislator, a partisan, may tend to protect his own administration or be overzealous in attacking an opposing administration. Also most legislators are overburdened and are specialists only in a few specific areas. The legislator should be principally a law maker; an Ombudsman would free legislators to legislate.[12] Opponents say that the Ombudsman who is a political appointee might, of course, be tempted to perform the duties of the office with an eye to the wishes of the appointing party's policies. He might have some political ambitions himself, which could lead to a kind of over-prosecution, such as harassing state officials on trivial matters.

Enabling Laws

For jurisdictions wishing to create an Ombudsman there is no absence of guidance available. In addition to the European models, there are several sets of guidelines available within the United States. One of these is the Hawaii law, which is summarized below.[13]

The Hawaiian Ombudsman is appointed by a majority vote of each house of the legislature for a six-year term. He may be removed only for neglect of duty, misconduct, or disability, by two-thirds vote of the legislature. He "has jurisdiction to investigate the administrative acts of agencies." The statute says that:

> An appropriate subject for investigation is an administrative act of an agency which might be:
> (1) Contrary to law;
> (2) Unreasonable, unfair, oppressive or unnecessarily discriminatory, even though in accordance with law;
> (3) Based on a mistake of fact;
> (4) Based on improper or irrelevent grounds;
> (5) Unaccompanied by an adequate statement of reason;
> (6) Performed in an inefficient manner; or
> (7) Otherwise erroneous.

The Ombudsman may hold hearings, issue subpoenas, and bring suit. The law further says that if, after investigation, the Ombudsman finds that:

(1) A matter should be further considered by the agency;
(2) An administrative act should be modified or cancelled;
(3) A statute or regulation on which an administrative act is based should be altered;
(4) Reasons should be given for an admini-

9. Ake Sandler, *An Ombudsman for the United States*, 377 ANNALS 104, 109 (1968).
10. Jesse Unruh, *The Ombudsman in the States*, 377 ANNALS 111, 115 (1968).
11. Ralph Nader, *Ombudsman for State Government*, THE OMBUDSMAN, 240 at 241 (1968).
12. Unruh, *supra* note 10 at 117, 118.
13. HAWAII REV. STAT. § 96-1; § 96-19 (Supp. 1968).

strative act; or
(5) Any other action should be taken by the agency.

He may so direct.

Hawaii's program began in July, 1969. The first Ombudsman was Herbert Doi, formerly head of the Legislative Reference Bureau. He reported that from July 1, 1969, to December 31, 1969, a total of 406 inquiries were made to his office.[14] The majority were telephone complaints. The Ombudsman had no jurisdiction in 26 percent of complaints. Eight percent were considered primarily informational, and 2 percent of investigations were discontinued. Mr. Doi says that his recommendations:

> May include a change in procedure, a change in a regulation used, a change in a statute governing the action of a department, or disciplinary action. If the opinion or recommendation involves either some criticism of the department or of an individual within the department, then the Ombudsman will informally consult with either the departmental director or the official involved. . . .[15]

The American Bar Association adopted a resolution at its January, 1969 meeting which recommends that state and local governments create Ombudsmen and that their legislation contain the following essentials:

1. authority to criticize all agencies, officials and public employees except courts and their personnel, legislative bodies and their personnel and the chief executive and his personal staff;
2. independence of the Ombudsman from control by any other officer except for his responsibility to the legislative body;
3. appointment by the executive with approval of designated proportion (preferably more than a majority) of the legislature;
4. independence of the Ombudsman through a long term (not less than five years) with freedom from removal except for cause determined by the legislature;
5. high salary equivalent to that of a designated top official;
6. freedom to employ his own assistants and to delegate to them without restraints of civil service and classification acts;
7. freedom to investigate any act or failure to act by any agency, official or public employee;
8. access to all public records relevant to an investigation;
9. authority to inquire into the fairness, correctness of findings, motivation, adequacy of reasons, efficiency and propriety of procedure of any action or inaction by any agency, official or public employee;
10. discretion to determine what complaints to investigate and to determine what criticisms to make or to publicize;
11. opportunity for the agency, official or public employee criticized to have advance notice of the criticism and to publish with the criticism an answering statement;
12. immunity from civil liability on account of official action.[16]

A model state Ombudsman statute was written by a group of Harvard law students in 1965. Among the chief features of that law are a section proposing that the Ombudsman be appointed by the Governor with Senate consent; a section proposing that the Ombudsman have jurisdiction to investigate actions of administrative agencies, even if these actions have not become final, and a section defining certain areas of administrative actions as appropriate for investigation.[17]

Attorney General's Role

The problem of the Attorney General's involvement in an Ombudsman concept was highlighted in a 1967 article by Professor Richard Aaron. Even should the Attorney General wish to act as an Ombudsman, the nature of most Attorneys General's offices would severely limit this role. With the many duties of his office, the Ombudsman's tasks would require more time and personnel than the usual Attorney General's office could offer. The Attorney General's understandable desire to have a good working relationship with governmental officials might preclude any serious criticism of these officials by the Attorney General. Professor Aaron brings up some other problems pertaining to the Attorney General:

> If the attorney general is an elected official who may be of a different political party than the governor, to what extent is the attorney general's response dictated by a desire to injure or protect the image of the governor's administration? How will the attorney general respond if the problem posed by the citizen can be resolved through legislation? If the problem is a potential one for litigation, does the attorney general conclude that he is a potential adversary to the citizen? If the problem is not one that can be resolved through litigation, does the attorney general conclude that the problem is outside of his province.[18]

Ralph Nader, in discussing the same problems, concludes that the Attorney General's role should be confined to investigating conflicts of interest in state agencies, because the "political complexions" of the office are not conducive to investigations other than of those "flagrant situations teetering on the brink of public exposure."[19] However a contrary opinion was expressed by Professor S. Nelson and E. Price in a recent article. They expressed confidence in the Attorney General's ability to act as a mediator of grievances since the Attorney General has an overview of the administration "and a measure of concern for the agencies' observance of legal proprieties." They suggest that the Attorney General can best perform an Ombudsman's role by formal and publicized assignment of aides to receiving complaints.[20]

6.73 Compensating Victims of Crime

The concept of compensation for victims of violent crime is not new. It can be traced as far back as the Code of Hammurabi and early Hebrew law, when the attacker paid the injured for the time it took to become healed.[1] Scholars have theorized that the practice of offenders compensating the victim was based on the assumption that the potential offender would be deterred and the victim or his family would be less likely to carry out vendettas.[2]

Rationale for Compensation

Arguments for public compensation for victims of crime fit into three categories. First, the criminal has the obligation to make restitution. Second, the state should be liable for compensation because it failed to protect the victims. Third, the state should aid victims as general social policy.[3]

Few criminals, although they bear the responsibility, have the funds to compensate the victims or the relatives of the deceased victims. This fact may have helped determine the response to a 1965 Gallup poll which asked: "Suppose an innocent person is killed by a

14. Herman Doi, *The Hawaiian Ombudsman Appraises His Office After the First Year*, 138-146 STATE GOVERNMENT (Summer, 1970).
15. *Id.* at 142.
16. Anderson, *supra* note 1 at 249-257.
17. *A State Statute to create the Office of Ombudsman*, 2 HARV. J. LEGIS. 213 (1965).
18. Richard Aaron, *Utah Ombudsman: The American Proposals*, UTAH L. REV. 32,37 (1967).
19. Nader, *supra* note 11 at 244.
20. Dalmas Nelson and Eugene Price, *Impact of the Ombudsman on American Institutions*, 377 ANNALS 128, 136 (1968). *See also* Charles O'Brien, *The Role of the Attorney General as a Public Lawyer*, 44 L.A. BAR BULL. 495 (1969).
1. Marvin Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 224, 225 (1965).
2. Gilbert Geis, *State Compensation to Victims of Violent Crime*, The President's Commission on Law Enforcement and Administration of Justice, CRIME AND ITS IMPACT 157, 159 (1967). This article contains a useful bibliography at 175-177.
3. Note, *Compensation for Victims of Crime*, 33 U. CHI. L. REV. 531, 533-36 (1966).

criminal—do you think the state should make financial provisions for the victim's family?" Sixty-six percent of those questioned thought the state should so provide.

Norval Morris and Gordon Hawkins express a different approach to victim compensation in their recent book:

> [C]rime is endemic in our society and . . . it is only proper for a society so organized that crime is endemic to share the burden which is by chance imposed on particular [unfortunate] individuals. The analogies with workmen's compensation and with compulsory third-party motor vehicle insurance are of some relevance; perhaps a closer analogue in this country is the extensive medical and social welfare provisions of the Veterans Administration legislation by which the community shares in the loss to the individual who has suffered for us from the external aggression of war. We should likewise share the loss to those who suffer for us from the internal aggression of crimes of personal violence.[4]

Those who are critical of victim compensation point to the difficulties in deciding who is a "victim." Approximately one fourth of all violent crimes are in some way precipitated by the victims, *e.g.* victims of confidence games, prostitutes who are victims of their clients, wealthy people who go slumming and some victims of rape, statutory or otherwise.[5] Another problem is that we have practically no information about victims of violent crime. No broad statistics are developed to indicate who the victims of crime are, what their incomes are, or what strata of society they come from.[6]

Existing Programs

Great Britain established a compensation program in 1964. In the United States, five states, California, Hawaii, Maryland, Massachusetts, and New York, have enacted victim compensation statutes.[7] Senator Ralph Yarborough of Texas introduced a Criminal Injustice Compensation Act in the 89th Congress which covers areas of general federal police power and responsibility.[8]

In Hawaii and Massachusetts, the Attorney General has a distinct role in the process of compensating crime victims. The Hawaii statute provides that eligibility for compensation shall be determined by a criminal injuries compensation commission, which is composed of three members appointed by the Governor.[9] The Attorney General serves as legal advisor to this commission. Other general features of the Hawaii statute include compensation for a variety of violent crimes. Compensation payment is awarded for actual expenses involved in a death or injury, total or partial loss of earning power, precuniary loss to dependents of deceased victim, victim's pain and suffering and any other pecuniary loss which the commission deems reasonable. The award is limited to $10,000. Specifically excluded from compensation are victims of offenders who are their relatives or who lived in the offender's household.

The Massachusetts statute for violent crime victim compensation resulted from a study by the Special Commission on the Compensation of Victims of Crime, created by the Massachusetts Legislature in 1967. The Special Commission said that the state should be involved with the victim's problems, since he has no meaningful remedy otherwise and since the state has preempted the field of law enforcement, crime is then a failure of government.[10]

4. Norval Morris and Gordon Hawkins, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 43 (1970).
5. Henry Weihofen, *Compensation for Victims of Criminal Violence: A Round Table,* 8 J. PUB. LAW 209 at 217 (1959).
6. James Starrs, *A Modest Proposal to Insure Justice for Victims of Crime,* 50 MINN. L. REV. 285.
7. Introduction, *Governmental Compensation for Victims of Violence,* 43 SO. CAL. L. REV. 1 (1970).
8. Ralph Yarborough, *S. 2155 of the Eighty-Ninth Congress—The Criminal Injuries Compensation Act,* 50 MINN. L. REV. 255 (1965).
9. HAWAII REV. LAWS § 351-31—70 (Supp. 1969).

The Special Commission stated that, after determining that the award process would be handled through the court system rather than an administrative system it had to choose between methods of procedure. Either the victim could sue the Commonwealth or the victim could sue the Attorney General. The Commission chose to involve the Attorney General in the process but not as a defendant:

> The Commission intended the proceeding to be non-adversary and similar to a small claims hearing. If the victim brought suit against the Commonwealth or the Attorney General, the problem would arise with regard to investigation and proof of the claim. The district court judge would have only the probation and court officers available to make an investigation. Part of this problem was avoided by requiring the submission of hospital and medical reports, creating a legislative presumption of the claim's validity upon presentation of reasonable proof. A suit against the Attorney General would mean an investigation by the Attorney General's office enabling him to consent (or default) to a judgment allowing the victim to recover. However, if the Attorney General were to contest the claim, the hearing would become adversary in nature and both sides would be forced to offer additional evidence in support of their claims.[11]

The Special Commission resolved the difficulty by determining that the Attorney General should submit his report prior to the actual court hearing. The Attorney General's report is directed toward the essential questions of whether a crime was committed, whether a death or injury resulted, and whether the crime was reported by the claimant within forty-eight hours of its occurrence.

The eligibility sections of the Act are similar to the Hawaii statute. Compensation, as in Hawaii, is awarded for out-of-pocket losses including earnings. Massachusetts also limits compensation awards to $10,000 and requires a minimum of $100 in order to file for compensation.[12] The procedure for obtaining state compensation for relief starts with filing a petition with the local court clerk. The clerk then notifies the Attorney General's office and a member of the Attorney General's staff begins an investigation. The appropriate authorities, such as the police, are contacted for verification. Every claim must be verified to justify an award. The Attorney General then makes a recommendation to the court. If it is favorable to the claim, the court determines the amount to be awarded. If the Attorney General denies the claim, then the claimant must convince the court of its validity, but the procedure does not become adversarial. The claimant may appeal the judges decision in the courts, but only on question of law.

In one year (July 31, 1968-July 31, 1969) seventy-one applications for compensation were filed with the Attorney General's office. Fifty-four of these reported that the assailants were unknown. Seventeen involved situations where arrests had been made. At the time the claims were filed, 8,916 violent crimes were reported in Massachusetts. Of the seventy-one claims filed in the first year, five awards were made and sixty-six denied or are still pending. The awards totalled $78,688.57. In 1970, $25,000 was appropriated to cover costs of investigation. Massachusetts has not yet had enough experience with the statute to determine why so few claims are filed, but lack of public awareness and private insurance coverage probably are factors.

In both the New York and Maryland Victim Compensation Acts, the Attorney General may submit objections to awards made by compensation boards.

10. Samuel Vitali, *A Year's Experience with the Massachusetts Compensation of Victims of Violent Crime Law,* 4 SUFFOLK U. L. REV. 237, 246 (1970).
11. *Id* at 249.
12. *Id.* at 249-251.

In Maryland, compensation awards are made by a three-member Criminal Injuries Compensation Board, usually after an investigation by the state's attorney. After the Board's decision, the Attorney General may commence a summary proceeding in the county circuit court if he determines that the "award is improper."[13]

The New York procedure for the Attorney General is similar to that in Maryland. The Crime Victims Compensation Board of three members determines compensation awards. The Attorney General may commence a summary proceeding in the appellate division of the supreme court if he determines that the Board's awards are improper or excessive.[14] The New York Attorney General's office reports that in an eight-month period (March, 1967 to December, 1967) it reviewed the Board's decision on sixty-one claims for compensation, but no proceedings were commenced in the appellate division.

In California, the Victims of Crime Compensation Law is limited to "needy" crime victims. Claims are decided by the California State Board of Control. The Attorney General is required to investigate the facts of each case, including the victim's financial condition, and submit a report to the Board of Control which determines the claim. The award is limited to $5,000.[15]

Model Legislation

The Committee of State Officials on Suggested State Legislation of the Council of State Governments drafted a model act for Compensation for Victims of Crime. It is based on a combination of the New Zealand and British plans, bills introduced in Congress, and state legislation. The model act is not predicated on a right to compensation; the compensation award is granted by a Criminal Injuries Compensation Board as a matter of grace. The board is to consider all relevant circumstances in determining compensation, including provocation, consent or behavior contributing to the victim's injury, prior social history of the victim and need for financial aid.

The model act designates an alternative to a compensation board by including a section for trial court administration. It does involve the state Attorney General in the procedure.[16]

13. MD. ANN. CODE art. 26A, § 1-17; § 10 (1957).
14. N.Y. EXEC. LAW § 621-635; § 629 (McKinney 1969).
15. CAL. GOV'T. CODE § 13960 - 13966; § 13963 (West Supp. 1969).
16. The Council of State Governments, XXVI SUGGESTED STATE LEGISLATION, A-38 (1967).

7. RELATIONSHIP TO OTHER AGENCIES

The Attorney General has a close and continuing relation to other agencies by virtue of his role as counsel. The structure and operation of this relationship has been examined throughout this Report. This chapter concerns some agencies with which the Attorney General has a special relationship and which are essential components of the state criminal justice system.

7.1 STATE ORGANIZATION FOR LAW ENFORCEMENT

Despite the state and federal governments' increasing role in law enforcement, their direct police activities are quite limited. The President's Commission found, in 1965, that there were a total of forty thousand law enforcement agencies in the nation. Of these, only fifty were federal and two hundred were state. Of 371,000 full-time personnel, 6 percent were federal, 11 percent were state, and 83 percent were local.[1] It is only in the last fifty years that most states have had any significant number of law enforcement officers or have played a significant role in public safety. The need to patrol highways and a desire for more uniform local law enforcement led most states to establish their own uniformed forces. The need to enforce particular laws led to vesting many types of state agents with peace officer powers. While state law enforcement activities remain limited compared to those of local units, they are of increasing importance.

7.11 Structure of Services

Many Attorneys General have some direct law enforcement responsibilities. They may be in charge of investigation and identification facilities. They may have special organized crime or narcotics agents, with peace officer powers. They may have specific enforcement responsibilities, as in North Dakota and Wisconsin, where the state fire marshal is under the Attorney General. They may be responsible for some uniformed personnel, as in Pennsylvania, where corrections facilities are under the Attorney General. However, most Attorneys General do not have charge of any significant numbers of law enforcement personnel. Exceptions are New Jersey, where the Attorney General is responsible for the State Police, and American Samoa, where he is charged with all law enforcement. In New Jersey, a reorganization study not only recommended that the State Police remain under the Attorney General, but favored giving him additional law enforcement functions. This report is discussed in Section 3.1.

When state police agencies were initiated, they were made directly responsible to the Governor and, apparently, no real consideration was given to expanding Attorneys General's duties to include law enforcement. The criminal justice system in America is generally viewed as having "three separately organized parts—the police, the courts, and corrections"[2] and each part as being distinct, although interdependent. Under this concept, the Attorney General is viewed as part of the courts, not the police. He is seen as a law officer, not as a law enforcement officer.

1. The President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE POLICE, 7 (1967).
2. The President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 7.

The N.A.A.G. recommendations say that, generally, the Attorney General should have responsibility only for those functions which involve law enforcement, legal services, or appropriate related services, such as investigation. His duties should be restricted to furnishing legal services, investigation and identification facilities, and special programs that are primarily legal. This would exclude such functions as highway patrol. This has been the policy of most states and of recent reorganization and studies, which continue to separate public safety functions from the Attorney General.

C.O.A.G. questionnaires show that Attorneys General are divided in their attitudes toward authority over state police. Incumbent Attorneys General were asked whether the Attorney General should have authority to direct the state police, or highway patrol. Seven said he should have full authority, seventeen that he should have limited authority, and sixteen that he should have none. Sixteen thought the state police should be accountable to the Attorney General with regard to enforcement of criminal laws, while eighteen thought they should not. Of one hundred and four former Attorneys General, fifteen felt that the Attorney General should have complete authority over state police, thirty-seven that he should have limited authority, and fifty-two that he should have none. Thus, the majority of both former and incumbent Attorneys General thought they should have some degree of control over state police.

There is a clear trend toward consolidating law enforcement functions. During the 1967-69 biennium, Colorado, Florida, Illinois, and Washington centralized such functions.[3] A 1969 Minnesota reorganization act created a Department of Public Safety which brought together the state highway patrol, motor vehicle licensing, civil defense, crime bureau, and state fire marshal. Effective April, 1971, Massachusetts will have nine executive offices, including one concerned with public safety. Each will be headed by a cabinet-level secretary. Arizona created a new Department of Public Safety in 1968, which includes the highway patrol, liquor control, narcotics enforcement, crime laboratory, and local law enforcement training. In California, a 1968 reorganization created four large agencies, each headed by a Gubernatorial appointee, within the executive. The Highway Patrol was placed under the Secretary for Business and Transportation.

In other states, reorganization study committees have generally recommended a single department of public safety. The New Mexico Governor's Committee on Reorganization of State Government recommended a cabinet system consisting of fourteen departments, including a public safety department and a justice department. An Arkansas plan called for seventeen departments, including one for public safety. The Indiana Governor's Reorganization Commission, created at the legislature's request, recommended that most state agencies be consolidated into eleven major departments. The State Police, however, would be placed in the Executive Office of the Governor.

A consultant paper prepared for the President's Commission and published by the Office of Law Enforcement Assistance set forth a proposed model organization for state law enforcement services.[4] It calls for a Public Safety Commission to serve as a coordinating body "to assist the departments in the formulation of general interdepartmental policies." The Attorney General is chairman. Other members are the State Comptroller, one appointee who is the Governor's selection, and two appointed by the Governor from a list submitted by the state peace officer's association. The plan places law enforcement functions under four departments: state police, motor vehicles, safety, and conservation. There are also offices of civil defense, fire marshal, brand inspector, and pollution control. This proposal, however, is contrary to the current trend toward centralization.

The Urban Action Center recommended that each state have a single Department of Crime Control, headed by a Commissioner who is directly responsible to the Governor. All state departments with law enforcement functions would be merged into this unit. The proposed department's relationship to the Attorney General is not defined, but it would be empowered to assist, coordinate and supervise district attorneys and local police. The Center also recommends that the state maintain an efficient state police with general law enforcement powers. It should provide criminal investigation services and have a special "urban strike force" to concentrate on crime in metropolitan areas.[5]

7.12 State Agencies With Law Enforcement Functions

The structure of state law enforcement services is much more complex than is commonly realized. In addition to state police, numerous state officers are charged with enforcement of specific statutes. Many have the power to arrest offenders for violation of specific or general laws. They are, in effect, agents of the criminal justice system, although they may work for a department of agriculture or a department of archives and history. Few analyses have been made of states' assignment of enforcement responsibilities; the two examples described below, however, indicate that peace officer powers have been vested in a wide variety of agencies.

A 1963 study by the Kentucky Department of Law found that twenty-four state agencies, in addition to the state police, had some law enforcement functions.[6] These were the departments or agencies of: aeronautics; agriculture; alcoholic beverage control; auditor; child welfare; conservation; corrections; economic security; education; finance; fish and wildlife resources; health; highways; insurance; labor; law; mental health; military affairs; mines and minerals; motor transportation; parks; professional and occupational licensing; public service commission, and revenue. The Department of Aeronautics, for example, had two inspectors who investigated complaints against aviators and who had peace officer powers. The State Department of Agriculture had numerous law enforcement powers, including appointment of a State Apiarist and his deputies, who had peace officer powers in enforcing the apiary law. The State Fair Board, which was attached to the Department of Agriculture, could appoint special police for the fairgrounds, who were vested with the powers of peace officers. A few agencies exercised extensive police functions. The Department of Fish and Wildlife Resources, for example, employed 115 full-time conservation officers who made a total of about 3,500 arrests in 1962.

A North Carolina report in 1967 attempted to list all the officers who were given arrest power by statute. The compiler noted that "even this has turned out to be difficult, as there are

3. The Council of State Governments, STATE EXECUTIVE REORGANIZATION 1967-69.

4. G. Douglas Gourley, *State Police Systems*, Office of Law Enforcement Assistance, U.S. Department of Justice, Grant No. 017, 208-391 (1967).

5. States Urban Action Center, Urban America, Inc., ACTION FOR OUR CITIES, 46-7 (1969).

6. Kentucky Department of Law, *Law Enforcement in Kentucky*, 52 KY. L. J., 148-202 (1963-64).

a number of essentially custodial employees with arrest power only as to certain inmates or on particular premises." He further noted that the list was not necessarily complete.[7] The list included: any parole officer; gasoline and oil inspectors; the Superintendent of Weights and Measures and his deputies; special peace officers of the Department of Archives and History; forest rangers; bank examiners; special police of the State Port Authority; and numerous other persons. The report found that there were five major state law enforcement agencies: (1) the Highway Patrol and Division of License and Theft in the Motor Vehicle Department; (2) the State Bureau of Investigation in the Department of Justice; (3) the Arson Division of the Insurance Department; (4) the Alcoholic Beverage Control Board, and (5) the Enforcement Division of the Wildlife Resources Commission.

One analysis of the fifty states showed one hundred and sixty-five police agencies, representing approximately eleven different types of law enforcement responsibilities.[8] This was based on questionnaires, not on statutory analysis, and appears to be very incomplete. Kentucky and North Carolina, for example, are each listed as having only four "police" agencies. The total number of each type of agency identified ranged from the forty-nine state police and highway control to four livestock and agriculture agencies with police powers.

Data are not available on how many Attorneys General's staff members have the power of arrest, or under what circumstances. Attorneys General's staff members do, however, advise personnel of other agencies of their rights and duties, and assist in enforcing statute and administrative law through regulatory action or judicial process. As more agencies are given direct enforcement powers, the extent and application of such powers becomes a matter of growing importance.

State law enforcement agencies generally work in cooperation with federal law enforcement agencies. These may include: the Federal Bureau of Investigation; the Secret Service; the Alcohol and Tobacco Tax Unit of the Treasury Department; the Narcotics and Dangerous Drugs Bureau, the United States Marshal; the Bureau of Customs, and the Immigration and Naturalization Service. They may also have close ties with federal organized crime strike forces and may cooperate with federal investigative grand juries convened pursuant to the Organized Crime Control Act of 1970.

7.13 Development of State Police

State police forces are a relatively recent development. They were established in answer to problems facing traditional law enforcement officers, including the elective nature of most offices, the many civil duties imposed on them, and the difficulties of securing qualified personnel. They represented the states' direct entry into law enforcement.

Local law-enforcement agencies, principally county sheriffs and local constables, at times were reluctant, or refused, to enforce state laws they considered unpopular in their communities. Governors were virtually powerless to compel them to perform their duties. Faced with the obligation under state constitutions of enforcing state laws, yet lacking effective means with which to discharge the responsibility, Governors turned to the legislatures, which responded with enabling legislation authorizing the organization of state police services.[9] Other factors that led to formation of police forces by the states included widespread corruption and mismanagement in local law enforcement, lack of uniformity in enforcement, poor protection in rural areas, and lack of coordination. It was also felt that a single state agency should be concerned with such matters as highway accidents, and should coordinate state law enforcement efforts.[10]

Most state police forces were not formed until after World War I, although some such forces had existed for many years. The Texas Rangers was formed in 1835, primarily for border patrol service. They gradually assumed general police duties, including criminal investigation. Massachusetts appointed a few state constables in 1865 to suppress vice and granted them statewide police powers. In 1878, the Massachusetts District Police was established, and continued until it was absorbed into a Department of Public Safety in 1920. Connecticut established a state police force in 1903 to enforce state laws, specifically those relating to liquor and gambling.

The Pennsylvania State Police was organized in 1905 and was the first real state police force. It began with 228 uniformed officers, under a superintendent who was solely responsible to the Governor, and who had broad administrative powers. From its inception, the force used a decentralized system of substations and patrolled rural areas throughout the state. Thus, it was characterized by highly centralized administration and decentralized organization. This pattern was followed by subsequent police forces.

New York and Michigan established state police forces in 1917. New Jersey and Rhode Island did so a few years later. Concurrently, some of the older state police forces were undergoing extensive changes. For example, Connecticut's state police were placed under a single administrator. Massachusetts established a statewide uniformed patrol.

Now, all states except Hawaii have some form of state police. They may be restricted to enforcing traffic laws, or may have general police authority. The 1969 *Comparative Data Report* of the International Association of Chiefs of Police classifies twenty-three states as having state police forces; eleven of these are part of a department of public safety or other larger body. Twenty-six states have highway patrols; seventeen of these are part of a larger department, usually a department of highways or motor vehicles.[11] These data, however, apparently were not current as of 1969. A Council of State Governments report showed that Colorado, Florida, Illinois, and Washington all created or consolidated agencies into new law enforcement departments in 1967-1969.[12]

The I.A.C.P. lists the following states as having state police: Alaska, Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. Of these twenty-three, nine are located in a department of law enforcement or public safety and two are shown as being part of the executive department. The other twelve are separate agencies.

Of the twenty-six states which have highway patrols, three are called departments of public safety: Alabama, Georgia and Texas. Of the others, six are separate agencies, while the rest are part of the highway or motor vehicle department, or part of a department of public safety. Again, this I.A.C.P. classification is not current; at least half of the fifty states probably

7. North Carolina Legislative Research Commission, REPORT of the Committee on the Advisability of Creating a Department of Public Safety, 16 (1969).

8. Gourley, *supra* note 4 at 216 *et seq.*

9. Frank D. Day, *State Law Enforcement*, 1962-1963 THE BOOK OF THE STATES, 436-37.

10. *See generally*, David G. Monroe, STATE AND PROVINCIAL POLICE, Northwestern University Traffic Institute (1941); Bruce Smith, POLICE SYSTEMS IN THE UNITED STATES (1960).

11. International Association of Chiefs of Police, COMPARATIVE DATA REPORT 1969, 7.

12. The Council of State Governments, STATE EXECUTIVE REORGANIZATION 1967-69, 14 (1969).

would now be classified as having state police.

State police forces will face further changes as relationships in law enforcement continue to evolve. The Director of the Division of State and Provincial Police of the I.A.C.P. notes that population increases in suburban areas have considerable implications for state police and highway patrols:

> Since these agencies were historically created and traditionally maintained as predominantly *rural* crime control and high patrol instruments, the migration to the suburbs reduces the 'rural' area and creates suburban areas with urban characteristics.

He notes some of the policy questions that result from this change:

> If a state force provides service to a rural area which has developed into a suburban complex, should it continue to exercise primary responsibility for police services? Should a new police agency be created? Should the core city expand its services? Is it better to bolster state police forces to meet the public needs in the suburbs? If so, what changes in mission, concepts, planning, budgeting and programming are necessary?[13]

The conditions that led to the development of state police have altered materially in the relatively few years that such police have been in existence. Their organization and functions will undoubtedly undergo continuing change to meet new conditions. Unlike most elements of the criminal justice system, they do not have a traditional function, but must define their duties as they evolve.

7.14 Functions and Organization

The International Association of Chiefs of Police 1969 *Comparative Data Report* classified functions for which highway patrols and state police were responsible. In all states except Maine, they were responsible for highway safety. In forty-one states, they were responsible for general patrol, statewide; in nine states, patrol was restricted to unincorporated areas. In twenty states, such agencies were responsible for drivers license examination and, in thirty-two, for motor vehicle inspection. Of state patrols, only those in Alabama, Georgia, Nebraska, and Texas had statewide crime control responsibilities, although almost all had limited criminal duties. Of state police agencies, all except those in Idaho and Virginia had statewide crime responsibility. The great majority of agencies had statewide investigative functions.[14]

A 1966 study showed that traffic functions were the primary activity of state police:

> . . . on the average, personnel (both uniformed and civilian) of police agencies that are subordinate units of a department of public safety spend 47 percent of their total activity on traffic supervision compared to the 64 percent spent by police agencies that are subordinate units of highway and motor vehicle departments. Independent State Police agencies devote 47 percent of their time to traffic supervision while independent highway patrols spend 31 percent of their time on the same activity.[15]

If only sworn, uniformed personnel were included, the percent of time devoted to traffic ranged from 59 to 75 percent.

The state police's powers may be restricted by statute or policy, or a combination of these. A Kentucky study, for example, noted that state police authority in cities was restricted by statute to enumerated circumstances, unless the mayor invited the state police to exercise full power. While virtually all cities had filed invitations,

> . . . the city's power to withdraw its invitation remains a potential threat to the state's authority and hinders effective law enforcement. The fact that a city bars the State Police after the latter has conducted a vigorous law enforcement campaign in that city indicates that local law enforcement is inadequate.

13. William H. Francy, *State Police and Highway Patrols*, THE BOOK OF THE STATES 1970-71, 424-5.

14. I.A.C.P., *Comparative Data Report*, 23.

15. Edward Gladstone and Thomas Cooper, quoted in Gourley, *supra* note 4 at 255.

The study recognized, however, that:

> In normal circumstances, the State Police probably operate more successfully in a city because they are there by invitation, which presupposes a cooperative situation.[16]

Bruce Smith, in his study of police systems in the United States, points out that limitations on the powers of state police forces may be intended to insure proper use of force or may reflect legislative distrust of well-organized, armed forces. Of particular significance are restrictions on the exercise of state police powers in regard to civil disorders. Presumably, such carefully-defined guarantees tend to lower levels of distrust and to recognize community resentment of action by outside forces to quell local disturbances.[17] The Act creating the New York State Police, for example, prohibited it from suppressing a riot within the limits of any city without Gubernatorial approval. In New Jersey, the State Police may not be used as a *posse* in any municipality maintaining a regular police force except by order from the Governor after a request from the local governing body.

The Advisory Commission on Intergovernmental Relations, in its study of state-local relations in the criminal justice system, recommended that state police or a comparable law enforcement agency be given a full range of statewide law enforcement powers and that geographical restrictions on their operations be removed. The Commission contends that functional limitations on state police deprive localities of needed supportive services and reduce the scope of basic police services that rural areas may require. They may also serve as an excuse for state avoidance of police problems in incorporated areas.

Others argue, however, that the police function should remain local, and that the state should not have unrestricted power to police localities. It is contended that conflicts between jurisdictions would result, along with duplication of efforts. Large cities, in particular, may have more highly trained personnel than the state police. If state police are under an elected official, they could be used to embarrass or harass elected officials of a locality. West Virginia reports, for example, that "difficulties and hard feelings often arise . . . when the State Police go into a municipality and conduct raids without consulting the local police."[18]

From the beginning, police functions have generally been placed under an administrator, who is responsible to the Governor. Authorities have generally argued that police should have considerable administrative independence:

> It is axiomatic that administration of the state police function requires broad and effective leadership relieved in so far as possible from the control of others. Once the policies of the department have been formulated, the administration of them should be the prerogative of the chief or commissioner of police. To what extent this authority is permitted hinges of course on many factors: the extent of authority conferred upon him by legislative act, personalities of the chief and his superiors, the party system, method used to appoint and remove the chief, the control over his personnel and the like.[19]

There is no uniformity in organization of police agencies. A 1967 study surveyed various state organization charts and listed the divisions and subordinate units in each state police agency.[20] There was great diversity in both the number and type of administrative units, and in the relationship of geographic to functional divi-

16. Ky. Dep't of Law, *supra* note 6 at 132.

17. Smith, *supra* note 10 at 179-180.

18. Governor's Committee on Crime, Delinquency and Corrections, WEST VIRGINIA COMPREHENSIVE CRIMINAL JUSTICE PLAN FOR 1969, Pub. L. No. 90-351, B-11.

19. Monroe, *supra* note 10 at 27.

20. Gourley, *supra* note 4 at 282.

sions. For example, Alabama's Department of Public Safety, which is actually a traffic patrol, included divisions for highway patrol, safety education, driver license, investigations and identification, training and administration. At the other end of the alphabet, Wyoming's Highway Patrol included only two divisions, one for safety and one for uniformed troops.

Several examples show organization and functions of typical state police forces. In New Mexico, the State Police Department is under a five-member Board of Supervisors which is appointed by the Governor, subject to Senatorial consent. Board members are appointed for six-year terms, so the Governor cannot completely control the Board. It appoints a Chief, who administers the Department and is assisted by two deputies. One is in charge of administrative functions and the other supervises the eleven field districts. There is also a Special Investigation and Intelligence Division, of non-uniformed officers, and small sections for staff inspection, planning, and internal security. They have full peace officer powers and serve as *ex officio* agents of the state in matters concerning the regulation of motor vehicles and driver licensing and the enforcement of traffic laws.[21]

Maryland's State Police is headed by a Superintendent. There is a Bureau of Administrative and Technical Services, including finance, personnel, training and public information and an Operations Bureau, which supervises field forces and special forces. It is responsible for traffic control, offering public information programs on traffic safety and similar subjects, and assisting federal, state and local agencies in law enforcement. There is also a Planning, Research and Inspection Division.[22]

The Director of Michigan's Department of State Police is appointed by the Governor, with consent of the Senate. It has almost 1,700 sworn officers who are assigned either to headquarters or to one of the fifty-eight posts throughout the state. They have the statutory powers of a sheriff in the execution of state criminal laws. The Department also has responsibilities in the areas of civil defense, law enforcement training, private police, licensing, gun registration, and accident reports.[23]

Some functions performed by the state police in some jurisdictions are assigned to the Attorney General in others and, therefore, are discussed elsewhere in this Report. For example, most jurisdictions now have state bureaus of investigation and identification. These are commonly placed under a department of justice or a department of public safety. In some states, the Attorney General has primary responsibility for organized crime control investigations, while the police may in others.

7.15 Relationship to Local Law Enforcement

Although law enforcement remains primarily a local responsibility, the states have taken positive action to strengthen the local capability to combat crime. Many states have given some officials, including the Attorney General, new responsibilities regarding local officers. This trend probably will continue, because:

> Control of crime is a difficult, complicated task, requiring deep commitment and day-to-day involvement by government. For reasons rooted in their past, states generally have not assumed that full role. For reasons rushing at them, states must assume that

21. Governor's Policy Board for Law Enforcement, New Mexico Law Enforcement Action Plan, April, 1969, 34-35.

22. Maryland Governor's Commission on Law Enforcement and the Administration of Justice, *Planning Grant Application*, 1968, 32.

23. Michigan Commission on Law Enforcement and Criminal Justice, II - 1.

> role in the future since only they can blend the necessary twentieth century crime control mix: legal power, intimate local knowledge and involvement, financial resources, geographic speed, and political leadership....
>
> Blending that proper 'mix' is one of the most important matters in this country. For crime control in America is in trouble, however its performance is measured. Statutes, public opinion, political leadership, official agencies—our antennae—all tell us that. Strengthened state action, including new state agency structures and stronger leadership of local efforts, represents the most promising direction for major improvements of crime control in America. Federal and local government action can offer no similar prospects.[24]

Most Attorneys General are not directly involved in local law enforcement. In response to a C.O.A.G. questionnaire, most Attorneys General said that they had no authority to direct or help direct police. Exceptions were California, where the Constitution gives the Attorney General supervision over law enforcement officers; Iowa, where he may summon peace officers and the highway patrol; Maryland, where he is advisor to the Police Commissioner of Baltimore, as well as to the State Police; New Hampshire, where the Attorney General may request assistance of any local law enforcement officers; Samoa, where he is charged with all law enforcement in the territory; South Carolina, where the Attorney General intervenes when assistance is required by the police; South Dakota, where the statutes require local officers to comply with his orders; and Vermont, where he is responsible for training of law enforcement officers. In addition, some Attorneys General are in charge of bureaus of investigation and identification, which assist local officers.

Two Attorneys General report that they have direct authority over some law enforcement officers under certain circumstances. The Attorney General of Iowa may summon the Highway Patrol and peace officers from all over the state in emergencies. In Vermont, the Attorney General has authority over all deputy and special deputy sheriffs in the state while on road patrol, guard duty or investigations. The 1969 legislature included funds in the Attorney General's appropriation to pay for eight statewide sheriffs' patrols to be held on holiday weekends throughout the year. These patrols were authorized by the Attorney General, who was to report to the legislature on their effectiveness.

Attorneys General in the following states serve on councils or commissions concerned with training of law enforcement officers: Arizona, California, Colorado, Florida, Indiana, Maryland, Michigan, Minnesota, Montana, New Jersey, North Dakota, South Carolina, Texas, Utah, Vermont, and Washington. The exact titles of these councils, and their statutory basis, are given in Table 7.3 of this Report. Virtually all Attorneys General are concerned to some extent with peace officer training, through this service on their states' criminal justice planning agencies.

An increasing number of Attorneys General issue publications for local law enforcement officials, either manuals or periodical bulletins. These are discussed in Section 3.63 of this Report. The Attorney General of Massachusetts, for example, issues a handbook concerning general police procedures for police officers. Entitled *Enforcing the Criminal Law*, it was intended to provide advice on general legal problems.

While this Report cannot attempt to deal with the complex and challenging area of local law enforcement, the Attorney General does play a significant role in many states concerning police, sheriffs, and other local officers. Some specific state statutes are described below as examples of Attorneys General's potential role.

24. Eliot Lumbard, *State and Local Government Crime Control*, 43 NOTRE DAME LAWYER, 859 (1968).

A 1967 Vermont law[25] created a Law Enforcement Training Council in the Attorney General's Office. The Attorney General serves as a voting member. Other members are the Commissioner of Public Safety, the Commissioner of Motor Vehicles, the F.B.I. agent in charge of the district, two members appointed by the Governor from a list nominated by the Vermont police chiefs' association, and two citizen members. They are appointed for three-year staggered terms; as the Governor only serves a two-year term, this prevents control by any one Governor. The Council meets four times a year or on call of the Chairman or Attorney General.

The Council recommends to the Attorney General regulations with respect to: (1) the approval of law enforcement officer training schools; (2) minimum standards for such schools; (3) minimum qualifications for instructors; (4) the minimum basic training which shall be required of officers before appointment, or for continuation of officers appointed on a permanent basis; (5) advanced in-service training programs. The Council, with approval of the Attorney General, appoints an Executive Director. No person may be appointed as a regular police officer unless he is certified by the Executive Director. Regulations promulgated by the Attorney General under this law required completion of a minimum of 150 hours of instruction for certification. A temporary certificate may be issued for up to twelve months.[26]

North Dakota's Combined Law Enforcement Council was also established in 1967. It consists of the Attorney General, who is Chairman, the Superintendent of the S.B.I., the Highway Patrol Superintendent, the State Parole Officer, a state's attorney, a sheriff, a police chief, and a member of each house of the legislature. The Council hires a director and other personnel, makes legislative recommendations, conducts and prescribes rules for law enforcement training programs, recommends suitable uniforms and equipment for police, and prescribes minimum standards of training "prior to carrying a sidearm." It also may recommend rules for local jails and may appoint an inspector for such jails.[27] It is located administratively under the Attorney General.

New Jersey's 1970 Criminal Justice Act is concerned primarily with extending the Attorney General's authority over prosecutors. It does, however, provide that:

> It shall be the duty of the police officers of the several counties and municipalities of this State and all other law enforcement officers to cooperate with and aid the Attorney General and the several county prosecutors in the performance of their respective duties, . . .[28]

The Attorney General is empowered to call into conference "as often as may be required" the prosecutors, chiefs of police and any other law enforcement officials "for the purpose of discussing the duties of their respective offices with a view to the adequate and uniform enforcement of the criminal laws of this State." No conferences of police have yet been called, but this gives the Attorney General a role in local law enforcement if he decides such action is desirable.

California was the first state to give the Attorney General substantial authority over local law enforcement. The California Constitution, pursuant to an initiative measure adopted in 1934, gives the Attorney General supervision over district attorneys, sheriffs, and other law enforcement officers and the power, where state law is not adequately

25. VT. STAT. ANN. ch. 151, § 2351-2358.
26. Office of the Attorney General, Vermont Law Enforcement Training Council, REGULATIONS, June 30, 1969.
27. N.D. CENT. CODE ch. 12-61.
28. N.J. STAT. ANN. § 52:17B-112.

enforced, to supplant the sheriff or district attorney.[29]

California's Commission on Peace Officer's Standards and Training was created in 1959 to set minimum standards for city and county law enforcement officers. It resulted from various studies, and the recommendations of the Attorney General.[30] This Act, which was a pioneering effort to establish statewide standards of training, said that "in enacting this legislation the legislature finds that vocational training and the enforcement of state laws are matters of statewide interest and concern."[31] The Commission is in the Department of Justice, under the Attorney General. Other members are appointed by the Governor, after consultation with the Attorney General and with Senatorial consent: five must be sheriffs or chiefs of police, two must be elected officers of cities and two of counties. The Commission's duties essentially are to adopt rules establishing minimum standards for recruitment and training of sheriffs and police officers. The Attorney General is an *ex-officio* member of the Commission.

A 1967 Minnesota law created a Peace Officer Training Board in the Office of the Attorney General.[32] It consists of two sheriffs, two peace officers, and two police chiefs, all appointed by the Governor, the police chiefs of each city of the first class, the superintendent of the State Bureau of Criminal Apprehension, the chief of the highway patrol, a special agent of the F.B.I., two members of the general public appointed by the Governor, and the Attorney General or his designee. Members serve for four-year, overlapping terms. The Governor appoints an Executive Director, and other staff is appointed by the board. The Director, on behalf of the board, exercises powers in accordance with regulations promulgated by the Attorney General.

The Board's duties include approval of: all peace officer or highway patrol training schools or courses; minimum courses at such schools and qualifications of instructors; minimum standards of physical, mental, educational and moral fitness of non-elective peace officers; minimum training; requirements for in-service training. The Director certifies schools, instructors, and successful completion of courses. He consults with peace officer training schools, local, state and federal agencies, and universities and colleges. Any peace officer appointed or elected by any governmental unit of more than one thousand population must attend a peace officers course.

New Jersey established a Police Training Commission by law in 1961, but training of county and city law enforcement officers did not become mandatory until 1965. The Attorney General is Chairman of the Commission, which is located administratively in the Department of Law and Public Safety. A 1968 report listed five major areas of concern:

(1) law enforcement agencies, including replies to a broad range of informational requests, development of informational bulletins, and maintenance of records pertaining to all new police appointments;

(2) school administrators, who are given assistance in curricula development, program evaluation, administrative procedures, and other matters;

(3) police instructors, for whom seminars are sponsored, lesson plans and guides are developed, visual aids and teaching materials prepared and individual assistance furnished upon request;

29. CAL. CONST. art. V, § 21.
30. Mary K. Sanders and Mary Agnes Neuman, POWERS AND DUTIES OF THE ATTORNEY GENERAL OF CALIFORNIA, California Department of Justice, 92 (1967).
31. CAL. PENAL CODE, § 13500-13523.
32. MINN. STAT., § 626-841; § 626-853.

(4) trainees, who are taught the requisite information and skills and awarded appropriate certificates; and,
(5) law enforcement officers who are given tuition assistance for higher education.[33]

Various groups have made recommendations for state regulation or supervision of local law enforcement training. The Committee on Suggested State Legislation of the Council of State Governments published a Model Municipal Police Training Act in 1960.[34] The Act creates a seven-member council, with six members appointed by the Governor, and the head of the department in which the council is located serving as the seventh. The International Association of Chiefs for Police formulated a Model Police Standards Council Act in 1966.[35] The I.A.C.P. model establishes a fifteen-member council, which includes the Attorney General. Both Acts would empower the council to set minimum standards for training.

The President's Commission recommended that police standards commissions should be created in each state and should be empowered to establish mandatory requirements and to give financial aid to local units to implement standards. As an additional role, which was

> Perhaps most important, State Commissions could initiate the research that must continually test, challenge, and evaluate professional techniques and procedures in order to keep abreast of social and technical change . . . they could help develop within the ranks of law enforcement the vision, inventiveness, and leadership that is necessary to meet the complex challenges facing the police of our cities.[36]

Attorneys General could assist in this task, as well as in informing police of developments in the criminal law and the effect of court decisions.

33. The State of New Jersey, Department of Law and Public Safety, 1968 ANNUAL REPORT, X-2, 3.
34. SUGGESTED STATE LEGISLATION, 1961, 89-93 (1960).
35. President's Commission, *supra* note 1 at 219-220.
36. President's Commission, *supra* note 2, at 123.

7.2 Criminal Justice Planning Agencies

The Omnibus Crime Control and Safe Streets Act was passed in 1968. Seldom has a single piece of legislation had such an immediate impact on a major area of governmental responsibility; seldom have federal-state-local relationships been subject to such sudden redefinition; and seldom has one law generated such searching analysis of personnel and practices at all levels of the federal system.

The state Attorney General has a direct interest in the Omnibus Act. In all but two states, he or a member of his staff serves on the policy-making board which administers the Act in each state. In fifteen states, he or a staff member serves as Chairman. In most states, his office has participated in programs financed by the Omnibus Act. He will be affected by whatever changes in his state criminal justice system result from plans and programs stimulated by the Act.

The National Association of Attorneys General's recommendations state that the Attorney General should be the Chairman or a member of the criminal justice planning agency in his state, and should work to assure effective planning, evaluation and use of funds.

7.21 Development of the Safe Streets Act

The 1968 Act was partly the outgrowth of a 1965 Law Enforcement Assistance Act and of the President's Commission on Law Enforcement and the Administration of Justice, created the same year. The 1965 law, in turn, was stimulated by numerous studies, and by public concern with crime problems. The work of the President's Commission and other groups is discussed in Section 1.7 of this Report.

1965 Law Enforcement Assistance Act

The Law Enforcement Assistance Act of 1965 was designed to foster new approaches, new capabilities, and new resources for dealing with crime through a modest experimental program of federal aid. Briefly, the Act authorized the Attorney General to make grants to public or private nonprofit agencies to improve training, advance the capabilities of law enforcement bodies, and assist in the prevention and control of crime. The Act further authorized him to conduct studies, render technical assistance, evaluate the effectiveness of programs and disseminate results. The Office of Law Enforcement Assistance, (O.L.E.A.,) was established within the office of the Attorney General to administer the Act.

A total of 426 grants, amounting to $20.6 million, were made by O.L.E.A. during the three-year life of the Act.[1] Grants were used, for example, to: develop model police training programs; equip police departments with audio-visual training devices; set up a criminal intelligence system for the New England states; train prosecutors; and otherwise try new techniques to upgrade law enforcement.[2]

The Attorney General indicated his belief that O.L.E.A., "within the constraints of its modest resources" had, in its short life, "provided valuable assistance in demonstration, training, and research programs; [and] accrued necessary experience for larger and more comprehensive assistance programs."[3] L.E.A.A. has contracted with a university to study programs funded under

1. Office of Law Enforcement Assistance, U.S. Dept. of Justice, L.E.A.A. GRANTS AND CONTRACTS FISCAL 1966-1968, ii-iii.
2. U.S. Dept. of Justice, 1968 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES, 3.
3. U.S. Dept. of Justice, Office of Law Enforcement Assistance, L.E.A.A. GRANTS AND CONTRACTS, FISCAL 1966, 1967 AND FIRST HALF 1968, x.

the 1965 Act; this will provide the first real evaluation of these grants.

Matching grants of $25,000 per state were made to encourage formation of criminal justice planning commissions. The President called for the creation of state committees "to stimulate the growth of public involvement and the development of a comprehensive anti-crime agenda in every part of the country."[4] While it is doubtful if most met this broad mandate, these committees did lay a foundation for state action under the 1968 Act. One study concluded that:

> Each committee . . . worked to (1) identify noteworthy practices of police, court and correctional agencies in the state, (2) isolate the state's most pressing problems, (3) inventory financial, procedural and personnel needs, (4) pinpoint areas where gaps have arisen between the legal principles of criminal justice and the problems of everyday operation, (5) evaluate the feasibility of proposals made by the President's Commission, (6) assess the state's resources and agencies, and (7) plan coordinated programs for law enforcement, courts and corrections.[5]

By mid-1967, sixteen states had started such planning groups.[6] This number had grown to thirty-one by 1968, when the Omnibus Act made them a prerequisite to receiving federal crime funds.

The President's Commission on Law Enforcement and Administration of Justice was created in 1965 and issued its report in 1967, calling for major state and federal efforts to control crime. The Omnibus Crime Control and Safe Streets Act of 1968 embodied many of the Commission's recommendations.

Following publication of the Commission's report, the N.A.A.G.'s Committee on Criminal Law and Law Enforcement reviewed the office's role in criminal justice planning. It drew up a model crime control coordinating council bill, headed by the Governor or Attorney General. to develop and execute a statewide program, serve as a clearinghouse for information, and employ staff to assist local groups.[7]

Omnibus Crime Control and Safe Streets Act

In his 1968 State of the Union Message, President Johnson stressed that the Omnibus Act:

> . . . does not mean a national police force. It does mean help and financial support to develop state and local master plans to combat crime. To provide better training and better pay for police. To bring the most advanced technology to the war on crime in every city and every county in America.[8]

The law was signed on June 19, 1968.

The grant program it establishes is administered by the Law Enforcement Assistance Administration L.E.A.A., of the United States Department of Justice. Congress appropriated $63 million for fiscal 1969, $300 million for fiscal 1970, and $650 million for fiscal 1971. Funds are distributed to the states through a block-grant system, for further distribution to local units. As the word "omnibus" implies, the Act contained other crime control measures, such as wiretapping provisions; these are discussed elsewhere in the C.O.A.G. study.

The Act's purpose is to:

(1) encourage States and units of general local government to prepare and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement;

(2) authorize grants to States and units of local government in order to improve and strengthen law enforcement; and

(3) encourage research and development directed toward the improvement of law enforcement and the development of new methods for the prevention and reduction of crime and the detection and apprehension of criminals.[9]

Although it was generally agreed that some such legislation was needed, the Congress was deeply divided as to the form federal aid for crime control should take. For example, the Director of the Office of Law Enforcement Assistance told a N.A.A.G. meeting in June, 1968, that there was disagreement as to whether the Act should be administered by the Department of Justice or by an independent agency, and the degree to which states should be involved in grant administration.[10] As a result of the legislative process, the original administration proposal was considerably modified. "Direct federalism" gave way to "block grants" to the states; a single director was replaced by a three-man administration, and other major changes were made.[11] The Act underwent additional amendment in 1970.

Prior Studies of the Act

There have been few nationwide studies of the Act; most of these have advocated the views of a single group, and many were made early in the Act's operation. The staff of the Urban Coalition and Urban America, Inc., issued a short study in June, 1969, based on a survey of twelve states. This report was generally critical, holding that planning agencies were not representative, plans were fragmented, regions were not logically drawn, and the Department of Justice did not offer adequate guidance.[12] The National League of Cities analyzed planning grant applications for thirty-one states, and concluded that funds were being "dissipated" without regard to need.[13]

In June, 1969, the International City Management Association distributed detailed questionnaires to directors of state planning agencies and to chief administrative officers of cities over 25,000 population. These were the primary bases for an analysis which found that:

> . . . despite some achievements in law enforcement assistance, variations in competency among state governments as well as patterns of city-state conflict may lead to the conclusion that direct federal grants must supplement state grants.[14]

The Executive Director of the National District Attorneys Association reviewed first-year plans and found that twenty-nine jurisdictions had no action grant expenditures for prosecutors; in the others, the amount to be shared by prosecutors, courts and other components of the judicial process ranged from 1 percent in ten jurisdictions to a high of 13 percent in one state.[15] Other studies included a National Association of Counties survey of chief elected officials of counties with a population of at least 50,000. About one-fifth of the officers replied. The N.A.C.O. study was

4. President Lyndon B. Johnson, Message to Congress, March 9, 1966.
5. U.S. Dept. of Justice, Office of Law Enforcement Assistance, GOVERNORS' PLANNING COMMITTEES IN CRIMINAL ADMINISTRATION —TWO STUDY PROJECTS, ii (June, 1968).
6. Report of Committee on Criminal Law, 1967 CONFERENCE OF ATTORNEYS GENERAL, 153-54.
7. Attorney General R. Thornton, *The Attorneys General in Public Protection*, THE BOOK OF THE STATES 1968-69, 410.
8. *New York Times*, 16:4,5, January 18, 1968.
9. Title I, 82 Stat. 197; Pub. L. No. 90-351, 90th Congress.
10. Courtney Evans, Acting Director of the O.L.E.A., in Report of Committee on Criminal Law and Law Enforcement, N.A.A.G. CONFERENCE PROCEEDINGS 1968, 150 (June, 1968).
11. *See* discussion of Congressional action in Advisory Commission on Intergovernmental Relations, MAKING THE SAFE STREETS ACT WORK: AN INTERGOVERNMENTAL CHALLENGE, 10-19 (September, 1970).
12. The Urban Coalition and Urban America, Inc., LAW AND DISORDER: STATE PLANNING UNDER THE SAFE STREETS ACT (June, 1970).
13. National League of Cities, ANALYSIS OF STATE ADMINISTRATION OF PLANNING FUNDS ALLOCATED UNDER THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (March, 1969).
14. Douglas Harman, *The Politics of Law Enforcement Assistance*, 1970 MUNICIPAL YEAR BOOK, International City Management Association, 479 (1970).
15. Patrick Healy, *An Analysis of 1969 State Planning Agencies' Plans from the Viewpoint of the Prosecutor*, 5 THE PROSECUTOR 230 (July-August, 1969).

mildly critical, but upheld the block grant approach.[16]

The most thorough analysis was conducted by the Advisory Commission on Intergovernmental Relations. The A.C.I.R. developed a questionnaire for state planning agencies, which all but two returned. This and supplementary sources provided the basis for a report, *Making the Safe Streets Act Work*. Its recommendations included retention of the block grant and planning agency system, greater emphasis on courts and corrections, and creation of a single Director for L.E.A.A.[17]

The block grant approach was also upheld by a National Governors Conference Committee report, which commended L.E.A.A. for its cooperation with the states and for "providing wide latitude to the states in developing plans for improving the entire criminal justice system."[18] This report was generally uncritical of either state or federal administration.

Juvenile Delinquency Control Act

As a companion to the Omnibus Act, Congress passed the Juvenile Delinquency Prevention and Control Act of 1968. The Act is administered by the Youth Development and Delinquency Prevention Administration within the Social and Rehabilitation Service of the U. S. Department of Health, Education, and Welfare.

This Act provided two alternative methods of participation. One, the modified block grant approach, required that a comprehensive, statewide juvenile delinquency prevention and control plan be developed with all allocated action funds going to local delinquency programs. In a great many states, however, the juvenile courts, institutions, and services operate on a statewide basis. The other option was to receive money under specific program grants from D.H.E.W. This meant that state and local programs would compete for funding without any comprehensive planning.[19]

With no authority to establish priorities among projects, and with the need to follow guidelines which were distributed very late, some states did not even apply for funds. Other allotted little for juvenile programs under the Omnibus Act, assuming that funds would be forthcoming under the Juvenile Delinquency Act. Adding to these problems, Congress provided a very small amount for first-year operations. Each state was advised that it would receive a grant of $50,000 with which to conduct comprehensive planning, with little likelihood of additional funding for action projects. For these reasons, the timing and structure of the Juvenile Delinquency Act resulted in the absence of juvenile delinquency programs in most first-year comprehensive plans.

It was not clear initially whether the same agency could administer both acts. In February, 1969, the Secretary of H.E.W. and the Attorney General issued a joint statement[20] emphasizing the desirability of designating a single agency and board for both programs, "in the interest of effective coordination." They added that "admittedly, current Federal guidelines have not fully reflected this kind of unification."

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16. National Association of Counties, NATIONAL URBAN COUNTY SURVEY OF CRIME CONTROL AND SAFE STREETS ACT OF 1968. Discussed in: Urban Data Service, THE SAFE STREETS ACT: THE CITIES' EVALUATION, International City Management Association, 8-9 (September, 1968).
17. A.C.I.R., *supra* note 11 at viii-xi.
18. National Governors Conference Committee on Law Enforcement, Justice and Public Safety, RESPONSE TO THE CHALLENGE OF CRIME, 6.
19. *Id.* at 13-14.
20. U.S. Dept. of Justice, Office of Law Enforcement Assistance, MEMORANDUM FOR STATE PLANNING AGENCY DIRECTORS—No. 9 (February 19, 1969).

7.22 The Law Enforcement Assistance Administration

The Law Enforcement Assistance Administration has complete responsibility at the federal level for all aspects of the grant program. It is the first continuing component of the Department of Justice to be primarily concerned with grant administration, and discussion of its operation must recognize this limited experience.

General Responsibilities

The Law Enforcement Assistance Administration is headed by three administrators, appointed by the President with the consent of the Senate. It is under the general authority of the Attorney General.

L.E.A.A.'s functions are set forth in the Omnibus Crime Control and Safe Streets Act. They are:

> (1) to provide federal funds to support state and local efforts to improve their criminal justice systems. The grant program consists of planning grants to develop comprehensive state-wide plans for improvement, and action grants to fund projects in the plans;
>
> (2) to encourage and perform research relating to law enforcement through operation of a National Institute of Law Enforcement and Criminal Justice; and
>
> (3) to administer an academic assistance program providing funds to institutions of higher education to assist students studying law enforcement.

The legislation made it clear that no federal control was contemplated, saying that it did not authorize any federal officer or agency to "exercise any direction, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof." L.E.A.A. was authorized by law:

> (a) to conduct evaluation studies of the programs and activities assisted under this title;
>
> (b) to collect, evaluate, publish, and disseminate statistics and other information on the condition and progress of law enforcement in the several states, and
>
> (c) to cooperate with and render technical assistance to States, units of general local government, combinations of such States or units, or other public or private agencies, organizations, or institutions in matters relating to law enforcement.

These provisions enable L.E.A.A. to go beyond merely channeling federal funds and to work constructively with the states.

Structure of L.E.A.A.

The Law Enforcement Assistance Administration is headed by an Administrator and two Associates, supported by appropriate fiscal, personnel, administrative and legal services. It contains four major divisions:

(1) The Office of Law Enforcement Programs, which processes block grant and discretionary grant applications. It includes divisions for civil disorders, organized crime, police, corrections, and courts programs;

(2) The National Institute of Law Enforcement and Criminal Justice, which is concerned with research and development, and includes five program centers, two substantive project managers, a research and support staff;

(3) The Office of Academic Assistance, which finances higher education for criminal justice personnel, and

(4) The National Criminal Justice Information and Statistics service, which collects and disseminates statistics.

The Omnibus Act empowered the Administration to: promulgate regulations; subject to civil service laws, to appoint employees and fix their compensation; to hold hearings, issue subpoenas and receive evidence; and to appoint advisory commissions. The Administration was authorized to withhold funds if an applicant or grantee failed to comply with the law, regulations, or to submit an approved plan. Applicants or grantees were given authority to appeal any final action of the Administration in court. "Applicant" is not defined for this purpose, so it is not clear whether a local government can appeal direct-

ly to the Administration if the S.P.A. rejects its application for a subgrant.

The most controversial feature of L.E.A.A.'s structure was vesting control in three administrators.

The Advisory Commission on Intergovernmental Relations study gives the following arguments in favor of a single director:

> [One] is the basic organizational principle of pinpointing administrative responsibility in order to avoid buck-passing and achieve expeditious decision-making. . . . Congress had worked out the policies of the Act in fairly specific detail, and what was needed, in light of the urgency of the problems of crime, was prompt, effective implementation of those policies. . . .
>
> Finally . . . while bipartisanship may have merit in garnering support for passage of the legislation in the first instance, it raises difficulties in getting the system to work once the legislation is passed. Personnel appointments, particularly crucial to the effective administration of any program, are likely to be the victims of disagreement.[21]

The difficulties in obtaining concurrence by three administrators are obvious. The Democrat member of the trio resigned in May of 1970, so the advantages of bipartisan control were absent. A 1971 amendment helped correct the situation by authorizing the Administrator to "exercise all administrative powers, including the appointment and supervision of Administration personnel." All other powers are to be exercised by the Administrator with the concurrence of either one or both of the two Associate Administrators. One of the Associates must be a member of a different political party than the President.

Regional Offices

From inception, L.E.A.A. has used regional divisions in its office to work directly with the various state planning agencies. Initially, these divisions were at the Washington office and were known as "desks" to which states reported. In the fall of 1969, they were moved to the field and established in seven cities to serve multi-state areas. Their purpose is to shorten the length of time necessary to act on grants, provide closer guidance to state agencies and decrease travel time and costs.[22]

Attempts are being made to increase the effectiveness of these offices. All now have auditors and many have specialists in such areas as courts and corrections. Some are using contractual assistance for evaluation of limited area programs. It apparently is intended that regional staffs remain small, to prevent development of a regional bureaucracy.

The regional offices work with the state agencies to assist in planning and developing programs, aiding in compliance with Guidelines set by L.E.A.A. and serving as liaison with Washington. They review and evaluate state plans prior to submission to Washington. This allows necessary modifications at the state level and facilitates final review. Regional offices assure that the states comply with any specific conditions placed on the grants and ascertain that required reports are filed.

The regional offices help inform potential grantees about the discretionary grant programs. In addition to direct contact with specific agencies, seminars or conferences are held to acquaint appropriate groups with the Act and its significance to them. Discretionary grant applications are reviewed in the regional offices, then submitted to Washington. Administration of discretionary grants to large cities is handled by the regional offices; all other discretionary grants are administered by Washington.

Office of Academic Assistance

The primary function of L.E.A.A.'s Office of Academic Assistance is the operation of the Law Enforcement Education Program (L.E.E.P.). L.E.E.P.

21. A.C.I.R., *supra* note 11 at 55.

22. U.S. Dept. of Justice, Law Enforcement Assistance Administration, 2ND ANNUAL REPORT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FISCAL YEAR 1970, 61 (1970).

provides two types of aid to students enrolled in higher education institutions: (1) maximum loans of $1800 per academic year for full-time study; and (2) maximum grants of $300 per semester or $200 per quarter. Such study must be "in areas related to law enforcement or suitable for persons employed in law enforcement." Grants are limited to state and local police, courts and corrections personnel, while loans are available to those individuals as well as to pre-service students preparing for criminal justice careers. Loans are cancelled at the rate of 25 percent for each year of full-time service in public law enforcement; a student has no repayment obligation if he continues to work in his employing agency for two years after completing courses. A total of $6.5 million was given to 485 colleges and universities for the second half of the 1968-69 academic year.

L.E.E.P. is administered directly by L.E.A.A., which makes awards directly to the institutions of higher learning. It does ask that educational institutions contact their state planning agency to ensure communication. The S.P.A.'s were asked to assume a leadership role in:

> (1) promoting an awareness among law enforcement agencies of programs available at local educational institutions and an awareness among colleges of their responsibility in promoting participation; (2) reviewing the type of course offerings and their level of quality and, where required programs do not exist, incorporating in the state's comprehensive plan assistance to schools; and (3) gaining cooperation between the two-year and four-year institutions in resolving problems of transferability of credits.[23]

During the fall and spring terms of the 1969-70 academic year, about 50,000 students participated in L.E.E.P. Clearly, a substantial number of individuals are taking advantage of the opportunities afforded by L.E.E.P. and returning to the classroom. There was apparently some initial confusion in the program regarding the eligibility of corrections personnel for these funds, but efforts were made to correct this misconception. If increasing numbers of college graduates enter the law enforcement profession, it may become necessary to provide for more specialization so that these improved skills can be fully utilized. Perhaps the greatest contribution which L.E.E.P. can make to law enforcement would be to attempt to determine the educational needs of personnel and then seek ways to fill those needs.

Significant amendments were made in 1970 to the educational provisions of the Act. The Administration is now authorized to make grants to or contract with institutions of higher education to assist in planning, developing or strengthening: (1) graduate programs in law enforcement; (2) training of faculty; (3) the law enforcement aspects of any courses; and (4) research. It may also develop and support regional and national training programs, workshops and seminars to instruct law enforcement personnel "in improved methods of crime prevention and reduction and enforcement of the criminal law." Specific authority is given to establish and support a training program for state and local prosecutors engaged in the prosecution of organized crime.

The National Institute of Law Enforcement and Criminal Justice

In *The Challenge of Crime in a Free Society*, the President's Commission said that the greatest need of law enforcement and the administration of criminal justice is the need to know. It stated that "there is probably no subject of comparable concern to which the Nation is devoting so many resources and so much effort with so little knowledge of what it is doing."[24]

23. *Id.* at 55.

24. President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 273 (1967).

In response to this need, the Congress established the National Institute of Law Enforcement and Criminal Justice as the research arm of L.E.A.A. The Institute is authorized to make research grants and contracts with individuals, public agencies, institutions of higher education, industry and private organizations. The Institute has an authorized professional staff of thirty-five. Its first-year budget was $2.9 million, which was increased to $7.5 million for FY 1970.

The Institute contains five research centers:

1. The Center for Crime Prevention and Rehabilitation, seeks to identify the conditions underlying criminal behavior as well as developing techniques for crime prevention, correction and rehabilitation.
2. The Center for Criminal Justice Operation and Management, seeks to identify ways in which the efficiency, structure and tactics of law enforcement agencies can be improved and encourages the development of new types of equipment for law enforcement.
3. The Center for Law and Justice, examines the effectiveness and fairness of our criminal laws and procedures. It is concerned with courts, prosecution and defense, and also with police and correction procedures.
4. The Center for Special Projects administers a graduate fellowship program as well as a small grants competition for research projects.
5. The Center for Demonstration and Professional Services studies the problems of technology, transfer and the process of acceptance of research findings within criminal justice agencies, various levels of government, and the community at large.[25]

The centers administer Institute grants to individuals, industry and to both public and private agencies. More than one hundred grants have been awarded. The largest number have gone to private firms and to universities, each receiving 24 percent of the total amount of funds; 20 percent went to state and local governments, 14 percent to federal agencies, 13 percent to national and professional organizations and the rest to individuals. By program area, funds for FY 1970 were distributed as follows:[26]

Program Area	Funds	Percent
Police Equipment, Techniques, Systems	$2,593,537	35
Police Personnel Training, Supervision	675,663	9
Crime Prevention	1,201,894	16
Courts and Prosecution	1,494,934	20
Corrections	490,652	7
National Service Functions	1,012,769	13
Total	$7,469,449	100

The Institute, to date, has been concerned primarily with awarding grants, but its statutory authority is much broader. It is not only authorized to make grants, but also to "make continuing studies and undertake programs of research" and "to make recommendations for action which can be taken by federal, state, and local governments and by private persons and organizations to improve and strengthen law enforcement." It is empowered to collect and disseminate information obtained by the Institute or by other agencies "relating to new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement."

The Institute apparently plans ultimately to assume these broader functions. Its *Program and Project Plan for Fiscal Year 1970* notes that it will address national needs, including: (1) a mechanism to coordinate criminal justice research activity of all federal agencies; (2) possible assistance to state criminal law revision efforts; (3) planning a national reference service for criminal justice research; (4) a user evaluation and standards service for equipment and facilities; (5) "a program for comprehensive introduction of change in one or more selected medium-sized cities" and studies of factors which affect the process of change; (6) private research activity in large urban areas, and (7) enlarging the quality and quantity of the relevant research community.[27] The Institute has suffered from a lack of personnel and of sufficient funds. Although much valuable research has been and is being conducted, few attempts have been made to distribute such information widely.

The Institute, like other components of L.E.A.A., has operated without continuous administrative leadership. Its first Director resigned in May, 1970. Since then, the Deputy Director has served as Acting Director. It has also been subject to some controversy as to its proper location. Congress has considered placing the Institute directly under the Attorney General. The President's Commission, on the other hand, thought the research function should not be placed in the Department of Justice, but in:

> . . . a number of institutes specifically dedicated to research into crime and criminal justice. Such institutes would bring together top scholars. . . . Presumably most of these research institutes would be located at universities. . . . These institutes would serve as the foundation for the other parts of the Federal program described here, both in the substance of the research they undertook and in the availability of their staff members as top-level consultants.[28]

National Criminal Justice Information Service

The National Criminal Justice Information and Statistics Service came into being in late 1969, with a budget of $1 million for FY 1970. It consists of a Statistics Center, which will "develop a well-balanced program of statistical research and development" through its grants and through its own experts, and a Systems Analysis Center, which will offer technical assistance in the use of computers and information systems.[29]

The Service has undertaken five programs for fiscal 1970: (1) developing a series of three surveys of victims of crime and estimating other factors from these data; (2) developing a directory of criminal justice agencies and collecting statistics on agencies and expenditures; (3) developing a national correctional statistics system; (4) encouraging the creation of independent statistics centers in the states, and (5) assessing the present status of information systems. The Service is also developing a prototype automated system for the states to handle and store data and to monitor grants. These programs, if successful, will provide a much-needed core of criminal justice data.

Administration and Staffing

L.E.A.A., like other criminal justice agencies, has encountered staffing problems. Its employees are subject to civil service laws and to security clearance as Department of Justice employees. These requirements cause delays in staffing. Additional problems undoubtedly result from the lack of continuity in administration. Many persons would not wish to join an organization until they knew who its administrators would be and until they had some concept of its probable policies.

Appropriations for fiscal 1969 were approved late in August, 1968. It was not until October that the first three administrators were installed. Their appointments were not confirmed, because of the change of administration, and they left office in February and March, 1969. Charles H. Rogovin, a former Massachusetts Assistant Attorney General, took office as Administrator in March, 1969. Richard W. Velde, former minority counsel of the Sub-Committee on Criminal Law of the Senate Judiciary Committee, was sworn

25. U.S. Dept. of Justice, Law Enforcement Assistance Administration, 1ST ANNUAL REPORT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FISCAL YEAR 1969, 23 (1969).

26. L.E.A.A., *supra* note 22 at 231.

27. U.S. Dept. of Justice, PROGRAM AND PROJECT PLAN FOR FISCAL YEAR 1970, 11-12 (1970).

28. President's Commission, *supra* note 24 at 288.

29. L.E.A.A., *supra* note 22 at 58.

in as an Associate Administrator at the same time. On December 22, 1969, Clarence M. Coster, a former police chief, became the third Administrator. Mr. Rogovin resigned in May, 1970, because of "policy and personal differences."[30] The Director of the National Institute resigned at the same time. As of February, 1971, neither position was filled and the lack of continuity at the leadership level has probably hindered agency operations and recruitment.

Further problems stemmed from the need to make funds available to the states as promptly as possible. The Omnibus Act became law on June 19, 1968. Tentative Guidelines were first issued on August 20 and issued in more complete form in November. These contained about seventy pages of instruction on the composition of S.P.A.'s and their staffs, the application process, and plan development. December 19, 1968, was the deadline for the states to submit full planning grant applications. Telegrams were sent to the states on October 21, announcing that installation of the administrators had made possible approval of initial planning fund grants. Budget material requirements were simplified to help the states meet the deadline. The balance of the planning grant funds were awarded in January. A detailed financial guide was issued in May, 1969, and detailed instructions on plan preparation in February, 1969. It was recognized that the retroactive application of these guidelines might cause hardship, and provision was made for adjustments in such cases.[31]

A report of the National Governor's Conference Committee on Law Enforcement, Justice and Public Safety praises "the continual, monumental, efforts of the L.E.A.A.," and points out that it operated under real difficulties:

> Struggling to define their own role as a fledgling agency, and under the pressure of impossible time-tables, they succeeded in carrying out the spirit of the block grant approach. Rather than focusing on developing their own administrative superstructure they concentrated technical assistance and supportive activities to develop individual state capabilities.[32]

Professor Douglas Harman, who prepared the *Urban Data Service* report, notes differences in party approaches to administration:

> Democratic appointees first administered the L.E.A.A. program, and they tended to favor strict interpretation of the federal requirements upon State administration of the program. The Republican administration which inherited the program midway in its first year took a different position. The Republican administrators held that the block grant made this a state effort and that it was the states' responsibility to make the program a success. They favor a limited federal role.[33]

The federal role has been limited. No formal challenge has been made, for example, to the composition of advisory boards or to the allocation of funds, requirements for which are described elsewhere in this Report. In at least one instance, L.E.A.A. made continuing receipt of funds contingent upon expansion of the advisory board to provide broader representation,[34] but first year funds had been awarded to the original board.

The Urban Coalition charges that L.E.A.A. "provided little leadership in the establishment of priorities, the proper structuring of regional and local planning mechanisms, or the development of sound action programs," nor did it insist that state plans be truly comprehensive.

The Urban Coalition also cited L.E.A.A.'s failure to set up any means of disseminating the limited existing information about the effectiveness of various anticrime programs. The Urban Coalition study concludes:

> This lack of direction has resulted in great confusion among the states on such important questions as whether the division of a state into regions is optional or mandatory; whether private agencies active in such fields as juvenile treatment and corrections can be the recipients of action grants; or whether juvenile programs are restricted to Department of Health, Education and Welfare funds, or can be supported by L.E.A.A. grants. On another level, that of substantive impact, the lack of standards and guidelines has resulted in a tremendous duplication of effort among states and localities attacking similar problems.[35]

In answer to such charges, the Administrator reported in June, 1969, that L.E.A.A. had: held four regional planning conferences for top state officials; convened two national meetings for S.P.A. directors; held four regional conferences for top corrections officials. In addition, the eighteen professionals on L.E.A.A.'s regional desks made hundreds of trips throughout the states.[36] Additionally, information concerning related federal programs was circulated.

7.23 State Planning Agencies

The Omnibus Act placed primary responsibility for administration with the states. The Advisory Commission on Intergovernmental Relations pointed out that this program differs markedly from most recent federal grant programs:

> The most striking change is the Act's heavy reliance on State governments as planners, administrators, coordinators, and innovators. The States are assigned the major share of administrative responsibility for the program. They must establish broadly representative State level law enforcement planning agencies, prepare comprehensive plans, review and approve applications for financial aid submitted by their political subdivisions, distribute planning and action grant funds to local jurisdictions, and provide appropriate assistance to applicants. The State's overall role is to act as a catalyst in bringing together previously isolated components of the law enforcement and criminal justice system and coordinating, directing and supporting their efforts in a comprehensive attack on crime.[37]

The Act provided that grants would be made to a law enforcement planning agency in each state, to be designated by the Governor. The S.P.A. (state planning agency) should "be representative of law enforcement agencies of the State and of the units of general local government within the State."

The Omnibus Act recognized the importance of planning, although deadlines for submission of plans precluded extensive plan development. The federal government paid up to 90 percent of the cost of establishing S.P.A.'s.

Responsibilities of State Planning Agencies

The Omnibus Act required each S.P.A. to:

1) develop, . . . a comprehensive statewide plan for the improvement of law enforcement throughout the State;

2) define, develop, and correlate programs and projects for the State and the units of general local government in the State or combinations of States or units for improvement in law enforcement; and,

3) establish priorities for the improvement in law enforcement throughout the State.

L.E.A.A. guidelines expanded these responsibilities to include:

—providing information to prospective aid recipients on the benefits of the program and procedures for grant application

—encouraging grant proposals from local units of government for law enforcement planning and improvement efforts

—encouraging project proposals from State law enforcement agencies

—evaluation of local applications for aid

30. *New York Times*, 15:1, May 1, 1970.

31. U.S. Dept. of Justice, Law Enforcement Assistance Administration, COMPREHENSIVE PLAN OUTLINE AND FORMAT FOR ACTION GRANT APPLICATIONS, S.P.A. MEM. No. 10, (February 28, 1969).

32. National Governors Conference, *supra* note 18 at 5.

33. Harman, *supra* note 14 at 472.

34. Pennsylvania Criminal Justice Planning Board, IMPACT 1 (March-April, 1970).

35. The Urban Coalition, *supra* note 12 at 7.

36. N.A.A.G., 1969 CONFERENCE PROCEEDINGS, 24.

37. Advisory Commission on Intergovernmental Relations, *supra* note 11 at 15.

and awarding of funds to local units of government

—monitoring progress and auditing expenditures of grants by local units of government

—encouraging regional and metropolitan area planning efforts, action projects and cooperative arrangements

—coordination of the State's law enforcement plan with other federally-supported programs relating to or having an impact on law enforcement

—oversight and evaluation of the total State effort in plan implementation and law enforcement improvement, and

—collecting statistics and other data relevant to law enforcement in the State as required by the Administration.[38]

Structure and Placement

The law required that the S.P.A. be designated by the Governor and subject to his jurisdiction. It could be either a specially-established unit of state government, or an existing body. Organization and structure were matters of state discretion, but the state planning agency must:

(1) be a definable agency in the executive branch of State government charged with and empowered to carry out the responsibilities imposed by the Act;

(2) have a supervisory board (i.e., a board of directors, commission, committee, council, etc.) which has responsibility for reviewing, approving and maintaining general oversight of the State plan and its implementation, of action priorities, of sub grants or allocations to localities, and of other planning agency functions;

(3) have an administrator and staff who devote full time to the agency's work.[39]

Most states created, either by executive order, statute, or a combination of the two, an independent agency attached to the Governor's office or to some other executive department. About a dozen, however, placed their agencies within general state planning departments. Some built upon criminal justice commissions organized prior to the Act, but the majority created entirely new agencies.[40]

The position of the state planning agency within the governmental structure varies. Although the Omnibus Act requires that the agency be subject to the Governor's jurisdiction, this does not mean that it must be directly under him. The Wisconsin Council on Criminal Justice, for example, was attached to the Department of Justice under the administrative authority of the Attorney General. However, the executive order implementing the transfer notes that the Governor has ultimate jurisdiction over the Council.[41]

North Carolina's planning agency, the Governor's Committee on Law and Order, was originally an independent body. It is now the Division of Law and Order in a new Department of Local Affairs, an agency with responsibility for planning in a number of other fields, such as recreation. It operates through uniform local planning districts.[42] In Virginia, the Governor created a State Law Enforcement Planning Council, which functions in a supervisory capacity, and placed the Law Enforcement Administration within the Division of State Planning and Community Affairs. After one year's operation, the Law Enforcement Administration was made a separate division within the Governor's Office.[43] The Ohio Law Enforcement Planning Agency is within the Ohio Department of Urban Affairs, a body with broad planning functions.

Composition of Boards

The Act specified that a state planning agency "shall be representative of

38. U.S. Dept. of Justice, Law Enforcement Assistance Administration, GUIDE FOR STATE PLANNING AGENCY GRANTS, 5 (November 1968).

39. *Id.* at 6.

40. Daniel Skoler, *State Implementation of the Omnibus Crime Control Act*, THE BOOK OF THE STATES 1970-71, the Council of State Governments, 415.

41. Wisconsin Council on Criminal Justice, STATE COMPREHENSIVE PLAN, 184 (May, 1969).

42. North Carolina Department of Local Affairs, Division of Law and Order, IMPROVEMENT IN THE CRIMINAL JUSTICE SYSTEM: COMMITMENT TO ACTION, 676 (April 15, 1970).

43. Virginia Council on Criminal Justice, STATE COMPREHENSIVE PLAN, EI-1, (April 15, 1970).

law enforcement agencies of the State and of the units of general local government within the State."[44] L.E.A.A. Guidelines said that "the composition of such boards may vary from State to State; however, balanced representation is required" and must include representation of: state law enforcement agencies; units of general local government; local law enforcement agencies; each major law enforcement function, such as police, corrections and courts; juvenile delinquency; community or citizen interests; "reasonable geographical and urban-rural balance and regard for the incidence of crime and the distribution and concentration of law enforcement services in the State."

A Department of Justice spokesman told a N.A.A.G. conference in June, 1968, that the Act "contemplates a [planning] agency that is composed largely of officials appointed by the governor in a body that can spend almost full time or at least the permanent staff can spend full time in working out an entire new, greatly expanded approach to the criminal justice process."[45]

A thirty-one state survey by the National League of Cities found that:

> The intended degree of representation of local policy makers has not been realized . . . out of a total of 678 supervising board members or designated positions in the 31 planning grant applications surveyed, only 71 could be classified as representative of local policy making officials.[46]

A study of twelve states by the National Urban Coalition found that boards "are dominated by professionals from the agencies that comprise the criminal justice system and, to a lesser extent, by local elected officials."[47] It adds that:

> Only limited representation, at best, has been given residents of poor and minority neighborhoods. . . . Agencies dealing with problems related to crime, such as health, poverty, or employment, in many cases have played minor roles or have not participated at all.[48]

One analysis of S.P.A. supervisory board composition in December, 1969, showed a total membership of 1,153 or an average of 23 per state. Of these, only 11 percent were local elected officials; 17 percent were citizen representatives and 16 percent were from corrections and juvenile delinquency programs. A larger number, 23 percent, were police representatives and 20 percent were from the courts, prosecution, and defense.[49]

Some states have become cognizant of this problem and have restructured their boards. Pennsylvania's board consisted of three professionals from criminal justice agencies, plus a private attorney. Eight additional members have been added, including four local officials and two legislators.[50] The Pennsylvania Criminal Justice Planning Board also requires that seven of the thirty-five members of each regional planning council be citizen representatives; these include such diverse interests as the security director of a steel corporation and an employee of Black Action, Inc.

No aspect of S.P.A.'s has been more sharply criticized than the composition of the boards, yet this determines their ability to plan and implement viable programs. Daniel Skoler reported that of more than 1,100 persons serving on such boards, 35 percent were from state government, 43 percent were from local government, and the rest represented private citizens. Law enforcement professionals constituted about half the board membership.

44. U.S. Dept. of Justice, L.E.A.A. *supra* note 38 at 8.

45. N.A.A.G., CONFERENCE PROCEEDINGS 1968, 38 (June, 1968).

46. National League of Cities, *supra* note 13 at 10.

47. National Urban Coalition, *supra* note 12 at 8.

48. National Urban Coalition, LAW AND DISORDER VI, 24 (1970).

49. A.C.I.R., *supra* note 11 at 25, L.E.A.A. cited as source.

50. Pennsylvania Crime Commission, COMPREHENSIVE PLAN, 376 (1970).

Skoler, an L.E.A.A. official, conceded that although:

> the initial state record here [on including community representatives] was better than most critics allowed . . . the States would need to continually prove their commitment on this point and find not only formal but productive roles for the public and community viewpoint.[51]

In evaluating criticism of board membership, several factors should be kept in mind. One is that Congress did not require community representation; L.E.A.A. wrote this into the guidelines on its own initiative. Second, the occupational classifications used are arbitrary at best; a state legislator, for example, might also be a juvenile delinquency worker. Third, a person's occupation does not define his personal interests or beliefs; a legislator could be an effective spokesman for a conservative area or for a ghetto. Finally, no critic has found any correlation between representation on boards and allocations of funds.

Table 7.231 shows the number of members of advisory boards. These range in size from ten in one state to forty-eight in two states. The 1969 average was twenty-three, according to the A.C.I.R. survey. Of these, 37 percent were from the state and 63 percent from the local level.[52] Another 1969 survey found an average of twenty-two members, including six from the state and ten from local government.[53] Obviously, some of the larger boards could not function effectively, as their size would preclude real review or discussion. Some states have a smaller group which actually reviews applications. Thus, Massachusetts has a proposal review board, which consists of seven members of the thirty-five member board.

It is not possible to document the extent to which boards actually make policy and the extent to which they merely endorse staff action. The A.C.I.R. survey found that from April 1969 to February 1970, boards met from one to nineteen times, with attendance averaging from 62 percent to 76 percent, by type of member.[54] At least one state reports that it holds monthly meetings lasting for several days, and also holds an annual retreat.[55]

Regional Planning Districts

While the Act did not specifically require sub-regions of local planning units, it did encourage their formation. S.P.A.'s must make at least 40 percent of their total planning grant allocation available to units of general local government or to combinations of such units. The Guide for State Planning Agency Grants said that:

> Planning efforts on a regional, metropolitan area, or other 'combined interest' basis are encouraged and should receive priority. Common or consistent planning regions with other federally-supported programs or with existing State planning districts, . . . should be considered as well as utilization where feasible, of the planning efforts of CDA's (community development agencies) under the Model Cities program.[56]

Priorities in funding local plans were to be given to major urban areas, other high-crime areas and to efforts involving combinations of local units. Forty-five states established regions for law enforcement planning, and forty-one of these created regional policy boards or advisory councils. In at least thirty, existing multi-jurisdictional entities were expanded to encompass law enforcement planning.[57] At least one state, New Jersey, initiated a subdistrict scheme then abandoned it.[58]

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51. Skoler, *supra* note 40 at 416.
52. A.C.I.R., *supra* note 11 at 25.
53. National Governors Conference, September 2, 1969 News Release.
54. A.C.I.R., *supra* note 11 at 28.
55. Interview with Assistant Attorney General Jacob B. Tanzer, Chairman, Oregon Law Enforcement Council, in Salem, Oregon, October 6, 1970.
56. U.S. Dept. of Justice, L.E.A.A., *supra* note 38 at 10.
57. A.C.I.R., *supra* note 11 at 33.
58. Interview with T. Howard Waldren, Acting Executive Director, New Jersey State Law Enforcement Planning Agency, in Trenton, New Jersey, September 24, 1970.

7.231 STATE PLANNING AGENCIES: SIZE OF BOARDS AND STAFF

	SPA Board Membership		SPA Staff No. of Personnel***		% Level of Staffing***
	1970*	1969	Prof.	Clerical	
Alabama	30	30	14	4	77
Alaska		27	3	1	100
Arizona		17	6	4	100
Arkansas	14	14	9	4	100
California	29	25	18	22	100
Colorado	18	19	8	6	100
Connecticut		18	13	5	85
Delaware	24	24	4	3	80
Florida	29	26	5	6	33
Georgia	24	22	6	2	66
Guam					
Hawaii	34	15	6	5	100
Idaho	18	15	4	2	57
Illinois	30	30	24	19	100
Indiana	26	13	5	1	53
Iowa	31	30	8	3	80
Kansas	24	26	5	5	33
Kentucky	48	43	12	6	100
Louisiana	35	34	13	2	93
Maine	23	19	4	4	100
Maryland	25	24	19	6	79
Massachusetts	30	30	39	17	75
Michigan	26	28	18	7	91
Minnesota	35	32	8	4	88
Mississippi		34	10	3	100
Missouri	19	18	8	3	100
Montana	13	12	5	3	79
Nebraska	18	21	5	3	100
Nevada		17	3	1	75
New Hampshire	30	30	4	4	100
New Jersey	14	14	22	13	92
New Mexico		18	4	3	57
New York	22	23	23	16	65
North Carolina	22	26	6	3	54
North Dakota		15	5	--	83
Ohio	21	22	22	16	45
Oklahoma	48	47	6	5	100
Oregon	22	22	5	2	100
Pennsylvania	11	42	24	15	89
Puerto Rico					
Rhode Island	22	22	4	5	80
Samoa					
South Carolina	16	16	4	2	67
South Dakota	15	16	2	1	75
Tennessee	16	16	8	3	80
Texas	21	21	8	6	100
Utah	17	18	4	--	100
Vermont	19	18	5	4	100
Virgin Islands	19	--			
Virginia	18	16	10	8	100
Washington	37	29	4	2	66
West Virginia	35	25	8	3	90
Wisconsin	10	12	7	2	70
Wyoming	23	22	3	2	100

* 1970 board members compiled by C.O.A.G. from State Plans
** L.E.A.A. reproduced in Advisory Commission on Intergovernmental Relations, *Making the Safe Streets Act Work*
*** A.C.I.R., *Supra.* December 31, 1969

The effectiveness of sub-regions is a matter of controversy. The National Governor's Conference Committee on Law Enforcement Justice and Public Safety made this comment on the utilization of regional planning agencies:

> Because planning funds have been extremely limited, most states have utilized some form of planning region serving several local jurisdictions as a basis for local planning. Without this level of aggregation, very few local jurisdictions would have received sufficient allocations to carry out significant planning. However, the majority of states structured the regions to provide major population centers a dominant voice in regional planning affecting their jurisdictional role. As a result, relationships between local officials and the states, in the execution of planning activity, have been extremely harmonious.[59]

The National League of Cities, however, argued that regions helped direct too much money to rural areas, to the detriment of cities.[60] It cited, as an example, California's regional allocation system, which resulted in Los Angeles receiving 2.3¢ per capita, while one rural region received 58¢ per person. The National Urban Coalition says that:

> Although it is too late to prevent the formation of regions, there is a serious question whether the regional structures imposed by some of the states are authorized under Title I. The language of the Act authorizes state plans to 'encourage units of local government to combine or provide for cooperative arrangements.' It does not suggest compulsory joinder. Regional units should be authorized only if they serve a functional purpose, if they are voluntary, and if they accommodate the fundamental planning needs of the cities.[61]

Development of regions is probably one of the most far-reaching effects of the Omnibus Act. Its success will depend in large part on the viability of particular groupings, and the extent to which local units were involved in the selection process. Recent amendments to the Safe Streets Act require that regional units, like state planning agencies, be representative of law enforcement agencies, units of government, and crime control agencies.

California's S.P.A., for example, adopted the regional planning areas developed in 1964 by the County Supervisor's Association and ratified by the California State Planning Advisory Committee. The California Council on Criminal Justice elected to plan through these eleven regions, rather than the state's four hundred municipalities and fifty-eight counties because: (1) grants to individual localities would be too small to be useful; (2) they would hinder development of a broad perspective in planning; (3) they might not reflect the variety of needs facing smaller units, and (4) many local units would not be able to support planning on a continuing basis.[62] California made an effort to assure that regional advisory bodies were representative by requiring that each include at least five members from local government, five from the criminal justice system, and three "who reflect the composition of the community."

North Carolina initially established twenty-two planning regions, but revised these into seventeen regions, corresponding to those established for other state purposes. Each region will have a full-time planner. The Director of the S.P.A. feels that regions are essential, as North Carolina has almost five hundred local government units.[63] The S.P.A. has issued printed guidelines for developing regional comprehensive plans.

If rationally developed, regions can help overcome the "Balkanization" of law enforcement. Many areas of the

59. National Governors Conference, *supra* note 18 at 8.
60. National League of Cities, *supra* note 13 at 8
61. National Urban Coalition, *supra* note 48 at 11.
62. California Council on Criminal Justice, PLAN FOR ACTION, 55 (1970).
63. Interview with James Van Camp, Executive Director, North Carolina Division of Law and Order, in Raleigh, North Carolina, September 30, 1970.

criminal justice system, such as corrections and communications, cannot be developed adequately on a city or county level. In many states, for example, courts and prosecution functions are organized into multi-county districts. A regional system might operate against urban interests, but this need not be true. Pennsylvania's S.P.A., for example, uses the state's multi-purpose regions, but designates the state's two largest cities as separate regions.

Regions apparently will continue to be used by the vast majority of states; their function should be evaluated to ensure that they facilitate the flow of ideas and funds, and their composition evaluated to assure that they are representative of areas and interests.

Task Forces

The use of task forces seems clearly evident in the state plans. The President's Commission provided a prototype for their use. Taking examples at random, North Carolina's initial plan indicated the use of seven task forces, each of which was assisted by a staff associate. North Carolina established the following categories: Apprehension and Suppression; Adjudication; Treatment of Offenders, Delinquents and Pre-Delinquents; The Criminal Justice System and the Public; Criminal Justice Agencies in the Public Service; Management and Technology; and, Recruitment, Selection and Training. California established task forces at both the local and state level. Eight were established at the state level, with two, Organized Crime, Riots and Disorders, being optional at the local level. Several local regions formed additional task forces to study unique problems, such as Indian Affairs task forces. These local task forces were intended to research the local criminal justice system, determine needs, and develop plans for advisory board consideration.[64]

Idaho utilized a traditional approach in establishing task forces. Each of the three local regions was asked to appoint a task force chairman for four areas: police, courts, corrections and juvenile delinquency. Task forces in other areas were optional. Each chairman could appoint as many members as he wished and was requested to submit a written report along with project proposals. In addition, each state agency with some involvement in law enforcement was asked to appoint a staff member to act as liaison with the state planning agency.[65]

Minnesota set up task forces on law enforcement, administration of justice, corrections, and crime prevention through citizen's action. These task forces consisted of over one hundred professionals, public officials and citizens. Staff assistance was provided by the S.P.A. and other state agencies, and by some outside consultants. Ultimately, the task force reports and recommendations were published in a single volume containing over two hundred recommendations.[66]

The fifty-member Pennsylvania Advisory Council subdivided into task forces, each concentrating on a particular aspect of the criminal justice system: Police, Courts, Corrections, Organized Crime, Juvenile Delinquency, Special Offenses, Community Relations, Assessment of Crime, White-Collar Crime and Science, Research and Technology.[67]

Task forces exist in a majority of the states, but it is difficult to assess their effectiveness. The tradition division of the criminal justice system into police, courts and corrections fails to view criminal justice as a single process. The

64. California Council on Criminal Justice, *supra* note 62 at 29.
65. Idaho Law Enforcement Planning, COMPREHENSIVE PLAN, 1-8 (1969).
66. State of Minnesota, Governor's Commission on Crime Prevention and Control, THE MINNESOTA PLAN, 5 (May 7, 1969).
67. Pennsylvania Crime Commission, COMPREHENSIVE PLAN, D-3 (1969).

task force approach does have the advantage of providing qualified assistance at minimum cost to the state; however, it is questionable whether such a group, meeting infrequently, could do more than focus on isolated parts of the system. Properly used, however, such bodies can be extremely useful.

Coordination with Related Agencies

The Omnibus Act and guidelines developed under it emphasize the need for cooperative effort. As an illustration of the multiplicity of agencies involved, the L.E.A.A. Correctional Planning Guide[68] says that state and local planning agencies should interrelate with other agencies, such as: state and regional development agencies; mental health planning agencies; educational planning agencies; Model Cities groups; local planning agencies; Area Economic Opportunity Commissions; cooperative manpower planning agencies; judicial councils; trade advisory committees; welfare advisory commissions; bar associations; organized labor; etc.

There is little evidence to suggest that most S.P.A.'s have enjoyed or sought full cooperation from other agencies. This is probably due to the newness of the program, as well as to bureaucratic and political factors. Also, a substantial number of law enforcement personnel who are participating in the planning effort are still somewhat resistant to change. While law enforcement is clearly trying to achieve professionalization, attempts to initiate change are bound to meet some resistance.

Staffing State Planning Agencies

The passage of the Omnibus Crime Bill created what was virtually a new profession: the law enforcement planner. Not only the states, but regional boards and L.E.A.A. itself were faced with the problem of securing staff. In less than a year of operation, aggregate S.P.A. staffs in the fifty-four jurisdictions exceeded five hundred persons, with a total payroll of over $4 million. It is impossible to estimate how many additional positions were created in state and local governments as a result of grants under the Omnibus Act, but personnel shortages were severe.

L.E.A.A. guidelines require that each state planning agency have a full-time administrator and staff adequate to "provide reasonable assurance that the required agency functions can be properly executed."[69] They further require that areas of competency include such areas as police science, corrections, court administration and criminology. There were few criminal justice planners available. Two groups of planners were recruited by S.P.A.'s: the first was composed of individuals who had substantive planning expertise in such fields as economic or public health planning, but no knowledge of the criminal justice system; the second group was composed of individuals with law enforcement experience, such as police officers, F.B.I. agents and lawyers, but little knowledge of planning. A third group emerged later, composed of fiscal and administrative personnel.

One observer predicted after the Act's passage that staffing problems ". . . would cause intolerable delays in implementing the grant program." He felt that "the task of staffing fifty such offices in a relatively short time seems an impossible one." However, by the end of the first year's operation, all fifty states had such programs, averaging eight to twelve full-time staff members per agency.[70]

The recent A.C.I.R. survey found that S.P.A. professional staff size ranges from two to thirty-nine, with an average of 9.3.[71] The level of full staffing averaged 83 percent. Additional staff may be assigned to regions, but paid by the state, as in Pennsylvania, where staff totals about one hundred persons.[72] Table 7.231 shows the number of professional and clerical staff members, by state, and the percent of positions that are filled. These figures would indicate that fears of a new bureaucracy at the state level are unfounded.

The problem, rather, is recruitment and retention of staff, especially at the higher administrative levels. The unavailability of expert personnel in specialized fields makes it difficult for state agencies to operate efficiently. Daniel Skoler has identified this area as one of the most crucial:

> [P]robably 50 percent of the states experienced a change in state planning agency staff direction between activation of the program in October of 1968 and the close of the biennium. Without reasonable stability here, the difficult mission of state coordination of the Crime Control Act program will be in jeopardy. Gains in experience, training and working relationships are lost when the guard is changed too frequently and these are too valuable to the state coordination effort to be compromised too often.[73]

The qualifications and tenure of S.P.A. directors are particularly critical. A C.O.A.G. review of plans shows that of the fifty-five persons who were directors of S.P.A.'s at the time the 1969 plans were submitted, only twenty-eight were still directors when the 1970 plans were filed. Such turnover obviously conflicts with long-term planning.

The director's role was multi-faceted. Initially, he had to provide overall guidance to the planning effort. He had to establish and maintain relationships with local, state and federal officials throughout the criminal justice system. He had to recruit and train staff, prepare guidelines, submit proper applications and be cognizant of political and local considerations.

The 1969 International City Management study[74] found that, in thirty states surveyed, 43 percent of the executive directors came from legal and judicial positions, 30 percent from general government and public administration, 13 percent from police work and 10 percent from corrections. I.C.M.A. contended that:

> The executive director's position is highly political in most states. The governor appoints him directly in 42% of the states. The state planning agency makes the appointment in 56% of the states. . . . Federal officials are concerned about the political character of this position and the high turnover rate in many states. In some instances, the change resulted from election of a new governor; in others, the difficult political conditions surrounding law enforcement planning led to their departures.[75]

Review of the 1970 plans shows that directors tend to be professionals in the law enforcement field, with practical experience or advanced degrees in the behavioral sciences, or to be lawyers with limited experience in the criminal justice field. The director may be an attorney recruited from private practice, as in North Carolina and Kentucky; he may have a law degree plus experience in criminal justice, as in Massachusetts, where the director was a trial attorney with the U. S. Department of Justice. Some directors are law enforcement professionals, with academic credentials plus practical experience, as in Michigan, West Virginia and Illinois. Some have long records of service with criminal justice agencies, as in Indiana. Still others have experience in fields such as public administration, but not in criminal justice, as in Oregon.

At a Denver meeting, called by L.E.A.A., the state planning directors

68. U.S. Dept. of Justice, Law Enforcement Assistance Administration, CORRECTIONAL PLANNING AND RESOURCE GUIDE, 4-5 (1969).

69. U.S. Dept. of Justice, L.E.A A., *supra* note 38 at 11.

70. Skoler, *supra* note 40 at 415.

71. A.C.I.R., *supra* note 11 at 24.

72. Interview with Frederick D. Giles, Director, Pennsylvania Criminal Justice Planning Board, in Harrisburg, Pennsylvania, September 23, 1970.

73. Skoler, *supra* note 40 at 415.

74. Urban Data Service, THE SAFE STREETS ACT: THE CITIES' EVALUATION, International City Management Association, 8-9 (September, 1968).

75. *Id.*

sought to form their own professional organization. Loosely organized, the group is known as the National Association of State Planning Directors. The existence of this group may help give state directors common representation in policy matters.

Role of the Attorney General

Administrator Charles Rogovin, in an address to the 1969 Annual N.A.A.G. Conference, deplored the fact that some S.P.A. supervisory boards did not include the Attorney General:

> . . . an attorney general has special abilities of great value to bring to the LEAA program regardless of whether his official duties include law enforcement or strictly legal work.
>
> I do not know all of the reasons why some attorneys general are not represented on state supervisory boards. If partisan considerations are ever a factor, I would urge that they be forgotten. Congress clearly intended that it be non-partisan, and that is the way it is being operated by the LEAA staff.[76]

At the preceding N.A.A.G. Annual Conference, Richard L. Braun of the U.S. Department of Justice had said he thought "it was almost essential that the Attorney General be a member of the SPA."[77]

Despite such statements and the obvious need for the state's chief law officer to participate in law enforcement planning, two Attorneys General are not represented on their state planning boards. One of the two, Attorney General Breckinridge of Kentucky, stated that exclusion of his office violates the Act's requirement that the board be representative. Funds were awarded to Kentucky's S.P.A., so federal officials apparently do not consider the Attorney General's participation essential.

This unwillingness to challenge the Governor was brought out in a discussion at a 1968 Conference of the International Association of Chiefs of Police. William Franey of I.A.C.P. expressed concern that:

> Even though the [Omnibus] bill clearly identifies the Governor as the administrator . . . apparently some Attorneys General are moving in the direction of establishing what I would call, for want of a better term, quasi-police agencies within their own particular state. These efforts by certain Attorneys General seem to have the concurrence of the Department of Justice. . . .

Courtney Evans of the U. S. Department of Justice answered that:

> Insofar as the constitutional position of the state Attorneys General is concerned, I don't know that we've had any concurrence at the Federal level about allowing them to assume law enforcement responsibilities. . . .
>
> If a Governor desires to name a State Attorney General to a membership on the state planning agency, we have taken the position that this is the Governor's prerogative . . . if the Governor appoints him to the Governor's planning commission provided for in the 1968 legislation, then the Attorney General is acting in this capacity not as an independently elected officer, but as a Governor's appointee.[78]

The N.A.A.G. has resolved:

> that the Attorney General of the state maintain his traditional role as the chief law enforcement officer and . . . be involved in some form or manner with the state direction of the distribution of federal funds devoted to improving law enforcement and combatting crime.[79]

The model criminal justice planning board legislation which a N.A.A.G. committee developed, specified that the Attorney General be a member. His essential role in criminal justice planning was recognized by the President's Commission, which recommended establishing "a State council of prosecutors comprising all local prosecutors under the leadership of the attorney general."[80]

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76. N.A.A.G., *supra* note 36 at 21.
77. N.A.A.G., *supra* note 45 at 39.
78. International Association of Chiefs of Police, THE POLICE YEARBOOK, 104 (1969).
79. N.A.A.G., *supra* note 45 at 140.
80. President's Commission, *supra* note 24 at 149.

	Attorney General			
	Chmn.	Member	Not on	Title of Agency
Alabama		X(1)		Alabama Law Enforcement Agency
Alaska		X		Criminal Justice Commission
Arizona	X	X		Arizona State Justice Planning Agency
Arkansas		X(2)		Commission on Crime and Law Enforcement
California	X	X		California Council on Criminal Justice
Colorado		X		Governor's Council on Crime Control
Connecticut		X		Governor's Planning Committee on Criminal Administration
Delaware		X		Delaware Agency to Reduce Crime
Florida		X		Inter-Agency Law Enforcement Planning Council
Georgia		X		Office of Crime and Juvenile Delinquency Prevention in the Bureau of State Planning and Community Affairs
Guam				Attorney General
Hawaii		X(3)		Law Enforcement and Juvenile Delinquency Planning Agency
Idaho		X		Law Enforcement Planning Commission
Illinois		X(4)		Law Enforcement Commission
Indiana		X		State Criminal Justice Planning Agency
Iowa		X		Crime Commission
Kansas		X		Governor's Committee on Criminal Administration
Kentucky			X	Commission on Law Enforcement and Crime Prevention
Louisiana		X		Commission on Law Enforcement and Administration of Criminal Justice
Maine		X		Law Enforcement Planning and Assistance Agency
Maryland		X		Governor's Commission on Law Enforcement and Administration of Justice
Massachusetts	X	X		Committee on Law Enforcement and Administration of Criminal Justice
Michigan		X		Office of Criminal Justice Programs
Minnesota	X	X		Governor's Commission on Crime Prevention and Control
Mississippi		X		Division of Law Enforcement Assistance
Missouri		X		Law Enforcement Assistance Council
Montana		X(5)		Governor's Crime Control Commission
Nebraska	X	X		Governor's Crime Commission
Nevada		X		Commission on Crime, Delinquency and Corrections
New Hampshire		X		Governor's Commission on Crime and Delinquency
New Jersey	X	X		State Law Enforcement Planning Agency
New Mexico				Governor's Policy Board for Law Enforcement
New York		X		State Crime Control Council
North Carolina		X		Law and Order Division
North Dakota	X	X		Law Enforcement Council
Ohio	X	X		Law Enforcement Planning Agency
Oklahoma	X	X		Crime Commission
Oregon*	X			Law Enforcement Planning Council
Pennsylvania	X	X		
Puerto Rico		X		Crime Commission
Rhode Island	X	X		Governor's Committee on Crime, Delinquency, and Criminal Administration
South Carolina		X		Law Enforcement Assistance Program
South Dakota		X		State Planning and Advisory Commission on Crime
Tennessee		X		Law Enforcement Planning Agency
Texas		X		Criminal Justice Council, Executive Department
Utah		X		Law Enforcement Planning Council
Vermont		X		Governor's Commission on Crime Control and Prevention

Virginia		X		Division of Justice and Crime Prevention
Virgin Islands	X	X		Law Enforcement Commission
Washington	X	X		Law and Justice Planning Office
West Virginia			X	Governor's Committee on Crime, Delinquency and Corrections
Wisconsin		X		Council on Criminal Justice
Wyoming	X	X		Governor's Committee on Criminal Administration
American Samoa				Territorial Law Enforcement Planning Agency

(1) Alabama: Assistant Attorney General is a member.
(2) Arkansas: Represented by Assistant Attorney General.
(3) Hawaii: Assistant Attorney General is a member.
(4) Illinois: Assistant Attorney General is a member.
(5) Montana: Assistant Attorney General is a member.
* Oregon: Solicitor General serves as Chairman.

In fifty-two jurisdictions, the Attorney General or a member of his staff serves on the state board under the Omnibus Act. Table 7.232 shows his role on the board. In thirteen jurisdictions, the Attorney General is Chairman; in two more, a member of his staff heads the board. In four of these fifteen, the Attorney General is appointed by the Governor. In one, Pennsylvania, the Attorney General's responsibilities include the corrections system; in another, New Jersey, he heads the State Police. In California, the Attorney General has constitutional authority over the entire criminal justice system. In a few jurisdictions, including Guam, Pennsylvania and Wisconsin, the S.P.A. is located administratively under the Attorney General.

The Safe Streets Act gives virtually unlimited power to the Governor. He can appoint and remove members and staff; he can create or abolish subdistricts; he can largely determine the distribution of funds. The only curbs are those placed by the legislature. This approach allows maximum flexibility and avoids federal control. The Public Administration Service was recently commissioned by the Council of State Governments to study the major federal grant programs; its recommendations closely correspond with the terms of the Safe Streets Act, saying that the federal government should not set organizational requirements, but should allow the Governor to designate an agency to administer the grant program, and require the Governor to approve all grant applications.[81]

This approach also presents problems. Professor Harman cites one example of politics interfering with administration of the Act:

> A series of personalized disputes between the governor and important members of the legislature over the state patrol and other issues resulted in defeat of a comprehensive state criminal justice planning act and in a refusal to support minimum state staffing for the required planning. During the critical period when state plans were to be formulated, Nebraska had the services of only an executive director and a secretary. As a result of the failure of the state political system to support law enforcement, the cities of the state were nearly put in the position of having to apply directly to LEAA for support. However, the governor and the state legislature finally reached a truce which allowed planning to proceed.[82]

Under the block grant approach, it is not the federal government's role to monitor partisan disputes or to place controls on executive authority. Effective design and administration of the planning agencies is a state responsibility.

7.24 The Grant Program

The Omnibus Act is the first major example of a new form of federal aid. The 1967 President's Commission Report[83] called for federal grants to strengthen law enforcement and envisioned the program "as one on which several hundred million dollars annually could profitably be spent over the next decade." To distribute these funds, Congress chose a block grant approach. L.E.A.A. distributes a block sum to each state planning agency with the agency in turn distributing funds to local components of the criminal justice system. The S.P.A.'s have broad discretion as to how these funds are allocated and, except for submission of a comprehensive plan, are relatively free from federal control. There are indications that the $63 million spent in fiscal 1969 and the $268 million for fiscal 1970 will be far exceeded in the future. The extent to which this federal input upgrades the criminal justice system will depend on the wisdom with which grants are allocated.

81. Public Administration Service, STATE PLANNING AND FEDERAL GRANTS, Council of State Governments, 43-4 (1969).
82. Harman, *supra* note 14 at 475.
83. President's Commission, *supra* note 24 at 284.

Allocation of Funds: The Block Grant Approach

There are three kinds of L.E.A.A. grants to the states: (1) planning grants, to establish and maintain state and local planning agencies; (2) action grants, allocated to the S.P.A.'s on the basis of population and distributed by them to local units, and (3) discretionary grants, which are allocated by L.E.A.A. at its discretion. Most funds are in the form of block grants.

Table 7.24 shows the allocation of funds to the states in fiscal 1969, 1970 and gives estimates for 1971. Planning grants have increased from $19,000,000 to $21,000,000 to an estimated $26,000,000 per year. Action grants grew from $24,650,000 to $132,750,000 to $340,000,000 per year. Total amounts per jurisdiction estimated for fiscal 1971 range from $154,000 for American Samoa to $32,435,000 for New York. These totals do not include discretionary grants, L.E.E.P. grants, or administrative expenses of L.E.A.A.

The block grant concept is the most controversial facet of the program. The original legislation submitted by the administration would have given most money directly to large cities. Fear of a national police and federal bureaucracy, Congressional sentiment for strengthening the states, and reluctance to concentrate too much power in the Attorney General were some of the factors which led to adoption of the modified block grant approach. Consequently, all the planning grant funds and 85 percent of action grant funds are channeled through the states; even the 15 percent discretionary funds are subject to state certification under present administrative policy, although L.E.A.A. may overrule the state in awarding such funds.

The N.A.A.G. is on record as favoring retention of the block grant approach. N.A.A.G. has resolved that it "strongly endorses the block grant concept of this program which encourages states to mount innovative and comprehensive crime control programs by granting state flexibility in establishing spending priorities for program funds."[84] The National Governors Conference also supports it.[85] Spokesmen for the cities, however, contend that it has led to unwise use of funds.

Governor Rockefeller of New York State and Mayor Lindsay of New York City exemplify the opposing viewpoints. Both have testified before the House Judiciary Committee concerning distribution of funds under the Act. Governor Rockefeller stated that:

> Without this major financial incentive, the comprehensive planning effort, the attempt to coordinate all aspects of the criminal justice system and the ability effectively to allocate resources on a statewide basis would be undermined.[86]

Mayor Lindsay argued that New York City was fairing poorly under the

84. Resolution adopted by the 64th Annual Meeting, N.A.A.G., July 1, 1970, St. Charles, Illinois.
85. National Governors Conference, *supra* note 18.
86. *New York Times*, 45:2, February 20, 1970.

7.24 ALLOCATION OF PLANNING AND ACTION FUNDS
Fiscal Years 1969, 1970 and 1971
(Amounts in Thousands)

State	Fiscal Year 1969 (Actual)			Fiscal Year 1970 (Actual)			Fiscal Year 1971 (Estimated)		
	Planning	Action	Total	Planning	Action	Total	Planning	Action	Total
Alabama	$ 338	$ 434	$ 772	$ 369	$ 3,175	$ 3,544	$ 456	$ 5,906	$ 6,362
Alaska	118	33	151	121	249	370	128	463	591
Arizona	210	201	411	228	1,503	1,731	128	2,795	3,064
Arkansas	232	242	474	252	1,787	2,039	300	3,325	3,625
California	1,488	2,352	3,740	1,566	17,287	18,853	2,039	32,162	34,201
	233	243	476	258	1,863	2,121	309	3,466	3,775
Connecticut	297	360	657	326	2,669	2,995	399	4,965	5,364
Delaware	135	64	199	141	480	621	154	894	1,048
Florida	504	737	1,241	575	5,597	6,172	728	10,414	11,142
Georgia	404	555	959	450	4,127	4,577	563	7,678	8,241
Hawaii	150	91	241	159	699	858	178	1,300	1,478
Idaho	147	86	233	154	639	793	172	1,189	1,361
Illinois	833	1,339	2,172	938	9,877	10,815	1,208	18,376	19,584
Indiana	436	614	1,050	487	4,565	5,052	612	8,493	9,105
Iowa	285	338	623	312	2,501	2,813	381	4,654	5,035
Kansas	253	279	532	275	2,065	2,340	332	3,842	4,174
Kentucky	315	392	707	347	2,906	3,253	426	5,407	5,833
Louisiana	346	449	795	384	3,344	3,728	475	6,221	6,696
Maine	165	120	285	175	882	1,057	199	1,640	1,839
Maryland	347	451	798	384	3,349	3,733	476	6,231	6,707
Massachusetts	465	666	1,131	516	4,902	5,418	650	9,119	9,769
Michigan	678	1,055	1,733	763	7,817	8,580	977	14,544	15,521
Minnesota	340	439	779	380	3,302	3,682	470	6,143	6,613
Mississippi	258	289	547	280	2,117	2,397	337	3,939	4,276
Missouri	409	565	974	452	4,155	4,607	566	7,731	8,297
Montana	147	82	229	153	627	780	170	1,167	1,337
Nebraska	197	176	373	211	1,310	1,521	247	2,437	2,684
Nevada	130	55	185	134	405	539	145	753	898
New Hampshire	146	84	230	154	634	788	171	1,179	1,350
New Jersey	571	860	1,431	641	6,372	7,013	815	11,856	12,670
New Mexico	168	123	291	176	896	1,072	200	1,667	1,867
New York	1,333	2,251	3,584	1,490	16,392	17,882	1,939	30,496	32,435
North Carolina	439	619	1,058	492	4,625	5,117	619	8,604	9,223
North Dakota	143	78	221	148	562	710	163	1,046	1,209
Ohio	803	1,284	2,087	911	9,563	10,474	1,173	17,792	18,965
Oklahoma	267	306	573	294	2,291	2,585	357	4,263	4,620
Oregon	234	246	480	253	1,806	2,059	303	3,361	3,664
Pennsylvania	882	1,427	2,309	998	10,591	11,589	1,288	19,704	20,993
Rhode Island	161	111	272	169	819	988	192	1,523	1,715
South Carolina	274	318	592	304	2,406	2,710	370	4,476	4,846
South Dakota	145	83	228	151	599	750	167	1,115	1,282
Tennessee	362	478	840	402	3,562	3,964	500	6,627	7,127
Texas	831	1,334	2,165	942	9,926	10,868	1,213	18,468	19,681
Utah	169	126	295	179	929	1,108	204	1,729	1,933
Vermont	128	51	179	133	387	520	143	719	862
Virginia	405	557	962	452	4,150	4,602	558	7,604	8,287
Washington	308	380	688	352	2,971	3,323	433	5,527	5,960
West Virginia	221	221	442	239	1,640	1,879	284	3,050	3,334
Wisconsin	382	515	897	422	3,795	4,217	526	7,061	7,587
Wyoming	121	39	160	125	290	415	133	540	673
D.C.	154	99	253	161	723	884	181	1,345	1,526
American Samoa	102	4	106	102	28	130	103	51	154
Guam	106	12	118	108	90	198	110	167	277
Puerto Rico	281	330	611	308	2,454	2,762	375	4,566	4,941
Virgin Islands	104	7	111	104	50	154	106	93	199
Totals	$19,000	$24,650	$43,650	$21,000	$182,750	$203,750	$26,000	$340,000	$366,000

Estimates based on House-approved FY 1971 appropriation (House Report No. 91-1072)
Source: L.E.A.A., *A Program for a Safer, More Just America*, pp. 22-23.

Act; that it had 75 percent of the crime in the state but only 43 percent of the money distributed under New York's state plan. The *New York Times* concluded that:

> The differences between Mr. Lindsay and Mr. Rockefeller are part of a larger and lingering dispute between most governors and mayors over how many Federal programs should be operated. The governors, generally, want Federal funds to go through the states, and the mayors, generally, want the funds to go directly to the cities.[87]

In June, 1969, the United States Conference of Mayors adopted a resolution urging Congress to permit direct grants to the cities.[88] A group of Senators introduced legislation to concentrate more money in the urban areas, claiming that funds distributed under the Act were being used to create another level of bureaucracy and that a disproportionately small amount of the money was going to cities.[89]

Attorney General Mitchell responded with the statement that up to 90 percent of the funds in many states were distributed to local governments.[90] Subsequently, he announced that 112 cities, including the 69 largest and others with high crime rates, were eligible to apply for assistance from a special $10 million discretionary fund. The Attorney General contended that:

> A direct grant program to the cities would make Washington a dictator over every anticrime project in the country. It would also by necessity spawn an enormous federal bureaucracy to evaluate these programs and would undermine the concept of a federal-state cooperative partnership which this Administration is attempting to establish in the anticrime area and in other areas of social progress.[91]

A 1970 amendment to the Act adopted a recommendation of the Advisory Commission on Intergovernmental Relations, that no state plan would be approved unless it allocated "adequate assistance to deal with law enforcement problems in areas characterized by both high crime incidence and high law enforcement activity." This and other changes constituted concessions to the cities, but the states retained control of the program.

Supporters of the block grant approach point out that one reason some cities have not been awarded an adequate share of funds is that they have failed or delayed in applying for grants, or have not applied for adequate amounts. This problem will diminish as officials become more familiar with the Act's provisions.

The Act provided that at least 75 percent of action grant funds must be made available to units of general local government. This "pass through" provision was modified by an amendment which provides that, beginning July 1, 1972, at least that percent of federal funds granted to the S.P.A. for any fiscal year:

> which corresponds to the per centum of the State and local law enforcement expenditures funded and expended in the immediately preceding fiscal year by units of general local government will be made available to such units or combinations of such units in the immediately following fiscal year . . . [and that] the State will provide in the aggregate not less than one-fourth of the non-Federal funding.

Thus, the percent of funds "passed through" will vary from state to state and from year to year, reflecting the particular pattern of fiscal support for law enforcement.

State and Local Contributions

The law requires matching of federal funding, with the level depending on the purpose of the grant. The federal government will pay up to 50 percent of construction costs. Prior to the recent amendments, it would pay up to 60 percent of programs except those concerned with riot control or organized crime, where it would pay 75 percent. Not more than one-third of

87. *New York Times*, 30:4, March 3, 1970.
88. *New York Times*, 28:1, June 22, 1969.
89. *New York Times*, 38:3, November 22, 1969.
90. *New York Times*, 28:4, January 19, 1970.
91. *New York Times*, 21:7, March 10, 1970.

any grant may be used for compensation of regular law enforcement personnel. Matching grants may be from either state or local sources, and matching in the form of cash, or goods and services has been accepted.

The Act stipulates that federal funds may not be used to supplant state and local funds. Matching shares may be drawn from existing agency resources, so long as total expenditures of the grantee are not supplanted by the federal grant.[92] Effective July 1, 1972, at least 40 percent of the non-federal funding of any program or project must be of money appropriated as matching funds by state or local governments.

L.E.A.A.'s *2nd Annual Report* noted that "A matter of increasing concern to L.E.A.A. is growing difficulty experienced by many participating states in raising the funds required by law to qualify for L.E.A.A. grants."[93] To match the $20.9 million of planning grant funds awarded for the 1970 fiscal year, states will be required to furnish about $2.3 million. To match the $215 million of action grants, they must furnish about $140 million. Although some states have appropriated funds, most matching has been in the form of goods and services. "With increasing federal contributions to the program, however, it will be increasingly difficult for the states to continue to divert resources from other efforts to apply as L.E.A.A. grant funds."[94] It notes also that some localities may fail to apply for grants because they lack the required match.

The extent to which states "buy into" the program by furnishing funds to cover non-federal matching has been suggested as a measure of their concern with crime control. The Advisory Commission on Intergovernmental Relations found that, of forty-eight states, twenty-one allocated a total of $791,945 to match federal grant awards as of February, 1970. A.C.I.R. points out that some legislatures had adjourned by the time 1969 federal funds were awarded, so it was not possible to "buy in." It also notes that data on state-local expenditures show that many states which have not "bought into" Safe Streets Act programs were assuming a substantial share of police and corrections costs.[95] Effective beginning with the 1972-73 fiscal year, the states and localities will have to furnish at least 40 percent of matching in cash, which should stimulate "buying in."

Further problems arise because matching may involve various officials. Thus, a police chief may seek a grant, but be unable to persuade the city legislative body to provide necessary matching. Also, a local economic recession might sharply curb a city or state's ability to provide matching at the very time it most needed the federal funds.

Planning Grants

Planning grants may be awarded to cover up to 90 percent of the cost of state planning agencies. At least 40 percent of federal planning grants must be made available to local government units by the state agencies; however, L.E.A.A. may waive this requirement if it "is inappropriate in view of the respective law enforcement planning responsibilities exercised by the State and its units of general local government." Each state receives a grant of $100,000, plus an additional amount based on population. Table 7.24 shows the amount of planning funds received by the states. On a per capita basis, 1970 planning grant awards varied considerably, from 8.1¢ in California and New York to 43.8¢ in Alaska. The average was 10¢ per capita.

92. U.S. Dept. of Justice, L.E.A.A., FINANCIAL GUIDE, 41 (May, 1969).
93. U.S. Dept. of Justice, L.E.A.A., *supra* note 22 at 417.
94. U.S. Dept. of Justice, L.E.A.A., *supra* note 22 at 82.
95. A.C.I.R., *supra* note 11 at 47.

To expedite initial planning, states were eligible to receive an advance of up to 20 percent of their first-year planning funds to hire staff and apply for full funds. The first advances were awarded in October, 1968. In January, all the fifty-five jurisdictions received their full planning grants. The law allowed six months from approval of full planning grants until submission of a comprehensive plan. However, L.E.A.A. did not award full funds until January, so the S.P.A.'s had only five months until the end of the fiscal year when funds would lapse.

L.E.A.A. guidelines originally required a five-year plan with detailed descriptions. These guidelines were greatly simplified in early 1969. The five-year requirement, for example, was changed to three years,[96] and identification of needs was "accepted as a given fact, rather than an item for study."[97] Some critics contend that this change in guidelines represented a change in policy when the Republican-appointed administrators took office.[98] Some relaxation of requirements, however, probably was necessary if deadlines were to be met.

By June 30, 1969, all but one jurisdiction, American Samoa, had successfully submitted a plan and qualified for action funds. If they had not, the L.E.A.A. was empowered by law to make grants directly to local units.

The law requires that at least 40 percent of planning funds be available to local governments or combinations thereof. State assistance to or studies for local units are not counted as "pass through" funds unless the state board and the affected local governments approve these practices.[99] L.E.A.A. also directs that:

> . . . priorities in funding local planning should be given to the state's major urban and metropolitan areas, to other areas of high crime incidence and potential, and to efforts involving combinations of units.

The A.C.I.R. analysis points out the uneven compliance with the guidelines:

> As of December 31, 1969 . . . 14 States, excluding Alaska and Delaware which received waivers of the local 'pass through' requirement, had not made available the full 40 percent local share for fiscal 1969.
>
> . . . Furthermore, 16 States (again exempting Alaska and Delaware) had actually paid less than three-fourths of the total amount they had awarded to local subgrantees. . . .
>
> On the other side of the coin, 16 States 'passed through' more than the required 40 percent.[100]

An average of 45 percent of planning funds "passed through" in 1969 and 72 percent had actually been paid to the local units.

The Urban Coalition is among the groups which have criticized the planning process, contending that:

> The states tended to go to two extremes. Some developed overly detailed plans which in effect precluded localities from developing their own priorities by requiring them to fit into one of the state's preferred categories. Others avoided planning responsibilities entirely by filing plans which were so general in nature that almost any subsequently submitted proposal could be tailored to fall within the plan.[101]

The National League of Cities also states that "local planning funds are being dissipated broadly without regard to need and are being used to finance third levels of bureaucracy as a matter of state administrative convenience."[102]

While there are inadequacies and inequities it is commendable that all S.P.A.'s managed to produce first-year plans. Most started with little information regarding their respective criminal justice systems. L.E.A.A. was itself

96. L.E.A.A., Memorandum for S.P.A. Directors, No. 27 (January 10, 1970).
97. U.S. Dept. of Justice, L.E.A.A., *supra* note 25 at 8.
98. Urban Data Service, *supra* note 74 at 18.
99. U.S. Dept. of Justice, L.E.A.A., GUIDE FOR COMPREHENSIVE PLANNING GRANTS, 6-8 (1970).
100. A.C.I.R., *supra* note 11 at 32.
101. The National Urban Coalition, LAW AND DISORDER II, 7 (no date).
102. National League of Cities, *supra* note 13 at 7.

getting organized and not able to offer adequate guidance in the early months. The lack of personnel, the lack of adequate time to plan, and a multiplicity of administrative difficulties added to the problems of the S.P.A.'s.

Action Grants

Action grants are made to S.P.A.'s on the basis of their annual comprehensive plans. They may be made for the following purposes, as listed in the law:

1. " . . . development, demonstration, evaluation, implementation and purchase of methods, devices, facilities, and equipment" to reduce crime;
2. recruiting and training personnel;
3. public education "encouraging respect for law and order";
4. construction of facilities to implement these purposes; including "local correctional facilities, centers for the treatment of narcotic addicts, and temporary courtrooms";
5. organization and training of organized crime prevention and prosecution personnel and the development of information systems;
6. organization and training of personnel and purchase of equipment for riot prevention and control;
7. recruiting and training of community service officers, improving police-community relations "and other activities designed to improve police capabilities, public safety and the objectives of this section." Two other purposes were recently added by amendment:
8. establishing criminal justice coordinating councils for units of government, or combinations thereof, with a population of 250,000 or more;
9. developing and operating community based delinquency prevention and correctional programs, emphasizing half-way houses, expanded probationary programs, and community service centers for the supervision of "potential repeat youthful offenders."

The Act also specified that S.P.A.'s and L.E.A.A. "give special emphasis . . . to programs dealing with the prevention, detection, and control of organized crime and of riots." The emphasis of these programs has been criticized, but Congress gave them clear priority.

By program, L.E.A.A. classifies action grant expenditures as follows, although any such classification is somewhat arbitrary:

	1969 Fiscal Year	1970 Fiscal Year
Upgrading Law Enforcement	19.4	14.7
Prevention of Crime	10.2	7.0
Prevention and Control of Juvenile Delinquency	5.6	8.9
Detection and Apprehension	14.2	24.9
Prosecution, Courts and Law Reform	5.6	6.1
Correction and Rehabilitation	8.0	14.9
Organized Crime	4.4	3.6
Community Relations	4.3	3.7
Riots and Civil Disorders	19.7	3.4
Construction	2.5	7.1
Research and Development	3.6	4.5
Miscellaneous	2.5	1.2

The greatest increases are in funds for detection and apprehension and for correction and rehabilitation. The greatest decrease is in riot control funds.

The first-year emphasis on riot control was due largely to a special provision of the Act. When the Act passed in June of 1968, it appeared probable that the Nation would be subject to a wave of violent disorders. L.E.A.A. was, therefore, authorized to make grants for programs dealing with the prevention, detection, and control of riots on the basis of applications only, without the steps requisite to receiving other planning funds, until August 31. Under this provision, Section 307(b), forty-two jurisdictions received almost $4 million.[103]

The Act required that most federal funds be made available to units of general local government or combina-

103. U.S. Dept. of Justice, L.E.A.A., *supra* note 25 at 18.

tions of such units. In most states, judicial and correctional functions are state-controlled, so this requirement had the practical effect of channeling funds away from these programs. This factor, coupled with the short time allowed for first-year planning, meant that a substantial portion of first-year funds were spent on equipment purchases and less sophisticated programs. While most planning agencies recognized that the term "law enforcement" encompassed the judicial and correctional systems as well as police, there were few substantive programs suggested in these areas. Instead, goals such as "the improvement of prosecution and court activities," and "an increase in effectiveness of corrections and rehabilitation" were stated. The more complex areas are receiving a greater share of funds than they did originally. For example, the percent of the action grant dollar for corrections rose from 8 percent in FY 1969 to 15 percent in FY 1970.

The distribution of action funds, like planning funds, has been criticized. The National League of Cities and the U.S. Conference of Mayors conducted studies of the 1969 plans and concluded that the funds distributed under these plans were missing their prime target, crime on the streets. The states were found to be distributing large amounts of funds to rural and suburban areas with low crime rates.[104]

The Urban Coalition's twelve-state survey found that "Many states failed to pose fundamental operational questions in defining priorities for the various agencies which submitted grant requests. As a result, the programs to reform criminal law or to restructure criminal justice agencies were few in number and small in scale."[105] A *Municipal Year Book* report concludes that " . . . the greatest crime problems are found in central cities, and the bloc grant is not an administrative device capable of funneling large amounts of money directly into cities."[106] Examples of disproportionate distribution abound.

The Advisory Commission on Intergoveramental Relations' survey found that, in 1969 and 1970, twelve of forty-eight reporting states "passed through" more than the required 75 percent to local units. Eight months after receiving their action grant allocation, however, two-thirds of the states had not awarded the full 75 percent share to local units. The survey data "tend to confirm the allegation that some S.P.A.'s have spread Federal anti-crime action funds thinly among a large number of local units, particularly those in rural and small suburban areas." It cites additionally the Attorney General's testimony that, in 1969, cities over 50,000 or units in which they participate had received 59 percent of action funds, although they contain only 40 percent of the population.[107]

Many factors help govern fund distribution. State planning agencies cannot award funds unless an application is received, and many cities failed to file significant applications. The costs of providing any service, including law enforcement, may be considerably higher in a low-density population area. This, plus the generally lower level of services, argue for more money to non-urban areas. Indexes of crime rates, on which critics rely, have largely been discredited; no one actually knows comparative rural-urban crime rates.

Discretionary Grants

Section 306 of the Omnibus Act authorized L.E.A.A. to allocate some action funds at its own discretion. The Administrators describe these grants as a means by which L.E.A.A. can:

104. *New York Times*, 16:1, February 18, 1970.
105. National Urban Coalition, *supra* note 101 at 14.
106. Harman, *supra* note 14, at 438-9.
107. A.C.I.R., *supra* note 11 at 40-41.

. . .advance national priorities, draw attention to programs not emphasized in State plans, and provide special impetus for reform and experimentation within the total law enforcement improvement structure created by the Act. . . .[They] will be used for special emphasis and supplementation rather than to meet the massive or widespread need that State plans and 'block grant' action funds most address.[108]

Discretionary grants totaled $4,350,000 in fiscal 1969, $32,250,000 in 1970, and an estimated $60,000,000 in 1971, or 15 percent of action grants. They may be awarded to states, local units of government, combinations of units, or to multi-state, regional or other special units. The units must furnish from 25 to 50 percent of the total program cost. Discretionary funds may not be used for research, which is to be funded under National Institute grants, but for "action projects that support or stimulate law enforcement improvement in specifically defined or focused directions."[109]

Each of the program divisions of the Office of Law Enforcement Programs has developed discretionary fund plans. Thus, L.E.A.A. can use discretionary grants to put its own plans for improving the criminal justice system into effect. Discretionary grants have also been made to the 76 largest urban areas for special projects concerning city crime, and to the nineteen smallest governmental units to assure them a reasonable minimum in funds.

L.E.A.A. has been criticized by urban groups for requiring state certification of all discretionary grant applications. If the S.P.A. withholds approval, L.E.A.A. "will make a final determination as to the application in question, reserving the right to make direct awards to qualified applicants."[110] However, the advantages of coordinating these grants with state plans would appear to outweigh any delay involved in state review.

Trends in 1970 Plans

An examination of available data on the 1970 state plans indicates that the criticisms leveled at the 1969 plans have been heard by the S.P.A.'s. Generally, police functions are receiving somewhat less money and corrections and courts are receiving somewhat more, as shown in Table 7.24.

L.E.A.A.'s *2nd Annual Report* characterizes the 1970 plans as follows:

The 1970 state plans varied substantially in quality but overall they reflected a major increase in sophistication, and also a change in direction. Initially, in fiscal 1969, there had been great emphasis by many states on purchasing needed equipment. The FY 1970 plans reflected more attention to planning, training, and comprehensive treatment of the criminal justice system as a system, instead of separate parts of a system. Evidence of the change is shown in regional approaches, in inter-disciplinary training programs, in joint utilization of facilities and in the pooling of agencies, of approaches and of resources to make a coordinated attack on mutual problems.[111]

This change in emphasis is in part due to guidance from L.E.A.A. and in part to increased expertise in the planning agencies themselves. The regional offices have assisted in the preparation of plans and in conducting preliminary review, and worked with the states to assure compliance with any special conditions placed on grants by L.E.A.A.

The 1970 plans reflect an increasing emphasis on cooperation between jurisdictions, between parts of the criminal justice system and between states. Examples of multi-state coordination include: (1) Project SEARCH, a ten-state project for sharing computerized criminal justice records; (2) the Four-State Border Cooperative Movement, a joint effort to control illegal border crossings; (3) a four-state program for police education and narcotics control training; (4) the Four Corners Project for Indian criminal justice planning, involving four states with a Navajo population, and (5) a feasibility study to explore the development of a correctional facility to be shared by four sparsely-populated states.[112]

The 1970 plans also offer instances of pooling resources within states. This move toward better utilization of money, facilities and manpower is a step away from fractionalization of function and facilities. Examples include:

(1) A New York state feasibility study of the consolidation of police departments, especially those serving smaller communities;

(2) A Michigan study of inter-jurisdictional cooperation of city police, sheriffs and state police to deal with highly mobile criminal gangs;

(3) A Maine study of regional jails;

(4) A regional detention center in Minnesota to serve six surrounding counties;

(5) A centralized security office to serve as a clearinghouse for New Jersey's municipal police departments.

Unfortunately, there is little dissemination of results of action grant-programs, so successful ones are not always brought to the attention of others. Much money is still being spent on simplistic solutions to problems, such as buying more equipment; once these highly visible needs are met, states may concentrate more on innovative programs.

An examination of the 1970 comprehensive plans indicates that effective law enforcement planning is not yet a reality. Very few S.P.A.'s are able accurately to assess the nature and extent of crime. Some still cannot provide a detailed description of the components of their criminal justice systems. The 1970 plans, however, consciously state a concern with the criminal justice system. They are attempts to establish multi-year programs to look at criminal justice as a system and not a collection of components.

Correctional Facilities Grants

A 1970 amendment authorized grants to S.P.A.'s "to develop and implement programs and projects for the construction, acquisition and renovation of correctional institutions and facilities, and for the improvement of correctional programs and practices." The S.P.A. must set forth a comprehensive statewide plan for such facilities, the control of which must be in a public agency. Other requirements include providing:

. . . satisfactory emphasis on the development and operation of community-based correctional facilities and programs, including diagnostic services, halfway houses, probation, and other supervisory release programs for preadjudication and postadjudication referral of delinquents, youthful offenders, and first offenders, and community oriented programs for the supervision of parolees, . . . provides for advanced techniques in the design of institutions and facilities.

Half the funds available under this Section are to go to S.P.A.'s, and the other half may go either to S.P.A.'s or to local units of government. At least 25 percent of the cost of the program or project must be matching funds.

7.25 Issues in Criminal Justice Planning

The Safe Streets Act is an attempt to focus the resources of our federal system on a critical problem—crime in America. It embodies a major fiscal commitment at the federal level which, in turn, has imposed a major administrative task on the states. The Act marks a milestone in federal-state relations:

While Congress said that the purpose of the Safe Streets Act was to fight crime, it also used this program to transfer grant-in-aid powers to state governments. This is the basic dilemma of law enforcement assistance. Despite LEAA's modifications of the program which directs funds to large cities,

108. U.S. Dept. of Justice, GUIDE FOR DISCRETIONARY GRANT PROGRAMS, 1 (1970).
109. *Id.* at 9.
110. U.S. Dept. of Justice, L.E.A.A., *supra* note 108 at 6.
111. U.S. Dept. of Justice, L.E.A.A., PRELIMINARY PROGRAM DIVISION ANALYSIS, 95 (June, 1970).
112. U.S. Dept. of Justice, L.E.A.A., *supra* note 22 at 4-5.

law enforcement assistance is still a state-run program, and its success or failure will largely be determined by the ability that states demonstrate in the coming years.[113] This is the first major federal grant program in which state Attorneys General have played a primary role.

Strengthening the Federal System

A key issue in the development of the Safe Streets Act was where to place administrative control over planning and funds. A cogent summary of the relative merits of placing control at federal, state or local levels appeared in a 1968 article by Eliot Lumbard.[114] He concluded that the states are the proper agencies to control planning since, under our constitutional system, they have primary responsibility for law enforcement. He points out that local governments lack the ability to do the job, because: (1) the sheer complexity of current law enforcement tasks overwhelms their abilities; (2) they do not have a sufficiently broad tax base to support the necessary efforts at crime control; (3) they are chronically plaqued with questions of jurisdiction over local policy with consequent fragmentation of action and accountability; (4) the population explosion and extraordinary mobility of today's people have created interstate and large scale "white collar" crimes they are not equipped to deal with, and (5) personnel of local law enforcement agencies are not adequate in number or quality. Factors arguing against federal control, he noted, are: (1) that the federal legal power is inadequate; (2) there is no reason to believe a large federal bureaucracy would be efficient; (3) the danger of a federal police state; (4) existing federal agencies are inadequate in size and scope; (5) crime control activities are more effective today at local and state levels, and (6) the federal government is not adequately organized to undertake the task.

The Safe Streets Act adopts a modified block grant approach, requiring each state to submit a comprehensive plan, but otherwise allowing the states to determine how funds will be allocated. L.E.A.A. exercises only broad controls; it does not administer each project directly and exercises only broad administrative supervision at the state level.

The Safe Streets Act is the federal government's first major effort to improve law enforcement. The federal role had previously been limited to enforcement of federal criminal laws, operation of federal prisons, collection and dissemination of statistics, and similar activities. Law enforcement has been a state and local responsibility and the Act clearly proscribed any change in this pattern.

Some observers feel that the influx of large sums of federal funds is bound to increase federal authority. One author predicted at the time of the Act's passage that:

> The extent of potential federal authority over local law enforcement will depend greatly on how significant a part of the local law enforcement budget the federal dollar is likely to become. That, in turn, may be determined by the amounts of money involved, the purposes for which the money may be used, and the extent to which there is discretion in the grant-making agency to withhold funds unless the applying local law enforcement agency meets certain conditions.[115]

There is little indication that such fears are justified. Probably the best safeguard against federal dominance is adequate state and local funding of law enforcement, so that the criminal justice system does not come to depend on federal funds for its normal operation.

Urban interests have been critical of the Safe Streets Act, arguing that they

113. Urban Data Service, *supra* note 74 at 33.

114. Eliot Lumbard, *State and Local Government Crime Control*, 43 NOTRE DAME LAWYER, 889 (1968).

115. Norman Abrams, *Federal Aid to State and Local Law Enforcement*, 43 NOTRE DAME LAWYER, 876 (1968).

are under-represented on state planning agencies, subject to a state bureaucracy, and receiving an inadequate share of funds. Yet, even they recognize that the cities themselves are partly to blame:

> Participation at the city level has in many cases been deficient, in part because of the restricted role which the Act itself and the state administrators have carved out for the cities, and in part because many city officials have not placed a high priority on the program. A few mayors reached in the Coalition survey were not even aware of how much money had been committed to agencies within their cities or who had participated in the planning process.[116]

While the states are responsible for distributing federal funds, it is the cities and counties which receive and spend most of the money. The local units develop and execute the programs involved in the state plan. Local units range from those cities that are larger than some states to the many small towns that operate "police departments" consisting of just a few men. Obviously, the local ability to plan intelligently and to maximize the impact of additional funds varies greatly.

The Safe Streets Act has introduced a new level of administration, the region, into most state criminal justice systems. If intelligently developed, the regional approach can result in pooling resources for better planning and execution. Conversely, poorly-structured regions can merely intensify intergovernmental antagonisms and add an unnecessary level of bureaucracy.

Developing Administrative Capability

When the Safe Streets Act was passed, many observers thought it would be impossible to create the requisite administrative structure at both the state and federal level in the allotted time. The states did manage to build the necessary agencies and to make them operational almost immediately. Some states had criminal justice planning boards prior to the 1968 Act. Few of these were functioning agencies, with staff, procedures or funds. There was little carryover in personnel or program from the pre-1968 planning agencies to those designated to administer the Safe Streets Act.

Programs of this scope commonly build slowly from a relatively modest start. The S.P.A.'s and L.E.A.A. did not have time for adequate recruitment, planning or development of administrative controls. Now, criminal justice planning agencies have a body of experience on which to build. Personnel needs have been defined, administrative procedures have been established, and criminal justice planners can devote full attention to administration of the law.

Coordination and Evaluation

Fragmentation of planning and operations has been a primary problem in law enforcement. All observers agree that "the efforts to deal with the problem of crime are hampered by the tendency of each agency to pursue its own ends oblivious of the interests of other agencies and of the aggregate effect on criminal law administration."[117] There is little point in improving police ability to apprehend criminals if they are not prosecuted effectively, or if they are committed to a corrections system that only produces recidivists. Similarly, improvement in prosecution is futile if the police commit procedural errors that negate the prosecutor's case.

Only in the current decade has law enforcement, as broadly defined in the Omnibus Act, begun to be viewed as a totality. The first attempts to determine the aggregate costs and workloads of the state and local agencies involved were made only a few years ago. People did not think of police, court and correctional budgets as part of a single major governmental service cost. As a result, criminal jus-

116. National Urban Coalition, *supra* note 101 at 8.

117. Geoffrey Hazard, Jr., *Epilogue to the Criminal Justice Survey*, 55 A.B.A. J., 1049 (November, 1969).

tice administration seemed small in comparison with other governmental service functions, such as education and welfare.

If the Omnibus program is to succeed, it is imperative that federal, state and local participants establish effective methods by which programs can be measured. Failure to provide an effective system of grant evaluation has been apparent at both the national and state level. Few, if any, of the state plans have been subjected to effective evaluation. Valid review is difficult, goals have been generally stated and few individuals are capable of accurately assessing progress. The plans themselves do not provide for critical review and S.P.A. staff members interviewed in the course of this study admit that no effective evaluation exists. Recipients are required to report on the effect of the grant, but such reports may be cursory, and show more about the agency's report-writing ability than about the program involved.

Our system of criminal justice is in need of major revision at all levels; the Safe Streets Act aims at providing those improvements. It is off to a slow and severely-criticized start. But the job is a massive one that must be expected to require time, patience and cooperation between all levels of government.

7.3 The Attorney General's Membership on Boards and Commissions

Any consideration and evaluation of the Attorney General as a member of state boards and commissions is based on the concept of the office of Attorney General itself. "Should he be regarded primarily as a policy making administrator, or is he fundamentally a lawyer functioning as an advisor to policy making administrators from an objective vantage point?"[1] The views of Attorneys General differ as to the value of service on boards. Former Attorney General Jon Sheppard of Texas, in commenting on his membership on twenty-five boards, said that "men who will be elected Attorney General in the future should not be harassed and hamstrung with this impossible number of sideline duties."[2] Other Attorneys General find such service worthwhile.

While enthusiasm for service on boards may vary with the interest and other duties of the individual Attorney General, an examination of the type of boards served on and the composition of their membership will assist in evaluating such service.

7.31 Types of Boards and Commissions

Table 7.3 lists the boards and commissions of which the Attorney General is a member, by states. These data were derived from two sources: lists submitted by Attorneys General's offices and a computer search of state statutes. These sources were not in agreement for most states. When possible, the state was asked to reconcile the conflict. Otherwise, the statutes were checked manually. Some inaccuracies may still exist, however.

The boards and commissions on which Attorneys General serve range from those of local interest, such as Georgia's Seed Development Commission, to those of national import, like the Arkansas Presidential Election Commission.

1. Robert L. Montague, *The Office of Attorney General in Kentucky*, 49 KY. L. J. 194, 206 (1960).
2. Jon Sheppard, A BUREAUCRAT'S DILEMMA 1 (undated).

7.3 The Attorney General's Membership on Boards and Commissions

Alabama
- Alabama Education Authority (ALA. CODE tit. 52, § 513[3]).
- Armory Commission (ALA. CODE tit. 35, § 186).
- Board of Canvassers of Election Returns (ALA. CODE tit. 17, § 201).
- Board of Compromise (ALA. CODE tit. 55, § 12).
- Board of Directors-Boys Industrial School (ALA. CODE tit. 52, § 586).
- Board of Health Advisory Council (ALA. CODE tit. 22, § 204[6]).
- Bridge Finance Corporation (ALA. CODE tit. 55, § 408).
- Building Authority (ALA. CODE tit. 55, § 440[1]).
- Building Commission (ALA. CODE tit. 55, § 365).
- County Records Commission (ALA. CODE tit. 55, § 18[12]).
- Highway Finance Corporation (ALA. CODE tit. 23, § 124[1], [5]).
- Licensing Board for the Healing Arts (ALA. CODE tit. 46, § 257[1]).
- Public Hunting and Forestry Association (ALA. CODE tit. 55, § 441).
- Records Commission (ALA. CODE tit. 55, § 18[10]).
- Safety Coordinating Committee (ALA. CODE tit. 36, § 58[70]).

Alaska
- Governor's Planning Council on the Administration of Criminal Justice (ALASKA STAT. tit. 44, § 44.19.738).
- National Counsel of Commissioners on

Uniform State Laws (not a statutory member).

Arizona

Arizona Law Enforcement Officer Advisory Council (ARIZ. REV. STAT. ANN. 41, § 41-1821).

Board of Archives and History (ARIZ. REV. STAT. ANN. 41, § 41-721).

Board of Pardons and Paroles (not a statutory member).

Colorado River Boundary Commission (ARIZ. REV. STAT. ANN. 41, § 41-521).

Commission of Indian Affairs (ARIZ. REV. STAT. ANN. 41, § 41-541).

Selection Board-Public Lands (ARIZ. REV. STAT. ANN. 37, § 37-202).

State Disaster Board (ARIZ. REV. STAT., ANN. 35, § 35-192).

Traffic Safety Coordinating Council (not a statutory member).

Water Pollution Control Advisory Council (not a statutory member).

Arkansas

Board of Apportionment (ARK. CONST. art. 8, § 1).

Board of Review of Donation Contests (ARK. STAT. ANN. 10, § 10-918).

Commission on Crime and Law Enforcement (not a statutory member).

Presidential Election Commission (not a statutory member).

State Board of Election Commissioners (ARK. STAT. ANN. 3, § 3-601).

State Sovereignty Commission (ARK. STAT. ANN. 6, § 6-802).

California

California Council on Criminal Justice (CAL. PENAL CODE, § 13800).

California Crime Technological Research Foundation (CAL. PENAL CODE, § 14003).

California State Communications Advisory Board *(ex-officio)*, (CAL. GOV'T CODE, § 15275).

California State Disaster Council (CAL. MIL. & VET. CODE, § 1510).

Colorado River Boundary Commission *(ex-officio)*, CAL. GOV'T CODE, § 175).

Commission on Peace Officer Standards and Training (CAL. PENAL CODE, § 13500).

Commission on Judicial Appointments (CAL. CONST. art. 6, § 7).

Committee on Official Reporter of Counts *(ex-officio)*, (not a statutory member).

County Central Committee (CAL. ELECTIONS CODE, § 9325).

Departmental Coordinating Committee on Atomic Energy Development and Radiation Protection (CAL. HEALTH & SAFETY CODE, § 25750).

Election Commission (Where voting records are destroyed in disasters) (CAL. ELECTIONS CODE, § 55).

Reapportionment Commission (CAL. CONST. art. 4, § 6).

Research Advisory Panel (On Marijuana and Narcotic Abuse) (CAL. HEALTH & SAFETY CODE, § 11655.5).

State Commission on Voting Machines (CAL. ELECTIONS CODE, § 14970).

State Electronic Data Processing Policy Committee (CAL. GOV'T CODE, § 11720).

Colorado

Board of Canvassers (COLO. REV. STAT. ANN. 49, § 49-16-9).

Board of Claims of the Game, Fish, and Parks Department (COLO. REV. STAT. ANN. 62, § 62-3-9).

Committee on Legal Services (COLO. REV. STAT. ANN. 135, § 135-3-1).

Governor's Council on Crime Control (not statutory).

Governor's Executive Clemency Advisory Board (COLO. REV. STAT. ANN., § 39-18-1).

Highway Safety Council Committee (COLO. REV. STAT. ANN. 3, § 3-5-3).

Irrigation District Commission (COLO. REV. STAT. ANN. 150, § 150-2-16).

Law Enforcement Training Academy Advisory Board (COLO. REV. STAT. ANN. 124, § 124-23-3).

State Board of Parole (COLO. REV. STAT. ANN. 39, § 39-18-1).

State Central Committee (Party Committee), (COLO. REV. STAT. ANN. 49, § 49-5-8).

State Employees and Officials Group Health Insurance Board of Administration (COLO. REV. STAT. ANN. 72, § 72-22-4).

State Equalization Board (COLO. REV. STAT. ANN. 10, § 15).

Water Conservation Board (COLO. REV. STAT. ANN. 149, § 149-1-3).

Connecticut

Board of Assessors (City liability for damage done by mobs), (CONN. GEN. STAT. REV. 7, § 7-108).

Board of Delegates-State Bar Association *(ex-officio)*, (not statutory).

Board of Issuance of Bonds and Notes for Dire Emergencies (CONN. GEN. STAT. REV. 7, § 7-379).

Commission on Intergovernmental Cooperation (CONN. GEN. STAT. REV. 2, § 2-73).

Committee on Bonding (State officers and employees), (CONN. GEN. STAT. REV. 4, § 4-20).

Committee on Permanent Injury to Inmates of Penal Institutions *(ex-officio)*, (CONN. GEN. STAT. REV. 18, § 18-95).

Connecticut Planning Committee on Criminal Administration (appointive), (not statutory).

Executive Committee on Human Rights and Opportunities *(ex-officio)*, (CONN. GEN. STAT. REV. 4, § 4-61b).

Expressway Bond Committee (CONN. GEN. STAT. REV. 13a, § 13a-20, § 13a-199).

Hardship Committee (Education grants to towns), *(ex-officio)*, (CONN. GEN. STAT. REV. 10, § 10-288).

Interstate Sanitation Commission (CONN. GEN. STAT. REV. 25, § 25-57).

Records Management Committee (CONN. GEN. STAT. REV. 4, § 4-34).

Retirement of Judges *(ex-officio)*, (CONN. GEN. STAT. REV. 51, § 51-49).

State Bond Commission (CONN. GEN. STAT. REV. 3, § 3-20).

Vietnam Bonus Appeal Board *(ex-officio)*, (CONN. GEN. STAT. REV. 27, § 27-140[k]).

Delaware

Board of Bank Incorporation (DEL. CODE ANN. tit. 5, § 501).

Board of Pardons (not a statutory member).

Board of Post-Mortem Examiners (DEL. CODE ANN. tit. 29, § 4702).

Council on the Administration of Justice (DEL. CODE ANN. tit. 10, § 2001).

Medical Council (not a statutory member).

Florida

Board of Appeals of County Officers' Budgets (FLA. STAT. V, § 30.49).

Board of Conservation (FLA. STAT. XXVI, § 370.02).

Board of Fixing Values of Investment Securities of Trust Companies *(ex-officio)*, (not a statutory member).

Board of State Canvassers (FLA. STAT. IX, § 102.111).

Board of Trustees of Internal Improvement Trust Fund *(ex-officio)*, (FLA. STAT. XVII, § 253.02).

Board of Trustees of Teachers' Retirement System *(ex-officio)*, (FLA. STAT. XV, § 238.03).

Executive Board of Department of Motor Vehicles (FLA. STAT. XXII, § 318.011).

Executive Board of Department of Public Safety (FLA. STAT. XXII, § 321.01).

Florida Air and Water Pollution Control Commission (FLA. STAT. XXVII, § 403.041).

Florida Board of Archives and History (FLA. STAT. XVII, § 267.031).

Florida Bureau of Law Enforcement (FLA. STAT. IV, § 23.086).

Florida Electronic Data Processing Management Board (FLA. STAT. IV, § 23.023).

Governor's Committee on Interstate Cooperation (FLA. STAT. III, § 13.05).

Interagency Law Enforcement Planning Council (not statutory).

Judicial Council *(ex-officio)*, (FLA. STAT. V, § 43.15).

Multistate Tax Compact Advisory Committee (FLA. STAT. XIII, § 213.17).

Outdoor Recreation Council (FLA. STAT. XXVI, § 375.021).

Police Standards Council (FLA. STAT. IV, § 23.062).

Railroad Assessment Board (FLA. STAT. XIII, § 195.001).

Securities Commission (FLA. STAT. XXXI, § 517.03).

State Board of Education (FLA. STAT. XV, § 229.012).

State Board of Vocational Education *(ex-officio)*, (FLA. STAT. XV, § 229.08).

State Civil Defense Council (FLA. STAT. XVI, § 252.05).

State Planning and Budget Commission (FLA. STAT. XIII, § 216.01).

State Revenue Commission (FLA. STAT. XIII, § 212.02, § 213.02).

Georgia

Agriculture Commodity Commissions (GA. CODE ANN. 5, § 5-2909).

Board of Commissioners of the Peace Officers Annuity and Benefit Fund (GA. CODE ANN. 78, § 78-902).

Board of Commissioners—Superior Court Clerks' Retirement Fund (GA. CODE ANN. 24, § 24-2732).

Board of Commissioners of Ordinaries (not statutory).

Board of Compromises and Settlements (Taxes), (GA. CODE ANN. 92, § 92-8411.1).

Building Authority (Markets), (GA. CODE ANN. 65, § 65-304).

Building Authority (Penal), (GA. CODE ANN. 77, § 77-1002).

Commissioners of Ordinaries Retirement Fund (GA. CODE ANN. 24, § 24-1701a).

Committee to Investigate Incapacity of Comptroller General and State Treasurer (GA. CODE ANN. 40, § 40-207.1).

Council to Investigate Suspension of Revenue Commissioner (GA. CODE ANN. 92, § 92-8403).

Department of Public Safety (GA. CODE ANN. 92a, § 92a-101).

Georgia Education Authority (GA. CODE ANN. 32, § 32-102a).

George Seed Development Commission (GA. CODE ANN. 5, § 2703).

Governor's Committee on Interstate Cooperation (GA. CODE ANN. 47, § 47-1103).

Mineral Leasing Commission (GA. CODE ANN. 91, § 91-118).

Office of Crime and Juvenile Delinquency Prevention (not statutory)

Refunding Bond Commission (GA. CODE ANN. 87, § 87-501a).

Seed Advisory Committee (GA. CODE ANN. 5, § 5-2410).

State Parks Authority—Jekyll Island (GA. CODE ANN. 43, § 43-604a).

State Properties Acquisition Commission (GA. CODE ANN. 36, § 36-102a).

Guam (citations not available)

Board of Bar Examiners

Judicial Council

Hawaii

Abstract Makers, Board of Examiners (HAWAII REV. LAWS 25, § 436-2).

Advisory Committee on Markets (HAWAII REV. LAWS 11, § 147-3).

Commission to Promote Uniformity of Legislation (HAWAII REV. LAWS 4, § 3-1, § 26-7).

Contested Nominations of Presidential Electors and Alternates, Committee (HAWAII REV. LAWS 2, § 14-2, Act 26, L. 1970).

Hawaii Education Council (HAWAII REV. LAWS 18, § 311-3, L. 1966).

Hawaii Foundation for History and Humanities; Board of Trustees (HAWAII REV. LAWS 1, § 6-16.1, Act 236, 1969; Act 206, 1970).

Multistate Tax Compact (HAWAII REV. LAWS 14, § 255-2, L. 1968).

State Commission on the Status of Women (HAWAII REV. LAWS, Act 190, L. 1970).

State Highway Safety Council (HAWAII REV. LAWS 18, § 286-5, L. 1967).

Idaho

Board of Canvassers (IDAHO CONST. art. 21, § 10).

Board of Examiners *(ex-officio)*, (IDAHO CODE ANN. 4, § 18).

Coeur D'Alene River and Lake Commission (IDAHO CODE ANN. 70, § 70-201).

Land Board *(ex-officio)*, (IDAHO CODE ANN. 9, § 7).

Law Enforcement Planning Commission *(ex-officio)*, (IDAHO CODE ANN. 19, § 19-5101).

Multistate Tax Compact Advisory Committee (IDAHO CODE ANN. 63, § 63-3706).

Natural Resources Advisory Board (IDAHO CODE ANN. 38, § 38-101).

Traffic Safety Commission *(ex-officio)*, (Not a statutory member).

Illinois

Building Bond Board (cite not available)

Electoral Board (ILL. REV. STAT. ch. 46, § 7-14).

Commission on Intergovernmental Cooperation (ILL. REV. STAT. ch. 127, § 186).

Indiana

Administrative Law Study Commission (IND. ANN. STAT. 63, § 63-2902).

City-County Traffic Advisory Board (IND. ANN. STAT. 47, § 47-3032).

Commission for Railroads Through Grounds of Charitable and Benevolent Institutions (IND. ANN. STAT. 22, § 22-116).

Criminal Justice Planning Commission (IND. ANN. STAT. 9, § 9-3805).

Judges Retirement Board (IND. ANN. STAT. 4, § 4-7005).

Law Enforcement Training Board—Advisory Council (IND. ANN. STAT. 63, § 63-3303).

Sale of State Lands in Indiana Commission (IND. ANN. STAT. 62, § 62-306).

State Board of Canvassers (IND. ANN. STAT. 29, § 29-3617).

State Commission for Reorganization of School Corporations (IND. ANN. STAT. 28, § 28-6113).

State Traffic Safety Advisory Committee (IND. ANN. STAT. 47, § 47-3011).

Iowa

Board of Law Examiners (IOWA CODE tit. 30, § 610.4).

Commission on Reinsurance Plans *(ex-officio)*, (IOWA CODE tit. 20, § 521.5).

Crime Commission (IOWA CODE 63 GA, Ch. 100, § 9).

Law Enforcement Academy Council (IOWA CODE tit. 5, § 80B.6).

Pittsburg Plus Protective Committee *(ex-officio)*, (IOWA CODE tit. 23, § 553.24).

State Printing Board (IOWA CODE tit. 2, § 15.1).

Kansas

Committee on Surety Bonds and Insurance (KAN. STAT. ANN. § 75-4101).

Executive Council (KAN. STAT. ANN. § 75-2101).

Governor's Advisory Crime Committee (not statutory).

Governor's Committee on Interstate Cooperation (KAN. STAT. ANN. § 46-403).

Kansas Bureau of Investigation Pension Board (KAN. STAT. ANN. § 75-7a03).

Multistate Tax Compact Advisory Committee (KAN. STAT. ANN. § 79-4306).

School Fund Commission (KAN. STAT. ANN. § 75-2301).

State Board of Canvassers (KAN. STAT. ANN. § 25-3201).

State Charter Board (KAN. STAT. ANN. § 17-401).

State Records Board (KAN. STAT. ANN. § 75-3502).

Kentucky

Air Pollution Control Commission (KY. REV. STAT. XVIII, § 224.420).

Archives and Records Commission (KY. REV. STAT. XIV, § 171.420).

Board of Trustees—Employees Retirement System (KY. REV. STAT. VIII, § 61.645).

Board of Trustees of the Teachers Retirement System of the State of Kentucky (KY. REV. STAT. XIII, § 161.250).

Capital Plaza Authority (KY. REV. STAT. VII, § 58.215).

Committee for Revision of Criminal Law (not a statutory member)

County Debt Commission (KY. REV. STAT. IX, § 66.300).

Governor's Advisory Committee on Intergovernmental Relations (KY. REV. STAT. II, § 8.030).

Kentucky Health and Geriatric Authority (KY. REV. STAT. XVIII, § XVIII, § 216.803).

Kentucky Law Enforcement Council (KY. REV. STAT. III, § 15.315).

State Committee for School District Audits (KY. REV. STAT. XIII, § 156.265).

State Law Library Board of Trustees (KY. REV. STAT. XIV, § 171.015).

State Property and Building Commission (KY. REV. STAT. VII, § 56.450).

The Kentucky Commission on Children and Youth (not a statutory member).

Turnpike Authority of Kentucky (KY. REV. STAT. XV, § 175.430).

Water Pollution Control Commission (KY. REV. STAT. XVIII, § 224.030).

Water Resources Authority of Kentucky (KY. REV. STAT. XIII, § 151.330).

Louisiana

Board of Liquidation of State Debt (LA. CONST. art. IV, § 2[a]).

Committee to Approve Proposed Amendments to Criminal Procedure Code (LA. CONST. art. III, § 39).

Commission of Law Enforcement and Administration of Criminal Justice (not statutory).

Law Institute Council (LA. REV. STAT. 24, § 202).

Law Library Advisory Commission (LA. REV. STAT. 25, § 92).

Legislative Bureau (LA. CONST. art. III, § 31).

Pardon Board (LA. REV. STAT. 15, § 572).
State Advisory Board (State Highways), (LA. CONST. art. VI, § 22).
State Archives and Records Commission (LA. REV. STAT. 44, § 401).
State Bond and Tax Board (LA. REV. STAT. 47, § 1801).
State Bond Commission (LA. REV. STAT. 39, § 1401).
State Sovereignty Commission (LA. REV. STAT. 49, § 701).
Steam Control Commission (LA. REV. STAT. 56, § 1431).

Maine

Baxter State Park Authority (ME. REV. STAT. ANN. tit. 12, § 901).
Board of Sanitation (Licensing and inspection), (ME. REV. STAT. ANN. tit. 5, § 311).
Highway Safety Committee (ME. REV. STAT. ANN. tit. 23, § 104).
Law Enforcement Planning and Assistance Agency (ME. REV. STAT. ANN. tit. 5, § 3351).
Judicial Council (ME. REV. STAT. ANN. tit. 4, § 451).

Maryland

Advisory Committee to the Commission on Intergovernmental Cooperation (MD. ANN. CODE art. 40, § 17).
Board of State Canvassers (MD. ANN. CODE art. 33, § 18-1).
Complaint Evaluation of Baltimore City Police Department (not a statutory member).
Governor's Commission on Law Enforcement and Administration of Justice (not a statutory member).
Maryland State Employees Surety Bond Committee (MD. ANN. CODE art. 78A, § 46).
Police Training Commission (MD. ANN. CODE art 41, § 70A.)
Sundry Claims Board (MD. ANN. CODE art. 41, § 188A).

Massachusetts

Appeal Board—License Milk and Cream (MASS. GEN. LAWS ch. 1-15, § 94-42K).
Board of Appeal on Motor Vehicle Liability Policies and Bonds (MASS. GEN. LAWS ch. 1-2 § 26-8A).
Board to Apportion Funds for Abolition of R.R. Grade Crossings (MASS. GEN. LAWS ch. 1-22, § 159-70).
Board to Establish Installment Insurance Premium Rates (MASS. GEN. LAWS ch. 1-22, § 175-162B).
Board to Review the Reporting and Prosecution of Violations of Banking Law (MASS. GEN. LAWS ch. 1-22, § 167-5).
Civil Defense Claims Board (MASS. GEN. LAWS ch. 1-5, 33 App. § 13-11A).
Committee on Law Enforcement and Administration of Criminal Justice (MASS. GEN. LAWS ch. 1-2, § 6-156).
Consumers' Council (MASS. GEN. LAWS ch. 1-2, § 6-115).
Emergency Finance Board (MASS. GEN. LAWS ch. 1-6, § 35-36A).
Emergency Finance Commission (MASS. GEN. LAWS ch. 1-17, § 121-26DD).
Governor's Highway Safety Committee (MASS. GEN. LAWS ch. 1-14, § 90A-1).
Medical Service Corporation Review Board (MASS. GEN. LAWS ch. 1-22, § 176B-12).
Records Conservation Board (MASS. GEN. LAWS ch. 1-3, § 30-42).
State Council on Juvenile Behavior (MASS. GEN. LAWS ch. 1-2, § 6-159).

Michigan

Judges Retirement Board (MICH. COMP. LAWS, § 38.803).
Law Enforcement Officers Training Council (MICH. COMP. LAWS, § 28.603).
Executive Committee on Consumer Affairs (MICH. COMP. LAWS, § 445.822).
Michigan Great Lakes Commission (MICH. COMP. LAWS, § 3.652).
Municipal Finance Commission (MICH. COMP. LAWS, § 132.1).
Probate Judges Retirement Board (MICH. COMP. LAWS, § 38.903).
State Administrative Board (MICH. COMP. LAWS, § 16.208).
State Employees Retirement Board (MICH. COMP. LAWS, § 38.3).

Minnesota

Archives Commission (MINN. STAT. I, § 138.14)

Board of Directors of State Bureau of Child and Animal Protection (MINN. STAT. I, § 343.05).
Board of Pardons (*ex-officio*), (MINN. STAT. V, § 638.01).
Civil Defense Advisory Council (MINN. STAT. , § 12.12).
Exchange of Public Lands Commission (MINN. CONST. Art. VIII, § 7).
Executive Council (MINN. STAT. I, § 9.011).
Governor's Commission on Crime Prevention and Control (not statutory).
Governor's Committee on Interstate Cooperation (MINN. STAT. I, § 3.29, subd. 3).
Minnesota Voting Machine Commission (MINN. STAT. I, § 206.08).
Peace Officers Training Board (Within the Attorney General's Office), (MINN. STAT. V, § 626.841).
Publication Board (MINN. STAT. I, § 15.046).
State Board of Investment (Schools), (MINN. CONST. art. VIII, § 4).
State Employees Insurance Benefits Board (MINN. STAT. I, § 43.43[14f]).
State Urban Affairs Council (MINN. STAT. I, § 4.25).
Teletypewriter Communications Advisory Committee (MINN. STAT. I, § 299C.47).

Mississippi

Board of Disability and Relief Appeals (Firemen), (MISS. CODE ANN. 16, § 3479, § 3494-11).
Board of Savings and Loan Associations (MISS. CODE ANN. 21, § 5288-10)
Board to Approve Credit Unions (MISS. CODE ANN. 21, § 5391).
Central Data Processing Authority (MISS. CODE ANN. 33, § 8946-62).
Division of Law Enforcement Assistance (not statutory).
Lieu Lands Commission (*ex-officio*), (MISS. CODE ANN. 17, § 4116).
Mineral Lease Commission (MISS. CODE ANN. 23, § 5947).
Mississippi Civil Defense Council (MISS. CODE ANN. 31, § 8610-05).
Motor Vehicle Inspection Department (MISS. CODE ANN. 30, § 8258-05).
State Board of Education (MISS. CODE ANN. 24, § 6233).
State Board of Election Commissioners (*ex-officio*), (MISS. CODE ANN. 1-4, § 3204).
State Bond Commission (MISS. CODE ANN. 18, § 4380).
State Depository Commission (MISS. CODE ANN. 35, § 9126).
State Library Board (MISS. CODE ANN. 33, § 9037).
State Sovereignty Commission (MISS. CODE ANN. 33, § 9028-31).
State Temperance Commission (MISS. CODE ANN. 24, § 6679).

Missouri

Board of Fund Commissioners (MO. REV. STAT. IV, § 33.300).
Board of Public Buildings (MO. REV. STAT. 2, § 8.010).
Board—Qualifications and Requirements of Liquor Control Commission (MO. REV. STAT. XX, § 311.620).
Disability Board (Governor), (MO. CONST. art. IV, § 11[b]).
Governor's Committee on Interstate Cooperation (MO. REV. STAT. II, § 16.-030).
Highway Reciprocity Commission (MO. REV. STAT. XIX, § 301.273).
Law Enforcement Assistance Council (not statutory).
Missouri Housing Development Commission (MO. REV. STAT. XII, § 215.020).
Multistate Tax Compact Advisory Committee (MO. REV. STAT. IV, § 32.250).
State Records Commission (MO. REV. STAT. VIII, § 109.250).

Montana

Montana Law Enforcement Academy (MONT. REV. CODES ANN. 75, § 75-5205).
State Board of Canvassers (MONT. REV. CODES ANN. 23, § 23-1814).
State Board of Education (MONT. REV. CODES ANN. 75, § 75-101).
State Board of Examiners (MONT. REV. CODES ANN. 82, § 82-1101).
State Board of Land Commissioners (MONT. REV. CODES ANN. 81, § 81-103).

Nebraska

Board to Count Ballots for Judicial Nom-

inating Commission (NEB. REV. STAT. 24, § 24-806).
Board of State Canvassers (NEB. REV. STAT. 32, § 32-4, 104).
Nebraska Commission on Law Enforcement and Criminal Justice (NEB. REV. STAT. 81, § 81-1417).
State Board of Pardons (NEB. CONST. art. IV, § 13).
State Records Board (NEB. REV. STAT. 84, § 84-1204).
Sundry Claims Board (NEB. REV. STAT. 81, § 81-857).

Nevada

Board of Directors—Department of Highways (NEV. REV. STAT. 35, § 408.105).
Board of Examiners (NEV. REV. STAT. 31, § 353.010).
Board of State Prison Commissioners (NEV. REV. STAT. 5, § 21).
Multistate Tax Compact Advisory Committee (NEV. REV. STAT. 32, § 376.050).
Private Investigators Licensing Board (*ex-officio*), (NEV. REV. STAT. 54, § 648.-020).
State Board of Pardons (NEV. REV. STAT. 16, § 213.010).

New Hampshire

Advisory Committee to the Traffic Safety Commission (N.H. REV. STAT. ANN. XXI, § 259-A:4).
Ballot Law Commission (N.H. REV. STAT. ANN. IV, § 68:1).
Board of Appeal (N.H. REV. STAT. ANN. XXXV, § 383:14).
Board of Approval (State Officers' Surety Bonds), (N.H. REV. STAT. ANN. VI, § 93:2).
Board of Trust Company Incorporation (N.H. REV. STAT. ANN. XXXV, § 392:1).
Civil Defense Advisory Council (N.H. REV. STAT. ANN. VIII, § 107:5).
Commission on Interstate Cooperation (N.H. REV. STAT. ANN. I, § 19:2).
Commission to Study Uniform State Laws (N.H. REV. STAT. ANN. I, § 18:1).
Governor's Commission on Crime and Delinquency (not statutory)
Judicial Council (N.H. REV. STAT. ANN. LI, § 494:1).
Records and Management and Archives Board (N.H. REV. STAT. ANN. I, § 8-B:17).

New Jersey

Advisory Committee on Government Immunity (N.J. REV. STAT. § 52:17B-4.1)
Board of Review Upon Classification and Reclassification of Bidders (N.J. REV. STAT. § 52.°35-5).
Commission on Status of Women (not statutory).
Committee on Bonding of State Officers (N.J. REV. STAT. § 52.° 14-17.16).
Governor's Council Against Crime (not statutory).
Governor's Interdepartment Committee on Equal Opportunity (not statutory)
Judicial Conference (N.J. REV. STAT. Court Rule 1:35-1).
Law Enforcement Planning Agency (not statutory).
Narcotics Advisory Council (N.J. REV. STAT. § 30:6c-2).
New Jersey Housing Finance Agency (N.J. REV. STAT. § 55:14j-4).
New Jersey Public Broadcasting Commission (N.J. REV. STAT. § 48:23-4).
Police Training Commission (N.J. REV. STAT. § 52.°17B-70).
State Medical Examination Advisory Committee (N.J. REV. STAT. § 52:17b-82).
State Records Committee (N.J. REV. STAT. § 47.°3-20).
State Supreme Court's Committee on Press Relations (not statutory).

New Mexico

Capital Custodian Commission (N.M. STAT. ANN. 6, § 6-1-9).
Judicial Council (N.M. STAT. ANN. 16, § 16-10-1).
Land Commission (N.M. STAT. ANN. 7, § 7-1-4).
New Mexico Traffic Safety Commission (N.M. STAT. ANN. 64, § 64-33-2).
State Certification Board (N.M. STAT. ANN. 75, § 75-27-1).
State Commission of Public Records (N.M. STAT. ANN. 71, § 71-6-3).

New York

Cemetery Board of Division of Cemeteries of the Department of State (N.Y. CODE art. 14, § 1401, of Not-For-Profit Corp. Law).
Crime Control Council (N.Y. CODE art. 23, § 642, of Exec. Law).
Interdepartmental Committee of the Division for Youth (N.Y. CODE art. 19-A, 19-G, § 417, of Exec. Law).
State Board of Canvassers of the Department of State (N.Y. CODE art. 10, § 278, of Election Law).
State Defense Council (N.Y. UNCONSOL. LAWS, § 9111).

North Carolina

Armory Commission (N.C. GEN. STAT. XVI, § 143-230).
Board of Directors of Roanoke Island Historical Association (N.C. GEN. STAT. XVI, § 143-200).
Eugenics Board (N.C. GEN. STAT. VII, § 35-40).
Governor's Committee on Law and Order (N.C. GEN. STAT. XVI, § 143-400).
Judicial Council (N.C. GEN. STAT. II, § 7-448).
North Carolina Capital Building Authority (N.C. GEN. STAT. XVI, § 129-40).
North Carolina Capital Planning Commission (N.C. GEN. STAT. XVI, § 129-31).
Traffic Safety Authority (N.C. GEN. STAT. XVI, § 143-392).
Tryon Palace Commission (N.C. GEN. STAT. XVI, § 121-19).

North Dakota

Annexation Review Commission (N.D. CENT. CODE 40, § 40-51.2-10).
Board of Managers of Bureau of Criminal Identification (N.D. CENT. CODE 12, § 12-60-02).
Board of Pardons (N.D. CENT. CODE 12, § 12-55-01).
Board of University and School Lands (N.D. CENT. CODE 15, § 15-01-01).
Combined Law Enforcement Council (N.D. CENT. CODE 12, § 12-61-01).
Commission on Peace Officers' Standards and Training (not statutory).
Commission to Hear Petitions for Consolidation of Insurance Companies (not statutory).
Emergency Pardon Board (not statutory).
Game and Fish Hearing Board (N.D. CENT. CODE 20, § 20-02-25).
Health Advisory Council (N.D. CENT. CODE 23, § 23-01-02).
Industrial Commission (N.D. CENT. CODE 54, § 54-17-02).
Judicial Council (N.D. CENT. CODE 27, § 27-15-01).
Medora Restoration Commission (not statutory).
Natural Resources Council (N.D. CENT. CODE 54, § 54-49-03).
State Auditing Board (N.D. CENT. CODE 54, § 54-14-01).
State Bonding Fund Board (N.D. CENT. CODE 26, § 26-23-12).
State Highway Patrol Hearing Board (N.D. CENT. CODE 39, § 39-03-03).
State Highway Traffic Advisory Committee (N.D. CENT. CODE 24, § 24-13-02).
State Laboratories Department (N.D. CENT. CODE 19, § 19-01-02).
State Safety Committee (N.D. CENT. CODE 23, § 23-13-09).

Ohio

Canal Land Authority (OHIO REV. CODE ANN. 1, § 123.681).
Commission to Rule on Companies' Merger and Consolidation (OHIO REV. CODE ANN. 39, § 3907.11).
Emergency Board (OHIO REV. CODE ANN. 1, § 127.01).
Judicial Council (OHIO REV. CODE ANN. 1, § 105.51).
Law Enforcement Supervisory Council (not statutory).
Ohio Fair Plan Underwriting Authority (OHIO REV. CODE ANN. 39, § 3929.-49).
Ohio Reciprocity Board (OHIO REV. CODE ANN. 45, § 4503.36).
Organized Crime Prevention Council (not statutory).
Police and Firemen's Disability and Pension Fund Board (OHIO REV. CODE ANN. 7, § 742.03).
Public Employees Retirement Board (OHIO REV. CODE ANN. 1, § 145.04).
Public Facilities Commission (OHIO REV. CODE ANN. 1, § 154.01, § 154.04).
School Employees Retirement Board (OHIO REV. CODE ANN. 33, § 3309.-05).
Sinking Fund Commission (OHIO REV. CODE ANN. 1, § 129.01).

State Board of Deposits (OHIO REV. CODE ANN. 1, § 135.02).
State Records Commission (OHIO REV. CODE ANN. 1, § 149.32).
State Teachers Retirement Fund (OHIO REV. CODE ANN. 33, § 3307.05).
Sundry Claims Board (OHIO REV. CODE ANN. 1, § 127.11).

Oklahoma

Archives and Records Commission (OKLA. STAT. tit. 74, § 564).
Board of Education (OKLA. CONST. art. 13, § 5).
Board of Managers of State Insurance Fund (OKLA. STAT. tit. 85, § 131a).
Board of Trustees—Public Employees Retirement System (OKLA. STAT. tit. 74, § 905).
Board to Authorize Surety Companies (OKLA. STAT. tit. 19, § 622).
Civil Defense Advisory Council (OKLA. STAT. tit. 63, § 683.6).
Commission on Criminal and Traffic Law Enforcement System (OKLA. STAT. tit. 74, § 1454).
Funding Bond Commission (OKLA. STAT. tit. 62, § 133).
Governor's Committee on Interstate Cooperation (OKLA. STAT. tit. 74, § 424).
Highway Safety Coordinating Committee (OKLA. STAT. tit. 47, § 40-109).
Legislature Apportion Commission (OKLA. CONST. art. 5, § 11A).
Oklahoma Capitol Improvement Authority (OKLA. STAT. tit. 73, § 152).
Pension Board—Department of Public Safety (OKLA. STAT. tit. 47, § 2-303).
State Armory Construction Board (OKLA. STAT. tit. 44, § 233.1).
State Board of Equalization (OKLA. STAT. tit. 68, § 2463).
State Buildings Bonds Commission (OKLA. STAT. tit. 62, § 57.1).
State Depository Board (OKLA. STAT. tit. 62, § 71, § 516.2).
State Employees Group Health Board (OKLA. STAT. tit. 74, § 1304).

Oregon

Crime Control Coordinating Council (not a statutory member).
Judicial Council (ORE. REV. STAT. 1, § 1.610).
Minor Court Rules Committee (ORE. REV. STAT. 1, § 1.510).
Multistate Tax Compact Advisory Committee (ORE. REV. STAT. 29, § 305.470).
Traffic Safety Commission (not a statutory member).

Pennsylvania

Board of Commissioners on Uniform State Laws (PA. STAT. tit. 71, § 114).
Board of Finance and Revenue (PA. STAT. tit. 71, § 115).
Board of Pardons (PA. STAT. tit. 71, § 113).
Board of Property (PA. STAT. tit. 71, § 116).
Commission on Charitable Organizations (PA. STAT. tit. 10, § 160-5).
Hazardous Substances Transportation Board (PA. STAT. tit. 75, § 2404).
Local Government Records Committee (PA. STAT. tit. 53, § 9005).
Pennsylvania Civil Disorder Authority Board (PA. STAT. tit. 40, § 1600.302).
Pennsylvania Crime Commission (PA. STAT. tit. 71, § 179).

Puerto Rico (citations not available)

Child Commission
Commission on Codification of Laws
Commonwealth Commission for the Control of Drug Abuse
Crime Commission
Judicial Council
Mining Commission
Retail Installment Credit Financing Companies Regulatory Board
Water Pollution Control Advisory Board

Samoa (citations not available)

Alcoholic Beverage Board
Commerce Commission
Fiscal Review Board
Immigration Board
Parole Board
Personnel Advisory Board
Salary and Wage Committee
Tax Exemption Board
Wage and Hour Board

Rhode Island

Board of Building-Loan Association Incorporation (R.I. GEN. LAWS ANN. 19, § 19-22-2).

Commission on Discovery and Utilization of Public Rights-of-Way (R.I. GEN. LAWS ANN. 42, § 42-33-1).
Commission on Interstate Cooperation (R.I. GEN. LAWS ANN. 42, § 42-23-2).
Emergency Milk Control Board (R.I. GEN. LAWS ANN. 21, § 21-4-5).
Governor's Committee on Crime, Delinquency, and Criminal (not statutory)
Official Visitors of Institutions (R.I. GEN. LAWS ANN. 13, § 13-2-30).
Reciprocity Board (R.I. GEN. LAWS ANN. 31, § 31-29-1).
State Medical Examiner Advisory Committee (R. I. GEN. LAWS ANN. 23, § 23-4-3).
State Properties Committee (R.I. GEN. LAWS ANN. 37, § 37-6-1).

South Carolina

Board of Health (S.C. CODE ANN. 32, § 32-1).
Judicial Council (S.C. CODE ANN. § 15-2102).
Law Enforcement Assistance Program (not statutory).
South Carolina Archives Council (S.C. CODE ANN. § 9-7).
South Carolina Law Enforcement Training Council (S.C. CODE ANN. § 53-43).
South Carolina Public Service Authority Advisory Board (S.C. CODE ANN. § 59-2).

South Dakota

Board of Review (Securities Registration and Sales (S.D. CODE 47, § 47-31-119).
Indian Affairs Commission (S.D. CODE 1, § 1-4-2).
Records Destruction Board (S.D. CODE 1, § 1-27-11).
Red River Tri-State Authority Commission (S.D. CODE 46, § 46-28-5).
State Board of Finance (S.D. CODE 4, § 4-1-1).
State Canvassing Board (S.D. CODE 12, § 12-20-46).
State Oil and Gas Board (S.D. CODE 45, § 45-8-1).

Tennessee

Board of Claims (TENN. CODE ANN. 9, § 9-801).
Board of Pension Examiners (TENN. CODE ANN. 4, § 4-341).
Bond and Coupon Cremation Committee (TENN. CODE ANN. 9, § 9-926).
Building Commission (TENN. CODE ANN. 4, § 4-1501).
Code Commission (TENN. CODE ANN. 1, § 1-101).
Commissions to Control Supreme Court Buildings (at Nashville and Knoxville), (TENN. CODE ANN. 16, § 16-324).
Commission to Purchase Federal Property (TENN. CODE ANN. 12, § 12-103).
District Attorney—General Conference (TENN. CODE ANN. 8, § 8-713).
Gas and Oil Board (TENN. CODE ANN. 60, § 60-103).
Governor's Committee on Intergovernmental Cooperation (TENN. CODE ANN. 4, § 4-1003).
Judicial Conference (TENN. CODE ANN. 17, § 17-402).
Judicial Council (TENN. CODE ANN. 16, § 16-901).
Law Enforcement Planning Agency (TENN. CODE ANN. 38, § 38-1001).
Public Records Commission (TENN. CODE ANN. 15, § 15-401).
State Consolidation Committee (TENN. CODE ANN. 5, § 5-301).
State Law Library Commission (TENN. CODE ANN. 10, § 10-515).

Texas

American Revolution Bicentennial Commission (of Texas), (TEX. CODE Art. 6145-8, V.A.C.S.).
Commission on Law Enforcement Officer Standards and Education (TEX. CODE Art. 4413, 29aa, V.A.C.S.).
Criminal Justice Council (not a statutory member).
Governor's Committee on Interstate Cooperation (TEX. CODE Art. 4413b-1, § 1, V.A.C.S.).
Legislative Redistricting Board of Texas (TEX. CODE Art. III, § 28).
Multistate Tax Compact Advisory Committee (TEX. CODE Art. 7359a, V.A.C.S.).
Records Preservation Advisory Committee (TEX. CODE Art. 5441d, V.A.C.S.).

Utah

Board of Examiners (UTAH CODE ANN. 63, § 63-6-1).
Board of Pardons (UTAH CONST. art. VII, § 12).

Compilation Commission —1953 Code (UTAH CODE ANN. 68, § 68-1-1).
Council of Defense (UTAH CODE ANN. 63, § 63-5-2).
Council on Justice Administration (UTAH CODE ANN. 63, § 63-25-2).
Council on Peace Officer Training (UTAH CODE ANN. 67, § 67-15-11).
Governor's Committee on Interstate Cooperation (UTAH CODE ANN. 63, § 63-7-3).
Hearing Board—Traffic Rules and Regulations (UTAH CODE ANN. 41, § 41-6-160.5).
Law Enforcement Planning Council (not statutory).
Multistate Tax Commission (UTAH CODE ANN. 59, § 59-22-1, art. VI).
Multistate Tax Compact Advisory Committee (UTAH CODE ANN. 59, § 59-22-7).
State Records Committee (UTAH CODE ANN. 63, § 63-2-68).
State Traffic Coordinating Committee (UTAH CODE ANN. 41, § 41-14-2).

Vermont

Claims Commission (VT. STAT. ANN. tit. 32, § 931).
Governor's Commission on Crime Control and Prevention (not statutory).
Governor's Drug Council (not statutory)
Interstate Cooperation Commission (VT. STAT. ANN. tit. 1, § 781).
Law Enforcement Training Council (VT. STAT. ANN. tit. 20, § 2352).
Statutory Revision Commission (appointive), (VT. STAT. ANN. tit. 1, § 51).

Virgin Islands (citations not available)

Governor's Commission for Human Services.
Judicial Council
Parole Board
Virgin Islands Law Enforcement Commission.

Washington

Data Processing Advisory Committee (WASH. REV. CODE ANN. § 43.105.-030).
Judicial Council (WASH. REV. CODE ANN. § 2.50.070).
Law and Justice Planning Commission (not statutory).
Law Enforcement Officers' Training Commission (WASH. REV. CODE. ANN. § 43.100.030).
Washington Public Employees Retirement Board (WASH. REV. CODE ANN. § 41.40.030).

Virginia

Division of Justice and Crime Prevention (not statutory).
Virginia Code Commission (VA. CODE ANN. 9, § 9-67).

West Virginia

Public Land Corporation (Natural Resources), (W.V.A. CODE ANN. 20, art. 1, § 15).
Records Management and Preservation Advisory Committee (W.VA. CODE ANN. 5, art. 8, § 6).
Retirement Board of Death, Disability and Retirement Fund (W.VA. CODE ANN. 15, art. 2, § 27).
Review of Suspension Board (W.VA. CODE ANN. 5A, art. 3, § 40).
West Virginia Housing Development Fund Board (W.VA. CODE ANN. 31, art. 18, § 4).
West Virginia Sheriffs' Bureau (W.VA. CODE ANN. 15, art. 8, § 1).

Wisconsin

Board of Canvassers (WIS. STAT. II, § 7.70).
Claims Commission (WIS. STAT. III, § 16.007, § 15.105[2])
Committee on Public Records (WIS. STAT. III, § 16.80, § 15.105[4]).
Council on Criminal Justice (WIS. STAT. III, § 15.255).
Great Lakes Compact Commission (not a statutory member).
Group Insurance Board (WIS. STAT. III, § 15.165[2]).
Group Insurance Board (WIS. STAT. VIII, § 66.919).
Investigation Council of the Department of Justice (WIS. STAT. III, § 15.257).
Judicial Council (WIS. STAT. XXIV, § 251.181).
Menominee Indian Committee (WIS. STAT. III, § 13.83).
Natural Resources Committee (WIS. STAT. IV, § 23.26, § 15.347[2]).
Public Lands Commission (WIS. CONST. art. 10, § 7).
State Library Trustees (WIS. STAT. VI, § 43.01).
State Medical Grievance Committee (WIS. STAT. XV, § 147.195).

Wyoming

Governor's Committee on Intergovernmental Cooperation (WYO. STAT. ANN. 9, § 9-233).
Governor's Planning Committee on Criminal Administration (WYO. STAT. ANN. 9, § 9-276.18:11).
State Board of Identification (WYO. STAT. ANN. 9, § 276.10).
State Health Insurance Board of Administration (WYO. STAT. ANN. 9, § 9-702).
State Highway Reciprocity Commission (WYO. STAT. ANN. 31, § 31-69).
State Library Archives and Historical Board (WYO. STAT. ANN. 9, § 9-204).
State Records Committee (WYO. STAT. ANN. 9, § 9-212.6).
Statute Revision Commission (WYO. STAT. ANN. 8, § 8-10.2).
Wyoming Compilation Commission (WYO. STAT. ANN. 8, § 8-1).

An attempt to classify boards by categories gives the following picture:

Category of Board	No. of States	No. of Boards
Law Enforcement	52	90
Fiscal and Tax Matters	40	109
Legal Services and Bar	38	52
Records and Libraries	33	37
Land and Buildings	30	47
Traffic Safety	21	30
Planning and Intergov't Relations	22	28
Elections	19	23
Conservation	16	24
Health	14	18
Education	11	16
Agriculture	6	11

There are, additionally, other boards which do not fall into any of these categories. For example, three Attorneys General are members of boards concerned with data processing.

Some states have reduced the number of memberships, while other states have expanded it. In Texas, for example, the number declined from twenty-five in the 1950's to seventeen in 1962, to the present nine memberships. In Kentucky, however, the number has grown from nine in 1960[3] to the present eighteen. In Florida, the Attorney General served on twenty-four boards in 1960, compared to thirty-five today.[4]

7.32 Membership by Attorney General

The number of boards on which the Attorney General serves ranges from two in several states to thirty-five in Florida. Five Attorneys General serve on from one to four boards each; twenty-seven serve on from five to nine boards; ten serve on from ten to fourteen boards; nine serve on from fifteen to nineteen boards, and three serve on more than twenty boards.

While it is not possible to determine how much time is involved in such service, some Attorneys General have commented on the problem. Former Attorney General Peterson of Minnesota, for example, said that:

> I think I could better serve the State by giving all my time to legal work. As a practical proposition, I put in extra hours and work Sundays and holidays so that I can give the requisite time to purely legal work of the State. In my judgment, this ought not to be necessary, but I am compelled to do so because the non-legal work takes up so much of my time.[5]

A 1962 study of the Texas Attorney General's board memberships found that he belonged to seventeen boards which held a total of 117 meetings in 1961. The time the Attorney General spent at each meeting ranged from fifteen minutes to two hours, and totaled about 133 hours for the year. In addition, he presumably spent time preparing for such meetings.[6] Former Attorney General Benton of Texas had commented previously that:

3. Montague, *supra* note 1 at 207.
4. *Functions of the Office of Attorney General*, 34 FLA. B. J., 14, 15.
5. N.A.A.G. 1934 CONFERENCE 72.
6. Texas Legislative Council, EX-OFFICIO BOARD MEMBERSHIPS OF THE ATTORNEY GENERAL, Report No. 57-9, 54-56 (1962).

In the week of May 3-May 9, 1955, six major boards in which he serves held ten meetings, each lasting more than two hours and requiring additional hours of preparation. On August 3, four ex-officio boards of which the Attorney General is a member—the State Building Commission, the School and Veteran's Land Boards and the Banking Commission—met from 8 a.m. to 4 p.m. A man can spend so much time feeding the chickens he doesn't have time to plow.[7]

North Dakota's Attorney General has reported that the Industrial Commission, of which he is a member, may meet three or four times a month, or even more frequently. The Lands Board meets at least monthly. The Pardon Board meets three times a year and the Emergency Pardon Board meets "at frequent intervals."[8]

There are not sufficient data to indicate how often the Attorney General himself attends meetings personally and when he designates a deputy to represent him. Many statutes specifically provide for the designation of a deputy, or assistant Attorney General, or representative of the justice department to serve on boards and commissions.[9] Some of the statutes allow many or all board members to assign assistants to serve in their place. In Delaware, the Attorney General may assign a deputy to serve on any board or commission of which the Attorney General is a member.[10] Colorado, however, has a constitutional requirement that the Attorney General serve personally on all boards on which he is an *ex-officio* member. A deputy may initially be named to a board instead of the Attorney General, as in Oregon, where a deputy is chairman of the criminal justice planning agency, and in Maryland, where the Wholesale Meat Advisory Council includes a representative of the Consumer Protection Division of the Attorney General's office.[11]

While assigning a deputy or assistant may relieve the Attorney General of some duties, the solution to the problem lies in reducing the number of boards served on to those which are within the capabilities of time available to the individual Attorney General.

7.33 Evaluation of Board Membership

The Committee on the Office of Attorney General has recommended that the Attorney General's membership on boards be restricted to those few in which his participation as a policy-maker is essential. His role should be restricted to rendering legal advice, rather than serving as a member, except on those few boards which set policy for broad areas of the criminal justice system. This policy is in keeping with most studies, as well as with the views of Attorneys General.

Former Attorneys General were asked whether *ex officio* service on many boards and commissions constitutes a worthwhile expenditure of an Attorney General's time. Only thirty-six said that it did, while seventy-two said that it did not.[12] Sixty-four said that membership on some boards was more important than others, while seventeen made no distinctions. Respondents were asked to specify which boards are the most important, but their answers were so diverse as to defy classifications. The most frequently mentioned areas were law enforcement, criminal justice, and pardon and parole boards.

Of incumbent Attorneys General, seventeen said that such membership was worthwhile, while nineteen said that it was not. When asked on what boards he should serve, the crime commission or law enforcement training board was the only group mentioned by any significant number of Attorneys General. Other boards mentioned included code commissions, the Governor's Cabinet, and those dealing with fiscal matters such as bonds, trust funds, claims and revenue. In a separate question, twenty-two of thirty-six Attorneys General think they should serve on the judicial council.

A 1962 Texas survey of Attorneys General asked them to comment on the desirability of serving *ex-officio* on boards. Seven commented favorably, seven objected to such service, and seven felt that membership was proper within certain limits: "The primary concern of the majority of 21 attorneys general who chose to comment on such board membership was the time involved."[13]

At the time of the study, the Texas Attorney General served on six boards related to the leasing and administration of state-owned land and was forced to rely on the staff of the General Land Office to supply him with requisite information for making policy. His membership on the Banking Board to consider applications for charters involved the reliance on information from bank examiners hired by the banking commission.[14] The study indicates the overall difficulty of the board service in areas outside the usual business of the Attorney General:

> On no board which the attorney general serves was it found that the actual day-to-day administration was vested in his office. With but few exceptions, this is not so in regard to other members of the Executive Department. Who could better determine whether state land should be leased or sold and at what price than the commissioner of the General Land Office? Who could better make the necessary decisions than the treasurer when serving as an ex officio member of the State Depository Board?[15]

The Texas study compares the Attorney General's board service with those of other executive officers and found that the other officers' board memberships related more to their normal duties. For instance, the Comptroller and Treasurer were members of boards related to fiscal affairs and the Land Commissioner served on boards dealing with public lands. It was pointed out that the Attorney General had not been named to a number of boards pertinent to the legal nature of his office such as the commission on Uniform Laws, and the Texas Civil Judicial Council.[16]

A 1957 study of the West Virginia Attorney General's office also opposed service on boards unrelated to legal areas. This study suggested that the Attorney General be relieved of any non-legal, "or what might be termed pseudo-legal" duties. For instance, the West Virginia Attorney General's membership on the Board of Public Works, which evaluated public utilities, was cited as an example of a non-legal duty. The members of the Public Works Board were all elected officials or full-time heads of various state government departments. The study suggested that the work of the board be done by a permanent commission established under the State Tax Commission, and that the Attorney General's duties in relation to all boards and commissions be that of legal adviser rather than member.[17]

These problems are not peculiar to Attorneys General, but are inherent in such memberships. One writer commented that:

> Of all board arrangements, ex-officio boards are the least satisfactory. This is true because an attorney general, secretary of state, or some other administrative official lacks the time, interest, or special qualifications required by some ex-officio boards. For lack of time it may be impossible for these

7. Sheppard, *supra* note 2 at 4.
8. REPORT OF THE ATTORNEY GENERAL OF NORTH DAKOTA, vii (1966).
9. E.g. Crime Technological Research Foundation, CAL. PENAL CODE, § 14003, Prequalification Committee Highways Act. U.S. Laws, § 27, 7-35.7, and Board of Pardons, S.D. CONST., art. IV, § 5.
10. DEL. CODE ANN. tit. 29, § 2505.
11. MD. ANN. CODE, art. 66C, § 470E.
12. C.O.A.G., *Former Attorneys General Analyze the Office*, 13.
13. Texas Legislative Council, *supra* note 6 at 64.
14. *Id.* at 50-53.
15. *Id.* at 53-57.
16. *Id.* at 9-10.
17. Lyell Clay, THE ATTORNEY GENERAL OF WEST VIRGINIA, 99-100 (1957).

officials to attend all the meetings of ex-officio boards to which they have been assigned. ... As a result decisions may be made with something less than membership. Mismanagement and corruption have resulted, on occasion, from action or inaction by ex-officio boards.[18]

James Havel's recent study of the Secretary of State in the states, analyzed that officer's memberships and found that they served on boards involving such diverse subjects as interstate cooperation, records, lands and buildings, textbooks purchasing, mineral leasing, tourist development, state history, disability and relief appeals, law libraries, bonds, civil rights, rough rider awards, salary administration, university affairs, status of women, public works and charities and reforms.[19] Mr. Havel commented that while board membership in some states expanded the actual or potential political power of the Secretaries of State, many board duties were "not germane to their primary secretarial responsibilities."

Section 5.1 of this Report discusses the structure of state legal services and shows that the Attorney General is attorney for all or some boards and commissions in each jurisdiction. The propriety of his serving both as a member of and as attorney for a board may be questioned. As one former Attorney General said, "It may be questioned whether he can be as independent in his advice under such circumstances as he might otherwise be."[20] Another pointed out that the Attorney General could be placed in the position of advising himself if he serves on boards which pertain to the legal functions of the Attorney General, or that he might have to witness his own signature on a contract.[21]

Other problems could arise when the Attorney General is required to render an opinion to a board or commission upon which he serves as a member[22] or when the Attorney General has the power to oust any unqualified member of any board or commission.[23]

The Texas survey showed that the primary reason given by those Attorneys General who favored board membership was that he could contribute legal advice. A discussion at the 1934 N.A.A.G. Conference brought forth other arguments for membership. Then-Attorney General A.G. O'Conner of Iowa said that "it might be advisable to increase such duties. Many administrative boards get into trouble before consulting the Attorney General," but would not do so if he were present before action was taken.[24] Attorney General A. B. Chez of Utah said that:

> For small states, I think it is advantageous for the Attorney General to serve on the various boards. By serving, he obtains first hand knowledge of the problems and questions to be solved, and by his legal knowledge and experience is able to aid in solving them.[25]

The present Attorney General of Utah, Vernon B. Romney, estimates that board service takes an average of an hour per week, and considers this a worthwhile expenditure of time.[26]

A New York study related the Attorney General's board service to the powers of the board, rather than its duties, in evaluating the desirability of membership. It commented that the Attorney General's rule-making function was enhanced by service on such boards as the water power and control commission, the cemetery board and retirements board. Since these boards have regulatory powers the Attorney General serves in a "dual capacity": that of legal adviser and policy maker.[27]

Undoubtedly, the Attorney General's membership on boards and commissions should vary according to the needs of that state and, in some cases, according to the interests of the individual Attorney General. Certain areas, however, would be consistently more appropriate, such as those concerning legal services, criminal law and justice, and police training standards. All boards can be said to in some way be involved with the law. It is more difficult to evaluate board service in those areas involving work not related to the office of Attorney General but of broad policy-making impact. Increasing emphasis on narcotic control, environmental protection, and similar areas will probably mean the creation of new boards and commissions. While neither field is directly related to his office, the Attorney General's membership might be justified because of their importance.

18. Wilburn Benton, TEXAS: ITS GOVERNMENT AND POLITICS, 298-99 (1961).
19. James Havel, THE OFFICE OF STATE SECRETARY OF STATE IN THE UNITED STATES, 62-65 (1969).
20. Attorney General Holt, 1934 CONFERENCE OF ATTORNEYS GENERAL, 72.
21. Sheppard, *supra* note 2 at 3-4.
22. *See Brockbank v. Rampton*, 22 Utah 19, 447 P 2d 376 (1968).
23. KAN. STAT. ANN. § 75-714.
24. 1934 CONFERENCE OF ATTORNEYS GENERAL.
25. *Id.*
26. Interview with Attorney General Vernon B. Romney, Salt Lake City, Utah.
27. Robert H. Gordon, THE RELATIONSHIP BETWEEN THE ATTORNEY GENERAL AND AGENCY COUNSELS IN NEW YORK, 476 (Unpublished dissertation, Syracuse U. 1968).

7.4 Military Forces

The National Guard has increasingly come to be regarded as the Governor's primary agency to augment civil authorities in establishing and maintaining order during periods of civil strife or natural disaster. In the past few years, it has been called to emergency duty in most states to supplement civil law enforcement capabilities. Attorneys General in most states provide at least some legal services for the Guard and Guardsmen and are concerned with issues involved in their use as law enforcement officers. To obtain data on such services and on the legal status of the Guard, C.O.A.G. circulated a questionnaire to Adjutants General. Thirty-two were returned in time for use in this Report.

It became apparent that further study and action was needed. The 1971 N.A.A.G. Winter Meeting adopted a Resolution calling for appointment of a Special Advisory Committee on Legal Services to Military Forces, and requesting the National Guard Association of the United States, the Adjutant General's Association and appropriate components of the Department of Defense to name representatives to serve on the Committee. The Committee was directed to formulate recommendations for:

> improving liaison at both the state and national level; developing model legislation to clarify legal problems where this appeared indicated; preparing manuals and related materials concerning the legal status of members of the National Guard; collecting, analyzing, and disseminating information on existing laws and administrative practice; and strengthening relationships between legal advisers, military forces, and law enforcement officers, especially during emergency situations.

This should make possible a comprehensive analysis of the Guard's legal status and suggestions for strengthening liaison with Attorneys General. This present report is based primarily on C.O.A.G. questionnaires, and is only a preliminary survey of some of the questions involved.

7.41 Extent of State Authority

The National Guard occupies a unique status in the federal system:

> It is responsive, on the one hand, to state authority, and functions as a state military force to augment civil authorities in time of emergency. On the other hand, it serves as the primary backup force for the U.S. Army and Air Force, as a statutory element of the federal defense establishment.[1]

The Constitutional provisions relating to the militia forces established a division of mutually exclusive powers. There was vested in Congress the limited power to enact those laws relating to the organization of the militia which were deemed necessary to the common defense. There was reserved to the states the right to organize, maintain and regulate such forces, and to appoint and commission their officers.[2]

It was manifest in the Constitution that the militia units were to remain subject to the control and authority of their respective states until called into active service of the United States for the special purposes authorized.[3] Congress has empowered the President to call forth the militia for the following purposes: to execute the laws of the Union; to suppress insurrections; and to repel invasions.

There are three basic prerequisites to the use of federal troops in a state in the event of civil disorder:

(1) A situation of severe domestic violence must exist in the state;

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1. Col. W. D. McGlasson, *The National Guard*, THE BOOK OF THE STATES 1970-71, 434.
2. U.S. CONST., art. I., § 8.
3. *State of Maryland ex rel. Levin v. United States*, 329 F. 2d 722, 724 (1964).

(2) The domestic violence must be determined to be beyond the control of the law enforcement resources available to the Governor;

(3) The Governor, or legislature, depending upon the state constitution, must request the President to employ federal troops; or the President, on his own initiative, may deploy federal troops to a state to enforce the laws of the United States when disorder precludes the effective use of ordinary judicial proceedings. The Constitution makes the President Commander-in-Chief of the militia when called into active service of the United States.[4] Once called into active federal duty, federal control over a National Guard detachment is exclusive.

The term "militia" in the Constitution was used to refer to all male citizens and resident aliens who could be called upon in an emergency, rather than to an organized body. In present times the term refers to males, generally 18 to 45 years of age, who are individually enrolled in regularly organized, uniformed, equipped and trained National Guard units. A majority of the state constitutions embody this distinction.[5] The federal government pays 90 percent of the operating costs, 50 percent of the costs of physical installations, and nearly all equipment costs of the Guard. Guard members, however, take an oath of allegiance to the state, and unless called into federal service, the Guard is under the control of the Governor.[6]

When the existence of the state is threatened, as in the case of an invasion, the Governor or the legislature has the right to declare itself under martial law, as provided for in the state constitution and statutes. A declaration of martial law by a state operates to suspend the civil status of the state, or a portion thereof, and the Governor then acts in a military capacity as Commander-in-Chief of the military forces. In the strict interpretation of martial law, military courts are substituted for civil courts and traditional constitutional guarantees provided by the Bill of Rights may be denied.

A proclamation calling out the Guard is rarely intended to decree complete martial law. A state may use its military power, short of declaring martial law, to put down an armed insurrection within the state which is too strong to be controlled by civil authorities or is otherwise emergent. Mississippi, for example, distinguishes between "absolute martial law", which has not been invoked in this century, and "qualified martial law," which is primarily military assistance to civil authorities.[7] Iowa differentiates between "establishment of a Military District under Martial Law" and "active state service for the purpose of aiding civil authorities."[8]

The Governor's decree of martial law is subject to judicial review[9] and is limited by a series of cases holding that martial rule can never exist when the courts are capable of enforcing their orders, even with military assistance.[10] Unless civil disorder reaches such proportion as to eliminate completely civil control, there is no need for the Governor to resort to martial law.

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4. U.S. CONST., art. II, § 2.
5. Col. William L. Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 MIL. L. REV. 39, 44 (1966), (DA Pam 27-100-31, 1 January 1966).
6. The Report of the National Advisory Commission on Civil Disorder, 275 (March 1, 1968); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895), 39 L. ed. 914, 916.
7. According to the Adjutant General of Mississippi "absolute martial law" has not been resorted to in Mississippi during this century.
8. IOWA CODE ANN., § 29 A 8 (1966).
9. *Sterling v. Constantin*, 287 U.S. 378 (1932).
10. *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 127 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 66 S.Ct. 606, 90 L. ed. 688 (1946); Accord, *Lee v. Madigan*, 358 U.S. 228, 232, 79 S.Ct. 276, 3 L.ed. 2d 260 (1958).

Colonel L. J. Crum, Judge Advocate General of the State of Michigan, stated following the Detroit riots that:

> Undue hesitation resulted during the Detroit riots due to uncertainty over the necessary procedures in activating both state and federal forces. Too much time was wasted in debating semantics. We can never be sure how many lives or how much property damage could have been saved if the officials involved had not delayed so long over choice of terminology. It was the action, not the phraseology, that was important.[11]

To prevent this, Attorneys General might assure that Governors are apprised in advance of the proper procedures.

Regardless of the descriptive title employed, almost all states provide for the Guard to be called to active state duty by the Governor to assist local authorities, in a status considerably short of "martial law". The power to call the military forces of the state to serve is usually vested by statute or constitutional provision in the Chief Executive of the state, who is the sole judge of the necessity for military assistance and whose decision is conclusive upon the courts.

When the Guard is called to provide military aid to civilian authorities, it is apparent the Governor, the Adjutant General, or their designee maintains control over the Guard detachment. Likewise, immediate control over the local authorities is exercised in the normal manner by the head of each individual local agency. Generally, the civil authorities designate the particular objectives to be accomplished although the means of execution is left to the discretion of the Guard commanding officer.

Language providing for the military to be under strict subordination to and governed by the civil power is found in nearly every state constitution. As stated in an Illinois pamphlet,

> The basis of our Republican form of government is to help preserve and maintain the civil authorities and not to supersede them; there is no such thing as military power independent of civil power while the civil power is functioning.[12]

The Governor, in his dual capacity as Commander-in-Chief of the Guard and as Chief Executive, is head of the civil power and is bound to execute the laws of the state. The military does not have an independent being and need not be placed under the "command" of local authorities to uphold the constitutional provisions for subordination.

The Council of State Government's 1970 Program of Suggested State Legislation includes a model Act conferring emergency powers upon the Governor to control civil disorders.[13] Among other provisions, it allows the Governor, on his own initiative or the request of a city mayor, to order the National Guard into service to preserve order. When the Governor orders the Guard into special active service, "if he believes the maintenance of law and order will be promoted he may by proclamation declare the area in which the militia is serving to be under martial rule."

7.42 Interstate Relations

The National Guard's status involves many problems of interstate relationships. These will become even more important if states adopt compacts providing for interstate use of Guard forces. The authority of a Guardsman to act as a peace officer in a state where he has been sent on duty may not be clear, nor may his liability for acts committed while on duty. He may, for example, through negligence, cause an accident to a civilian in another state. What redress is available to the injured party? Who provides the defense if the Guardsman is involved in litigation in a foreign jurisdiction? Answers to these types of questions should be clearly defined.

A National Guard Mutual Assistance Compact was drafted pursuant to request of the National Governors' Conference in 1967 and published by the Committee of State Officials on Suggested State Legislation in 1969. It provides for deployment of National Guard forces upon request of the Governor of a party state, with the agreement of the Governor of a responding state. The Governor of whom the request is made may send any or all components of his state's Guard forces to another state "as he may deem necessary, and the exercise of his discretion in this regard shall be conclusive." The Guard forces shall have the same privileges and immunities as the Guard in the requesting state and all liability arising under the laws of the requesting state are to be assured by that state. Each responding state is to be reimbursed by the requesting state for expenses incurred in responding to the request.[14]

The States Urban Action Center's recommendations concerning law enforcement also stressed the need for interstate agreements. The Center said that:

> The State should (i) adopt a comprehensive plan of action on the use of the National Guard in controlling civil disturbances, (ii) enter into mutual assistance agreements with other states, (iii) establish and develop effective liaison with State and local law enforcement officials, and (iv) make active efforts to increase recruitment of members of minority groups.[15]

7.43 Peace Officer Powers

There are wide variations among the states in the authority conferred on the National Guard and on individual Guardsmen to arrest and detain persons not subject to the military code. Table 7.43, based wholly on responses to C.O.A.G. questionnaires, shows such powers in reporting states and underlines this variation. A minority of states give Guardsmen clear-cut authority to arrest and detain. In at least four states, Guardsmen have only the authority of any other citizens. A number of states allow a citizen to arrest without a warrant for felonies and breaches of peace committed in his presence and on probable cause for past felonies, provided they have actually been committed. The Urban Coalition and the Committee of State Officials on Suggested State Legislation are among the groups which recommend that the Governor may authorize some or all Guard units or members to arrest offenders.[16]

The courts have uniformly upheld the Governor's power to order the military to detain temporarily the leading agitators in a riot situation until order has been restored, before turning them over to the civil authorities.[17] However, what are the allowable limits of military discretion, and whether they have been overstepped in a particular case by the Governor, are judicial questions.[18]

It must be realized that there have been no reported cases involving detention by the Guard in the past thirty-six years. Although it may still be arguable that turning agitators over to

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11. F. Philip Colista and Michael Domonkos, *Bail and Civil Disorder*, 45 J. URBAN L. 821 (1968); For citations to the New York Times delineating the Detroit riot and subsequent controversy between President Johnson and Governor Romney, *see*, Note *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638, 639 n. 19 (1968).
12. Illinois Internal Security Plan, Annex L, at 1-5 (1968).
13. The Committee on Suggested State Legislation, The Council of State Governments, 1970 SUGGESTED STATE LEGISLATION, 42-10-00.
14. The Committee on Suggested State Legislation, XXVIII SUGGESTED STATE LEGISLATION, D-10-D-15 (1969).
15. States Urban Action Center, Urban America, Inc. ACTION FOR OUR CITIES, 63 (1969).
16. *Id.*; SUGGESTED STATE LEGISLATION, *supra* note 13.
17. *Moyer v. Peabody*, 212 U.S. 78 (1908).
18. *Sterling v. Constantin*, *supra* note 9.

7.43 PEACE OFFICER POWER OF GUARDSMEN OVER CIVILIANS

	Basis of Authority	Extent of Authority
Arkansas	Statute	May arrest and detain
California	Statute	May arrest and detain; do not if local authorities are available
Colorado		May detain until turned over to local authorities
Hawaii	Statute	Citizen arrest authority only
Idaho		Citizen arrest authority only
Illinois	Statute	May arrest and detain
Indiana	A.G. opinion	May arrest and detain with discretion
Iowa	A.G. opinion	No powers unless specifically delegated by Governor
Kansas	Statute	May arrest and detain
Kentucky	Statute	May arrest and detain
Louisiana		No powers
Minnesota	Statute	May detain until turned over to local authorities
Mississippi	Statute	May arrest and detain
Missouri	Statute	May arrest for trespass or unlawful assembly; may detain
New Hampshire	Statute	May arrest and detain until turned over to local authorities
New Jersey	Statute	May arrest and detain; done by police whenever possible
New Mexico	Implied	May arrest
North Dakota	Statute	May arrest for interference with Guard
Ohio	Statute	May arrest and detain
Oklahoma	Statute	Citizen arrest authority only
Oregon	A.G. opinion	May arrest
Pennsylvania	Case law	May arrest
Puerto Rico	Gov. Proclamation	Same as any law enforcement officer
Rhode Island		May arrest for trespass or unlawful assembly
South Dakota	Statute	May arrest and detain
Tennessee		Citizen arrest authority only
Texas		May detain when directed by police
Utah	Common law	Citizen arrest authority only; may detain
Vermont		May detain when directed by police
Virginia		May detain when directed by police
Washington	Statute	Commanding officer delegated arrest power; may detain
Wisconsin	A.G. op. (informal)	May arrest and detain
Wyoming	Statute	May arrest and detain

civil authorities only to be released on bail to again promote insurrection is a "farce",[19] recent Supreme Court decisions delineating the rights in criminal cases, coupled with decisions denying court-martial jurisdiction over civilians,[20] may indicate a judicial predisposition to deny the Guard authority to detain a rioter. Consequently, "every governor who through military force temporarily imprisons the leading agitators of a riotous mob must be prepared to justify his action in a habeas corpus proceeding."[21]

A number of states report that, by policy, Guardsmen do not arrest or detain persons if other peace officers are available. Additionally, most Guardsmen are directed to surrender arrested persons to the civil police authorities as quickly as possible.

7.44 Immunity for Guard and Guardsmen

The application of sovereign immunity to the National Guard was unclear from the questionnaire responses. One state mentioned that sovereign immunity might be applicable to the Department of Military Affairs, but not to Guardsmen. The other states apparently have waived immunity from liability for negligence of state employees acting within the scope of their employment.

There is a question as to whether Guardsmen are considered state employees, thereby exposing the state to liability for their acts. Iowa reports that state liability for damages incident to Guard operations conducted pursuant to federal authority has been expressly precluded by statute.[22]

A member of the National Guard in peacetime is not an "employee of the Government" within the definition of the Federal Tort Claims Act[23] unless called to federal duty, according to court decision. In many states, this leaves the injured party with no other recourse than to sue the Guardsman personally. In 1960, Congress provided for *ex gratia* payment of meritorious claims up to $5,000 for personal injury or property damage caused by National Guard personnel. Any claim in excess of $5,000 deemed to be meritorious can be submitted to Congress for consideration.[24] The intent of Congress was to provide a means for settling claims arising from activities of the National Guard while engaged in training which involves a distinct federal relationship.[25] Numerous claims to the federal government are denied due to the fact the Guardsman was performing state duty. In other cases the claimant is not fully or correctly informed of the claims procedures, or they appear too cumbersome, leaving no apparent alternative than to seek redress from the Guardsman personally.

Almost all states give individual Guardsmen immunity for both criminal and civil liability for acts committed while on active emergency duty, if such acts are performed pursuant to orders from superior authority or within the scope of their duty. Some states report limitations on such immunity. In Oregon, Pennsylvania and Vermont, criminal immunity is from arrest only. In Pennsylvania, South Dakota, Tennessee, and Vermont, civil immunity is from civil process. In Tennessee and Vermont, immunity from civil process or arrest does not apply to treason, felony, or breach of the peace.

In all probability, the Guardsman's immunity would not preclude a suit, but would provide an affirmative defense which could be overcome by a finding that:

(1) the orders from the superior authority relied upon the Guardsman were obviously illegal;

(2) the individual Guardsman deliberately and willfully exceeded his authority;[26] and

(3) the act was the result of wanton misconduct not authorized by the orders or was not in the performance of his duties.

Courts have held that "a person who enters military service is not thereby relieved from his obligation to observe the law of the jurisdiction in which he finds himself. Speaking generally, he is liable for his torts as are other persons."[27] Some states impose limits by statute. Wyoming law, for example, provides that no member of the Guard shall, by reason of acts committed in the performance of his nec-

19. *In re Moyer*, 35 Colo., 85 P. 190, 193 (1904).
20. *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).
21. Wiener, *Helping to Cool the Long Hot Summer*, 53 A.B.A. J. 713, 716 (1967).
22. Ch. 1027, Acts 63rd GA (2d RS) *amending* IOWA CODE ch. 25 A (1966).
23. *O'Toole v. United States*, 206 F.2d 912, 916 (1953); *McCranie v. United States*, 199 F.2d 581 (C.A. Ga. 1952) *cert. denied* 345 U.S. 922, 73 S.Ct. 780, 97 L. ed. 1354.
24. 32 U.S.C.A. § 715 (1970 Supp.)
25. 1960 U.S. Code Cong. and Adm. News 3492.
26. *Manley v. State*, 69 Tex. Cr. 502, 154 S.W. 1008 (1913).
27. *Cotton v. Iowa Mutual Liability Ins. Co. et al*, Kansas City Ct. App., 260 S.W. 2d 43 (1953), citing *Neu v. McCarty*, 309 Mass. 17, 33 N.E. 2d 570, 572, 133 A.L.R. 1291.

essary duties incident to service ordered by the Governor or superior officer, incur civil or criminal liability unless palpably illegal, excessively violent, or malicious.[28]

Although Vermont does not have general statutory immunity for Guardsmen there is a statute which provides that "officers and persons assisting them, in lawfully dispersing or apprehending such rioters, shall not be liable in civil or criminal proceeding if a rioter, by reason of his resistance, is killed or injured."[29] It is not known if other states have similar statutes giving implied immunity to a Guardsman assisting a police officer. However, issues such as the death of a bystander, death of a rioter not offering resistance at the time of his death or injury, and unlawful assembly falling legally short of a "riot", and other foreseeable problems, may not offer desired protection to the Guardsman.

An extension of immunity in some states provides for exemption of the Guardsman from arrest while going to, remaining at, or returning from any place of duty,[30] or exemption from enforcement of civil process during such times as the Guardsman is on active state duty.

7.45 The Attorney General's Services to the Guard

Each Adjutant General responding to the questionnaire indicated a close, cooperative and cordial relationship with the Attorney General or his staff when advice or assistance has been requested.

For example, the Adjutant General of Kentucky commented favorably that the Attorney General had assigned a member of his staff to assist the Guard. It was felt this provided the Guard with quick access to legal counsel, while at the same time assuring continuity in advice. The California and Wisconsin Attorneys General are among those who have assigned requests for advice from the Adjutant General to assistants who are themselves members of the National Guard. The Adjutants General consider this arrangement particularly desirable due to the complexities of the dual federal-state status of the Guard.

Cooperation between the Attorneys General and Adjutants General apparently does not often extend to joint cooperative statements during times of civil disorder or other emergencies. Mississippi reported that the Attorney General assists the Adjutant General and Governor with such statements and North Dakota said such a statement had been drafted; no other state, however, reported that such a statement had been prepared.

The mere presence of the Attorney General at the scene of an emergency can be reassuring to those in command. The Adjutant General of Oregon commended the presence of the Attorney General in a joint coordinating center during a recent convention where disorder was anticipated. The Attorney General was thereby able to give the Governor and the Adjutant General the immediate benefit of his advice. The Attorney General of Mississippi's action pursuant to a disaster is described in Section 6.44. The Adjutant General of California, recognizing that the Guard's successful action in civil disturbances depends almost directly upon the ability of local law enforcement to do its job in containing the disturbance, stressed the necessity for cooperation between the Guard and the Attorney General in training local law enforcement officials.

Adjutants General may refer legal problems to J.A.G. officers while on duty rather than to the state Attorney General's office. This is due to the special legal problems involved in the federal-state nature of the Guard.

Of thirty-one Adjutants General reporting, seventeen had requested a formal opinion from the Attorney General in the preceding year and twenty-one had requested informal opinions. Only six had not requested any opinions. The number of formal opinions requested ranged from one in six states to ten in one state. The number of informal opinions ranged from one in three states to an estimated fifteen to twenty. Thus, Adjutants General do seek the Attorney General's written advice in most states.

Six Adjutants General indicated the Attorney General or his staff had prepared guides concerning Guardsmen's rights and duties. The California Attorney General's office has prepared written materials relating to civil disturbance. The Iowa Attorney General prepared a pamphlet entitled "Riot Suppression in Iowa," which is basically a summary of Iowa statutory provisions applicable to riot control. An Oregon booklet compiled relevant Attorney General's opinions and additional material delineating the authority of Guardsmen in riot situations, with particular emphasis on the law of search and seizure. An Assistant Attorney General of Mississippi prepared a pamphlet outlining the functions, powers, immunities and liabilities of Guardsmen as peace officers in civil disturbances and natural disasters.

7.46 Litigation Involving the Guard or Guardsmen

Most states probably have experienced some legal actions arising out of National Guard activities, although Adjutants General of eight states indicated to C.O.A.G. that the Guard or its members had not been involved in such litigation recently.

If litigation involved the Guard as party defendant the Attorney General or one of his assistants would apparently be the only authorized representative of the Guard in less than half the reporting states, as shown in Table 7.46. Representation of the Guard in litigation is probably discretionary with the Attorney General or the Guard in the remaining states. As a practical matter, counsel in litigation involving insured motor vehicles would be selected by the state or insurer.

Individual Guardsmen in almost half the states have been subjected to litigation for acts performed by them while in a duty status. In a large number of states, Adjutants General are unaware of the specific instances when an Attorney General will provide a defense for a Guardsman. The extent to which the state will aid the Guardsman in his defense is generally predicated upon the preliminary finding by the Attorney General or Adjutant General that the Guardsman's act was committed within the scope of his duties. If the act is considered to have been in the line of duty, it is apparent the Attorney General in all but a few states has an option to provide a defense for a Guardsman for civil litigation. Few states statutes require the Attorney General to appear in the Guardsman's behalf in all such litigation. And, most states prohibit the Attorney General from representing the Guardsman in a criminal case.

States which require the Attorney General to provide a defense for a Guardsman in civil litigation resulting from an act in the performance of his duties base this requirement upon the assertion that a Guardsman on state duty is a state employee whose acts are an extension of the state executive branch. The Attorney General of at least one state has recognized the need to provide a Guardsman with legal representation at trial. As former Attorney General John J. Dillon of Indiana has written:

> As the law is found today in Indiana, the National Guardsman is placed in the inequitable position of being called out in case of riot or insurrection to protect the state and

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28. *See*, WYO. STAT. § 19-78.27 (1957 *as amended* 1969).
29. VT. STAT. ANN tit. 13, § 904.
30. ORE. REV. STAT. § 399.225(2). Pennsylvania Military Code, PA. STAT. ANN. tit. 51, § 1-841, § 1-842.

7.46 PROVISION OF COUNSEL IN LITIGATION INVOLVING THE GUARD OR GUARDSMEN

		Cases Involving Individual Guardsmen	
	Cases Involving the Guard	State Defends For Act in Line of Duty	State Defends if Guardsman Negligent
Arkansas	A.G. only counsel		No
California	A.G. only counsel	Yes	Yes—A.G. or J.A.G.
Colorado		Yes	
Hawaii		Yes	
Illinois	A.G. only counsel	May	Yes—if in line of duty
Indiana	A.G. only counsel	Required	Yes—at option of A.G.
Iowa	A.G. may appoint J.A.G. as Asst. A.G.	Yes—may be J.A.G.	Yes—if in line of duty
Kansas	A.G. or other counsel	Yes	Yes—if committed on duty
Kentucky	A.G. or other counsel	Yes	Yes—if act lawful
Louisiana	A.G. only counsel	Yes	Yes—if in line of duty
Minnesota	A.G. or private counsel	No	No—may entertain claims
Mississippi		Yes	Yes—civil action only
Missouri	A.G. only counsel	No	No
New Hampshire	A.G. only counsel	Yes	Yes—unrestricted
New Jersey	A.G. or J.A.G.	Yes—may be J.A.G.	Yes—if in line of duty
New Mexico	A.G. only counsel	Yes	Yes—if committed on duty
North Dakota			
Ohio	A.G. or special counsel	Yes	May provide defense
Oklahoma		Yes (J.A.G. or insurer)	No
Oregon		Yes (insurer)	
Pennsylvania	A.G. only counsel	Yes (insurer)	Insurer defends for vehicle use only
Puerto Rico	A.G. for some claims	Yes	
Rhode Island	A.G. or appointed by Governor	Yes	Yes—unrestricted
South Dakota		Yes (by J.A.G.)	
Tennessee		Yes	Yes
Texas			Yes—under normal circumstances
Utah	A.G. defended only action to date	Yes (by J.A.G.)	Yes—J.A.G. defends
Vermont	A.G. or insurer		No
Virginia	A.G. may select other		No
Washington			
Wisconsin	A.G. or other	Yes	Yes—unless bad faith or outside line of duty
Wyoming	A.G. or expert counsel	Yes	Yes—if in line of duty

public interests with the attendant threat of being subjected to civil or criminal prosecution for an act committed while performing his military duties. The expenses for the defense of any such action must be borne by the guardsman. No one will seriously contend that a guardsman may act with complete disregard for the civil laws while suppressing a riot unless martial law has been invoked, but it has been strongly contended that the state, whose interest the guardsman is protecting, should either defend or assume the costs of defense in actions brought against the guardsman for acts committed while performing his military duty. To deny this privilege is to create a state of apprehension about fulfilling and carrying out the orders of superiors in time of riot which will necessarily inhibit the guardsman's effectiveness. We should not ask a guardsman to protect the state if the state is unwilling to protect the guardsman.[31]

31. Indiana Attorney General Opinion 66, December 30, 1967, at 17-18.

A number of states specifically exempt malicious acts or acts performed outside the scope of military duties from the requirement of state representation. However, what is or is not in the line of duty is itself a determination which normally would be made in a judicial proceeding.

It is not known whether the states that provide defense for an individual pay, in addition to the attorneys' fees, witness fees for the defense, defendant's court costs, costs for transcripts of records and abstracts, and judgments decreed against the Guardsman. Iowa and Oregon require the plaintiff to file a security deposit to be applied to court costs should judgment be in favor of the defendant.

Guard units need established procedures to convene a board of investigation to inquire into the facts and circumstances of any act of a Guardsman which culminates in injury or death to any person, or in any damage, confiscation or other deprivation of private property. Such investigation reports usually contain opinions concerning the culpability of the Guardsman, with recommendations for disposition. Without statutory subpoena power to compel the attendance of witnesses, such an investigation may be one-sided. However, an early recitation of facts by Guardsmen who were witnesses to the incident, as well as a voluntary statement by the Guardsman as a party to the investigation, would be helpful to the Adjutant General and the Attorney General to assist them in disposing of the case.

7.47 Compensation and Benefits

Compensation for Guardsmen is set by state statute C.O.A.G. data indicate that, in most states, it is the same as federal pay for comparative rank. A few states provide for minimum daily pay or for additional per diem stipend. A survey conducted by the National Guard Bureau obtained data from forty-eight states and found that members of the Guard in seventeen states receive the same pay and allowances they would receive for active federal service, while in twenty-nine states they are paid a minimum or augmented rate that is higher than that paid for federal service.[32]

In almost all states, Guardsmen receive workmen's compensation at the same rate as other state employees, generally computed from their earnings as a Guardsman. Some states apparently feel that to base workmen's compensation upon a Guardsman's pay in state service may ignore the probability that he receives less income than from his usual civilian occupation. These states have enacted legislation permitting a choice of pay base, military or civilian, or assuming a wage which would automatically qualify the recipient for the maximum compensation award.

Wisconsin is the only state which reports that it has special legislation to provide for death and disability benefits in addition to other benefits when death or disability of the Guardsman results from public insurrection. Kansas and Texas have enacted specific disability and survivor benefits for Guardsmen instead of relying upon the general state workmen's compensation laws.

The Kerner Commission recognized the National Guard as the only organization with sufficient manpower, equipment, and appropriate organization materially to assist local police in riot control operations.[33] Guardsmen are subject to wide variations in their rights, liabilities, immunities and benefits, depending on the laws of their states. Some aspects of their rights and duties may be unclear to them, or even unclear as a matter of law. Hopefully, some of these problems can be clarified and resolved by analysis and subsequent action.

32. Memorandum from the National Guard Bureau to Adjutants General, 31 August 1970.

33. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 274 (1968).

7.5 State Bureaus of Investigation and Identification

State bureaus of investigation and identification now exist in virtually all jurisdictions. They may be identification units only, or statewide investigative agencies, or may combine these functions. They may have power to initiate investigations, or be limited to assisting local authorities on request. They generally have laboratory facilities which are available to local authorities. Their investigators usually have the powers of a peace officer. Such bureaus are of fairly recent origin and represent a realistic response to the impact of technology and training on crime control.

7.51 Establishment of State Bureaus

In some jurisdictions, bureaus of investigation and identification are under the Attorney General's authority. In others, he may use their facilities. This section describes the organization and function of such bureaus. Very little has been published about state crime bureaus and the data herein are derived primarily from C.O.A.G. questionnaires and review of state statutes. State plans filed with the Law Enforcement Assistance Administration were also reviewed for pertinent data.

The President's Commission on Law Enforcement and Administration of Justice made several recommendations relating to identification and investigative services:

> The Commission has found that the police are not making the most of their opportunities to obtain and analyze physical evidence. They are handicapped by technical lacks . . . the Commission strongly believes that it should be an important goal of the police to develop the capacity to make a thorough search of the scene of every serious crime and to analyze evidence so discovered.[1]

It further said that central metropolitan or state laboratory facilities should be provided and that specialized state or metropolitan personnel should aid smaller departments with major investigations and in specialized services.[2]

The Commission's Task Force on the Police suggested that both state and local facilities were necessary:

> The first requisite in establishing a State program of laboratory service is to determine what can be done best by the State and what on the local or regional level. Much laboratory work is of a simple, routine nature, . . . Consequently, local units may well maintain the small laboratory facilities concerned with primary analysis and forward all complex work to a State or regional agency or the F.B.I. Laboratory for detailed or specialized analyses.[3]

The Task Force concluded that: basic laboratory services should be available on a local or regional basis, to perform routine investigation; states should provide complex central facilities and services free of cost to local agencies; consideration should be given to consolidating laboratory services for use by medical examiners, law enforcement personnel, and related agencies in one facility; and consideration should be given to placing all police laboratories in a state under the direction of a single administration.

As the accompanying table shows, almost all jurisdictions now have state bureaus of investigation and identification, most of which are of fairly recent origin. Most are located in departments of public safety or state police. In eight states, the Attorney General is in charge of a state bureau, and in some other states he exercises some of its functions. Generally, such bureaus are part of an agency whose head is named

1. The President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 118 (1967).
2. *Id.* at 122.
3. Task Force on the Police, TASK FORCE REPORT: THE POLICE, 92 (1967).

Alabama	Investigation and Identification Division in Department of Public Safety
Alaska	Components of the Department of Public Safety
Arizona	Criminal Identification Section of the Department of Public Safety
Arkansas	Bureau of Identification and Information in Department of State Police
California	Bureau of Criminal Identification and Investigation in Department of Justice
Colorado	Bureau of Investigation in Department of Public Safety
Connecticut	Criminal Intelligence Division in Detective Division; Identification Division in State Police
Delaware	State Bureau of Identification in the State Police
Florida	Crime Laboratory Bureau in Department of Law Enforcement
Georgia	Bureau of Investigation in Department of Public Safety
Guam	Attorney General supervises "special investigation". Other functions in Department of Public Safety
Hawaii	Attorney General may hire investigators and may operate an identification system
Idaho	Department of Law Enforcement Investigation
Illinois	Bureau of Criminal Identification in Department of Public Safety
Indiana	Bureau of Criminal Identification and Investigation in State Police
Iowa	Division of Criminal Investigation and Bureau of Identification in Department of Public Safety
Kansas	Bureau of Investigation in Attorney General's Office
Kentucky	Bureau of Criminal Identification and Statistics in Department of Public Safety
Louisiana	Bureau of Criminal Identification in Department of State Police
Maine	Bureau of Criminal Identification in State Police
Maryland	Duties assigned to State Police
Massachusetts	Crime laboratory in Department of Public Safety
Michigan	Records and Identification Division in Detective Division in Department of State Police
Minnesota	Bureau of Criminal Apprehension in Department of Public Safety
Mississippi	Bureau of Investigation in Department of Public Safety
Missouri	State Highway Patrol has authority to investigate any crime
Montana	Bureau of Criminal Identification and Investigation under Prison Warden
Nebraska	State Patrol has some investigation authority
Nevada	No state bureau of investigation
New Hampshire	No state bureau named in statutes
New Jersey	State Bureau of Investigation in State Police—under Attorney General
New Mexico	Bureau of Criminal Identification
New York	Bureau of Criminal Investigation in Division of State Police
North Carolina	State Bureau of Investigation in Department of Justice
North Dakota	Bureau of Criminal Identification and Apprehension in Attorney General's office
Ohio	Bureau of Criminal Identification and Investigation in Attorney General's office
Oklahoma	State Bureau of Investigation in Office of Governor
Oregon	State Bureau of Identification and Investigation in State Police Department
Pennsylvania	Bureau of Criminal Justice Statistics in Department of Justice; Department of State Police
Puerto Rico	Various investigation components of Police of Puerto Rico
Rhode Island	Division of Criminal Identification in Department of the Attorney General
Samoa	Attorney General exercises all law enforcement functions
South Carolina	Law Enforcement Division
South Dakota	Division of Criminal Investigation in Attorney General's office
Tennessee	Bureau of Criminal Identification in Department of Public Safety
Texas	Bureau of Intelligence and Identification in Department of Public Safety
Utah	State Bureau of Criminal Identification in Department of Public Safety
Vermont	Bureau of Criminal Investigation in Department of Public Safety
Virgin Islands	Bureau of Investigation in Department of Public Safety
Virginia	Central Criminal Records Exchange in Office of Attorney General
Washington	Components of the Department of Public Safety
West Virginia	Criminal Identification Bureau in Department of Public Safety
Wisconsin	Law Enforcement Services Division in Department of Justice
Wyoming	State Board of Identification

by the Governor. In some jurisdictions, no special bureau of investigation or identification exists, but at least some of its duties are performed by various components of a state police or public safety agency.

The agency's title does not always reflect its duties accurately For example, Louisiana has a Bureau of Criminal Identification within the Department of State Police which keeps identification files, but also assists state and local officials in felony cases.

The trend has been to merge bureaus of identification and investigation into larger agencies. The Indiana Criminal Identification and Investigation Bureau was established in 1927; in 1933, it was combined with the traffic patrol to form the State Police. In Florida, such facilities were initiated by the sheriffs' association and functioned as the Florida Sheriff's Bureau. In 1967, the Bureau's powers and duties, the Narcotics Bureau of the Department of Health, and most of the Attorney General's criminal investigation powers were made part of a Department of Law Enforcement.[4] As noted in chapter 7.1 of this Report, a number of states have recently consolidated law enforcement functions into a single state agency.

At least one state, Oregon, has a crime detection laboratory established with a medical school at a state university.[5] Ohio's Crime Commission recommended establishing a State Pathologist and Toxicologist, independent of the crime laboratory, and attaching it to a state medical school.[6] One study suggested that laboratories might be established as an arm of the court, or an independent, scientific organization:

> A substantial number of criminalists, who are laboratory directors, propose to make crime laboratories independent organizations serving both the prosecutors and defense attorneys, as well as law enforcement agencies.[7]

7.52 The Attorney General's Role

The N.A.A.G. adopted a recommendation that the Attorney General should have full access to services of a state bureau of investigation and should have directly assigned to him those services that are necessary to fulfill the responsibilities of his office. A supporting statement said that the Attorney General should have access not only to all information available from such a bureau but, upon his request, should have assigned to his office the services of such state investigative and law enforcement personnel as are required to fulfill his responsibilities. This stops short of recommending that all identification and investigation functions should be under the Attorney General, but leaves this to the individual Attorney General's discretion.

Attorneys General, however, indicate on C.O.A.G. questionnaires that they favor placing such bureaus under their authority. Of thirty-eight incumbent Attorneys General, thirty said that a state bureau of investigation should be under the Attorney General. Of one hundred and four former Attorneys General, seventy-eight concurred in this position. Thus, about three-fourths of respondents thought the Attorney General should have authority over state bureaus of investigation.

State bureaus of investigation and identification are under the Attorney

4. Letter from Commissioner William L. Reed, Florida Department of Law Enforcement, to Patton G. Wheeler, August 3, 1970.
5. Office of the Governor, State of Oregon, PRIORITIES FOR LAW ENFORCEMENT, B-1, May 1969.
6. Ohio Crime Commission, FINAL REPORT, 4.
7. John Jay College of Criminal Justice, *Study of Needs and the Development of Curricula in the Field of Forensic Sciences*, in CRIME LABORATORIES—THREE STUDY REPORTS, Office of Law Enforcement Assistance, 9 (1968).

General in California, Kansas, New Jersey, North Carolina, North Dakota, Ohio, South Dakota, and Wisconsion. State bureaus of identification are under the Attorney General in Rhode Island and Virginia. The 1970 Georgia Legislature passed a bill that would have transferred the Georgia Bureau of Investigation from the Department of Public Safety to the Department of Law. The bill, however, was vetoed by the Governor. All Bureau employees who elected to transfer to the Department of Law would have retained their merit system status.

The Virginia Central Criminal Records Exchange is in the Attorney General's office. It handles criminal records for local, state and federal agencies. Wyoming has a State Board of Identification which aids local law enforcement officers with respect to crime data; the Attorney General serves on this five-man board. Wyoming does not have central investigative facilities but planned to request legislation establishing the position of State Investigator under the Attorney General. Hawaii has no central crime bureau, but the Attorney General may, as the public service requires, hire investigators who have peace officer powers. He also has statutory power to operate identification systems for statistical studies. Rhode Island has a statutory Division of Criminal Identification in the Department of the Attorney General, which keeps criminal records. The Attorney General is empowered to assist other law enforcement officers in criminal investigations which involve identification by fingerprints.

In 1969, the crime laboratory division of the Wisconsin Department of Justice was renamed the Law Enforcement Services Division and given expanded responsibilities with regard to criminal identification and statistical records. The Kansas Bureau of Investigation was placed in the Attorney General's office when it was created in 1939.

In several states, bureaus have been developed by the Attorney General, then later removed from his jurisdiction. Iowa's Bureau of Criminal Investigation was organized in 1924 as part of the Department of Justice. In 1939, it was transferred to a new Department of Public Safety. More recently, the Bureau of Criminal Apprehension was transferred from Minnesota's Attorney General to the Department of Public Safety in 1970. New Mexico's identification bureau was transferred from the Department of Justice to the State Police.

Of the states which have recently created such bureaus, there has been no consistency in where they were placed. Idaho established a Department of Law Enforcement Investigation in 1968. Ohio's bureau of investigation was established by statute the same year, but placed under the Attorney General. Washington established a state crime information center in 1967, in the State Patrol.

In those jurisdictions where the Attorney General has control of a state bureau, his authority may be limited. The Director of the Kansas Bureau of Investigation is appointed by the Attorney General, but must be approved by the Senate. The Director of State Police in New Jersey is appointed by the Governor, although he is located administratively under the Attorney General.

7.53 Organization and Administration

The organizational structure of state bureaus varies greatly. A few are described here. In Connecticut, for example, the State Police agency is headed by an appointed Commissioner. It includes a Criminal Intelligence Division, a Detective Division, and an Identification Division. The Intelligence Divi-

8. Letter from Assistant Attorney General Harold N. Hill, Jr., to Attorney General John B. Breckinridge, April 8, 1970.

sion is concerned with narcotics, gambling, organized crime, and other areas. The Identification Division has a Section for identification of fingerprints, documents, and firearms, a Photography Section, and a Polygraph Section.[9]

Iowa has a Division of Criminal Investigation and Bureau of Identification in the Department of Public Safety. The Division includes: an Investigative Section, which accepts requests for investigative services and works directly with the local law enforcement officer, prosecutor, or mayor who makes the request; an Identification Section, which collects, preserves and disseminates criminal record information, with the cooperation of local agencies; and a Technical Laboratory. The Division is described as "a service organization which cooperates with, and supplements, the work of local officers of the State." It is not a police unit, but is a central agency to which local units may come for help. It also investigates matters involved in state government functions.[10]

South Dakota's Division of Criminal Investigation employs twelve agents. One is the Chief, whose duties are primarily administrative; one is primarily an identification agent; one conducts training; one is a polygraph operator; and eight are engaged in investigative work.[11]

The Ohio Bureau of Criminal Identification and Investigation is by statute a part of the Attorney General's office. It is permitted to operate a laboratory and have a staff of investigators and technicians, keep statistics, assist in the prevention of crime and engage in other such activities relating to solving and controlling crime. Its employees do not have peace officer powers. It is located at a state penal institution and also has laboratory facilities at two other locations. A 1970 report said that the B.C.I. was fulfilling a great need, but its facilities and budget were too limited.[12] The Kansas Bureau of Investigation, in the Attorney General's office, has three divisions: Investigation, with a supervisor and twenty-one field agents, who reside in various cities; reports and identification with a supervisor and ten civilian employees; a crime laboratory, with a supervisor and ten civilian and five agents.[13]

The Bureau of Criminal Identification and Investigation in the California Department of Justice has broad statutory duties, including both identification and investigation. The Department also includes a Bureau of Criminal Statistics and a Bureau of Narcotic Enforcement. The Bureau of Criminal Identification and Investigation keeps files of fingerprints, photographs, *modus operandi* and other matters. It conducts special investigations on request of county judges, grand juries and legislative committees. In 1961, the state was divided into two areas for Bureau services.

Some states direct that the crime bureau cooperate with other jurisdictions. Ohio law, for example, directs the Attorney General's Bureau of Criminal Identification and Investigation to cooperate with bureaus in other states and with the F.B.I.

Training requirements, as reported on C.O.A.G. questionnaires, appear to vary greatly. Colorado and Louisiana are among the states which report that their bureau of identification or investigation personnel are not subject to formal training requirements, but are given on-the-job training. New Jersey, on the other hand, is among the states which operate academies for law enforcement personnel, which includes training in investigation and identification. In California, two years of college or the equivalent are required for fingerprint personnel, who then receive several weeks of classroom training followed by supervised on-the-job training; productivity is reached in six or seven months.

Various training programs may be used to supplement training furnished by the agency, according to information furnished to C.O.A.G. Iowa reports, for example, that Division of Criminal Identification personnel have utilized the following facilities: the Iowa Law Enforcement Academy; the F.B.I. National Academy; the Southern Police Institute; the Keeler Polygraph Institute; the Internal Revenue Service Intelligence Unit Training Program; the U.S. Secret Service; the Questioned Document Examiner Training Program; and, a Firearms Identifications course offered by the Houston, Texas Police Department. Maine's Bureau of Criminal Identification sends personnel to ballistics, fingerprinting and photography schools, and conducts its own in-service training programs. Maine's Criminal Division in the Attorney General's office sends its investigators to programs on homicide, drug abuse and organized crime, and sends its attorneys to prosecutors schools and criminal law seminars.

A considerable amount of staff time is used in testifying in court. California reports that technical personnel may anticipate 3 to 3-1/2 days per week in the laboratory, with 1-1/2 to 2 days devoted to travel and court testimony. All technically trained laboratory staff qualify as expert witnesses in courts of all levels in the state. Staffing projections for any crime laboratory would have to take into account time for court appearances.

9. Connecticut, THE ADMINISTRATION OF CRIMINAL JUSTICE IN CONNECTICUT, 6 (May, 1969).
10. Memorandum prepared by Division of Criminal Identification and included in letter from Solicitor General Richard E. Haesemeyer to Attorney General John B. Breckinridge, March 20, 1970.
11. Letter from Assistant Attorney General Leonard E. Andrea to Attorney General John B. Breckinridge, June 5, 1970.
12. Ohio Law Enforcement Planning Agency, Ohio Department of Urban Affairs, 1970 OHIO COMPREHENSIVE LAW ENFORCEMENT PLAN, 115.
13. The Governor's Committee on Criminal Administration, APPLICATION FOR ACTION GRANT BY STATE OF KANSAS, 40-41, (1969).

7.54 Investigative Functions

State bureaus of investigation may be given general investigatory power, or specific statutory duties. In North Carolina, for example, specific assignments are to investigate mob violence, election frauds, gaming laws, and crimes when requested by local authorities. Such investigations are to be made at request of the Governor. The Kansas Bureau of Investigation investigates major crimes at the Attorney General's direction; in practice, it enters only at the request of a local agency. The Attorney General also investigates if evidence indicates malfeasance or negligence on the part of public officers.

Investigative assistance appears to be welcomed by local authorities when it is provided upon their request. Such assistance is, for example, the major activity of the Kansas Bureau of Investigation.[14] It may be limited to certain circumstances, as in Florida, where investigative assistance is provided only after the case has proceeded to a point such that local resources are not sufficient to solve it, or local officials cannot cope with jurisdictional problems.[15] Ohio's statutes authorize the Attorney General's Bureau of Criminal Identification and Investigation to investigate any statewide or intercounty criminal activity when requested by local authorities, but specify that he shall not impair local authority or prerogatives.[16]

Most Attorneys General employ investigators, who may have general responsibilities or whose activities may be limited to one area, such as consumer protection. In Montana, for example, the position of criminal investigator in the Attorney General's office is estab-

14. Interview with Assistant Attorney General Gary L. Rohrer, in Topeka, Kansas, October 22, 1970.
15. Florida Inter-Agency Law Enforcement Planning Council, FLORIDA'S COMPREHENSIVE PLAN 1970-1975, 156.
16. OHIO REV. CODE ANN. § 109.54.

lished by statute. He is to "assist local, state, and federal law enforcement agencies in solving felonies committed in the state", to assist law enforcement schools, and to cooperate with the State Bureau of Criminal Identification and Investigation.[17] The Maine Attorney General's office has a Criminal Division staffed by two investigators, although the State Police has a bureau of Criminal Identification. The Division tries murder, gambling and narcotic cases, advises local prosecutors, and seeks to coordinate criminal prosecutions and investigations.

The two investigators employed by the Vermont Attorney General investigate complaints against attorneys and homicides, assist state's attorneys, and investigate "anything else where the Attorney General's office is involved", according to a C.O.A.G. questionnaire reply. Hawaii has no state investigation bureau, but the Attorney General may appoint investigators who have the powers of a police officer or a deputy sheriff. The Attorney General of Missouri may appoint investigators necessary to carry out his duties;[18] the highway patrol also has full authority to make investigations connected with any crime.[19] Alabama reported to C.O.A.G. that the Attorney General's investigator does not have peace officer authority; such authority was to be requested from the legislature.

An increasing number of Attorneys General have established special investigative-prosecutorial units to combat organized crime. Some of these are described in Section 6.8 of this Report. All of these include investigators, with statewide jurisdiction, but their services are confined to organized crime problems.

The Attorney General may be specifically authorized by law to use the investigative authority of other agencies. In Michigan, for example, the Attorney General may employ any member of the State Police in an investigation or any other matter under his jurisdiction. The Attorney General of Oregon may call upon the Department of State Police or any other peace officer or department for assistance, when undertaking an investigation at the direction of the Governor.[20]

7.55 Identification and Records Functions

Criminal identification must be centrally administered to be effective, for its utility depends on having extensive files, involving large numbers of offenders. For this reason, the states began fairly early to develop central identification systems, consisting primarily of fingerprints. In 1930, with the active support of police chiefs, Congress authorized the F.B.I. to serve as a clearinghouse for identification. State and local cooperation in supplying prints to the F.B.I. is voluntary, but has resulted in a collection of almost 34 million criminal and 120 million noncriminal prints.[21]

Statutes may merely charge a state bureau with maintaining files, or may specify their content. The Colorado Bureau of Investigation is required to ". . . establish and maintain identification files".[22] Oklahoma's Bureau of Investigation must "keep records of felons and habitual criminals and cooperate with local law enforcers to establish a complete state system of criminal identification."[23] Bureaus may also be required to submit periodical statistical reports: Local units may be required to submit copies of fingerprints and other identification data, or their cooperation may be wholly voluntary.

17. MONT. REV. CODES ANN. § 82-416 (1969).
18. MO. ANN. STAT. § 27.020.
19. MO. ANN. STAT. § 43.180.
20. ORE. REV. STAT. ch. 180, tit. 18, § 180.070-180.090.
21. Bruce Smith, POLICE SYSTEMS IN THE UNITED STATES, 2d ed., 263 (1960).
22. COLO. REV. STAT. ANN. § 3-24-12 (1963).
23. OKLA. STAT. ANN., tit. 74.5157 (1969).

The National Crime Information Center is a computerized file operated by the Federal Bureau of Investigation. It was inaugurated in 1967 to make information concerning wanted criminals and stolen property available to local, state and federal law enforcement agencies. At the end of the 1969 fiscal year, it contained 1,100,000 active records and was handling over 35,000 transactions per year.[24] Most jurisdictions have given the state bureau of investigation and identification responsibility for N.C.I.S. participation, and for developing interface with the federal system.

Michigan's State Police, for example, operate the Michigan Law Enforcement Network, which is the state's computerized on-line, real-time data storage and retrieval system, and which interfaces with N.C.I.S. Its "files" include data on wanted persons, stolen vehicles, and stolen property. One hundred and forty-five direct access terminals are placed in one hundred and twenty police agencies around the state, so arranged as to enable any police officer or car to be in continuous radio contact with a terminal. About eight hundred file entries and cancellations and over eight thousand inquiries are processed daily. The system also has message-switching capability to enable messages to be switched between terminals and processes over twenty thousand such messages a day.[25] Other states have or are establishing such facilities, so that all states will be linked together in a crime information network.

The content of central files may be limited or complex. Maryland's Investigation-Identification Division, for example, maintains the following records: criminal; fingerprints, including latent fingerprints; central alphabetical files; missing, wanted, and deceased persons; departmental investigations and arrest reports; stolen cars, including reports of recoveries, cars stored and released, and garage inspection reports; stolen and lost property; property record receipts; statistics on crime, arrest, and other facets of criminal law enforcement; and miscellaneous investigation and reports. A sub-unit, the State Control Crime Records Bureau, maintains records in cooperation with the National Crime Information Center.[26] Puerto Rico reports to C.O.A.G. that the Attorney General's office is planning to establish a system of uniform criminal statistics in which the police, the courts, and the prisons participate.

The Ohio Bureau of Criminal Investigation maintains manual criminal history files. State law requires that police agencies forward information on all arrested felons to the Bureau. Legislation was introduced to extend this to misdemeanants, which would have required revising the system completely to handle the increased workload.

7.56 Crime Laboratories

Scientific analysis has become essential to the detection of crime and identification of offenders. Law enforcement officers are present at only a small percent of crimes, and must rely on analysis of evidence in solving and prosecuting most offenses. It has also been pointed out that Supreme Court decisions have forced police to rely less upon interrogation and investigation, and more upon objective evidence. Crime laboratories will become even more essential to the administration of

24. U.S. Dept. of Justice, 1969 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES, 19.
25. Michigan Commission on Law Enforcement and Criminal Justice, FIRST COMPREHENSIVE PLAN FOR MICHIGAN, 1969-70, 11-45.
26. State of Maryland, Governor's Commission on Law Enforcement and the Administration of Justice, PLANNING GRANT APPLICATION, 33 (1968).

stice as equipment and techniques improve.

Although complete data are not available, most states now have a crime laboratory. Many of these are new; a 1966 survey found that there were seventeen states in which no agency at the state, county or city level had a crime laboratory.[27] The International Association of Chiefs of Police 1969 *Comparative Data Report* classified state crime laboratories by the functions they performed.[28] No such functions were shown for nine states: Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Washington. The forty-one others performed the following functions: fire-arms identification—34; document analysis—28; chemical analysis—27; tool mark identification—34; photography—38; film development—37; and polygraph examination—34. In thirteen states, crime scenes were processed by a mobile laboratory and in twenty-nine they were not. Thirty-five states reported that they provided some laboratory services for local police agencies and seven that they did not. Officers of thirty-seven states testify as expert witnesses in cases handled by other police agencies and officers of four states do not. Thirty-six state crime laboratories conduct polygraph examinations for other police agencies and three do not.

C.O.A.G. data, however, indicate that some of the nine jurisdictions listed as not having crime laboratories actually do have at least some facilities.

Equipment available for analysis of evidence is becoming increasingly more expensive and sophisticated. A 1968 institute on police laboratory operations, for example, concluded that minimum equipment should include an ultra-violet and infra-red spectrophotometer, an emission spectograph, a gas chromatograph, thin layer and paper chromatographic and equipment. Additionally, instruments such as the X-ray diffraction unit, the gamma spectrometer, and the mass spectrometer should be acquired by large laboratories capable of providing service on a regional basis. When such equipment is acquired, it is possible for the laboratory to engage in on-going research in cooperation with universities. Such research programs may be utilized not only to improve methods of processing evidence, but also for teaching.[29]

A 1966 study set up an advisory board to help define laboratory standards. It determined that a model laboratory should serve a minimum of 500,000 people with at least 5,000 Part 1 offenses per year. It would employ twelve to twenty scientific employees, with a capital budget of about $200,000. It would offer technical services and analyses in: physiological fluids; hairs and fibers and other trace evidence; comparative microscopy; wet chemistry; instrument analysis; document examination, writings, typewriting; polygraph; photography; latent prints, crime scene services.[30] The study found that few crime laboratories could be considered fully equipped. It also found that much research work was needed to apply new scientific techniques and tools to criminalistics. Continuing education of personnel was considered essential to keep up with new developments and to assure that equipment was properly used.

Information reported on C.O.A.G. questionnaires reflects this eneven range of facilities. California's crime laboratory, for example, employs a forensic chemist and six criminologists. The Georgia laboratory has facilities for handwriting analysis, questioned documents, ballistics, autopsies and forensic medicine. Connecticut's crime laboratory has facilities for the analysis of fingerprints, firearms, and physical evidence, but none for chemical analysis. Chemical work is handled by the Department of Health laboratory. South Dakota reports to C.O.A.G. that its services include photographic processing, firearms comparisons, fingerprints, typewriting and handwriting examinations, ultra-violet and infra-red work, permanent and portable polygraph, and basic chemical examinations; however, these services are limited by insufficient personnel and facilities.

Idaho reported, in its 1969 comprehensive criminal justice plan, that forensic laboratory facilities were inadequate and that some analyses had to be made by the F.B.I. laboratories; this resulted in problems due to the time required and in the necessity for F.B.I. personnel to travel to Idaho to testify concerning the results.[31] Massachusetts' criminal justice plan for 1969 reported that the state crime laboratory was underequipped, having only five of the nine major pieces of equipment they considered essential, and was also understaffed, with inadequately trained personnel.[32]

Michigan, on the other hand, reported in its crime control funds grant application that it had two laboratories. The Crime Detection Laboratory, administered by the Michigan Department of Public Health, had seventeen employees who handled over 4,300 evidence analyses per year. The State Police Crime laboratories conducted a wide range of tests, 65 percent of them for local police. Equipment included a sound spectrograph for use in voice identification.[33]

Some larger states are establishing regional crime laboratories. Ohio's crime commission commented that it had been favorably impressed with the work of the Attorney General's crime laboratory operations; however, "the repeated need, implicit in the interviews we have had with local law enforcement officers and professional criminological personnel, is that more such facilities are needed and, from the operational standpoint, these should be regional in nature."[34] Georgia has a laboratory in the capital and a branch in another city. Pennsylvania and Michigan established satellite crime laboratories in 1969.[35]

Florida is considering a regionalized system consisting of a headquarters laboratory, three regional laboratories, and three satellite laboratories. The headquarters laboratory would conduct difficult tests requiring sophisticated equipment. It would also conduct research and train personnel. The regional laboratories would be equipped to provide the basic scientific examinations involved in a criminal investigation and to conduct a limited crime scene search service. Satellite labs would offer limited services depending on the frequency of requests for assistance in a particular area. For example, a high incidence of narcotics cases, and consequent court appearances, might justify a laboratory limited to such services. This regional system is intended to offer faster service, eliminate conflicts in court appearances, and reduce time spent in traveling.[36]

Some state crime laboratories charge for their services, although this is not common. The I.A.C.P. survey reported that thirty-seven states provide

27. John Jay College, *supra* note 7 at 5.
28. I.A.C.P. *COMPARATIVE DATA REPORT* 1969, 37.
29. Henry L. Guttenplan, *The National Institute on Police Laboratory Operations*, POLICE CHIEF, 38 (March-April 1970).
30. John Jay College, *supra* note 7 at 10.
31. Idaho Law Enforcement Planning Commission, COMPREHENSIVE PLAN 1969, 2-16.
32. The Commonwealth of Massachusetts, A SUMMARY OF THE COMPREHENSIVE CRIMINAL JUSTICE PLAN FOR . . . CRIME PREVENTION AND CONTROL (1969).
33. Michigan Commission on Law Enforcement and Criminal Justice, FIRST COMPREHENSIVE PLAN FOR MICHIGAN, 1969-1970, 11-45, 11-3.
34. Ohio Crime Commission, FINAL REPORT, Science and Technology Committee, 42 (1969).
35. William H. Franey, *State Police and Highway Patrols*, THE BOOK OF THE STATES 1970-71, 421.
36. Letter from Commissioner William L. Reed, Florida Department of Law Enforcement, to Patton G. Wheeler, August 3, 1970.

services for other agencies without charge, while two do not.[37] Wisconsin's Crime Laboratory Bureau is required by law to charge local units $17.50 per hour for its services. This is probably far below the actual cost of services, and it could have the effect of limiting local use of such facilities.

7.57 Other Functions

State bureaus of investigation and identification may be assigned other duties involving assistance to local law enforcement units or special functions. The Investigation-Identification Services Division of Maryland's State Police, for example, administers the private detective and gun registration laws, which require licensing of qualified private detectives and gun dealers. The pistol registration section supervises the approval of all pistol purchases.

An increasing number of bureaus publish information bulletins for local law enforcement agencies. Georgia, for example, issues a weekly bulletin listing all wanted and missing persons, stolen property and automobiles, prison releases and any items of current interest. Over 1,100 copies are furnished to law enforcement agencies in Georgia and other states.[38] Some of these are described in Section 3.63 of this Report.

The Division of Criminal Investigation of the South Dakota Attorney General's office is among the bureaus which conduct training courses for law enforcement personnel. One two-week course in 1969, for example, covered topics ranging from interviews and signed statements to crime scene skills. It was conducted in cooperation with the University and the state sheriffs and peace officers' Association. A week-long police management school was held the same year, with the F.B.I. actually conducting the school, and offering training in budget preparation, personnel evaluation, and related subjects.

The President's Commission on Law Enforcement and Administration of Justice emphasized the need for research in all areas of criminal justice. A report prepared by the Institute for Defense Analysis for its Task Force on Science and Technology urged that criminal justice agencies, with more than one thousand employees, should establish operations research groups with professionally trained scientists, mathematicians, engineers, and statisticians. Such groups would be "an important mechanism for innovation."[39] State bureaus of investigation and identification, with their scientific and statistical resources, would seem to be logical agencies for conducting such research.

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37. I.A.C.P., *supra* note 28.

38. Georgia Office of Crime and Juvenile Delinquency Prevention, 1970 ACTION PROGRAM, A-12.

39. Institute for Defense Analyses, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY, 82 (1967).

CONSULTANT'S REPORT*

by
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Introduction

Historically the office of the state Attorney General is derived from that of the Attorney General of England, the chief law enforcement officer. However in this country, from an early date, the enforcement of the criminal law in the states was a matter of special concern in counties and cities. County and city prosecutors have had the primary responsibility of prosecuting crime, with the state Attorney General frequently playing only a minor role.

Through common-law powers, sometimes set forth in state statutes, state Attorneys General retain the power to supersede a local prosecutor in the initiation or the continuation of a particular prosecution. Also in many states the appellate phase of the criminal prosecution is handled by the Attorney General, which places important responsibilities on him in the formulation of the criminal law by the appellate courts. Usually, too, once state prosecutions reach the Supreme Courts of the United States, the state Attorney General presents the state's position before the Court.

Practices vary from state to state, and in a number of states the Attorney General plays practically no role in the enforcement of the criminal law at all. Even when he plays a substantial role, it is usually a partial one, leaving the state with a fragmented enforcement of its criminal law.

Most Attorneys General do not wish to take over the responsibilities of the local prosecutors; and it is clear that local prosecutors are unwilling to subordinate their prosecution function to the powers of the Attorney General. Thus, in defining a realistic role for the state Attorney General in the enforcement of the criminal law, one must develop it around the traditional patterns of local prosecution existing in the states today. Nevertheless, it is important to recognize that present law enforcement practices have been generally inadequate, and both county and state law enforcement efforts to deal effectively with the crime problem are especially vulnerable to public criticism.

One need not go into a detailed discussion of the problems of our large cities, or the turbulence of community conditions in practically every state in the country, leading to increasing acts of violence, corruption, fraud, and general citizen disillusionment, to recognize that every state must have an urgent agenda for the improvement of its law enforcement processes and system of justice. Many of the problems facing the states are based on antiquated procedures and inefficient practices. The threats to the citizens of the states posed by crime, pollution and consumer exploitation have grown in such magnitude that state wide action is necessary, rather than efforts limited to a county or a city.

Statewide efforts in these critical areas of concern require the leadership of an official with statewide pow-

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*This report relates directly to the subject matter and recommendation contained in the main report of the Staff of the Committee. Supporting reference material can be found either in the text or footnotes of that report.

ers in the area of law enforcement. The state Attorney General is uniquely that officer. In assuming such leadership, he need not interfere with the local powers of the prosecutor, but rather he can offer statewide resources, in the form of technical aid, training, and other forms of assistance which local police, prosecutors and judges need and would generally welcome. The discussion which follows, including specific recommendations leading to a dynamic role for the state Attorney General in law enforcement does not ignore existing impediments to law enforcement efforts of state Attorneys General. However, it offers the strategy of creative initiative, which poses no challenge to an honest local prosecutor who wants to exercise his own authority in enforcing the criminal law of the state. It should provide such a prosecutor the opportunity to improve his effectiveness and to be part of a coordinated statewide program of criminal law enforcement.

Enforcement of the Criminal Law

As we have already recognized, the prosecution of individual criminal cases is basically the responsibility of local prosecutors. For the greatest part, this prosecution has to do with what we have come to call street crime, crimes against the person or property which are visible, such as assault, burglary, robbery, rape and murder. In addition, a great deal of police and prosecutorial time is taken up with misdemeanor offenses such as disorderly conduct, public drunkenness, vagrancy, loitering and prowling. Indeed, the President's Crime Commission reported that in many large cities, 76% of police arrests relate to these misdemeanor offenses. Local police, prosecutors and judges are primarily occupied with the prosecution of street crime, rather than with other forms of crime such as organized and white collar crime, which have always been prevalent, but which have only recently become a source of great embarrassment to the states.

Street Crime

Although one may begin with the recognition that the prosecution of street crime is initially the responsibility of local prosecutors, it is important to view this area of law enforcement in a statewide perspective and to identify certain critical problems and needs. Most law enforcement officials, on local, state, and federal levels, have been willing to admit that the record of law enforcement efforts aimed at street crime has generally been one of failure. One can place the blame wherever one may choose. Whether one points to our inability to solve our social and economic conditions which may lead to rising crime rates; whether one points to inadequate funds and resources to staff and equip the machinery of justice, or whether one identifies outmoded procedures or antiquated penal codes as the underlying problem, we must still face the fact that American cities and towns are doing a very poor job of safeguarding its citizens against crime.

Overburdened by the pressures of increasing criminal caseloads, local police, prosecutors and judges are unable even to accurately define the extent of street crime in terms of reliable statistics and projections. They have been unable or unwilling to develop adequate training programs to improve the competence and efficiency of the professional people responsible for the day-to-day enforcement of the criminal law. For example, investigative methods have hardly changed in the past 100 years. Local crime laboratory services are often antiquated, making little application of existing scientific knowledge in other fields.

Often these problems cannot be met at the local level, due to lack of resources or competent personnel. It is here that the state Attorney General,

exercising creative initiative, can begin to assert leadership providing statewide training facilities and services, modern crime laboratory resources, specialized and expert investigative services and other forms of assistance which would buttress and strengthen local law enforcement efforts. The initiation of such services could well stem from statewide conferences called by the Attorney General to which would be invited police chiefs and local prosecuting attorneys. State planning commissions, on which most state Attorneys General serve, sometimes as chairmen, can well be the basis for the sponsoring of such conferences. At these meetings a consensus of needs and priorities can be determined under the guidance and leadership of the state Attorney General and his staff with the assistance of experts and consultants, and the strategy for meeting these needs can be laid out with the cooperative support of the local police and prosecutors.

The need for these statewide services cannot be overemphasized. A significant cause of the ineffectiveness of law enforcement efforts at the local level is often the incompetent or unprofessional performance of those entrusted with law enforcement responsibilities. Limited training programs will not suffice. Adequate investigative resources must be made available. The reference to a statewide crime laboratory is a case in point. We really don't know how many crimes are unsolved or unsuccessfully prosecuted because an investigator has not recognized, collected and submitted for scientific identification physical evidence which may have been the basis for providing a clue for further investigation or for identifying and convicting the offender.

The state Attorney General may wish to consider establishing a statewide criminal justice center which would maintain a modern crime laboratory and would provide training resources and facilities for all of the participants in the criminal justice system. Even judges could use the center for training purposes and the holding of sentencing institutes. It would also be in keeping with our concept of a balanced criminal justice system, which recognizes the defense lawyer as an integral part of that system, to use the center for the training of criminal defense lawyers. Chief Justice Warren Burger has emphasized that the effectiveness of our system of criminal justice depends on the competent and professional performance of all three major participants in the prosecution of a criminal case—the judge, the prosecutor and the defense lawyer.

The center could be staffed to carry out other important functions for the improvement of criminal justice in the state. For example, it could include a data bank which could contain an up-to-date record of crimes reported in every part of the state so that an accurate statistical base could be developed for determining the crime rate trends. In addition a research and demonstration arm of the center could engage in short-term and long-term projects, including experimental programs aimed at testing the impact of innovations on the effectiveness and efficiency of law enforcement practices. The existence of such a center, together with its research capabilities and its utilization as a place where participants in the criminal justice system could convene and discuss common problems would provide the state Attorney General with the information he would need to recommend legislation to respond to identified needs.

In addition, the Attorney General would also be put in a position to sponsor other criminal justice programs which would require the support of the public or professional organizations such as bar associations. Here too, the state Attorney General could assert creative initiative and leadership by convening conferences involving com-

munity leaders or local bar association officials for the purpose of employing their leadership roles for the support of needed legislation or other reforms in the criminal justice system.

It is important to emphasize that few legal officers have the prestige or statewide jurisdiction of the state Attorney General. A careful use of Attorney General conferences will not only serve to provide the support and cooperation of community leaders, bar association officials, or criminal justice participants, but it will also serve to establish the leadership role of the state Attorney General without creating any concern by local officials that their jurisdiction or powers are being usurped.

In addition, an important function the state Attorney General can perform in improving street crime law enforcement is the sponsoring of a general reform of the state's penal code. All authorities who have reviewed the problems confronting effective law enforcement have agreed that the lack of an up-to-date penal code is a substantial cause of many law enforcement troubles. Such penal code revision will usually require legislative action authorizing a code revision commission. The Attorney General can take the leadership in the drafting of such enabling legislation which should provide for the Attorney General to play a significant role in the work of the commission. After the commission has completed its responsibilities, the Attorney General will have a significant part to play in winning legislative approval of the commission's recommendations.

There are other opportunities available to a state Attorney General for the enforcement of the criminal law of his state. Most Attorneys General already have responsibility for the handling of appeals in criminal cases as well as post-conviction remedy petitions. The appellate responsibilities of the Attorney General, including his involvement in other post-conviction procedures, should provide a basis for his providing guidelines for local prosecutors to assure uniformity in application of the state criminal law and the compliance with statutory and constitutional requirements for valid prosecutions. These guidelines could be worked into the training programs discussed above.

An extremely important part of the Attorney General's reponsibility in the handling of appeals in criminal cases involves not only appellate procedures before the courts of his own state, but also relates to proceedings attacking state convictions brought in federal courts through petitions for writs of habeas corpus. These proceedings sometimes ultimately lead to the review of a state conviction by the Supreme Court of the United States. In all candor, many state presentations in the United States Supreme Court have been weak if not extremely poor. United States Supreme Court justices have often complained that the state's representative has neither been adequately prepared as to the record of the trial proceedings nor on the law relating to the case.

The undertaking of these important responsibilities, such as appearances before the United States Supreme Court, require that the Attorney General of a state have available in his office highly qualified lawyers, experienced in appellate advocacy, and fully knowledgeable concerning their state criminal justice system and trial procedures. These same lawyers, serving in an appeals division in the Attorney General's office, could provide the staff resource for criminal law legislative reform; representation of the state in the collateral attack of a state conviction both in state and federal proceedings; review of common errors that may become apparent in the handling of prosecutions by local district attorneys, and the development of training programs for police and prosecutors which may be conducted through the type of criminal justice center discussed above.

Organized and White Collar Crime

It is well recognized that the primary programs of most law enforcement agencies have been directed against street crime because of the increase of this kind of crime and the general alarm of the community concerning crimes of violence. But there is generally agreement among experts in the criminal justice system that although street crime poses serious threats to community safety and requires vigorous law enforcement efforts to combat it, the actual harm resulting to the community from street crime, measured in personal injury or property loss, is actually relatively insignificant when compared to the destructive consequences of organized crime and white collar crime. The President's Crime Commission made some startling findings concerning organized crime and white collar crime, but these received little public attention.

It is understandable that the average citizen can identify with the terror of a street assailant or a house burglar; but he finds the massive operation of organized crime remote even though he is informed that the activities of organized crime subtly steal substantial portions from his salary check through their impact on prices, taxes, and the cost of services. This loss does not threaten his safety, and, perhaps, is not even credible to him. On the other hand, the citizen is becoming more aware of the losses he suffers through white collar crime, especially in the consumer fraud area. Only recently has such fraud been sufficiently dramatized to the point of creating community alarm and demand for action.

It is not my purpose here, in this report, to discuss specifically the operations of organized crime or white collar crime. The work of the C.O.A.G. staff in its main report deals sufficiently with this topic and provides numerous references for additional study. Suffice it to say that the operations of organized crime are not fictional, and the extraordinarily numerous instances of white collar crime committed daily in every state, and frequently by members of our so-called legitimate society, make it imperative that the Attorney General of each state develop a strong program to offer protection for his community from the ravishing effects of this form of crime.

It is obvious from the information included in the regular staff report that the launching of a successful campaign against organized crime or white collar crime is too large a responsibility for a local prosecutor. Organized crime, especially, involves statewide conduct, as well as conduct of an interstate nature. Only a marshaling of the forces of the entire state can effectively begin to combat this form of crime.

Every state Attorney General is by now well aware of the federal program which has been announced by the Attorney General of the United States. Combatting organized crime on a nationwide basis has been given high priority by the United States Department of Justice. The primary strategy which is being used by the Attorney General of the United States is the employment of strategic task forces in various sections of the country.

These task forces involve a joint participation of various federal law enforcement agencies under the direction of a special assistant from the Attorney General's Office working closely with the United States attorneys in the areas of the task forces' targets. In a number of situations, where the Department of Justice has confidence in local law enforcement personnel, local prosecutors or police agencies have been included in a task force operation. The Attorney General of the United States is able now to employ these task forces with increased effectiveness under the ex-

panded powers granted by the Congress under the Organized Crime Control Act of 1970.

Frankly, a state Attorney General cannot ignore an aggressive federal program which may be operating in his state. The control of organized crime for the protection of the citizens of his state is his responsibility as well, of course, as the responsibility of local prosecutors throughout the state. The failure of the state to have its own program of law enforcement in this area of crime will simply result in the state's abdicating to the federal government a major state responsibility. The state program should clearly include cooperation with the federal program. A state Attorney General should make every effort to have his office tied in with the task force operations of the federal government within his own state. He should offer all the cooperation he can give to permit a combined federal-state task force strategy.

Though the federal task force program is geared toward combatting organized crime, the program of the state Attorney General should also include control of white collar crime. Much of the effort that a state Attorney General will have to make to permit his office to be effective in dealing with organized crime, will also permit him to promote a law enforcement program against white collar crime, especially consumer fraud. To deal effectively with organized crime and white collar crime, there are a number of essential positive steps a state Attorney General must take:

(1) He should inform the local district attorneys in his state that he is developing an active program in this field of law enforcement. Perhaps an effective way of doing this is through a conference called by the Attorney General inviting every local prosecutor to attend. Such a conference would assure local prosecutors that while the State Attorney General is undertaking to carry out his own responsibilities, he is fully cognizant of the professional responsibilities of local prosecutors and will work closely with them in all appropriate situations.

(2) The state Attorney General must establish a competent investigative staff that is responsible and loyal solely to him. Cooperation with other statewide law enforcement agencies, such as the state police, is of course important. But it cannot be too strongly emphasized that investigations involving organized crime and white collar crime require not only the use of personnel of great integrity, but demand security and control of information which only a special Attorney General's investigative staff can assure.

It is not necessary that the men recruited for this investigative function be initially qualified for this field of investigation, although this would be highly desirable. But realistically, such personnel are not readily available. A state Attorney General can build a very effective force of investigators by recruiting competent and highly motivated young men and women, including young lawyers, who can be put through a special training program which would qualify them for the special tasks involved. A state Attorney General wishing to set up such an in-service training program would be able to call upon the United States Department of Justice for specialists in the fields of organized crime and white collar crime who could assist in the training program.

(3) Investigations in the fields of organized crime and white collar crime would not really be effective without the use of special investigating grand juries. If a state Attorney General does not already have legislative authority to apply to a court for the convening of a grand jury having statewide investigating powers, he should sponsor such legislation. The ability of a state Attorney General to have such a grand jury convened would provide him with the

necessary subpoena power to compel the attendance of witnesses before the grand jury to provide essential information indicating the scope and nature of organized crime or white collar crime activities in the state and to provide the basis for any future indictments.

Obviously, a number of the witnesses who possess the necessary information required by the Attorney General would not be willing to reveal what they know before a grand jury, and in the ordinary case, would be able to remain silent under the constitutional provisions protecting them against self-incrimination. Thus, unless the state already has such legislative provisions, it will be necessary for a state Attorney General to sponsor legislation providing for immunity to a witness whose testimony is essential. Although such an immunity provision is an effective weapon for law enforcement officials, it also involves special considerations of individual liberty relating to the citizen's fundamental right against self-incrimination. Recent federal legislation has been very sweeping in this area and has provided for witness immunity provisions which only substitute what is known as "use" immunity for a witness' information, instead of the traditional "transaction" immunity which has long been recognized as the type of immunity most protective of an individual's rights. This federal legislation poses serious constitutional questions since very strong arguments can be made under the landmark decision of the United States Supreme Court in *Councilman v. Hitchcock*, that the only immunity provision which will be upheld constitutionally is a *transaction* immunity provision, which provides a witness with immunity from prosecution for any crime arising out of the transaction about which he is being compelled to testify. It is this consultant's personal position that a state Attorney General should seek legislation providing for transaction immunity rather than use immunity.

(4) If the state has decided to adopt a statute authorizing wiretapping and other forms of electronic surveillance, it should be understood that this form of surveillance has provided useful information and evidence concerning organized crime and white collar crime activities. I would urge, however, that the state Attorney General take leadership in having such state legislation drafted strictly to conform to the decisions of the Supreme Court of the United State interpreting the Fourth Amendment of the Constitution. Also, because of the widely recognized opportunities to abuse this type of surveillance, the Attorney General should personally assume responsibility of this activity and should not allow an application to a court for an order authorizing electronic surveillance to be made without his personal written approval. This is the practice followed by the Attorney General of the United States.

(5) Although referred to specifically earlier in this Report, it is important to stress again that the state Attorney General should insist on his office being included in any federal task force on organized crime activities that are taking place in his state. Apart from the fact that the state Attorney General can provide effective assistance to a federal task force, his involvement is necessary to prevent his being faced with the embarrassment of major federal exposures that would leave the impression that either he has been passive, or worse, negligent, in carrying out his responsibilities in this area of law enforcement.

(6) Where criminal cases develop as a result of investigations carried out by his office in the field of organized or white collar crime, the state Attorney General should provide the local prosecutor in the jurisdiction involved the opportunity to conduct the prosecution, and should give him every assistance his office can offer to assure a successful prosecution. This relationship with the local prosecutor is important to allow the prosecutor to demonstrate

to his own community that he is properly performing his duties. Of course, if the local prosecutor cannot be relied upon to take on this job, then the state Attorney General should not hesitate to assume full responsibility for the prosecution.

(7) As the program of the state Attorney General develops in the fields of organized crime and white collar crime, the state Attorney General should implement a program for maintaining a complete intelligence data record system on individuals and activities in such a way, including the use of computers, as to permit speedy retrieval and correlation of information as new facts come in.

I realize that the kind of program outlined above requires a state Attorney General to set up a special unit that will involve a substantial budget for personnel and equipment. Frankly, a state Attorney General has no alternative, unless he chooses to ignore these problems of law enforcement. The state Attorney General must lay the groundwork for gaining acceptance of such budgetary allocations by carefully planned public announcements involving the threat to the community produced by these forms of criminal activity and by sponsoring statewide conferences involving state legislators, and business and community leaders. At such conferences he can present expert speakers from within his own state as well as national experts who can present a persuasive message to state policy makers.

The state Attorney General must persuade the state legislature that the failure to launch a major state program against such crime will simply result in the federal government taking over the state's law enforcement responsibility in this field. The question is not simply a matter of state-federal competition—it includes the essential control by the state of its own system of criminal justice and priorities. However effective a federal program might be within a state, it will be geared to federal priorities and not the special priorities of a particular state.

As indicated above, although the previous discussion has stressed cooperation with local prosecutors and law enforcement agencies, it is obvious that the program of the Attorney General is also necessary to offset those instances of indifference of some local prosecutors in this area of law enforcement, or more serious, the corruption of some of these officials. Distasteful as the thought may be, it is nonetheless true that organized crime and white collar crime cannot successfully operate without the connivance or abstention of local law enforcement agencies.

Initiation of Criminal Prosecutions by the State Attorney General

The preceding part of this Report has provided examples of situations where the state Attorney General might want to initiate prosecution of a criminal case through his own office. In the usual criminal case, the state Attorney General would neither have the desire nor be required to initiate the criminal prosecution. Local prosecutors are primarily responsible for initiating criminal prosecutions within their own jurisdictions, and to the extent that they are carrying out these responsibilities, they should not be interfered with by the state Attorney General. In most metropolitan areas, local prosecutors have the staff capabilities to perform their prosecution function competently, especially with the type of general assistance program sponsored by the state Attorney General, mentioned earlier in this Report. This kind of assistance to local prosecutors would not only be welcomed by them, but would provide a demonstration of a unity of interest in the state for the proper administration of criminal justice.

However, in rural areas and small towns and cities we too frequently experience the situation of part time prosecutors and part time staff who are unable to carry out prosecution functions effectively and in the interest of the community. The American Bar Association Standards Relating to the Prosecution Function recommend that efforts be made to develop in such areas of a state jurisdictional districts for prosecution purposes that might cut across city and even county lines. This would require legislation, and the state Attorney General should sponsor such legislation that would enable the development of jurisdictional units which could support full time prosecutors as well as full time staff.

In certain cases, which have resulted from the investigation of his own office, and where he finds it necessary to assume the responsibility of the prosecution of a criminal case, the state Attorney General should not hesitate to initiate a prosecution. But, as stated earlier, he should provide the local prosecutor every opportunity to assist with the prosecution and share the credits, unless the incompetence or corruption of the local prosecutor was the principal cause for the state Attorney General's reason for taking the initiative.

The preceding discussion raises the issue of supercession of a local prosecutor. At the state level, either in the Governor's office or in the office of the Attorney General, or both, there must be this power where a local prosecutor is either unwilling or incapable of carrying out essential law enforcement responsibilities on behalf of the community. The exercise of this power should be in accordance with fair standards of due process which will provide protection for the local prosecutor who in a particular case is superseded, or who, in an extraordinary situation, is removed from office.

Improving the Criminal Justice System Within the State

Some of the defects which plague our criminal justice system, causing it to jam up and almost break down, to the dismay of the general public, spring from the failure of many participants of the system to recognize that it is a comprehensive one, requiring that the interrelated parts respond to one another and work closely together. This means that the arresting police officer must be aware that his acts will have an impact on the prosecution, defense, trial and correctional phases of the criminal justice system. Similarly, correctional officers, judges, defense lawyers, and prosecutors must realize that how they perform their individual functions will have a significant impact on what the other participants in the system will or are able to do.

The state Attorney General is in a unique position to assess how the system of criminal justice is working within a state and to identify the impediments which cause delay or disruption of the process. The prestige of his office permits him to initiate innovative programs leading to the implementation of a comprehensive system of criminal justice. Before such programs can be undertaken, it is important for the state Attorney General to recognize, as a general proposition, that each of the major participants in the criminal justice system is presently functioning unsuccessfully due to inadequate resources, incompetent personnel and lack of training. The state Attorney General can go a long way in improving this situation.

One of the resources on which the state Attorney General should rely heavily is the state block grant program of the Law Enforcement Assistance Administration. Appropriations to states by the federal government are increasing each year and the state planning commissions created by the state governors have been given an opportunity unparalleled in any other period of American history to bring about the needed improvements in our administration of criminal justice. With special exceptions, the state Attorney General serves as either a member of the state

planning commission or as the chairman of the state planning commission. As the chief law enforcement officer of the state, the state Attorney General should provide leadership for the plans submitted by the state planning commissions and should emphasize that these plans be comprehensive in nature, providing programs and resources for every phase of the criminal justice system.

Although at this stage of the federal program, most of the federal money has been allocated for police department use, this has not resulted in substantial improvements on the part of police operations. Police recruiting and training remain high priority items in any good police program. The properly trained police officer who recognizes that he is an integral part of the total criminal justice system will have a tremendous impact on the success of the system and the goal of finality in any individual criminal prosecution. The criminal justice center, referred to earlier in this Report, which could be sponsored by a state Attorney General, could offer on a regional basis a special training program for police which would substantially improve police performance.

There is no less a need for upgrading the training, salaries, and professional performance of prosecutors. Recognizing that the local prosecutor has the initial responsibility of criminal prosecutions and is given under our law broad discretionary powers, it is essential that the office of district attorney be sufficiently prestigious so as to attract the most qualified lawyers. It is a fact of life that an important measure of the prestige of an individual is the paycheck he receives. The American Bar Association Standards Relating to the Prosecution Function emphasize that the district attorney should be a full time official and should be paid a salary commensurate with that earned by his counterpart in private practice. The state Attorney General should exercise leadership in assisting prosecutors to receive such salary recognition by the local governmental agencies having control over the purse strings. Of course, the Attorney General himself is frequently a case in point of our unrealistic allocation of resources and priorities, and state legislatures must be persuaded to provide a salary level for the state Attorney General commensurate with the responsibilities and prestige of that high office.

Training is another requirement for local prosecutors. Again criminal justice centers sponsored by the state Attorney General can offer such training opportunities. Although it is true that the National Association of District Attorneys in joint sponsorship with the American Bar Association's Section of Criminal Law and the American College of Trial Lawyers have inaugurated a National College for District Attorneys at the University of Houston at Houston, Texas, this college in all reality, cannot provide all training needs for the local prosecutors and their staffs throughout the states. Each state must develop a competent training program that is ongoing in nature and is kept up-to-date with the moving trends of the substantive and procedural law. This can be accomplished through the leadership of the state Attorney General.

The focal point of our judicial system is located, of course, in our courts. What has been said about the salaries of police officers and District Attorneys is equally applicable to judges. Judicial salaries at the trial and appellate levels are a disgrace to our nation. We place such tremendous responsibilities on the judges in our courts, yet we reward the persons entrusted with these judicial responsibilities salaries that are substantially below those earned by individuals with little more than clerical responsibilities in major industry. Again, the state Attorney General can provide leadership in presenting the case of the judiciary to the legislature for fair and just salaries. Judges, themselves, at times make trips to the legislative halls seeking wage increases, but are singularly inept in selling their own cause. They are not to be blamed. It is indeed difficult for the judge, who we have surrounded with an aura of respect and prominence, to go hat in hand to the legislators. Further, whatever they do for themselves can only be considered as self-serving. The state Attorney General, as the chief law enforcement officer of the state, having the interest of all the citizens of the state as his responsibility, is a much better advocate for legislation recognizing that the state will only get the kind of judicial system it is willing to pay for.

A state Attorney General, exercising this role, is able at the same time to establish a relationship with the judges of the state which enables him to learn their needs and the problems they face in performing the judicial function. Thus, he is also able to participate in the planning for the more efficient operation of the courts and for the sponsorship of legislation which would provide court administrators and more efficient judicial procedures.

Once again, the criminal justice center referred to above can be a basis for bringing judges together for training programs, sentencing institutes and for meetings with other participants in the criminal justice system for the purpose of working out problems that frequently have festered because of the failure of communication. There remains an additional area of leadership which can be asserted by the state Attorney General in improving the criminal justice system. All recent studies of the caseloads in our criminal courts make it clear that the great abundance of defendants are the poor minority dwellers in the slum areas of our cities. These persons cannot afford to retain their own lawyers to represent them competently and adequately in the course of the criminal case. Recent decisions of the United States Supreme Court make representation for all criminal defendants in serious criminal cases absolutely necessary. In a number of states such representation is being provided by an on-the-spot appointment of lawyers who happen to be available in the courtroom. In the first place such appointments frequently come too late in the criminal case, since the defendant under Supreme Court decisions needs representation at earlier stages. Also the ad hoc appointment of a busy lawyer will either result in the delay of the criminal case, or on the other extreme, a too speedy disposition by an immediate plea of guilty, which under recent court decisions would hardly stand up on a post-conviction remedy proceeding attacking the conviction.

Many states have begun to develop public defender systems where young lawyers can become skilled in the defense of criminal cases and are able to provide competent representation for a poor defendant. The American Bar Association's Standards Relating to Providing Defense Services recommend that a mixed system which includes a good public defender service as well as a panel of private lawyers able to try criminal cases on appointment be considered in every state. It is significant to note that the Chairman of the Advisory Committee of these American Bar Association Standards was Chief Justice Warren E. Burger before his appointment as Chief Justice of the United States. The Chief Justice has consistently stated that the defense function is an integral part of our criminal justice system and that it is essential that it be as strong as the judicial function and the prosecutor's function.

It has been recognized by everybody experienced in the criminal justice system that skilled and competent defense counsel are essential to the efficient, fair and speedy disposition of criminal cases. Court delay is more

frequently the result of incompetent, bungling or unprofessional defense work. Most prosecutors prefer to have a competent professional defense lawyer to deal with, since they know that if they have a strong case, the likelihood that the matter will be disposed of without trial on a guilty plea is greater because a competent and professional defense lawyer is fully aware of the alternatives available to his client and recognizes that frequently the best service he can offer his client is to advise him to plead guilty and work toward a fair and just sentence.

The state Attorney General has a major responsibility to assure that criminal prosecutions in his state are handled effectively, efficiently and fairly. On the basis of the decisions of the Supreme Court and his own professional background, he is fully aware of the need for competent defense lawyers for poor defendants who make up the bulk of the criminal case load of the state. Once again, the state Attorney General is uniquely in a position to assert the kind of leadership which can bring about a system of equal justice for all, and at the same time accomplish more efficiency in the handling of criminal cases. The state Attorney General should take the initiative to sponsor legislation creating local public defender systems, or as was done in New Jersey, a statewide public defender system. It is significant that the model public defender service which Congress created in the District of Columbia was developed through legislation drafted in the United States Department of Justice and supported in the Congress by the representatives of the Attorney General of the United States.

Of course there is a final area of consideration which should claim the attention of the state Attorney General. This is the crucial area of corrections. Our criminal case load is largely made up of the prosecution of recidivists, which is ample evidence that our correctional system has been ineffective. The highest judicial officer in our land, Chief Justice Warren E. Burger, announced to the American Bar Association at its annual meeting in Dallas, Texas, in 1969, that, "Our correctional system has failed." There is great need in all of the states for reevaluation of our correctional system, especially our custodial institutions. Correctional experts have recommended that we make more frequent use of community rehabilitation programs, either through sentences of probation or special flexible programs such as work release allowing a prisoner to work at a job during the day and to sleep at the prison at night. Half-way houses, outpatient therapeutic centers, special training programs and job opportunities and other correctional programs need to be tried if we are to give an offender an opportunity to engage in useful work in the community. We have begun to realize that an offender who is kept in prison at a custodial institution for a lengthy number of years, may be likened to a time bomb, because when released, as he eventually must be, he may explode violently to the danger of society.

A state Attorney General can exercise leadership in working with criminal justice agencies, community leaders, legislators, and others planning programs in the correctional field to construct more rational systems for rehabilitation of offenders than we now provide in most of our states. An important function which the state Attorney General can play is to encourage the cooperation of state and local governmental agencies to assure that persons with criminal records are given opportunities for decent, gainful employment. We cannot on the one hand release an offender from prison and expect him to earn his living lawfully rather than through crime, and on the other hand, deny him the very opportunity to obtain a lawful job. Certainly if state and local governmental agencies provide leadership in the hiring of persons who have been offenders, an educational program can be launched in the area of private industry which would open up even greater job opportunities for offenders seeking work.

In the field of probation, the state Attorney General can provide coordination among various jurisdictions where probationers are released on various conditions including that they be employed in lawful, gainful employment. Such employment may not be available to a probationer on location of the state, but may be in another location. Yet, under present circumstances a probation officer who is in charge of a particular offender would be unable to supervise his activities if the offender left his particular jurisdiction. The transfer of probation responsibilities among probation offices in different jurisdictions may be facilitated through the office of the state Attorney General operating closely with the courts, and thereby allow a more meaningful use of probation.

The American Bar Association has recently created a Special Committee on Corrections under the leadership of a prestigious panel. The purpose of this commission is to inaugurate a number of innovative correctional programs in various states throughout the country. Each state Attorney General should be receptive to the efforts of this commission and cooperate to the extent to which he believes that he can responsibly do so.

Many of these recommendations and a good part of the discussion which have been involved in this Report are also the subject matter of the American Bar Association's Standards for Criminal Justice. These Standards are a comprehensive set of Standards for criminal justice that cover the whole range of the administration of criminal justice from the police function all the way through post-conviction remedies. If these Standards were to be implemented they would go a long way to assure a particular state a speedy, efficient and fair disposition of criminal cases. The major goal of each state Attorney General should be to have the American Bar Association Standards reviewed in his state and to participate along with the courts, the bar, the legislature and the community, in efforts to implement those provisions which are relevant and helpful in his state. A number of states have already held major conferences, frequently sponsored by the Supreme Court of the state, but in most cases involving representation from the bar, the Attorney General's office, local district attorneys and members of the legislature. The Criminal Law Section of the American Bar Association has been given the responsibility on the part of the American Bar Association to carry out this implementation program. Retired Associate Justice Tom C. Clark of the United States Supreme Court has been serving as the Chairman of the Committee of the Criminal Law Section charged with this implementation responsibility. Justice Clark is available to the state Attorney General of each state who would like to explore the possibilities for inaugurating a review of the A.B.A. Standards for Criminal Justice in his own state.

Conclusion

In brief summary, the recommendations and discussion pertaining to the above Report, outline for the state Attorney General a program of aggressive involvement in the improvement of criminal justice in his own state. For the most part the Report suggests various ways in which the state Attorney General can exert his leadership as chief law enforcement officer of the state in either bringing about appropriate legislation, administrative action or voluntary contributions which would improve the manner in which criminal prosecutions are handled. Much of the

assistance which the Attorney General can render criminal justice agencies in a state can be supportive in nature, such as the sponsoring of a criminal justice center which would provide training and other facilities for the various segments of the criminal justice system. More directly, the state Attorney General can provide staff assistance, such as lawyers, forensic science experts, investigators, or other professionals where local law enforcement agencies or local prosecutors lack such services. In certain instances it is recommended that the state Attorney General actively engage in investigation and in the initiation of prosecution of the kinds of criminal cases which are statewide in nature and which cannot be properly handled by local prosecutors' offices.

The state Attorney General can really carve out whatever role he wishes to have in the administration of criminal justice in his state. As the Attorney General he should recognize that he has unique opportunities as a convener of the various participants in the criminal justice system to work out problems which have never been worked out before. It is obvious that most Attorneys General do not wish to undertake the job of the local prosecutor. Not only is this unnecessary, but it is undesirable. However, the state Attorney General has a great opportunity to strengthen the local prosecutor and in doing this, will encourage frequent cooperative efforts among various local prosecutors throughout his state which will in the long run provide more uniformity and efficiency in the administration of criminal justice. But it is absolutely essential to stress that the state Attorney General can play these various roles in improving the system of criminal justice in his state only if his office is adequately and competently staffed and provided with the kind of budget which is necessary for a chief law enforcement officer of a state to carry out the important responsibilities with which he is entrusted.

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