User-Accountability Provisions in the Anti-Drug Abuse Act of 1988: Assaulting Civil Liberties in the War on Drugs

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by

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The imperative necessity for safeguarding [the] rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.¹

The war on drugs is becoming a war against the Constitution.²

At twelve-thirty in the morning, on the last day of the second session of the 100th Congress, Congress passed the Anti-Drug Abuse Act of 1988.³ One senator called this legislation "the most comprehensive Anti-Drug Abuse Act ever considered in the U.S. Congress."⁴ Under the rubric of "user-accountability," Congress also passed the Edwards Amendment, which imposes civil penalties of up to ten thousand dollars for the possession of small amounts of marijuana, cocaine or other drugs,⁵ and the McCollum Amendment, which denies federal benefits to drug users and traffickers.⁶ These amendments are designed to win the war on drugs on the demand side.⁷ The supply-side provisions of this anti-drug

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2. N.Y. Times, Sept. 9, 1988, at 1, col. 1 (quoting Rep. Rangel, Chair, House Select Committee on Narcotic Abuse and Control).

[1223]
The provision imposing civil fines of up to ten thousand dollars on individuals for possession of small quantities of drugs bases the amount of the penalty on the individual's income and assets. The penalty is assessed by the Attorney General's office. Defendants have an opportunity to contest the sanction in an administrative hearing and can appeal that decision to federal district court. The Edwards Amendment is "designed to hold casual drug users accountable for the murderers, smugglers, pushers and dealers who exist to meet [their] private demand." It is an attempt to deter drug use by lessening the burden on prosecutors in punishing casual drug users.

The second major aspect of the new demand-side approach to the war on drugs gives judges discretion to deny federal benefits to those

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8. Other notable provisions in the Act include: a provision for the death penalty for drug related convictions (§ 7001); expansion of international drug control efforts (Title VII); a provision to evict families from public housing for drug-related criminal activity (§ 5101); expansion of criminal forfeiture provisions (Title VI, Subtitle B); and a dramatic increase in criminal penalties for drug convictions (Title VI, Subtitles K-M). H.R. 5210, 104 CONG. REC. H111,110-217 (daily ed. Oct. 21, 1988).


11. An article in the San Francisco Chronicle described the bill as "bear[ing] the unmistakable stamp of GOP conservatives who contend that the drug trade cannot be reduced unless a strict policy of 'user accountability' is adopted to discourage demand. Until now, federal law enforcement policy has been focused almost exclusively on halting the supply of drugs." San Francisco Chron., Oct. 15, 1988, at 1, col. 5.


13. See infra note 67 and accompanying text.


15. Under the administrative and enforcement provisions of the Drug Abuse Prevention chapter, of which the Act is now a part, the Attorney General may delegate her functions to any officer or employee of the Department of Justice. 21 U.S.C.A. § 871(a) (West 1981).

16. Id. § 844a(e-g). See infra notes 69-74 and accompanying text.

convicted of any federal or state offense involving drug trafficking or
drug possession.\textsuperscript{18} Federal benefits include any grants, loans (including
student loans), and professional or commercial licenses provided by fed-
eral agencies.\textsuperscript{19} For those convicted of drug possession, the Anti-Drug
Abuse Act also authorizes the court, in its discretion, to require the indi-
vidual to complete successfully a drug treatment program, submit to pe-
riodic drug testing, and perform community service.\textsuperscript{20}
This Note argues that these two new measures, the provisions for
civil penalties and the denial of federal benefits, violate individuals’ due
process rights and are haphazard, counter-productive attacks on the drug
problem.\textsuperscript{21} Section I illustrates how these provisions were the products
of election year pressure to fight drugs.\textsuperscript{22} Although the provisions repre-
sent significant departures from current penal policy, they were consid-
ered hastily, resulting in poorly drafted legislation. Section II
demonstrates that the imposition of civil penalties for criminal drug of-
fenses through an administrative hearing is an unconstitutional infringe-
ment on the due process rights of criminal defendants. Section III shows
how the denial of federal benefits is a harmful approach to the drug prob-
lem, is inconsistent with the goals of the penal system, and violates the
principles of federalism. These two measures curtail individual rights by
imposing punishment without due process and inflicting potentially dis-
proportionate punishment. Congress should abandon these measures in
favor of a more balanced and reasoned response to the problem of drug
abuse.

I. Legislative Response to the Drug Problem

The provisions for the imposition of civil penalties and the denial of
federal benefits in the Anti-Drug Abuse Act of 1988 are an unreasoned
and panicked response to the problem of drug abuse. The first part of
this section describes the mounting frustrations over America’s failure to
curb the use of illegal drugs. The second part of this section shows the

\textsuperscript{19} Id. § 853a(d)(1).
\textsuperscript{20} Id. § 853a (b)(A). Senator Bumpers commented, “What is successful completion? . . .
What is the meaning? ‘Successful completed’ [sic] has to have a meaning, What is the mean-
ing? You will not find it in this amendment.” 134 CONG. REC. S15,972 (daily ed. Oct. 14,
\textsuperscript{21} Representative Hayes argued that “the imposition of civil penalties on those not con-
victed of any offense, and the arbitrary deprivation of Federal benefits on individuals in addition
to sanctions imposed by the courts, are among the controversial provisions which fly in
the face of the Bill of Rights [and] these expansive provisions are [not] necessary or needed to
win the war on illegal drugs in America.” 134 CONG. REC. H11,225 (daily ed. Oct. 21, 1988)
\textsuperscript{22} Time magazine described the election year pressure as a “national frenzy that has
erupted to do something—anything—about drugs and related crime.” Church, Thinking the
results of public pressure to attack the drug problem. By imposing criminal penalties through the civil system, and by denying federal benefits, the Act's provisions represent a significant change in approach to the use of criminal sanctions. Yet these measures were rushed through Congress without a complete examination of the ramifications of these provisions and despite significant questions about their constitutionality.

A. Losing the War on Drugs

Since the early 1980s, Congress and the President have been working to crack down on drug use in America.23 This "war on drugs" has resulted in various measures such as random drug-testing, civil forfeiture,24 pretrial detention, strong criminal penalties, and a weakening of the exclusionary rule. Many of these measures threaten basic constitutional liberties.25

In addition, the government has increased expenditures dramatically to fight the war on drugs,26 increased law enforcement efforts,27 and expanded the role of the military in drug prevention.28 It has been acknowledged, however, that the war on drugs is being lost.29 The Act itself states, "despite the impressive rise in law enforcement efforts, the supply of illegal drugs has increased in recent years."30 This increase has resulted in the drug problem being called a "national emergency,"31 the "Nation's biggest single problem,"32 and "a crisis situation."33

25. Id. at 895-913. See also, The War on Drugs: A Search for a Breakthrough, 11 Nova L.R. 891, 891-1052 (1987) (reviewing such measures proposed recently and their threat to constitutional rights).
28. Church, supra note 22, at 19.
29. The Congressional Record of the debate over the Anti-Drug Abuse Act is replete with statements of legislators who are "convinced that the current war on drugs has been a losing battle." 134 Cong. Rec. S17,307 (daily ed. Oct. 21, 1988) (statement of Sen. Pell).
31. Morganthau, supra note 26, at 36 (quoting President Reagan).
In May of 1988, articles in *Time* and *Newsweek* explored the possibility of drug legalization as an approach to the drug problem. The articles declared that drugs were now the voting public's top concern, and recognized that drugs would be a predominant issue in the 1988 election year. These articles indicate that a motivating reason for drug legalization is avoidance of the risk to civil liberties created by anti-drug measures. Advocates contend that "legalization would remove a severe threat to individual freedom that is posed by widespread drug searches, demand for whole-sale testing and the pending use of the military to enforce drug laws." While legalization seems an extreme response, the movement for legalization demonstrates the shortcomings of simply concentrating on prosecuting more criminals and increasing penalties for drug use. The latter approach has not curtailed the use or influx of drugs. This Note argues that Congress needs to change the approach to the war on drug use by focusing on education, prevention, and treatment rather than punishment.

**B. Congressional Reaction**

Against the backdrop of the failed war on drugs and the upcoming election, Congress enacted the Anti-Drug Abuse Act, including the two amendments aimed at punishing drug users. Members of Congress "seemed hellbent on demonstrating that they [were] ready to out-tough the opposition on the drug issue." Congress ignored warnings from its own members that "[i]n a crisis, there is often a temptation to posture and to look tough, regardless of what the effect of legislative action might actually be upon constitutional rights." Instead, Congress enacted

34. Church, *supra* note 22, at 12; Morganthau, *supra* note 26, at 36. These articles illustrate the mounting frustration over a drug policy that failed despite the efforts of the Reagan administration and Congress.


36. *Time* magazine reported, "Polls show drugs emerging as the hottest issue in the presidential election. In a New York Times—CBS News survey last week, 16% of those questioned called drugs the nations No. 1 problem." Drugs received more than twice the response of either unemployment or the federal deficit. Church, *supra* note 22, at 13, 16.

37. Church, *supra* note 22, at 15. The *Newsweek* article recognized similar motivations, "The argument for legalization comes down to the notion that America's prohibition on drugs imposes too large a cost in terms of tax dollars, draconian law-enforcement tactics and potential infringement of civil liberties." Morganthau, *supra* note 26, at 36.

38. Church, *supra* note 22, at 19 ("[The movement for legalization] reflects the widespread dismay over antidrug efforts that have gone to such discomforting lengths as calling in the military without noticeably making a dent in crime and abuse problems.").


40. 134 CONG. REC. H11,230 (daily ed. Oct. 21, 1988) (statement of Rep. Vento). Congress should have heeded his advice that "it is in precisely those circumstances, in a crisis situation, where constitutional values are at risk of being abandoned that they must be protected most vigorously." *Id.*
these measures, in an attempt to satisfy election year pressure to crack down on drugs.  

The debate that preceded passage of the Anti-Drug Abuse Act indicates the extent to which the political pressure to crack down on drugs overcame the need to consider carefully this legislation. A member of Congress even acknowledged "what [Congress was] trying to do in this election year, and that [was] to prove that we are tougher than we ever have been on drugs." The pleas of some members of Congress to address the problem with greater restraint and consideration were ignored. A proponent of the measure, Senator Pete Wilson, recognized the pressure of the election year when he acknowledged that "there is an election year sensitivity on the part of my colleagues and I am not above exploiting it." Members who "had some concern about rushing headlong down this path" seemed overwhelmed by the threat of appearing soft on drugs. As a result of this election year pressure, Congress expedited procedures to consider the drug measures. The Anti-Drug Abuse Act of 1988 was the last action by Congress before adjournment. Despite the broad scope of the Act, Congress considered it for less than four months before it was passed. The amendments to the main bill providing for the de-

41. Congress responded to this pressure despite efforts to "turn attention to the need for more effective treatment and education efforts, rather than merely more election year frenzy and posturing." Church, supra note 22, at 19. In the end, Congress was "overpowered by an election-year push to enact measures." San Francisco Chron., Oct. 15, 1988, at 1, col. 5. Representative Frenzel declared, "I intend to vote against [this bill] on final passage. I see little merit in election year exercises." 134 Cong. Rec. H7940 (daily ed. Sept. 22, 1988) (statement of Rep. Frenzel).


44. San Francisco Chron., Oct. 15, 1988, at 1, col. 5.


47. The bill was introduced on August 11, 1988. H.R. 5210, 100th Cong., 2d Sess., 134
nial of federal benefits and the imposition of civil penalties were considered even more hastily.\footnote{48}

The initial impetus for this legislation began in May of 1988 when a group of Republican legislators created a task force to develop a drug bill.\footnote{49} On June 16, 1988, the task force introduced a sweeping measure that included proposals to withhold federal funds from states that did not revoke for six months the driver's licenses of people convicted of drug-related offenses, to require mandatory drug testing as a condition of parole, and to study an alternative judicial system using magistrates to prosecute drug-related offenses.\footnote{50} In response, House Democrats submitted a bill that eventually became the Act that was passed.\footnote{51} In August, in the rush to pass a bill before adjournment, the House took the unusual step of moving into the Committee of the Whole House on the State of the Union, allowing a consolidated bill proposed by the Rules Committee to skirt the normal committee process. The House severely limited debate on the bill and expedited consideration of the amendments.\footnote{52} The House passed a bill on September 22, 1988,\footnote{53} and sent it to the Senate for consideration. On October 14, 1988, the Senate passed its version,\footnote{54} and after a week of negotiation, the two chambers agreed to a final compromise, the Anti-Drug Abuse Act of 1988.\footnote{55} The debate on the Edwards and McCollum Amendments indicates the limited extent that they were examined. The Edwards Amendment, providing for the imposition of civil penalties, came to the floor of the House and Senate without the usual research and examination to which most proposals are subject. It was considered by the House although there had been no hearings on the Amendment.\footnote{56} It passed the House despite serious and largely unexamined questions\footnote{57} about the "unconstitutionality [of] creating...
ing a civil offense out of a criminal offense” and concerns that a civil penalty would deny individuals due process rights that are provided in the criminal justice system. After limiting debate on this amendment to only thirty minutes, the Senate passed the Edwards Amendment unanimously.

The McCollum Amendment, which denies federal benefits for certain drug convictions, originally was rejected by the House Judiciary Committee. It then was considered by the House as a whole without any committee hearings or public debate. In spite of the novelty of a “whole new approach” to punishment by denying federal benefits, and the lack of time to consider it, Congress chose to pass the Amendment immediately. On its face the legislation appears “sloppily drafted.” Significant questions about how the provision can be implemented led Congress to delay implementation of the Amendment until Sept. 1, 1989, leaving it to the President and the regulatory agencies to work out the effect of the law.

As this Note argues, Congress’ desire to attack the “demand-side” of the drug problem by passing legislation that violates constitutional rights, may have aggravated rather than alleviated the problem. Because of their rush to enact these provisions, Congress failed to respond to both constitutional and policy concerns.

59. The original House version appears more vulnerable to constitutional attack than is the final version of the civil penalties provision. Senator Kennedy, who negotiated and eventually supported the final Senate version, said he “[was] convinced [the House version] is unconstitutional, on the basis of a number of Supreme Court decisions.” 134 Cong. Rec. S15,762 (daily ed. Oct. 13, 1988) (statement of Sen. Kennedy).
60. 134 Cong. Rec. S15,760 (daily ed. Oct. 13, 1988). The Senate considered the amendment at about 7 o’clock at night and seemed extremely anxious to finish business for the day. Id.
61. See infra text accompanying notes 157-58.
62. As a member of the House Judiciary Committee explained, “Not one hearing or other shred of evidence was presented to the committee to prove the deterrent value of denying Federal benefits.” 134 Cong. Rec. H7291 (daily ed. Sept. 8, 1988) (statement of Rep. Cardin).
63. 134 Cong. Rec. S15,974 (daily ed. Oct. 14, 1988) (statement of Sen. Dodd). Senator Dodd went on to express concern about the questions raised by the bill and the lack of time to study them adding “my hope would be that we might come back to this amendment, [and] craft it a bit more tightly.” Id. at S15,977.
65. See infra notes 169-73 and accompanying text.
66. Senator Levin commented, “[T]his amendment is being considered too hastily. We cannot abdicate our task of writing good law and leave it up to regulatory agencies and the courts to clean up our sloppy work. [T]his amendment seems to me too ill-considered and too poorly drafted.” 134 Cong. Rec. S15,977 (daily ed. Oct. 14, 1988) (statement of Sen. Levin).
II. Civil Penalties for Possession of Drugs

The first of the new demand-side measures is the Edwards Amendment. This provision subjects anyone who knowingly possesses a controlled substance for personal use to civil fines of up to ten thousand dollars per violation.67 These civil penalties are in addition to any criminal penalties that could be imposed. The amount of the penalty is based on an individual's income and assets.68

After an opportunity for an administrative hearing pursuant to the Administrative Procedures Act,69 a penalty is assessed through the Attorney General's Office.70 The standard of proof at the administrative hearing is a preponderance of the evidence,71 rather than beyond a reasonable doubt, and many of the other protections traditionally afforded a criminal defendant would be unavailable.72 A defendant could appeal the administrative decision to federal district court for judicial review de novo, however, with an opportunity for a jury, the right to counsel, and the right to confront witnesses.73 The standard of proof in this review is beyond a reasonable doubt.74 A first time offender also has the opportunity to expunge a disposition from the record if after three years she has paid the fine, has not been convicted of another federal or state drug offense, and "agrees to submit to a drug test, and such test shows the individual to be drug free."75

This provision is unconstitutional because it denies individuals their due process rights by inflicting an essentially criminal sanction on defendants through the civil system. It seeks to employ a civil sanction "as a punishment . . . without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments."77 The following section will

68. Id. § 844a(b).
70. Id. § 844a(e).
71. See infra note 81.
72. See infra text accompanying notes 79-101.
73. 21 U.S.C.A. § 844a(g) (West Supp. 1989).
74. Id.
75. Id. § 844a(j).
76. The Congressional Record makes it clear that the section is designed to "impose civil fines of up to $10,000 . . . through administrative procedures, severely punishing drug users without burdening our courts." 134 CONG. REC. S17,303 (daily ed. Oct. 21, 1988) (statement of Sen. Dole) (emphasis added).
77. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-66 (1963) (footnote omitted). The fifth amendment provides that, "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to
review the procedures that will be used in the initial administrative hearing, illustrating the lack of due process protections. This section then will demonstrate that under "the tests traditionally applied [by the Supreme Court] to decide whether an Act of Congress is penal or regulatory in character,"[78] the civil fines in this legislation clearly are intended to be punitive in nature and because they lack adequate due process protections are unconstitutional.

A. The Nature of the Original Administrative Hearing

Under the Edwards Amendment, the Attorney General must provide written notice before assessing a civil penalty for possession.[79] Within thirty days of this notice, an individual may request a hearing.[80] In addition to a lower standard of proof,[81] administrative hearings to administer civil sanctions generally proceed informally,[82] a dramatically different approach from criminal prosecutions.

In administrative hearings, the rules both for gathering evidence and for using evidence differ from those in criminal proceedings. The scope of discovery and the power to subpoena evidence is left largely to the discretion of the administrative agency.[83] Since the Federal Rules of Evidence do not apply,[84] all evidence, including hearsay, is admissible.[85]

be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

78. Kennedy, 372 U.S. at 168.
80. Id.
81. The standard of proof is a preponderance of the evidence rather than beyond a reasonable doubt. Steadman v. SEC, 450 U.S. 91, 96-104, reh'g denied 451 U.S. 933 (1980); Bender v. Clark, 744 F.2d 1424, 1429-30 (10th Cir. 1984). See also United States v. Regan, 232 U.S. 37, 47-48 (1914) (proof beyond a reasonable doubt required only in criminal cases). "Absent statutory specifications of particular standards of proof, the APA [Administrative Procedures Act] requires that determinations in adjudicatory proceedings be made in accordance with the preponderance of the evidence standard." L. MODJESKA, ADMINISTRATIVE LAW, PRACTICE AND PROCEDURE § 4.17 (1982).
82. See L. MODJESKA, supra note 81, at § 4.
Many of the rights guaranteed to criminal defendants by the fifth and sixth amendments are not provided for in administrative hearings. There is no fifth amendment privilege against self-incrimination. There is no right to a jury trial, no right to the assistance of counsel, and no protection against double jeopardy because the double jeopardy clause protects only against consecutive criminal punishments. Moreover, there is no guarantee of a right to confront witnesses, and the right to cross examine witnesses is limited.

The Supreme Court has deemed these rights fundamental to the American scheme of criminal justice and protected them against federal and state encroachment. Because of the seriousness of criminal penalties and the stigma of criminal convictions, the criminal justice system provides stringent procedural protections. These safeguards help to ensure that criminal punishment is not imposed arbitrarily, and that the outcomes of criminal proceedings are reliable. In *Helvering v. Mitchell*, the Supreme Court recognized that Congress should not disregard these due process rights by sanctioning individuals through a civil system. The Court in *Helvering* stated that "civil procedure is incompatible

85. Hoska v. United States Dep't of the Army, 677 F.2d 131, 138 (D.C. Cir. 1982); Calhoun, 626 F.2d at 148; Klinesizer, 606 F.2d at 1130.
88. *Kennedy*, 372 U.S. at 164. The Attorney General is not obliged to provide an attorney in the event a defendant could not afford to provide her own. The Administrative Procedures Act does, however, allow a defendant to be assisted by counsel during a hearing. 5 U.S.C. § 555(b) (1982).
90. Id. at 403-04.
91. E.g., Cellular Mobile Sys. of Pa. v. F.C.C., 782 F.2d 182, 198 (D.C. Cir. 1985); Solis v. Schweiker, 719 F.2d 301, 302 (9th Cir. 1983); Central Freight Lines v. United States, 669 F.2d 1063, 1068 (5th Cir. 1982); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880 (1st Cir.), cert. denied, 439 U.S. 824 (1978).
93. The Supreme Court has said that due process "rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions." In re Winship, 397 U.S. 358, 362 (1969). In an article discussing the distinction between civil and criminal penalties, Professor Clark described due process safeguards:

The purposes of these safeguards can be generally stated as to ensure so far as possible that conviction will not be based on error, to prevent abuses and excesses against defendants (particularly with regard to compelled testimony) that might result in emotionally charged cases, and, related to the last, to avoid the use of repetitious prosecution to harass, intimidate, or wrongfully convict defendants.

94. 303 U.S. 391 (1938).
with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions . . . .”

It was precisely to avoid the mechanisms of criminal procedure that Congress enacted this measure. Proponents contended that this “alternative [to the] criminal justice system” would “significantly reduc[e] the Government’s burden” of prosecution by removing the protections normally afforded defendants. As Representative Glickman said, “[T]he whole idea is to go the civil way instead of the criminal way because of the lower standard of proof.”

The Senate, when it amended the House version, recognized some of the problems with the transformation of a criminal penalty to a civil sanction. The final bill provides that judicial review of the administrative hearing in federal district court be conducted de novo. The de novo review provides the right to a jury trial, to counsel, to confront witnesses, and requires that the standard of proof be beyond a reasonable doubt.

The protections added by de novo review fail to remedy the problems arising from the provision for civil penalties. For example, the protections arise only after an individual first requests an administrative hearing. Only after that hearing is conducted can an individual initiate an action for judicial review in district court. Requiring an individual and counsel to prepare for and attend an administrative hearing and a trial is an expensive and time consuming process. The administrative proceeding also does not include the right to a speedy trial contained in the sixth amendment. Full judicial protections should be guaranteed at the initial fact-finding level, without forcing an unreasonable burden on the defendant to appeal.

Because administrative and civil proceedings vary significantly from criminal proceedings, the latter having extensive due process protections, the Edwards Amendment is subject to constitutional attack. The next part of this section examines the constitutionality of using the civil sys-

95. Id. at 402-04 (footnotes omitted).
100. The House inserted the provision for de novo review and jury trial to try to develop a constitutional provision. See supra note 59 and accompanying text. One senator stated, “Many of the troublesome provisions in the House-passed bill have been deleted in favor of constitutionality . . . .” 134 Cong. Rec. S17,310 (daily ed. Oct. 21, 1988) (statement of Sen. Cranston).
tem to impose fines of up to ten thousand dollars for the possession of drugs.

B. The Constitutionality of the Civil Penalties

The civil penalties in the Edwards Amendment are an unconstitutional attempt to impose criminal punishment through the civil system. The Supreme Court has recognized that the legislature cannot dispense with a defendant’s constitutional rights by labelling criminal punishment a civil sanction and imposing it through the civil system. As Professor Charney notes, “criminal prosecutions masquerading as civil penalties will not be tolerated.” Prescribing civil procedures for a criminal sanction violates due process requirements.

The Court has upheld civil penalties if they are remedial and regulatory, but not if they are designed to punish. “The question, then, is whether a ... proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial.” In United States v. Ward, the Supreme Court indicated that a two-pronged inquiry is used to answer this question:

First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

If either the objective manifestations of congressional purpose in enacting the legislation are punitive, or the nature and effect of the statute


103. Charney, supra note 96, at 482. See Darmstadter & Mackoff, supra note 24, at 46 (“[A]s early as 1886, the Supreme Court recognized the hypocrisy in merely labelling as civil a procedure carrying obvious punitive ramifications, and thereby stripping the claimant of fundamental constitutional guarantees.”).

104. The Supreme Court has recognized that the Constitution mandates that “punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses.” Kennedy, 372 U.S. at 167.

105. See Kennedy, 372 U.S. at 167 (“If the sanction these sections impose is punishment ... the procedural safeguards required as incidents of a criminal prosecution are lacking.”); Charney, supra note 96, at 483; Clark, supra note 93, at 382, 385-97.


108. Id. at 248-49 (citations omitted).

is penal, the legislation is invalid. Under both prongs of this test the Edwards Amendment is unconstitutional.

(1) Congressional Intent

Under the first prong of the Ward test, the Court seeks to determine if there is "evidenc[e of] a Congressional desire to punish." In Kennedy v. Mendoza-Martinez, the Supreme Court looked to the legislative history and invalidated a civil sanction "because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive." Similarly, the legislative history of the Anti-Drug Abuse Act's civil fines clearly shows that Congress intended these civil penalties to be punitive, but sought to facilitate their imposition by removing them from the criminal justice system.

The measure was designed to punish. Proponents of the measure described it as a "tough and much needed penalt[y]," which sends "a simple message . . . [i]f you use drugs—and you get caught, expect to pay the price in either criminal or civil penalties or both." This measure was designed to impose punishment without the burdens of the criminal justice system, rather than to impose a regulatory or remedial scheme. Representative Edwards stated:

It does not replace any criminal penalty or decriminalize drug use in any way, in fact it does the exact opposite—it adds a civil penalty to the already existing criminal sanctions in a calculated effort to give law enforcement a new and effective means of dealing with small time users whose actions would otherwise be ignored because of our already overburdened criminal court system.

113. Id. at 169.
115. 134 CONG. REC. H7577 (daily ed. Sept. 14, 1988) (statement of Rep. Edwards). Together with the denial of federal benefits it was enacted to become "a double-edged weapon against those who have invited these ruthless and violent traffickers . . . into our front yard . . . severely punishing drug users." 134 CONG. REC. S17,303 (Oct. 21, 1988) (statement of Sen. Dole). In what would seem to be a hopelessly optimistic statement, another senator declared, "[I]n reality, the amendment before us now is going to do more to drive a stake in the heart of the drug industry than the death penalty and all the money we are spending on enforcement." 134 CONG. REC. S15,762 (daily ed. Oct. 13, 1988) (statement of Sen. Gramm). It was said to be a "zero tolerance operation. . . . Every person found in possession of a controlled substance would be slapped with a Federal civil penalty." 134 CONG. REC. H7578 (Sept. 14, 1988) (statement of Rep. Fish).
116. 134 CONG. REC. 7577 (daily ed. Sept. 14, 1988) (statement of Rep. Edwards). Earlier he said the amendment was a response to "frustration . . . from the inability of our criminal courts to effectively stop drug use." Id.
Supporters made it clear that they felt the "futility of arresting drug law violators when the court and prison system is too overburdened" meant that we need other "penalties and sanctions against the 23 million people who use drugs."

As in Kennedy v. Mendoza-Martinez, the objective manifestations of congressional intent reveal that they intended to punish. This type of penalty, because of its criminal nature, cannot be imposed through the civil system because it denies defendants due process of the law. Congress cannot, as Representative Glickman noted, "use civil penalties, in effect, for a punitive purpose [because it] clearly violates the Constitution." Because the legislative history shows that Congress intended to punish by imposing civil fines, the fines are unconstitutional under the first prong of the Ward test.

The punitive purpose, and resulting unconstitutionality of these civil fines, is illustrated further by examining the results that Congress intended the imposition of these sanctions to have.

(2) The Nature and Effect of the Civil Fines

The second prong of the test the Supreme Court uses to examine the constitutional validity of a civil sanction examines the sanction's purpose and effect. For this inquiry the Supreme Court relies on the seven factors laid out in Kennedy v. Mendoza-Martinez. These factors are:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose for which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned.

119. As the Court said in Kennedy, "[I]n keeping with . . . cherished traditions, punishment cannot be imposed 'without due process of law.'" 372 U.S. at 186. See United States v. Lovett, 328 U.S. 303, 313-18 (1946), for an example of the Court striking down a law designed to inflict punishment without a full judicial trial. For discussions of the Court's use of legislative history to determine if a civil penalty is designed to punish and not as remedial or regulatory penalty, see generally, Charney, supra note 96, at 492-94; Clark, supra note 93, at 436-39; Darmstadter & Markoff, supra note 24, at 46-49.
121. See supra text accompanying note 108.
124. Id. at 168-69 (citations omitted).
These should be evaluated as a whole, although "some may point in different directions." These factors are neither "exhaustive nor dispositive" but provide guidance for deciding whether a sanction is a civil remedy, or in effect a criminal penalty. Using these factors to examine the Edwards Amendment demonstrates that the civil sanctions are penal in nature and effect and therefore unconstitutional.

The first two factors are whether the sanction involves an affirmative disability or restraint, and whether the sanction traditionally has been regarded as punishment. Although civil fines do not involve an affirmative disability or restraint, and are often used as civil sanctions, these facts alone are not conclusive.

Civil fines should be remedial and compensatory. The Edwards Amendment provides for fines as high as ten thousand dollars based upon an individual's income and assets as a means to punish the offender, not to compensate for any harm. The fine does not "serve[] remedial purposes dissociated from punishment" but is a fine administered as a penalty for criminal actions. Fines are quite common as a criminal sanction. In fact, the present criminal penalty for simple possession of a controlled substance is a fine of not less than one thousand dollars, and up to five thousand dollars, in addition to a possible jail term of up to a year. The desire of Congress is not to change, and certainly not to diminish, the penalty, but rather to change the method for applying it. Because Congress believed that overcrowded jails prevented individuals from being sentenced to jail terms for possession of drugs, the civil fines they enacted were designed to inflict a greater sanction. Congress did not want to lessen the penalty, but to facilitate its imposition. As such, the civil fines in the Anti-Drug Abuse Act represent a criminal penalty and not a civil remedy.

125. Id. at 169.
126. Ward, 448 U.S. at 249.
127. Id.
128. Id. at 256 (Blackmun, J., concurring).
130. This is clear from the legislative history. As Representative Shaw said, "yes, a millionaire is going to be punished a lot more than an individual who is down near the poverty level. It is assessed just as we do now in civil cases as to punitive damages." 134 Cong. Rec. H7579 (daily ed. Sept. 14, 1988) (statement of Rep. Shaw) (emphasis added).
131. Ward, 448 U.S. at 246.
132. Cf. 448 U.S. at 258 (Stevens, J., dissenting) (fine was a penalty aimed at exacting retribution, not as a regulatory measure, and should be considered a criminal sanction).
134. See supra note 116 and accompanying text.
135. See supra notes 117-18 and accompanying text. Congress also wanted to remove procedural barriers to prosecutions. See supra notes 96-99 and accompanying text.
136. Because the maximum fine under the existing criminal law is $5,000, 21 U.S.C.A. § 844(a) (West Supp. 1988), the maximum $10,000 fine provided for in the Edwards Amendment would double the penalty.
The third factor is whether the sanction is applied only upon a finding of scienter or knowledge. The question of whether the sanction requires knowledge is an important indicator of penal intent because of its implication of culpability. The Anti-Drug Abuse Act specifically applies only to an individual who “knowingly possesses a controlled substance.” Because a penalty attaches upon a finding of blameworthiness, knowing possession, or criminal culpability, the penal nature of this statute is evident.

The fourth factor to consider is whether the penalty will promote the traditional aims of punishment—retribution and deterrence. This is precisely what the Act's civil fines are designed to do. The legislative history is plain that “[f]ining persons found guilty of possession could act as a deterrent for users or [sic] drugs.” There was also a strong retributive impulse behind the penalty: “Society has become increasingly disgusted with the crime, death, and human waste that your dirty habit spawns. If the courts are too crowded... we will find another way to hold you accountable for what you do to our children....” The Amendment sought to promote the traditional aims of punishment in a nontraditional way because of the belief that “nothing is being done to punish [users] today.”

The fifth factor to determine the nature of the sanctions is whether the behavior to which the sanction applies is already a crime. Of course, “[c]urrent law is very clear. Drug use is a crime.” Not only is the possession of drugs already a crime, but the civil fines are a penalty that can be applied in addition to criminal sanctions. When, as here, the behavior is recognized as a crime, an individual is entitled to her constitutional right of procedural due process. Professor Hart has written that “what distinguishes a criminal from a civil sanction... is the judgment of community condemnation which accompanies [it].” A finding that

139. 134 CONG. REC. H11,233 (daily ed. Oct. 21, 1988) (statement of Rep. Whitten). Representative McCollum said, “if we are really going to deter use, we are really going to have to do some pretty tough things... we need to come down on all kinds of folks in society who are using drugs.” 134 CONG. REC. H7580 (daily ed. Sept. 14, 1988) (statement of Rep. McCollum).
143. Hart, The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS 401, 404 (1958). Professor Hart continues that it is not the label a legislature attaches to conduct that identifies
an individual has used drugs, whether determined through the civil or criminal system, carries the potential for moral condemnation. The difference in the stigma attaching to a civil penalty has been used to justify imposing civil penalties. The stigma that may attach to a "disposition" in the Act's civil penalty provision illustrates the criminal nature of the sanction.

The provision by Congress of expungement proceedings also reflects an awareness that the civil penalties imposed by the Act are designed to attach to a serious crime. The expungement procedure allows an individual to expunge the disposition from the record after three years if she has not been convicted of any other drug-related offenses and passes a drug test. By providing for expungement, Congress acknowledged that a "conviction" in this civil proceeding results not only in a large fine but carries with it a stigma and record of disposition. Senator Kennedy described the expungement procedure as providing "an individual . . . found to have violated the law, . . . a right to have his or her record expunged in terms of that conviction, which I think can provide an important incentive." The Act's civil penalties apply to criminal behavior, and are imposed only after a finding that an individual has violated criminal law. In United States v. Constantine, the Supreme Court acknowledged that this kind of scheme reflects the criminal nature of a sanction saying, "The condition of the imposition is the commission of a crime. This . . . is again significant of penal and prohibitory intent rather than the gathering of revenue." Thus, analysis of the Edwards Amendment according to the fifth factor clearly indicates a criminal nature of that provision.

The remaining factors examine whether there is an alternative purpose of the sanction and whether the sanction appears excessive in relation to the alternative purpose. The only purposes that Congress acknowledged in passing this provision were deterrence and punishment—which are penal in character. A civil sanction should be

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144. See Charney, supra note 96, at 496; Clark, supra note 93, at 406-10.
146. Id.
149. Id. at 295; see also United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984) (The fact that actions giving rise to civil forfeiture penalty are also a crime suggests that the penalty is criminal in nature); United States v. Ward, 448 U.S. 242, 249-50 (1980) (Only one consideration aids respondent: that the penalty attaches to behavior that is already a crime).
150. In Trop v. Dulles, 356 U.S. 86 (1958), the Supreme Court said, "in deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the
designed to regulate,\textsuperscript{151} and there is no evidence that the Edwards Amendment was designed to regulate, not to deter and punish, drug use.

In sum, these factors reveal that the legislation is punitive in nature and effect and is thus an unconstitutional attempt to impose criminal punishment through the civil system. The civil penalty provisions of the Anti-Drug Abuse Act are invalid under either prong of the test the Supreme Court has established to determine the validity of civil sanctions. The test the Supreme Court has established serves a very important function of protecting the due process rights of individuals. As the Supreme Court has written, "Our forefathers 'intended to safeguard the people of this country from punishment without trial by duly constituted courts.'"\textsuperscript{152} Therefore, "the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason."\textsuperscript{153}

Requiring the government to prove its case fully before imposing essentially criminal sanctions better serves penal goals. It may foster respect for the criminal justice system and serve to educate the offender by formalizing the determination of guilt. It seems that the government may hope defendants will bypass even the initial administrative hearing, allowing the Attorney General to fine suspects without opposition. But it is questionable whether this process will actually serve to diminish the perceived seriousness of the offense. In any case, it is not worth abandoning the constitutional safeguards of the criminal justice system in pursuit of expediency.

Finally, there is a strong equal protection concern stemming from this provision. The civil fines serve as an alternative (or in addition to) to pursuing criminal sanctions. They are designed to "hold yuppie users accountable for their action."\textsuperscript{154} Because the amount of the fine is based on an individual's income and assets, prosecutors may be inclined to proceed administratively for wealthy suspects and criminally prosecute poorer ones.\textsuperscript{155} Congress tried to allay this concern by providing that the

\textsuperscript{151} See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 208 (1963) (Stewart, J., dissenting) ("The question of whether or not a statute is punitive ultimately depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or whether the disability is but an incident to some broader regulatory objective.").

\textsuperscript{152} Kennedy, 372 U.S. at 166 (quoting United States v. Lovett, 328 U.S. 303, 317 (1946)).

\textsuperscript{153} Id. at 184.


\textsuperscript{155} As Representative Glickman argued,

[This is an unconstitutional amendment because utilization of its provisions will be largely based on the abilities to pay the fines. A very rich person who is subject to
income and assets of an individual shall not be relevant to" deciding whether or not to pursue civil penalties.\textsuperscript{156} That may be easier said than done, however. In reality it may be that federal prosecutors would rely heavily on an individual's wealth in determining which sanction to seek.

III. Denial of Federal Benefits

The other major demand-side measure of the Anti-Drug Abuse Act is the McCollum Amendment. It provides that persons convicted of drug trafficking or possession of drugs may be denied federal benefits. Any person "convicted of any Federal or State offense consisting of the distribution of controlled substances" may, at the discretion of the court, be ineligible for all federal benefits for up to five years.\textsuperscript{157} These include "any grant, contract, loan [including student loans], professional license, or commercial license provided by an agency of the United States."\textsuperscript{158} After a second conviction for drug trafficking, the benefits may be denied for ten years\textsuperscript{159} and "upon a third or subsequent conviction for such offense [the defendant would] be permanently ineligible for all Federal benefits."\textsuperscript{160}

For those convicted of drug possession the McCollum Amendment provides a different procedure. Any person "convicted of any Federal or State offense involving the possession of a controlled substance"\textsuperscript{161} shall, at the discretion of the court: (1) be ineligible for federal benefits for one year; (2) be required to "successfully complete an approved drug treatment program which includes periodic testing to insure that the individual remains drug free;" (3) "be required to perform appropriate community service;" or (4) any combination of the above clauses.\textsuperscript{162} At the discretion of the court, a second conviction could result in the denial of benefits for up to five years, and any combination of the above four

\textsuperscript{156} 21 U.S.C.A. § 844a(b) (West Supp. 1989).
\textsuperscript{158} Id. § 253a(d)(1)(A).
\textsuperscript{159} Id. § 253a(a)(1)(B).
\textsuperscript{160} Id. § 253a(a)(1)(C).
\textsuperscript{161} Id. § 253a(b)(1). A drug or narcotic offense is defined broadly by reference to Section 404(c) of the Controlled Substances Act as "any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter." 21 U.S.C.A. § 844(C) (West Supp. 1988).
The section provides that the ineligibility for federal benefits would be suspended if the individual completes a supervised drug rehabilitation program, has otherwise been rehabilitated, or is unable after a good faith attempt to gain admission to, or pay for, a qualified drug rehabilitation program. Congress left open a number of questions as to how these provisions can be implemented, particularly how they will be enforced by federal agencies and the role of state courts in administering these penalties. Despite the confusion, a provision in the bill was eliminated that would have mandated the "drug-czar" to conduct a study and hold public hearings to determine if the denial of federal benefits would have a positive effect and deter drug use, and which benefits should be included. Instead, Congress passed the bill without any further study of the effects of the provision. Implementation of the section was delayed, however, until September 1, 1989, "thereby giving the next President and Congress, and possibly the courts, an opportunity to reexamine this issue before it impacts the innocent or places a double-jeopardy type of penalty in law." In the interim, on or before May 1, 1989, the President is obliged to transmit to

163. Id. § 253a(b)(B).
164. Id. § 253a(c).
165. See infra notes 207-13 and accompanying text.
166. As one senator pointed out:
   One aspect [of this amendment] which has not been commented upon is a surprise to this Senator. It is the provision as contained in the amendment, anyone convicted [sic] of any Federal or State offense consisting of the distribution of controlled substances shall have these penalties at the discretion of the court. I have never heard of a Federal act which authorizes a State court to impose sentence in a State court. That simply is not done. The Federal Government, simply stated, does not have the authority to pass a law which will authorize the State court to impose a penalty in a given set of facts. If that were to be true, what happens to Federalism in this country?
169. During the debate, one senator addressed this issue:
   The Drug Czar will be studying precisely the issue this amendment attempts to address. It is better that Congress make a considered judgment about the pluses and minuses of denying Federal benefits following the study we have mandated. This amendment is contrary to the bipartisan drug bill before us today and is a perfect example of "putting the cart before the horse."
Congress a report delineating the role of state courts in implementing this section, describing how federal agencies will enforce the section, detailing the means by which federal and state agencies and courts will share the necessary information, and recommending any modifications.\(^1\)\(^2\) Congress then will consider the report and enact appropriate changes.\(^3\)

Denying federal benefits to individuals who already have been convicted of a federal or state drug offense is a counterproductive approach to the problem of drug abuse. The following section will demonstrate that the potential harm of the measure outweighs its usefulness. For example, denying drug users benefits such as student loans, or other governmental aid, may prevent individuals from rehabilitating themselves and reinforce a cycle of poverty for low income individuals. The section then will argue that this new approach is contrary to many goals of the penal system and does not further any of the goals of punishment. It provides for disproportionate sentences, will not deter drug use, and may be enforced arbitrarily or discriminatorily. Finally, the section will show that passing federal legislation that has the effect of increasing state penalties for criminal offenses violates the principles of federalism.

A. The Effect of Denying Federal Benefits

The first step in evaluating the proposal is to examine its effects. It appears that the most likely result of denying federal benefits will be to hinder the rehabilitation of individuals convicted of drug offenses. The federal benefits that may be withdrawn include grants, loans (including student loans), professional or commercial licenses and contracts.\(^4\) It does not, however, include Social Security, welfare, or veteran’s benefits.\(^5\)

Originally, the House version of this provision would have made any individual convicted of a drug offense ineligible for public housing and veteran’s benefits.\(^6\) The Senate removed this language but provided that if any public housing tenant, any member of the tenant’s household, or any guest of the tenant’s, engages in drug-related criminal

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173. Id. § 253a(g)(2). So far the only action in Congress has been the introduction of bills in the House and Senate that would eliminate the judge’s discretion, making the withdrawal of federal benefits mandatory, and including welfare in the list of federal benefits that would be withdrawn. See 135 CONG. REC. S9940 (daily ed. Aug. 3, 1989) (explanation of Sen. Wallop); S. 1492, 101st Cong., 1st Sess. (1989); H.R. 2523, 101st Cong., 1st Sess. (1989).
174. Id. § 253a(d).
175. Id. § 253a(d)(1)(B). The version the House passed, however, included both veteran’s benefits and public housing. 134 CONG. REC. H7289 (daily ed. Sept. 8, 1988).
activity near the housing complex, it shall be grounds for terminating
that tenancy. 177

The withdrawal of federal benefits is designed to tell drug users,
"You are not going to be treated like a respected member of our society . . . [w]e are not going to provide [Federal benefits] to people who are profiteering off the health and happiness of our children." 178 One representa-
tive said,

To the middle class drug user, we say, you can lose very important
Federal benefits. To America’s lawyers we say, if you’re convicted of
using drugs, you can lose your license to practice law. To America’s
doctors we say, if you’re convicted of using drugs, you can lose your
license to prescribe drugs. To Wall Street we say, if you’re convicted
of using drugs, you can lose your securities brokers license. 179

The potential harm of this provision outweighs its usefulness. 180
First, the denial of federal benefits to people who are convicted of drug
offenses “mandates a punishment that is outrageously inhumane . . .
[and] works directly against reintegration of individuals who have al-
ready served their sentence.” 181 It “suspend[s] Federal aid for the people
who need that very assistance to defeat the circle of drug abuse, and
etirely circumvent[s] our court system.” 182 It ignores the reality that
the problem of drug abuse, particularly in the inner cities has multi-fac-
eted roots. 183 For many, drugs are a part of their life from childhood.
The federal government needs to offer people alternatives, not to aban-
don them or fail to treat them with respect.

Unfortunately, this kind of one-dimensional thinking severely limits
this country’s ability to approach the drug problem constructively. In-
stead of looking at the problems created by the cycle of poverty and
spending money on education and job training to offer individuals mean-
ingful alternatives in life, this Amendment seeks to do the opposite—cut
off what little help exists. 184 It is symptomatic of a desire to punish the

MIN. NEWS (102 Stat.) 4300. All the arguments related in this part of the Note apply equally
to the provision for the termination of tenancies in public housing. It also seems unfair to
punish, perhaps with devastating consequences, an entire family for the digressions of one
person. Again, this seems like more of an impulse to lash out against the drug problem with-
out examining the likely results or the overall fairness of the measure.
180. Senator Kassebaum put it somewhat more succinctly, saying the amendment “creates
183. Low income neighborhoods suffer the worst from the drug problem, yet the measures
designed to attack the problem often seem only to punish the victims even more. See
184. See Nadelmann, supra note 183, at 14-18.
way out of the drug problem, an approach that has met with little more than failure.\textsuperscript{185} This close-minded view of how to approach social problems contributes to a lack of hope on the part of many people and to a lack of respect for a political process that shuts many out.\textsuperscript{186}

This Amendment has equal protection infirmities as well. It unfairly targets poorer individuals who rely most on federal benefits. It "is discriminatory. [For example i]t could unfairly punish poor students who could not attend a postsecondary institution without federal financial aid. It would not affect those who have the means to attend college without Federal aid."\textsuperscript{187}

Another concern is how these provisions would be enforced by the agencies, and the "paperwork, delay and cost to the institutions and needy students" of background checks.\textsuperscript{188} To effectively implement these programs, federal agencies would need to verify that applicants have not become ineligible for federal aid. These checks are likely to infringe on the privacy rights of many individuals, because federal agencies need to either question applicants about criminal convictions or receive this information directly from the courts. In its rush to pass this bill Congress shrugged off these concerns saying they were not "going to get into a legal debate."\textsuperscript{189}

The detrimental effect of the denial of federal benefits is further illustrated by examining whether this provision furthers penal policy. In the next part, this Note considers whether the denial of federal benefits is consistent with the goals of penal policy.

B. The McCollum Amendment and Established Penal Policy

In general, the goals of punishment are recognized to be deterrence, incapacitation, retribution, and rehabilitation.\textsuperscript{190} Uniformity in sentencing and proportionate sentences based on the culpability of the offender

\textsuperscript{185} As one school teacher put it, "So many people say, 'Say no to drugs.' Well, what do we say yes to?" N.Y. Times, Aug. 15, 1989, at B1, col.2.

\textsuperscript{186} As Senator Bumpers argued,

If we insist on [passing this amendment,] it is not he who will suffer, it is we who will suffer. Because he has no choice but to go back doing the only thing he knows how to do, and that is to traffic in drugs. Who then will think that an amendment that denies him any opportunity to better himself and to develop skills other than the skills of crime.


She continues, "[The costs] do not justify the potential benefits." \textit{Id.}

\textsuperscript{190} The recently revised, \textit{Sentencing Guidelines for U.S. Courts}, 52 Fed. Reg. 18,045, 18,047 (1987), written by the United States Sentencing Commission, was designed to promote guidelines which "further the basic purposes of criminal punishment by deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."
are necessary to effectuate these goals.\textsuperscript{191} The additional sanction of a denial of federal benefits undermines these fundamental principles underlying the sanctions imposed by the criminal justice system.

In passing the provision for the denial of federal benefits, the major objective of Congress was to deter drug use and trafficking.\textsuperscript{192} There was, however, no study of the value of this measure as a possible deterrent.\textsuperscript{193} Most significantly, a wide array of serious criminal penalties already are provided to deter Americans from using drugs. In the words of Senator Bumpers, "If strong criminal penalties do not provide a deterrent, I am not convinced the loss of Federal benefits will."\textsuperscript{194} Indeed, the Anti-Drug Abuse Act contains many stiff new criminal penalties that are "tough for users . . . [and] tough for traffickers."\textsuperscript{195} In the face of the long prison sentences and severe criminal fines already in place, it is difficult to imagine the possible loss of federal benefits having an effect.

The measure is not well thought out. Rather, it is a product of the desire to pile on a variety of punishments in an attempt to legislate away the drug problem.\textsuperscript{196} On the floor of the Senate, the major proponents of the bill were unaware of existing penalties.\textsuperscript{197} Nevertheless, they were convinced that this additional sanction was needed. Similar to the provi-


\textsuperscript{192} Representative McCollum stated that the purpose "of the Amendment . . . is to add a deterrent." 134 CONG. REC. H7289 (daily ed. Sept. 8, 1988) (statement of Rep. McCollum).

\textsuperscript{193} \textit{See supra} text accompanying note 56-63.


[O]ur nation already has a user accountability system in place. Those who possess or use drugs in violation of the law are subject to jail terms and fines. In fact, the same system of accountability applies to almost every criminal act including murder, robbery and so forth.

This amendment would add to our current system of justice a variety of post-conviction penalties, not for all criminals, just for drug offenders. Apparently, proponents of this amendment feel that our judicial system imposes appropriate sentences in all instances except for drug crimes.


\textsuperscript{195} \textit{Id.}

\textsuperscript{196} As Representative Stark described it, "Predictably we have fallen victim to the biannual lust for drug bill demagoguery." 134 CONG. REC. H7939 (daily ed. Sept. 22, 1988) (statement of Rep. Stark). Senator Bumpers complained that the denial of federal benefits was an example of sacrificing constitutional protections "just to grow hair on your chest . . . send out press releases and tell everyone how tough you are on drugs." 134 CONG. REC. 15,971 (daily ed. Oct. 14, 1988) (statement of Sen. Bumpers). \textit{See also supra} text accompanying notes 39-66.

\textsuperscript{197} After an exchange in which Senator Bumpers asked Senator Gramm if he was aware of existing penalties and Senator Gramm was unable to answer, Senator Specter responded, "I would think if a proponent of an amendment, an additional penalty, is going to bring it to the floor, there would be some knowledge of what the existing penalties are." 134 CONG. REC. S15,966 (daily ed. Oct. 14, 1988) (statement of Sen. Specter). Senator Specter sent out an
sion for civil penalties, the denial of benefits stemmed from a perception that "we have crime without punishment for people who are using drugs." 198 There was no study, however, to confirm a lack of prosecution of drug users by the states—who have primary responsibility for enforcement of laws against illegal drugs. Despite the concerns of some members of Congress about overcrowded jails, drug users still can be punished and deterred by the imposition of a sentence, even probation, and the resulting criminal record. Also, even short jail terms of a few days would have an effect, if states chose to impose them.

Another purpose of Congress in passing this Amendment was retribution. Some members of Congress saw it as an attack on "greed soaked mutants who deal in illegal drugs." 199 This impulse to lash out at people in an effort to halt the drug problem is understandable as an initial reaction, but is an irresponsible basis for passing federal legislation. Retribution plays a part in criminal law, but emotional impulses should be controlled and legislation should reflect considered judgment. Sweeping condemnations of drug users ignore widespread drug use in society, and legislation based on "[m]oral adjurations vulnerable to a charge of hypocrisy [is] self-defeating [and] tends to breed a cynicism and indifference to the criminal-law processes." 200

The legislation also does not further the goal of incapacitation. As outlined above, 201 neither does it further the goal of rehabilitation, because it denies individuals aid while they would be trying to reintegrate themselves. It does the opposite; it hinders rehabilitation.

Uniformity and proportionality in sentencing are acknowledged as two additional goals of punishment. 202 Denial of federal benefits runs counter to these goals. The penalty is not uniform in relation to sentences for other crimes and the effect of the sanction can be extremely disproportionate. For example, two college students could be arrested, one for stealing a stereo and the other for smoking marijuana. While the first would likely receive probation and remain in school, the second may

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201. See supra text accompanying notes 174-82.
202. See supra note 191.
be forced to withdraw from college if the federal aid he depends on is denied in the future.

The provision for the denial of federal benefits ignores the need for uniformity in the criminal justice system. As one member of the House Judiciary Committee said, "[It] would abandon those processes of [the U.S. Sentencing Commission designed to impose equity in our sentencing process] established just 4 years ago, and selectively impose postconviction penalties." Instead of considering the punishment of criminal offenses in the context of the complete system, Congress has adopted a piecemeal approach.

The dramatic variations in the severity of the sanction's effect pose a significant problem. Not only may the denial of federal benefits impose a severe hardship on lower income groups, but the denial or revocation of a federal license or contract could be a harsh and unfair penalty. People who depend on federal licenses or contracts for their business or employment are subject to a stiffer sanction. A proponent of the Amendment recognized this potential saying, "if you have a license to operate a radio station and you are smoking marijuana, you are subject to losing that license." Punishment unequal in its application and dependent on the fortuity of circumstances has an unduly severe effect. Two individuals could be guilty of the same offense, smoking marijuana, and yet because one depends upon a federal license for employment she may be penalized much more severely.

In addition, these postconviction penalties apply only to drug use and not to other crimes that can easily be considered more morally reprehensible, such as rape or murder. The penalty is disproportionate to the crime and is based on current political pressures and not the culpability of behavior. Congress should not dispense with a uniform and cohesive system of criminal penalties by imposing this additional penalty in the case of drug crimes.

C. The Amendment Violates the Principles of Federalism

Another major problem is that the McCollum Amendment violates the rights of states to administer their own criminal laws. The denial of


204. 134 CONG. REC. S15,969 (daily ed. Oct. 14, 1988) (statement of Sen Gramm). Senator Gramm also provided another example: "If the farmer wants to enter into a contract with the Federal Government—for instance, through the Soil Conservation Service—and if that person is convicted of drug use, then the judge could deny him that benefit for up to a year." Id. at S15,973.

205. See Clark, supra note 93, at 404 ("the loss of a professional license may cause considerably more severe consequences than a short jail sentence").

federal benefits supplements existing penalties, primarily state laws. This imposition of an additional penalty for state crimes infringes on state jurisdiction. "Every State has its own laws, . . . defines what is illegal and specifies what the penalty is."207 The States of Oregon and California, for example, provide that the possession of personal use amounts of certain drugs is only a citable offense.208 The legislatures of the States have decided the appropriate range of punishment for drug offenses committed in their states. The federal government should not grant individual state judges the authority to disregard state law and punish individuals more severely. As written, the Amendment purports to give judges this authority,209 but it seems that this "cannot be done under our system of Federalism and our system of laws."210

In any event, the federal government should respect the provinces of the states to enact their own criminal laws. The Supreme Court has rejected the notion that "the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens."211 Yet this is exactly what Congress is trying to do by allowing state judges to impose the additional sanction of the denial of federal benefits to individuals convicted of state crimes. The Supreme Court warned that allowing Congress to add additional penalties for state crimes would "open the door to unlimited regulation of matters of state concern by federal authority."212 Certainly, Congress should not disregard the domain of state criminal law protected by our system of federalism and the tenth amendment.213

For the above reasons, Congress should repeal this section before September 1, 1989, the scheduled date of implementation. At the very least, Congress should delay the effective date of the Amendment further and subject the proposal to more adequate scrutiny. Without the pressures of an election year, Congress should be able to re-evaluate this proposal more objectively.

IV. Conclusion

There are no simple answers to the problem of drug abuse. Unfortunately, the recent approaches have added new concerns to the problem—

208. CAL. HEALTH & SAFETY CODE § 11357(b) (Deering 1984); OR. REV. STAT. § 161.705 (1985).
209. 21 U.S.C.A. § 253a(a-b) (West Supp. 1989). This section provides that individuals "convicted of any Federal or state offense" may be denied benefits at "the discretion of the court." Id.
212. Id.
213. Id.
that individual rights will be trampled and the criminal justice system
dismembered. In a rush to take action, Congress has "fallen victim to
the biannual lust for drug bill demagoguery" and disappointed those
who had a "glimmer of hope for a small change of direction in our
Nation's drug policy." The imposition of civil fines without criminal
due process protections may saddle individuals with undeserved drug
dispositions. The denial of federal benefits may condemn individuals to a
cycle of poverty and inhibit rehabilitation.

These provisions are part of a pattern of dangerous curtailments of
basic rights through draconian enforcement measures, punishments, and
sentencing procedures. For example, President Bush is proposing pub-
lishing the names of drug users in the newspaper, sending first-time of-
fenders to boot camps, and denying driver's licenses and scholarships to
drug users. Indeed, Professor Steven Wisotsky warned in 1987 that
growing efforts to prosecute drug offenses would result in further in-
fringements on civil liberties and the due process rights of criminal de-
fendants, including prosecutions and sanctions through the civil
system. Ironcally, these measures are self-defeating and serve to di-
vert attention away from exploring different measures that could be more
successful. They certainly have not brought us closer to victory in the
war on drugs. Congress ignored the calls of members that "we cannot legislate away drug abuse." Congress cannot merely pass legislation
and hope to fight a social problem so deeply embedded in our society.

The civil fines and denial of federal benefits are a product of the
 crackdown on drugs, but such measures may spread to other areas of
criminal law before they are adequately considered. Congress should re-
consider the provision to impose civil fines and should repeal the Amend-
ment providing for the denial of federal benefits before it becomes
effective. In any case, the courts should strike down the provision for
civil fines as an unconstitutional imposition of criminal penalties without
the due process of law.

215. Id.
217. Professor Wisotsky predicted that Congress would try to "bypass entirely the cum-
bbersome criminal justice system, with its tedious set of impediments to investigation, prosecu-
tion, and conviction, and substitute a control system consisting of civil sanctions: fines, asset
seizures and forfeitures." Wisotsky, supra note 23, at 925. Professor Wisotsky's article re-
views the threat to constitutional protections posed by the war on drugs.