FEDERAL COURTS, FEDERAL CRIMES, AND FEDERALISM

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ARTICLES
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The forthcoming celebration of the bicentennial of the framing of the United States Constitution provides us all with a special opportunity to re-examine our national charter and the unique federal system it established. An important debate concerning the need to refer to the intent of the Framers in interpreting the Constitution already is under way.¹ That there should be a debate over this issue seems curious to me, because judges and lawyers always begin their analysis of any document with an inquiry into the intention of the parties. It would seem especially important that they do so with a document as significant as the Constitution.

In this Article, I open the discussion on a different front, hoping perhaps to trigger another debate. I begin with the proposition that the enlarged criminal jurisdiction of the federal courts has led to an increasing federalization of the criminal law. Whether that proposition invokes a challenge to the system of dual sovereignty established by the Framers of our Constitution is the question I propose for debate. The discussion should be of particular interest to those concerned with maintaining the traditional functions of the states and the vitality of the Tenth Amendment.² Historically, of course, the detection, apprehension, prosecution, and punishment of those accused of anti-social conduct have been considered state functions of the most basic kind.

As I see it, the growing use of the federal courts for criminal prosecutions is attributable to three factors: ongoing congressional interest in the development of new criminal legislation, expansive interpretation of federal criminal statutes by the

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² The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
courts, and demands by state and local governments for federal assistance in criminal law enforcement. Add to these factors the vigor of some federal prosecutors in filling the gaps perceived to exist in state prosecutions, and we have the makings of a glut that threatens to overwhelm the federal courts—courts that were designed to handle a limited number of crimes affecting national interests.

The restricted role intended for the federal government in regard to the exercise of criminal jurisdiction is apparent from a reading of the Constitution itself. Jurisdiction over criminal matters is referred to specifically in the Constitution in only four of the enumerated powers of Congress: the power to provide punishment for the counterfeiting of United States securities and coin, the power to “punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations,” the power to exercise authority at the seat of federal government and in federal enclaves, and the power to punish treason. Obviously, the Framers expected that general criminal jurisdiction would remain with the States. James Madison put it this way in Number 45 of the Federalist papers:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Despite the limitations envisioned by Madison, the Constitution delegates to Congress a number of broad-ranging enumerated powers dealing with various matters of domestic concern. The Constitution also confers upon Congress the power to enact laws necessary and proper for the execution of those enumerated powers and for the execution of all other powers vested in the officers, departments and government of

5. U.S. CONST. art. 1, § 8, cl. 17.
6. U.S. CONST. art. 3, § 3.
the United States. The authority to adopt criminal legislation is derived from these provisions in our national charter. For example, the first criminal statute, enacted by the first Congress in 1789, defined certain customs offenses and was based on the enumerated power to lay and collect taxes, duties, imposts, and excises. The Crimes Act of 1790, the earliest federal criminal code, established penalties for four categories of prohibited activities within the exclusive jurisdiction of the federal government: felonies committed on the high seas, offenses directly affecting the operations of government, crimes committed within federal enclaves, and interference with the functioning of the federal courts.

The offenses sanctioned in the Crimes Act either were mentioned specifically in the Constitution or established under the authority of the Necessary and Proper Clause.

The Judiciary Act of 1789 divided jurisdiction for the trial of crimes against the United States between the district courts and the circuit courts. As originally constituted, the circuit courts consisted of one district judge and two Supreme Court justices and had both trial and appellate jurisdiction. The Act conferred upon the United States district courts jurisdiction over all crimes and offenses "cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted ...." Jurisdiction over crimes calling for greater punishments was vested in the circuit courts.

The very limited jurisdiction of the district courts was the cause of some inefficiency in the early criminal justice system. The minutes of the Supreme Court dated February 8, 1791 include a copy of a letter from James Duane, first judge of the

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11. Ch. 9, § 1, 1 Stat. 112, 112.
12. Ch. 20, 1 Stat. 73.
13. Ch. 20, § 9, 1 Stat. at 76.
15. See, e.g., ch. 20, §§ 4, 5 & 11, 1 Stat. at 74, 75 & 78.
17. Ch. 20, § 11, 1 Stat. at 78.
District of New York, to Chief Justice John Jay. Judge Duane advised that he had committed to custody one Goreham, Master of the Sloop Hiram, for "Breach of Revenue Laws aggravated by Perjury" and one Seely, mate aboard the same vessel, for landing a cargo of coffee at night without reporting. Noting that he was without jurisdiction to try these offenses by reason of the extent of punishment involved, Judge Duane requested that a circuit court be convened in New York, and it was so ordered by the Supreme Court. 18

It was not until 1891 that the circuit courts became circuit courts of appeals, exercising appellate jurisdiction only. 19 Now, of course, the district courts have original jurisdiction of all offenses against the laws of the United States. 20 Some lawyers describe the present-day courts of appeals as courts for the correction of district courts' errors, and for the perpetuation of their own. District judges compare circuit judges to soldiers who come onto the battlefield after the battle is over and shoot the wounded. One of my district judge friends swears that he once read a court of appeals opinion containing these words: "We reverse, substantially for the reasons stated in the decision of the court below."

A significant expansion of the criminal jurisdiction of the federal courts to cover crimes traditionally punished under state law came about in the Reconstruction Period following the Civil War. Until that time, federal criminal law generally was restricted to conduct directly affecting the functions and operations of the national government. The original mail fraud statute, enacted in 1872 as part of a legislative package dealing with the post office, 21 was remarkable as an extension of federal authority into an area formerly thought to be of state concern only. To be sure, the statute was enacted in furtherance of the constitutional power of Congress to establish post offices and post roads, 22 and, despite several amendments over the years, proof of its violation still requires a showing of use of the mails to establish jurisdiction. 23 This jurisdictional requirement has

become attenuated, however, by virtue of the Supreme Court decision holding that the requirement is fulfilled if the use of the mails can be reasonably foreseen in connection with the scheme to defraud.\textsuperscript{24}

Court decisions defining the scope of the fraudulent conduct proscribed also have extended the reach of mail fraud prosecutions. Originally designed to prevent the misuse of the postal system, the mail fraud statute has evolved by judicial interpretation into a vehicle for the prosecution of an almost unlimited number of offenses bearing very little connection to the mails, which would ordinarily be prosecuted in the state courts. Cases involving official corruption at the state and local levels have been introduced into the federal courts under the umbrella of mail fraud, with the courts finding actionable fraud where the corrupt officials can be said to have deprived the citizenry of intangible rights to their honest, loyal, and faithful services. Ironically, this theory of breach of fiduciary duty found expression in a case in which the court said "\textit{we are cognizant of the problem of the ever expanding use of the mail fraud statute to reach activities that heretofore were considered within the exclusive domain of State regulation.}"\textsuperscript{25}

In recent years the courts have sustained mail fraud convictions or indictments of a local political leader whose special relationship with the local government was considered sufficient to impose a public duty upon him,\textsuperscript{26} of an employee said to have breached a duty to disclose material information to his employer,\textsuperscript{27} of a corporate officer for diversion of corporate funds to unknown purposes,\textsuperscript{28} and of an attorney for a fraud generated by a conflict of interest.\textsuperscript{29}

A similarly broad range of activity is encompassed by the wire fraud statute,\textsuperscript{30} the twin of the mail fraud provision. Under that statute, the conviction of a man who established a bogus

\begin{itemize}
\item \textsuperscript{24} Pereira v. United States, 347 U.S. 1, 8-9 (1954).
\item \textsuperscript{26} United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), \textit{cert. denied}, 461 U.S. 913 (1983).
\item \textsuperscript{28} United States v. Weiss, 752 F.2d 777 (2d Cir.), \textit{cert. denied}, 106 S. Ct. 308 (1985).
\item \textsuperscript{30} 18 U.S.C. § 1343 (1982).
\end{itemize}
talent agency for the purpose of meeting and seducing young women was affirmed.\textsuperscript{31}

Chief Justice Burger has written that "when a 'new' fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized [federal] legislation can be developed and passed to deal directly with the evil."\textsuperscript{32} To my mind, that statement raises these important issues: whether there is a need for a proliferation of criminal statutes to deal with matters already covered under the mail fraud heading; whether the expanded interpretation of mail fraud implicates the Sixth Amendment right to be informed of the nature and cause of the accusation; and, most important, whether there is a place for state criminal law in the formulation of responses to new varieties of fraud.

As a fount of federal criminal jurisdiction, the power of Congress to establish the post office pales into insignificance in comparison with its power to regulate commerce among the several states.\textsuperscript{33} At the turn of this century, Congress found the need to respond to problems the States could not resolve and began to enact criminal legislation to fulfill that need under the guise of protecting the channels of interstate commerce. The Lottery Act,\textsuperscript{34} prohibiting the transportation of lottery tickets in interstate commerce, and the Mann Act,\textsuperscript{35} prohibiting the movement of women across state lines for prostitution, were early examples of such laws. In upholding the constitutionality of these two Acts, the Supreme Court rejected Tenth Amendment violation arguments,\textsuperscript{36} as well as contentions that the commerce power was not broad enough to support the legislation.\textsuperscript{37} Thus reinforced by the Supreme Court, Congress pushed on to adopt new criminal statutes purportedly protective of interstate commerce channels, supposedly responsive to problems unreachable by state law, and always intrusive into areas previously of exclusive state concern: transportation of

\textsuperscript{31} United States v. Condolon, 600 F.2d 7 (4th Cir. 1979).
\textsuperscript{33} U.S. Const. art. I, § 8, cl. 3.
\textsuperscript{34} Ch. 191, 28 Stat. 963 (1895) (current version codified at 18 U.S.C. §§ 1301-07 (1982)).
\textsuperscript{36} Champion v. Ames, 188 U.S. 321 (1903).
\textsuperscript{37} Hoke v. United States, 227 U.S. 308 (1913).
stolen vehicles,\textsuperscript{38} kidnapping,\textsuperscript{39} flight to avoid prosecution,\textsuperscript{40} and theft from interstate commerce.\textsuperscript{41}

When the Supreme Court upheld the authority of Congress under the Commerce Clause to regulate intrastate activity affecting interstate commerce,\textsuperscript{42} the stage was set for the most expansive intervention of the federal government in crime control since the beginning of the Republic. This extremely broad interpretation of the commerce power has enabled Congress to provide for the prosecution of local racketeering under the Hobbs Act,\textsuperscript{43} which punishes those who affect commerce by robbery or extortion; the Travel Act,\textsuperscript{44} which prohibits interstate travel in conjunction with various forms of unlawful activity; the Extortionate Credit Transaction Act,\textsuperscript{45} which outlaws extortionate credit transactions or "loansharking;" and, in recent years, the all-purpose Racketeer Influenced and Corrupt Organizations Act.\textsuperscript{46}

Whether the Constitution permitted the enactment of the federal loan shark statute was the issue before the Supreme Court in Perez v. United States.\textsuperscript{47} In my opinion, the Court's affirmative answer to that question marked an astounding change in the concept of federal criminal jurisdiction. The Court there held that a local loan shark could be convicted without any showing of a nexus between his activities and interstate commerce. The basis for jurisdiction was found in a congressional determination that interstate commerce was affected by a tie-in between the class of all extortionate credit transactions and organized crime.\textsuperscript{48} Justice Stewart's dissent in Perez, however, seems compelling. He wrote:

It is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to

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  \item \textsuperscript{38} 18 U.S.C. § 2312 (1982).
  \item \textsuperscript{39} 18 U.S.C. §§ 1201-02 (1982).
  \item \textsuperscript{40} 18 U.S.C. §§ 1073-74 (1982).
  \item \textsuperscript{41} 18 U.S.C. § 659 (1982).
  \item \textsuperscript{42} Wickard v. Filburn, 317 U.S. 111, 118-29 (1942).
  \item \textsuperscript{43} Ch. 645, 62 Stat. 798 (1948) (codified at 18 U.S.C. § 1951 (1982)).
  \item \textsuperscript{44} Pub. L. No. 87-228, § 1(a), 75 Stat. 498, 498 (1961) (codified as amended at 18 U.S.C. § 1952 (1982)).
  \item \textsuperscript{47} 402 U.S. 146 (1971).
  \item \textsuperscript{48} See id. at 155.
\end{itemize}
say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.\textsuperscript{49}

Despite Justice Stewart's dissent, it now seems certain that a congressional declaration that a particular activity affects commerce is sufficient to invoke the interstate commerce power as the basis for federal criminal legislation. Such a declaration is included in the Drug Abuse Prevention and Control Act of 1970,\textsuperscript{50} where Congress made the finding that "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."\textsuperscript{51} Having thus generated its own jurisdictional base, the statute goes on to authorize, among other things, federal prosecution of the otherwise local crimes of possession, distribution, and manufacture of narcotics and dangerous drugs.\textsuperscript{52}

Thus it is that local trafficking in controlled substances, as well as local fraud, loan sharking, theft, racketeering, municipal corruption, and many other crimes involving matters primarily of local concern have become grist for the federal prosecutor's mill. As I see it, the ongoing federalization of the criminal law has brought with it some very significant constitutional and pragmatic problems. The problems are these:

1. \textit{Unrealistic expectations.} In 1985, a total of 39,500 criminal cases were filed in the ninety-four United States district courts.\textsuperscript{53} During the same period, more than 1,000 criminal cases were filed in the superior courts of the New York state court system alone.\textsuperscript{54} The Criminal Court of the City of New York is said to handle 280,000 misdemeanor cases each year.\textsuperscript{55} Last year, there were 55,000 narcotics arrests in New York City.\textsuperscript{56}

\textsuperscript{49} Id. at 157-58 (Stewart, J., dissenting).
\textsuperscript{54} New York State Unified Court System: Superior Court— Criminal Terms, Executive Summary 3 (Jan. 30, 1986) (computer printout).
City.\textsuperscript{56} Nationwide, for the same period, there were but 5,623 marijuana, controlled substance, and narcotics cases filed for consideration by 575 United States district judges.\textsuperscript{57} Between 1984 and 1985, the United States District Court for the Southern District of New York sustained an increase in its total criminal caseload of 51.5\%, from 695 to 1,053 cases.\textsuperscript{58} Is it realistic to expect that the federal courts in New York City can shoulder ten percent of the City’s drug cases, as suggested by the state’s Chief Administrative Judge?\textsuperscript{59} Does it make sense to designate state prosecutors as federal prosecutors for this purpose, as proposed?\textsuperscript{60} From whence are to come the necessary court facilities and personnel? It simply is unrealistic to expect that the federal courts ever will be able to make the slightest inroads in handling the cases arising out of the tens of thousands of narcotics and other crimes committed in the nation in each year.

(2) \textit{Diversion of scarce federal resources.} This problem was delineated in a decision of the Court of Appeals for the Second Circuit in a narcotics distribution case heard last year.\textsuperscript{61} As a member of the panel issuing that decision, I was privileged to concur in the opinion of a colleague, Jon O. Newman, who wrote as follows:

Though the case was developed by New York City police officers, concerns readily visible criminal conduct requiring no special investigatory resources or equipment, and involves a $30 transaction, the matter became the subject of a federal criminal prosecution because it occurred on “federal day,” the day of the week when federal law enforcement authorities have decided to convert garden-variety state law drug offenses into federal offenses. Though we are urged in other contexts to tolerate missed deadlines because of the enormous burdens placed upon limited numbers of federal law enforcement personnel, . . . on “federal day” there are apparently enough federal prosecutors available with sufficient time to devote to $30 drug cases that have been developed solely by state law enforcement officers. Be that as it may,

\textsuperscript{59} Fox, \textit{supra} note 55, at 2, col. 5.
the case is lawfully within the jurisdiction of the federal courts and must be decided.\footnote{Id. at 125 (citation omitted).}

The obvious question presented by the decision is this: Should the federal courts be used for the prosecution of §30 "buy and bust" cases? I suggest that it might be a better use of resources to reserve federal courts for the prosecution of major interstate and international trafficking in those pernicious substances that have become a modern-day plague in our nation. The same considerations should apply to other crimes as well—federal prosecution should be limited to misconduct affecting clearly defined national interests.

(3) \textit{Duplication of effort in law enforcement.} It seems inevitable that problems will arise when state and local prosecutors have the authority to prosecute the same acts as violations of both state and federal law. Sometimes, there are unseemly "turf" wars, as was seen recently in New York City in connection with investigations into allegations of municipal corruption.\footnote{Meislin, \textit{Prosecutors Vie over Trial Dates in Scandal Case}, N.Y. Times, June 12, 1986, at B2, col. 4.} Sometimes, of course, there are clashes over who should be prosecuting crimes in mutual jurisdiction situations, as demonstrated in regard to drug prosecutions in New York City.\footnote{N.Y. Times, July 14, 1986, at B1, col. 5.} Always, there is the specter of duplication, waste, and destructive competition for the taxpayer’s law enforcement dollar. Although there is no constitutional bar to punishing a person twice for one act offensive to both federal and state sovereigns, is it necessary? Is it efficient? I suggest that the public interest is not well served by duplication of effort in law enforcement.

(4) \textit{Unbridled discretion of federal prosecutors.} As Congress defines ever more crimes, it becomes inevitable that federal prosecutors gain ever more discretion to decide what crimes they will prosecute. This is so because the expansion of federal law enforcement agencies, prosecutors and courts cannot keep pace with the proliferation of federal crimes. Federal district attorneys, therefore, must become very selective as to the crimes they will prosecute and those they will decline to prosecute. These appointed officials thus acquire the greatest power in the law enforcement field, because to them is entrusted the
authority to decide which cases they will bring to court and which they will not.

An attorney recently told me of the great effort he was making to persuade a United States Attorney not to prosecute his client for a state sales tax violation. (The prosecution was threatened under the mail fraud statute, of course.) My impression was that the case would be won or lost on the question of the exercise of discretion. Where there are many criminal violations but only a few can be chosen for prosecution, the prosecutor invades the province of the lawmaker. The inevitable result is a public perception that the process is unfair.

(5) Loss of the capacity for self-government. The citizenry increasingly has been conditioned to turn to federal law enforcement and to the federal courts as the first line of defense against anti-social conduct. What we are witnessing is an abdication of responsibility for self-government, reflected in the attitudes and lack of accountability of those chosen to govern at the state and local level. In the face of municipal corruption, it is easy to send for the “federals.” If narcotics are sold on the street corners of a major city, it is a simple matter to invoke high-profile federal criminal prosecution. When loan sharks and racketeers infest a municipality, local law enforcement efforts can be relaxed if federal help is on the way.

But something is lost in the process—the traditions of democratic self-government and of individual involvement and neighborly concern that have been the hallmarks of our society. To invite federal authorities to define and prosecute crime involving activities primarily of state and local interest is to concede that state and local government cannot be moved to serve the will of the people. I do not believe that the American people are prepared to make that concession.

Before there is a complete merger of state and federal law, the following steps might be considered:

(1) Congress should undertake a study of each and every federal criminal statute, identifying those dealing with matters of true national interest and discarding all others.

(2) No new federal criminal legislation should be enacted without assessing the impact of the legislation on federal courts and other federal resources.

(3) Consideration should be given to conferring upon state courts jurisdiction over certain federal crimes. This is not a new
concept; it has roots in the early days of our judicial system.65

(4) The Department of Justice should develop, enforce, and
widely disseminate precise guidelines circumscribing the exer-
cise of discretion by United States Attorneys.66 These guide-
lines should proscribe duplication of state prosecution.

(5) Mail fraud and other criminal statutes given expansive
interpretation by the courts because of imprecise statutory lan-
guage should be studied with a view toward adopting more
specific descriptions of the conduct prohibited.67

(6) The excellent program introduced by the Department
of Justice to promote cooperation and coordination among lo-
cal, state, and federal law enforcement agencies should be ex-
anded and encouraged.68

The criminal law is but one area in which Congress has in-
truded and displaced the functions of the States. But it is the
duty of Congress, just as much as it is the duty of the judicial
and executive branches, to maintain that deliberately measured
allocation of authority between the States and the federal gov-
ernment provided by the Constitution. Given the “underdevel-
oped capacity [of Congress] for self-restraint,”69 to use a
phrase coined by Justice O'Connor, there may be some doubt
whether the legislative branch has any great enthusiasm for
that duty. Chief Justice Marshall wrote that the power of Con-
gress under the Commerce Clause is restrained by “[t]he wis-
dom and the discretion of Congress, their identity with the
people, and the influence which their constituents possess at
elections.”70 These same factors are implicated in the exercise
of criminal jurisdiction under the Commerce Clause and in the
whole issue of the state-federal criminal law dichotomy. Of
these factors, the most important is the influence of the electo-
rate, because in this democratic society the proper direction of
our federal system can be determined only by the people.

66. See generally Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 LAW & CONTEMP. PROBS. 64 (1948).
68. Under this program, the individual United States Attorneys have organized Law Enforcement Coordinating Committees to achieve the program's goals.