

16. The Expanding Federal Police Power

Congress should

- reject all new proposals to make existing state crimes federal crimes;
- repeal all federal criminal laws that address conduct that takes place solely in one state, unless the conduct involves uniquely federal concerns, such as destruction of federal property; and
- adopt the proposal of the congressionally created Commission on Advancement of Federal Law Enforcement for five-year sunset reviews of all new and existing federal criminal laws.

Nothing in the Constitution gives the federal government authority over ordinary crimes. In America, crime fighting is the responsibility of state and local government. But despite the lack of constitutional authorization, federal policymakers continually try to involve themselves in crime fighting.

In recent years, the debate has been framed in terms of whether the president or Congress can take “credit” for the reduced rate of crime. In June 1998, for example, House Majority Leader Dick Armey argued that the “Republican-led crackdown on violent criminals . . . is the real reason for recent gains in public safety.” To support his claim, Armey touted a long list of “legislative victories,” which included the Juvenile Crime Control Act, the Church Arson Prevention Act, and the Sex Crimes against Children Prevention Act. Anyone unfamiliar with the Constitution would probably wonder why it took more than 200 years for Congress to enact those laws.

Every few months a heinous crime committed against a racial minority, or against a gay man or lesbian, spawns demands for a federal “hate crime” law. Those calls ignore the fact that homicide and other violent crimes are already illegal under state law, and are prosecuted vigorously.

The energy spent on obsessing about the symbolism of enacting a redundant federal law would be better spent on improving state criminal justice systems, to the benefit of all victims of violent crimes.

The federalization of crime endangers public safety and constitutional liberty in several ways. First, the creation of a duplicate federal offense subjects citizens to double jeopardy. In some cases, persons who served time in state prison on drug charges have been retried under federal law and sent to federal prison for a lengthy mandatory sentence. In other cases, persons acquitted in state courts have been re-prosecuted in federal court. Unfortunately, the federal courts have refused to stop such blatant injustices and have ruled that as long as there is one legal element in the federal offense that is not part of the state offense (for example, that the federal crime somehow “affects” interstate commerce), the second prosecution will be allowed. That legal standard eviscerates the Fifth Amendment’s double jeopardy clause.

Second, imposing a one-size-fits-all federal law on the 50 states undermines the states’ ability to make laws based on local conditions. Oregon is different from New York, and both are different from Alabama. Why should the federal government set the rules for firearms possession by minors when each state—or each county and city—is perfectly capable of enacting its own laws based on local conditions? The federal law against handgun possession by a minor is a particularly egregious example of bad federal lawmaking. If a father takes his 17-year-old son target shooting and supervises him at all times, both father and son are guilty of a federal crime, unless the son happens to be carrying a note explaining that he has parental permission to engage in target shooting.

Local police departments spend local tax dollars and are directly accountable to local voters. In contrast, federal law enforcement spends from a vast pool of “other people’s money” and is subject, at most, to very indirect democratic control. Thus, it should come as no surprise that federal crime dollars are spent on programs like Drug Abuse Resistance Education and the McGruff Crime Dog, which have been abject failures.

Finally, and perhaps most important, the federalization of policing has led to the militarization of policing. It was not long ago that police officers were known as “peace officers.” But since the 1980s the federal government has conducted a successful campaign to militarize federal, state, and local law enforcement. That militarization has led to the loss of innocent life—for example, in the well-publicized disasters at Waco and Ruby Ridge.

One of the principal causes of the growth of federal criminal powers beyond constitutional boundaries has been the gullibility of Congress, the media, and the public, who are taken in by various frauds and panics fomented by persons with an interest in centralizing more power in Washington. During the 1930s J. Edgar Hoover, director of the Federal Bureau of Investigation, told the American people that an unprecedented wave of child kidnappings was in progress. It was not, but the FBI was rewarded with substantial attention and funding. In the 1980s a very different FBI earned itself more funding by putting out phony claims about a wave of serial killers of children. More recently, an organization inaccurately called the Center for Democratic Renewal pulled off a successful hoax with phony claims about a wave of arsons of black churches in the South. Congress rushed to unanimously pass the Church Arson Prevention Act, which expands federal jurisdiction over arson, without taking enough time to draw a deep breath and discover that the arson figures were grossly inflated and that local prosecutors were already vigorously enforcing state laws against arson.

The policy implications of federalizing crime should not even be a subject for discussion since the Constitution does not authorize Congress to involve itself in crime fighting. The Constitution specifically authorizes only a few categories of criminal laws, all of which involve uniquely federal concerns. The first is based on the congressional power “To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.” The second involves the power “To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” Although currency, the high seas, and treason are clearly areas of federal concern, it is notable that the authors of the Constitution felt it was necessary to specifically authorize federal jurisdiction over them. Since Congress is given constitutional authority over certain other specific subjects (such as bankruptcies and post offices), it is reasonable for Congress to enact criminal legislation related to those subjects (such as bankruptcy fraud or attacks on postal employees).

While the body of the Constitution grants only narrow criminal law enforcement powers to the federal government, the Bill of Rights, in the Tenth Amendment, specifically reserves to the states all powers not granted to the federal government.

Even the *Federalist Papers*, which were, after all, a series of arguments for increased federal power, made it clear that criminal law enforcement would fall outside the federal sphere under the new Constitution. James

Madison wrote that federal powers “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the state.” Likewise, Alexander Hamilton, the most determined nationalist of his era, explained that state governments, not the federal government, would have the power of law enforcement, and that power would play a major role in ensuring that the states were not overwhelmed by the federal government: “There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice.”

Madison, Hamilton, and Jefferson were right to recognize that law enforcement is properly a local matter. As former attorney general Edwin Meese observed: “Federal law-enforcement authorities are not as attuned to the priorities and customs of local communities as state and local law enforcement. In the Ruby Ridge tragedy, for example, would the local Idaho authorities have tried to apprehend Randy Weaver in such an aggressive fashion? . . . More fundamentally, would Idaho officials have even cared about two sawed-off shotguns? In the Waco situation, would the local sheriff’s department have stormed the compound, or instead have waited to arrest David Koresh when he ventured into town for supplies, as he did frequently?”

The constitutional system created by Madison, Hamilton, Jefferson, and the other Founders, and ratified by the American people, was radically altered over the course of the 20th century. The enumerated powers of Congress “to lay and collect taxes” and “To regulate Commerce . . . among the several States” were turned by specious interpretation into congressional powers over issues that have nothing to do with taxes or with interstate commerce.

Too often, the partisan debate on crime control misses the larger issue of the proper scope of federal power. Yes, it is true that President Clinton’s plan to give local governments the money to put “100,000 more police officers on the street” actually provides funding for far fewer. But the more fundamental point is that federal control inevitably accompanies federal dollars. The trend toward centralization of criminal justice authority in Washington has put America on a road that will lead to a *de facto* national police force, an entity of unparalleled danger to civil liberty.

This danger is not remote or abstract. Los Angeles is currently suffering through the worst police scandal in the city's history, as years of police corruption, framing of innocent people, violence, and even killings are slowly being uncovered. The city's Board of Inquiry found that "the major cause in the lack of integrity in American police officers is mediocrity." The board's survey of Los Angeles police personnel "overwhelmingly pointed to the Department's lowered hiring standards as a major factor in the breakdown of integrity and ethical standards. . . . Additionally, those interviewed pointed to the Department's prior accelerated hiring phases as contributing to the breakdown of ethics and integrity."

Thus, Clinton's 1994 legislation to put "a hundred thousand more police officers on the street" could accurately be described as a plan to "give deadly weapons and life-or-death power to thousands of people who wouldn't have met the requirements for being a police officer in 1993."

The Justice Department is currently investigating police brutality and corruption cases all over the United States. Were it not for hiring grants distributed by one arm of the U.S. Department of Justice, there would not be so many local police crimes to be investigated by another arm of the department.

In the 1995 *Lopez* case and again in the 2000 *Morrison* case, the Supreme Court affirmed that Congress's power to "regulate commerce . . . among the several states" is not a power to create federal laws about local crimes. That Congress continues to discuss and enact criminal statutes in contravention of plainly stated Supreme Court precedent is an affront to the rule of law. Rather than rush to impose new criminal laws on the people, Congress ought to take the plank out of its own eye and start obeying the Constitution.

Suggested Readings

- American Bar Association, Criminal Justice Section, Task Force on the Federalization of Criminal Law. *The Federalization of Criminal Law*. Washington: ABA, 1998.
- Jacobs, James, and Kimberly Potter. *Hate Crimes: Criminal Law and Identity Politics*. New York: Oxford University Press, 1998.
- Kopel, David B., and Glenn H. Reynolds. "Taking Federalism Seriously: *Lopez* and the Partial-Birth Abortion Ban." *Connecticut Law Review* 30 (1997).
- Kopel, David B., and Paul H. Blackman. *No More Wacos: What's Wrong with Federal Law Enforcement, and How to Fix It*. Buffalo: Prometheus Books, 1997.
- Reynolds, Glenn Harlan. "Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?" Cato Institute Policy Analysis no. 216, October 10, 1994.

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