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The Growing Federalization of Criminal Law

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MR. THORNBURGH: The title of this session is "The Growing Federalization of Criminal Law." I think we probably might amend that to say "The Growing Federalization of Criminal Law...Until Lately," since the Supreme Court has lately been taking some steps that restrict the application of federal criminal law. But let's get into it. I'm going to begin with a discussion of the history of federal criminal law. Chuck Daniels is going to give you something a little deeper in terms of the constitutional principles. Then we'll follow up by having Bob Gorence talk about some of the practical consequences.

I brought a quotation today from 1702, when Chief Justice Holt of the House of Lords repeated the English legal maxim, "An Act of Parliament can do no wrong, though it may do several things that look pretty odd."[1] To some extent, that's been the history of federal criminal law. In the early days of the Republic, there was a very limited catalog of federal criminal laws having to do with treason, piracy, and counterfeiting, and then things that affected the administration of justice, such as bribery, perjury, obstruction of justice, and the like.[2]

It wasn't until the last third of the nineteenth century that there began to be more substance in the federal criminal laws. Mail fraud was introduced largely as a result of the widespread use of lotteries by state governments.[3] With the growth of the nation and the advent of the Industrial Age, interstate commerce types of wrongdoing began to be identified as federal offenses.[4] But federal criminal law really didn't take off until the roaring twenties and the 1930s. In large part this was due to the automobile, which gave a new mobility to wrongdoers, and along with it an ability to cross state lines and put themselves beyond the jurisdiction of many state and local officials. Bank robbery became a big-ticket federal offense.[5] There was also car theft, which used to be the staple for the FBI in their statistical

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1. City of London v. Wood, 88 Eng. Rep. 1592, 1602 (K.B. 1702).

2. Act of April 30, 1790, ch.IX, 1790 STAT. 112, 112-117 (providing punishment of certain crimes against the United States).

3. *See* Act of March 3, 1873, ch. CCLVIII, 1873 STAT. 598, 598-600 (providing for the suppression of trade in, and circulation of, obscene literature and articles of immoral use).

4. *See, e.g.*, Act of June 29, 1906, ch. 3594, 1906 STAT. 607, 607-608 (act to prevent cruelty to animals while in transit over state or territorial borders); Act of June 25, 1910, ch. 395, 1910 STAT. 825, 825-827 (act prohibiting the interstate transportation of women and girls for immoral purposes).

5. 18 U.S.C. §2113 (1994)(originally enacted as Act of May 18, 1934, ch. 304, §§ 1-3, 48 STAT. 783).

recitations, and kidnapping, largely as a result of the *Lindbergh* case.[6] Of course, with Prohibition and its whole progeny of racketeering and organized crime figures, the use of the federal income tax laws as a criminal predicate became much more prevalent—thanks to Al Capone, who was unable to be prosecuted federally on any substantive offense but was convicted and sent to prison on tax violations.[7]

During the 1960s and 1970s, the time during which I served as a U.S. attorney and as head of the criminal division of the Department of Justice in Washington, a lot more effort was focused on organized crime and corruption. Congress aided the effort through the so-called Travel Act of 1964, which made interstate travel in aid of racketeering a federal offense.[8] In 1968 and 1970, crime acts created new substantive violations. Drug laws became much more aggressively used and imaginative prosecutors resurrected the mail fraud statute[9] and the Hobbs Act[10] and utilized the new RICO statute,[11] all to use against local racketeering and corruption.

During the 1980s and 1990s, during the time that I served as Attorney General, the law in terms of criminal prosecution became much more international, again due to technological change. Transportation and communication broke down national boundaries, just as the automobile had broken them down at the state level in the 1930s. So we had new offenses in drug production and transportation outside the United States that were prosecuted in this country. We also had money laundering (where with the push of a button you could move illegal proceeds around the world very easily), terrorism, and international white-collar crime.

By the time we reached this new century, the statistics tell us that forty percent of all the federal criminal laws passed since the Civil War have been enacted since 1970.[12] Nonetheless, we are still at a point where about ninety-five percent of the criminal prosecutions in this country take place at the state and local level.

What we're looking at today, the centerpiece of our discussion today, is a new phenomenon, where Congress acts on the "crime de jour." That is, an individual congressman comes into his office, flips on the CNN morning news or reads the headlines in the newspaper, sees some dreadful thing that's happening, and divines that it should occasion the passage of a new federal criminal statute.

Consider just some of the more recent enactments that are now federal offenses: car jacking;[13] drive-by shootings;[14] deadbeat dads;[15] interstate domestic violence;[16] and violence against women through the Violence Against Women Act,[17] which was

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6. *See* State v. Hauptmann, 180 A. 809 (N.J. 1935). *See also* Federal Kidnapping Act, 18 U.S.C. 1201 (1994). (based on Act of June 22, 1932, ch. 271, §§ 1, 3, 47 STAT. 326; Act of May 18, 1934, ch. 301, 48 STAT. 781, 782).

7. *See* JOHN KOBLER, THE LIFE & WORLD OF AL CAPONE (1992).

8. Travel Act, 18 U.S.C. § 1952 (1994).

9. Mail Fraud Act, 18 U.S.C. §§ 1341-1346 (1994).

10. Hobbs Act, 18 U.S.C. § 1951 (1994).

11. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994).

12. Task Force on the Federalization of Criminal Law, American Bar Association Criminal Justice Section, *Federalization of Criminal Law* (1999), *available at* http://www.abanet.org/crimjust/fedcrimlaw1.pdf.

13. Anti-Car Theft Act, 18 U.S.C. § 2119 (1994).

14. Drive-By Shooting Prevention Act of 1994, 18 U.S.C. § 36 (1994).

15. Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228 (Supp. 1998).

16. Interstate domestic violence provision of Violence Against Women Act, 18 U.S.C. § 2261 (1994).

17. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994).

recently declared unconstitutional in part.[18] Every one of these statutes relates to what are basically local violations. They were passed with very little in the way of federal interest and have been scrutinized in the courts very carefully to determine if they square with the Constitution.

The consequences of this explosion have been manifold. A little over a year ago, the Chief Justice expressed in no uncertain terms that this explosion of federal criminal law was not a good thing.[19] An American Bar Association Task Force, which rendered its report shortly thereafter, came to a similar conclusion.[20] The reason is that the proliferation of these offenses potentially puts a great strain on the system, and particularly on the courts, which are busy enough, as many of you know. The speedy trial rules in criminal cases[21] tend to crowd out civil litigation. In addition, these duplicative laws create a great deal of confusion, not only among criminals, which is not all bad, but among law enforcement officials as well. Perhaps from the point of view of federal law enforcement, it holds the potential for deflection of federal resources away from investigations that only the feds can do: the kinds of sophisticated, multi-jurisdictional cases in organized crime, racketeering, public corruption, white-collar crime, and the like that are often beyond the reach of even the best state and local prosecutors, even when they have the jurisdiction.

I'm going to move to Chuck Daniels to give us a little bit more meat on those bones, if you will, from the point of view of constitutional law and the setting within which these problems exist.

MR. DANIELS: Thanks. To really get a handle on what's happening now, I think we have to go back a little bit in history. The Constitution, of course, established lots of checks and balances, and one of the more clear ones is that the federal government was not to have general police powers and substitute its role for that of the states.[22] The enactment of federal criminal laws pretty well followed that model for a long time, probably a century and a half, by and large. The kinds of things that were regulated by federal criminal law were things that were exclusively described in the Constitution, such as piracy on the high seas[23] and treason against the government.[24] They were those things that are enumerated in the Constitution.

A second category of law addressed the integrity of the federal government itself. A recent example, the Oklahoma City bombing case,[25] was prosecuted initially in federal court, even though the state had concurrent criminal jurisdiction, because it was uniquely an attack on the federal government. Those kinds of laws were passed early on.

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18. *See* United States v. Morrison, 529 U.S. 598 (2000) (holding neither the Commerce Clause nor the Sixteenth Amendment provided constitutional authority for Congress to enact the civil remedy provision of the Violence Against Women Act).

19. William H. Rehnquist, Address to the American Law Institute, *in* REMARKS AND ADDRESSES AT THE 75TH ANNUAL ALI MEETING, May 11, 1998, at 15-19 (1998).

20. *See* Federalization of Criminal Law, *supra* note 12, at 43-49.

21. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1994).

22. *See* Patterson v. New York, 432 U.S. 197, 201-02 (1977).

23. U.S. CONST. art. I, § 8 (The Congress shall have Power...[t]o define and punish Piracies and Felonies committed on the high Seas.").

24. U.S. CONST. art. III, § 3 ("The Congress shall have the power to declare the Punishment of Treason.").

25. *See* United States v. McVeigh, 918 F.Supp. 1467 (W.D.Okla. 1996).

The Commerce Clause[26] was another source of power, but Congress was fairly sparing in enacting criminal legislation that directly dealt with it. Congress tended to use the clause for things that directly related to commerce and not for things related to commerce only through some tangential "but for" sort of analysis. Of course, there is also the Necessary and Proper Clause,[27] which is applied to all federal government powers and provides congressional power for whatever is necessary and proper to protect the ability of the federal government to carry out its federal functions.[28]

That's the way it pretty well rested until the Civil War. The Civil War amendments, the Thirteenth, Fourteenth, and Fifteenth Amendments,[29] particularly the Fourteenth Amendment, needed to be enforced. They were still enforced fairly narrowly for almost a century after the Civil War. Other than sporadic changes in the laws due to increasing interstate commercial traffic, Congress did the things that Dick Thornburgh talked about. That was pretty well the situation until just the last few decades of this century.

Most of the federal criminal laws that are now on the books are not only those that have been enacted in the last few decades, but actually cover things that traditionally have been addressed by state laws and clearly could be covered by state laws. The primary motivating factor, which I agree with Dick Thornburgh on, is the "crime de jour" element. Congress has a hard time refusing pressures to speak out against whatever crime, local though it may be, that is affecting peoples' passions at the moment. The car-jacking statute he mentioned was enacted because of incidents that occurred outside the Beltway in Maryland, where the defendants, incidentally, were prosecuted and convicted under state homicide laws.[30] But it created such a visceral outrage that people wanted the big stick, the federal government, to do something about it.

More recently, we saw efforts following that racial dragging incident over in Texas where a black man was dragged to death behind a pickup truck.[31] There were pushes to enact a federal law, even though at the time it was being debated in Congress the defendants were being prosecuted, with the death penalty being sought. It's not that there is any vacuum of action, but it is the "crime de jour" aspect of it that motivates Congress to act.

The hook that was usually used in enacting these statutes is the Commerce Clause. It's the easiest one to use. The Court had not invalidated a congressional statute on the basis of the Commerce clause since 1936, in the *Carter Coal*

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26. U.S. CONST. art. I, § 8 ("The Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

27. U.S. CONST. art. I, § 8 ("The Congress shall have Power...[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

28. *See generally* McCulloch v. Maryland, 17 U.S. 316 (1819).

29. U.S. CONST. amend. XIII, XIV, XV. The Amendments were ratified in 1865, 1868, and 1870, respectively.

30. *See* Alan J. Craver, *Basu carjacker given life term with no parole: Solomon's crime called "outrageous and inhumane,"* BALT. SUN, August 19, 1993.

31. King v. Texas, 29 S.W.3d. 556 (Tex. Crim. App. 2000).

Company case.[32] That was about the time Roosevelt proposed the Court Packing Plan, and the Justices changed their composition a little bit and perhaps their view a little bit more. If you remember that saying, "The switch in time that saved nine," it refers to the period when the Court started looking at the Constitution's principles a little differently. Just six years later, the Court decided *Wickard v. Filburn*,[33] the little wheat patch case where a farmer was growing some wheat on his own land, not to sell it, but to grind it up and make bread for his own family. The Supreme Court, which had changed composition as well as views by 1942, said that despite the fact that he was not planning to sell it in interstate commerce, Congress could legitimately find that his use of the wheat to feed to his family meant that he would buy less wheat in interstate commerce and therefore had an effect on interstate commerce.

That case is really the epitome of the use of the Interstate Commerce Clause over the decades pretty much since then, up until this new round of refined jurisprudence. That's what I learned in law school and I think all of us did—that Congress can do anything they darn well please under the Commerce Clause using that *Wickard v. Filburn* case as an example. So most of these statutes that have been enacted over the last few decades have been grounded on Commerce Clause jurisdiction, although, you look at them and wonder, "What in the heck does this really have to do with commerce?" They're really looking at some other activity they're trying to regulate and saying that it has some kind of impact on commerce.

I think the best criminal example was the 1971 case *United States v. Perez*,[34] which upheld the loan sharking provision that was passed in 1968. The Court did not require Congress to make any showing of any particular interstate nexus of loan shark activity in order for Congress to give federal courts jurisdiction to prosecute someone for it.[35] Instead, the Court looked at the congressional hearings and said, "Well, organized criminals are often involved in loan sharking, and organized criminal activity has a national impact on commerce, and, therefore, it's okay."[36] That's the kind of analysis that was pretty much used.

The first real change came in 1995 with the *United States v. Lopez* case.[37] I think that was a real signal that the Supreme Court was no longer going to rubberstamp anything Congress passed using the pretext of the Commerce Clause. In 1990, Congress passed the Gun-Free School Zones Act.[38] One of the provisions made possession of a firearm illegal within 1000 feet of a school.[39] Again, the Act was passed on the basis of the Commerce Clause, purportedly because violence has a substantial impact on interstate commerce and people don't want to travel to places with dangerous schools—the same sort of reasoning that had gotten Congress by all those years. A five-Justice majority held that this couldn't be justified under the

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32. Carter v. Carter Coal Co., 298 U.S. 238, 299-301 (1936).
33. 317 U.S. 111, 128 (1942).
34. 402 U.S. 146, 156 (1971).
35. *Id.*
36. *Id.* at 157.
37. 514 U.S. 549 (1995).
38. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1988, Supp. V) (invalidated by United States v. Lopez, 514 U.S. 549 (1995)).
39. *Id.* at §922(q)(2)(A).

Commerce Clause. [40] It was the same five-Justice majority that is following through on *Lopez* to this day. I'll get to a case that was decided just this last month, the other most significant one of the last several decades, I think, in this area. The *Lopez* decision surprised a lot of commentators and analysts because the Court made such a break from its previous hands-off approach when it said, "Wait a minute. Carrying a gun to a school is not an economic activity."

Of course, everything ultimately has an impact in the sense that dropping a pebble at one side of the ocean affects the molecules on the other side. Everything has an impact in interstate commerce, but that's not really what the Interstate Commerce Clause was intended to address. If you use that analysis, it makes all the limitations on federal government power in the criminal area completely meaningless. By that analysis, you could uphold federal statutes such as general statutes against murder. Murder certainly has as much impact on interstate commerce as carrying a gun near a school or rape or robbery or all the garden-variety state criminal offenses.

The analogy is not meant to downplay the importance of criminal law addressing those offenses. It's really just a question of which court system is sovereign—that is, which court system has the responsibility and the right to deal with it. *Lopez* said that there are three ways you can look at whether the Commerce Clause is involved. One is the use of the channels of interstate commerce, interstate transportation, and so on. The second test is the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the particular activity at the moment is purely intrastate. The third test—and this is the one that is really where the battleground is found—is those activities having a substantial effect on interstate commerce.[41]

The Court didn't overrule the *Wickard v. Filburn* case, or any other precedent, and cited those cases as examples of things that have a substantial effect on interstate commerce.[42] But the Court said the activity addressed in the statute at issue in *Lopez*, carrying a gun near a school, was not economic activity. It's not really commerce in itself.[43]

Also, Congress had made no findings before passing the statute. Congress had gotten so used to being able to pass criminal laws like this that it didn't bother making any findings about the interstate commerce connection of carrying guns near schools; nothing in the statute indicated that. The Court said that alone is not dispositive, but it certainly made it more difficult for the Court to find any kind of interstate commerce effect to uphold the statute.[44]

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40. The majority included Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas.
41. *Lopez*, 514 U.S. at 558-59.
42. *Id.* at 559-60.
43. The Court stated that the statute
> is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561.
44. The Court stated,
> Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable

Erie v. Tompkins says the Constitution gives the federal government no plenary power, no general criminal law power; that's reserved to the states.[45] Congress has to act within an enumerated power and demonstrate some kind of traceable connection in order to justify legislation, instead of piling inference on inference in a manner that would give a general police power, as in murder, rape, and robbery. If it doesn't, there will never be a distinction between what's ruled national and what's local power.

Justice Thomas had an interesting opinion in *Lopez*,[46] and he carries the view even to this day. He would go even further in the direction of federal limitations than the other four Justices of the five-Justice block. He said that he would reevaluate the substantial effects test.[47] He thinks even that gives too much to Congress. He thinks the Court ought to look at whether this is truly a regulation of interstate commerce, or something else, and not just allow Congress to use interstate commerce as a jurisdictional hook.[48]

There has been a lot of reaction in the legal community, by commentators and by courts, to the *Lopez* opinion, because it was such a break. It was not a break from precedent technically, but it was a break from the application of precedent in a way that departed from law that existed for decades. The effect in the courts was fairly limited. You can search the law books. You won't find very many lower court cases that applied *Lopez* to other contexts and invalidated legislation. By and large, the courts were still applying older precedent in the way they had been applied before *Lopez*.[49]

The next real shot from the Supreme Court came just this last month in May [2000]. During that time Congress continued to pass "crime de jour" statutes, addressing things that have been traditionally dealt with by local law. There seems to be almost two lines of action by the federal government here. Even though in theory the conflict is between the states and the federal government, the more interesting conflict is between Congress and the courts, two branches of the federal

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> us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

Id. at 562-63 (citation and footnote omitted).

45. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

46. *Lopez*, 514 U.S. at 584-602.

47. Justice Thomas stated, "In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring). He further stated that the Court's Commerce Clause jurisprudence has given Congress power that has

> swallowed Art. I, § 8 and is coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly prohibited by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

Id. at 589 (Thomas, J., concurring).

48. Referring to the sweeping nature of the substantial effects test, Justice Thomas stated, "[O]ne always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Id.* at 600 (Thomas, J., concurring).

49. *See generally* United States v. Gilbert, 181 F.3d 152 (1st Cir. 1999); United States v. Santiago, 238 F.3d 213 (2d Cir. 2001); United States v. Gaydos, 108 F.3d 505 (3d Cir. 1997); United States v. Dorris, 236 F.3d 582 (10th Cir. 2000).

government fighting over where the lines are to be drawn under our federalism. That's really where the battle has been fought.

The states in some instances have been sort of bystanders on this whole dispute. Although you will find a lot of state officials who are unhappy with the feds gradually taking over areas that have been traditionally taken care of by the states, the federal government as a whole is sort of like the 600-pound gorilla in that old question, "Where does a 600-pound gorilla sleep? Anywhere it wants to." But, both Congress and the Court have federal power, and they've been going in two separate directions, at least for the last half-decade.

Congress continues to pass these laws, and I don't think they're going to stop. I don't think they're going to stop because of this more recent opinion, *Morrison*,[50] either, and there are some strong indications that they won't. It probably doesn't make a lot of difference to them, because the reason that they're passing a lot of this is for the political benefit or to protect themselves from political attack. They can always say, "Well, that isn't my job; it's the courts' job." And of course throw in the people's will. There have been some statements that indicate that's the sort of approach they're going to take.

But while Congress has been expanding its activity, the Court is trying to rein it in. The *Morrison* case was actually a civil case, but it has a lot of implications for the issue that we're talking about here because it does deal with the Commerce Clause justification for passing federal laws. The subject of the case is the Violence Against Women Act,[51] which Dick Thornburgh just mentioned, and the Act addresses a serious problem regarding sexual violence against women. It's a problem throughout the country.

That alone does not give Congress the authority to regulate in this area, but Congress held four years of sporadic hearings on it and made specific findings, unlike in *Lopez*, that violence against women—sexual violence—affected women's abilities to get jobs and earn income and contribute to the national economy. It affects their willingness to travel and their ability to travel, those kinds of things that traditionally, at least in the last half-century, have been used to uphold assertions of congressional power under the Commerce Clause.[52] The same five-Justice majority of the Supreme Court again followed up on its decision in *Lopez* and said that the Act was an unconstitutional assertion of congressional power.[53]

The statute itself had provisions that allowed the victim to sue the wrongdoer, and it also had criminal provisions that made it an offense to travel in interstate commerce, or travel interstate in order to commit violence.[54] That criminal provision really wasn't at issue in the case. In a footnote, Chief Justice Rehnquist said that the

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50. United States v. Morrison, 529 U.S. 598 (2000).

51. 42 U.S.C. §13981 (1994).

52. H.R. CONF. REP. NO. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801; S. REP. NO. 103-138, at 40 (1993).

53. *Morrison*, 529 U.S. at 617-18.

54. *See* Violence Against Women Act of 1994 § 40221(a), 18 U.S.C. § 2261(a)(1)(1994) (providing for punishment of "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State Lines to continue the abuse").

Court was not addressing that.[55] I wonder, however, what will happen when that case reaches the Court, but only the civil provisions were at issue in *Morrison*.[56]

Even though Congress made findings about the impact on interstate commerce, the Court said that the statute wasn't really about the economic impact of domestic violence.[57] The Court again questioned that reasoning, because it would give the federal government a general police power that is left to the states.[58] The Court upheld a district court decision that found that the Commerce Clause did not justify this assertion of congressional power and invalidated the statute.[59] In doing so, the Court again held on to precedent, and the majority held on to the substantial effects test.[60] But they said in reality that there was no substantial effect and the fact that Congress made the findings did not absolve the Court of its constitutional responsibilities to look at the reality of what was happening. Otherwise, just a recitation would allow Congress to usurp the Constitution.[61]

In comments immediately afterward, Senator Joseph Biden, Jr.,[62] who was the primary sponsor of the Violence Against Women Act, made a statement to the press and said, "This decision is really all about power, who has the power, the Court or the Congress."[63] Rehnquist anticipated that question and in the opinion he said, "Ever since *Marbury*, this Court has remained the ultimate expository of the constitutional text."[64] Unlike the Parliament that Dick Thornburgh mentioned could do no wrong, under our system of government, the Court does have the power to review the actions of Congress.

Thus, one of the battles being fought is whether Congress has the raw power to assert jurisdiction in areas that have been traditionally dealt with by the states. And that's one of the areas where the fight will continue. While the Supreme Court refines its views and the changes on the Court either strengthen those views or go back the other way, you might find some of the senators asking Court nominees about their views on federalism and congressional power and so on for those appointments, just as we have seen people being quizzed on their beliefs on the *Miranda* doctrine[65] in Washington when they come up for confirmation to the Supreme Court.

It's really hard to predict what's going to happen in this area, but in some ways the legal issues are not so important as the philosophical issues—that is, knowing where the line is drawn on the raw power of the federal government to act. The real policy question is, where does it make sense for the federal government to assert its power, and where does it make sense for the state government to assert its power

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55. *See Morrison*, 529 U.S. at 613 n.5.
56. *See* Violence Against Women Act of 1994 § 40302, 42 U.S.C. § 13981 (1994) (invalidated by *Morrison*, 529 U.S. 598 (2000)).
57. *See Morrison*, 529 U.S. at 614.
58. *See id.*
59. *Id.* at 617-18.
60. *See id.* at 608-610.
61. *See id.* at 614-16.
62. Democratic Senator from Delaware.
63. 146 CONG. REC. S3970 (daily ed. May 16, 2000) (statement of Sen. Biden).
64. *Morrison*, 529 U.S. at 616 n.7.
65. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Dickerson v. United States, 530 U.S. 428 (2000).

under our general federalism scheme? A lot of that deals with the practical realities of this kind of federalization.

I will turn this over to Bob Gorence to deal with that because he has had a lot of experience over the years in his various positions, including the position of head prosecutor in this district for several years, and he has a lot of experience dealing with the effects of this kind of federalization.

MR. GORENCE: Thanks, Chuck. My nametag says "Assistant United States Attorney," but the opinions I'm about to espouse are my own, not those of the department.

I was the acting United States Attorney for the past six months, the first assistant criminal chief for the past six years, and I have some observations about what happens when you are going from the "crime de jour," as Chuck called it, to the "bill de jour," by virtue of political pressures that you talked about, and then to the "law de jour." More specifically, I want to talk about what happens when a "law de jour" gives separate sovereigns—both federal and state prosecutors—concurrent jurisdiction.

With concurrent jurisdiction, when law enforcement agents believe they have a prosecutable case, they face a choice as to which prosecutor to present the case to. Almost without exception certain factors come into play when making that decision, because law enforcement agents and prosecutors are looking to find the most hospitable venue for the case.

The *Jones* case[66] from this last Term of the Supreme Court presented an interesting question about the choice between state and federal venues. In *Jones*, the indictment alleged interstate arson, but in reality it was a quintessentially local offense. The defendant was a young man who was quite unhappy with his cousin for some reason, and he tossed a Molotov cocktail through the front window of an owner-occupied building and destroyed the building.[67] Either the police in Indianapolis or the fire marshal called in the ATF.[68] After the investigation was completed, agents and prosecutors faced a decision.

Justice Stevens' concurrence illuminates exactly how this case was pursued in federal court. The concurrence states, "The fact that petitioner received a sentence of thirty-five years in prison when the maximum penalty for the comparable state offense was only ten years illustrates how a criminal law like this may effectively displace a policy choice made by the state. Even when Congress has undoubted power to pre-empt local law, we have wisely decided that unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[69]

With mandatory minimum statutes promulgated by Congress for both the use of an explosive device and interstate arson, the law enforcement discussion in Indianapolis probably went something like this, "We can perhaps get a ten-year sentence in state court, but if we take it over to the feds, this individual," as the expression goes, "is whacked with thirty-five." I can tell you that that discussion

66. Jones v. United States, 529 U.S. 848 (2000).
67. *Id.* at 851.
68. Alcohol, Tobacco and Firearms, a federal agency.
69. *Jones*, 529 U.S. at 859-860 (Stevens, J., concurring) (internal citations omitted).

happens day in and day out in prosecutors' offices across the nation. Congress needs to understand that in federalizing criminal law—in essence providing concurrent state and federal jurisdiction—it's giving extraordinary discretion and power to prosecutors. That's the practical effect of many of these "crime de jour, bill de jour" statutes becoming law.

There are other factors besides just the potential for incarceration that can affect the decision of who prosecutes the case. Issues such as forfeiture potential and discovery differences can affect the state versus federal venue question. Asset forfeiture under New Mexico state law is different from federal law, as are the incarceration schemes. I don't think it would surprise too many people if I said that by and large most agents and prosecutors seek the venue with the greatest potential incarceration and forfeiture possibilities with the least discovery obligations.

As a result, most United States Attorney offices have developed case acceptance guidelines that try to curb their discretion by articulating what cases involve a real federal interest. But I can tell you it's an ongoing issue, at least it was in the six years I was the first assistant/criminal chief. We tried to look at each individual case in a measured way to determine the precise federal interest so that case acceptance decisions did not vary from one assistant United States attorney to the next.

Another question, after a local crime problem has been federalized as it was in Richmond with the "Project Exile" gun cases, what is the exit strategy?[70] The city of Richmond realized they had such a high local homicide rate and violent crime rate that they, in essence, turned over every single offense that involved a firearm to the federal government, and those cases were prosecuted under federal firearm statutes, which carry mandatory minimum sentences.[71] The crime rate has been reduced, but do the feds ever leave?

It's interesting what happens, at least from my perspective, when you have one United States attorney in the country with a federalization policy like this. Community leaders and local law enforcement question why you're not doing the same thing in your particular district. Because crime rates have been cut in Richmond, there's pressure to emulate the strategy in other United States attorney's offices. Once you embark on a federalization strategy, though, it's very hard to ever get off of it. An example is the Weed-and-Seed projects that have been undertaken in New Mexico. Weed-and-Seed is a federal strategy that actually started when Dick Thornburgh was the Attorney General. Through the program, the federal law enforcement intervenes in high crime areas with a very strong presence.[72] After the bad guys have been removed, the area is sprinkled with a lot of federal money, putting in basketball programs and afternoon-school programs around the neighborhood. Sometimes it's more than a sprinkling, sometimes it's a dousing. But by and large, it's been very successful. The problem comes with its success, because now it's very hard to get the federal government out of the picture. Once a particular Weed-and-Seed community realizes that all these cases are going federal—all the

70. *See* Jeff Jones, *Guns Last Blast Is Best*, ALBUQUERQUE J., Sept. 1, 2000, at D1.
71. *Id.*
72. *See* Rebecca Roybal, *Serious Fun*, ALBUQUERQUE J., July 19, 1999, at B8.

gun cases, all the dope cases—and crime rates get reduced and money comes pouring in, the federal exit strategies become very difficult.

Those are my thoughts. Again, I just add the concept that concurrent jurisdiction means great discretion on the part of prosecutors. That's the practical effect, as long as Congress is comfortable with that.

THORNBURGH: Let me toss out a couple of comments. First of all, I want to agree with Chuck's characterization that this is not a federal-state controversy so much as it is a congressional controversy with the courts. In point of fact, in the Violence Against Women Act case, which is a case where an essentially local crime was federalized, you had thirty-eight state attorneys general as amicus curiae before the Court seeking to have that statute upheld,[73] which is contraindicated if there were a real federal-state controversy going on.

The second thing I wanted to pick up on was what Bob said about Project Exile and about these concurrent jurisdiction cases. There is room in the system, in my view, for some cooperation in particular areas, but it is very, very tricky. When you have a Project Exile-type blanket assumption of jurisdiction, it creates, in my view, a lot more problems than it may solve. We had a similar program back in the early part of the 1990s called Operation Trigger Lock, which was authorized by the Armed Career Criminal Act.[74] The program was designed to, in close cooperation between federal and state prosecutors, identify the most egregious gun violators and throw the book at them. That was used selectively in a way that did maximize the sentence consequences for an act that at a local level would have oftentimes resulted in a walk. Some of the anecdotal evidence that you got out of this was really quite astonishing. People who had been dancing through the raindrops using firearms in criminal offenses all of a sudden got hit with a fifteen-year minimum mandatory sentence—no probation, no parole, no nothing. They were going to do hard time. I felt that in that case and in some of the major drug trafficking cases there was great potential if you could work out the guidelines for cooperation, but I think it is a mistake to federalize all of those cases.

One comment I can't resist, Bob, is regarding your comment about the department.[75] I served as United States Attorney for six years in my hometown of Pittsburgh and then in 1975 was asked by Attorney General Ed Levi to come to Washington to be assistant attorney general in Washington and head of the criminal division. When I was getting ready to go down there, my wife said to me, "You know, for six years all I've heard you do is complain about the department. The department makes you do this, the department does that, blah, blah, blah. Buster, now *you* are the department." She was indeed right; that kind of constructive tension does play out there.

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73. Brief of the States of Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the Commonwealths of Massachusetts and Puerto Rico, as Amici Curiae in Support of Petitioners' Brief on the Merits, United States v. Morrison, 529 U.S. 598 (2000)(Nos. 99-5, 99-29).

74. Armed Career Criminal Act, 18 U.S.C. § 924(e) (1994).

75. Department of Justice.

I'm going to take a couple of minutes more to get something off my chest, because I think this discussion about the federalization ignores a larger problem that we have with regard to the federal criminal law and that's this: we have no true federal criminal code. We have some 3000-plus offenses that are scattered throughout some fifty different titles of the United States Code. For example, we have 232 theft offenses, 250 false statement offenses, ninety-nine forgery and counterfeiting offenses, ninety-six property destruction offenses, and a whole catalog of definitions with regard to criminal state of mind. And, I think, it really is fraught with more significance than just the orderly mind wanting to see these things done in an organized way. A criminal code was proposed based on the American Law Institute Model Penal Code[76] during the 1970s when I was in the department, and I found there really wasn't much political capital to be made in bringing some sense to this chaos.

Implicit in this discussion of federalization is the idea that we're dealing with a so-often-called criminal code that is not worthy of the name and provides all kinds of potential for mischief in pinning new types of offenses on it. Out of these some 3000 offenses, there are only about 1700 that are truly criminal in nature as we think of them, as *malum in se*, the old English common law term. The others are regulatory offenses. These days, when Congress passes any kind of statute, the last provision is always automatically criminalizing any violation of previous provisions and requirements. That just compounds the consequences of the lack of organization of the criminal code and vastly increases the offenses that characterize our criminal law.

76. *See generally* MODEL PENAL CODE (Proposed Official Draft 1962).