

April 1996

The Federalization of State Crimes: Some Observations and Reflections

Sam J. Ervin III

United States Court of Appeals Fourth Circuit

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

Sam J. Ervin III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. Va. L. Rev. (1996).

Available at: <https://researchrepository.wvu.edu/wvlr/vol98/iss3/5>

This Symposium: Federalism and the Criminal Justice System is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

THE FEDERALIZATION OF STATE CRIMES: SOME OBSERVATIONS AND REFLECTIONS

SAM J. ERVIN, III*

We are living in an age when Congress seems intent on “federalizing” more and more criminal offenses that have been historically tried in state courts. This trend has made it necessary for the Judicial Conference of the United States and its committees to expend substantial amounts of time and effort in attempts to convince our Senators and Representatives that a continuation of the practice will drastically alter the traditional role of the federal courts in our nation. Despite the present acrimony, I am convinced that the underlying dispute will produce positive results.

The history of the development and expansion of federal criminal jurisdiction is a fascinating subject in and of itself. I have, however, neither the space nor the knowledge to explore that matter in depth.¹ Nor is it necessary for my purposes to compile a list of the recent legislation that Congress has enacted (or currently has under consideration) which has added to the criminal jurisdiction of the lower federal courts. I will by way of illustration of the federalization problem, briefly discuss some of the more significant statutes.²

For purposes of my discussion of how the Judicial Conference has sought to assert some influence in this arena, we need to bear in mind:

1. That no one would question that Article III, Section 1, of the Constitu-

* United States Court of Appeals Judge for the Fourth Circuit; Chief Judge from February 1989 to February 1996.

1. For a clear and concise summary, see Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277 (1995) [hereinafter Beale, *Reporter's Draft*].

2. For an excellent analysis of the scope of the legislation, see Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995).

tion permits Congress in large measure to determine what the jurisdiction of the inferior federal courts shall be.

2. That by the same token, Congress also establishes by appropriations the amount of money available for the operation of the judiciary.

3. That at the present time, there are already more than 3,000 federal criminal laws on the books.³

4. That despite this substantial number of federal offenses, the federal courts have been (and will continue to be) minor players on this stage. Current statistics indicate that state courts handle approximately 95% of the total criminal case load and the federal courts deal with the remaining 5%.⁴

5. That most judges and other scholars in the field do not advocate a significant increase in the number of federal judges;⁵ certainly not to the extent that would be necessary to enable the federal judiciary to assume responsibility for many more criminal cases.⁶

6. That at the present time we have 167 active circuit court judges and 649 active district court judges to do the appellate and trial work of the federal courts.⁷ In this time of tight budgets it seems unrealistic to anticipate that Congress is likely to create many new judgeships.

7. That virtually all of the newly created federal offenses provide that the federal courts have concurrent jurisdiction with the state courts rather than exclusive federal jurisdiction. This approach further extends prosecutorial discretion and increases the possibilities for disparities between criminal sentences imposed in the two court systems.

3. Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681 (1992).

4. Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995) [hereinafter Gorelick] (keynote address to the Hastings Law Journal Symposium on the federalization of crime).

5. J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994); Jon O. Newman, *1000 judges — the limit for an effective federal judiciary*, 76 JUDICATURE 187 (1993); Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70; *but see* Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52.

6. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 38 (December, 1995) [hereinafter LONG RANGE PLAN] (stating in Recommendation 15 of its recent report that “[t]he growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction”).

7. Response from the Judicial Conference of the United States to the Judicial Survey Conducted by the Subcommittee on Administrative Oversight and the Courts, United States Committee on the Judiciary 12 (Feb. 26, 1996) (on file with author).

All of these factors have influenced the responses that the judiciary has made to its concerns about the effects of Congress's continued tendency toward federalization of state crimes. Much of the judiciary's activity in this sphere has focused on specific legislation. Last year's crime bill included a provision making it a federal offense to use in any crime of violence a gun that had passed in interstate commerce.⁸ This was an expansion of an earlier idea to criminalize all homicides committed with firearms that had travelled in interstate commerce. We were also quite interested in some or all aspects of the Child Support Recovery Act, the Violence Against Women Act, the Anti-Car Theft Act, the Farm Animal and Research Facilities Protection Act, the Child Protection Act, and a number of other such proposals. At times, we elected to express opposition to the entire proposal and on other occasions we decided not to do so. I am happy to report that we did succeed in limiting the scope of some bills and otherwise persuaded the sponsors to make them more palatable to the judiciary.

Rather than consider specific bills, however, I would like to address the overall question of Congress's insistence on federalization of state criminal offenses and its continued commitment to mandatory minimum sentences. Mandatory minimum sentences are single factor, statutorily mandated prison terms that apply regardless of the Sentencing Guidelines. While there is a lack of unanimity about the Sentencing Guidelines, the opposition to mandatory minimum sentences comes from all quarters of the judiciary, including the Sentencing Commission itself.⁹

Chief Justice William H. Rehnquist, who has been a powerful spokesman for the judiciary in these two areas, said:

[M]andatory minimum sentences are perhaps a good example of the law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose harsh punishment for first time offenders . . . Mandatory minimum sentences have also fueled the trend towards federalizing crimes. Because federal laws often

8. Gorelick, *supra* note 4, at 974.

9. The Honorable William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a War on Drugs Era*, 28 WAKE FOREST L. REV. 305, 319-24 (1993).

provide stricter sentences for drug possession and distribution than their state counterparts, state and federal prosecutors funnel more and more of their drug cases into federal courts. . . . The political combination of creating a federal offense and attaching a mandatory minimum became a veritable siren song for Congress. . . . Continuation of the last decade's trend in sentencing policy and federalization of crime will have a serious impact on the justice system and the federal courts. . . . Staggering amounts of resources will also be necessary to run the federal courts system unless we reach a different allocation of jurisdiction that both supports state efforts and preserves federalism. And the federal courts will be changed, perhaps irrevocably, unless the current federalism trends are halted.¹⁰

On another occasion, he said:

[M]ost federal judges have serious concerns about the numbers and types of crimes now being funneled into the federal courts. . . . Continuation of the [past decade's] trend toward large-scale federalization of the criminal law has the enormous potential of changing the character of the federal judiciary. . . . More recently federal and state judges have raised questions about provisions in pending crime bills creating new federal drug and weapons offenses, and in the versions of the Violence Against Women Bill that extend federal civil and criminal jurisdiction over matters they see as lying within the traditional province of state courts¹¹

These and other major concerns logically lead to the question: Where should the line be drawn between crimes which ought to be dealt with by the federal courts and those that should remain in the state courts? The following are among the interesting suggestions with which I am familiar.

First, the suggestion contained in the Long Range Plan for the Federal Courts, approved by the Judicial Conference of the United States, dated December 1995:

10. Administrative Office of the United States Courts, *The Crime Bill and the Law of Unintended Consequences: A View from the Federal Judiciary* (quoting Chief Justice William H. Rehnquist, Address at the National Symposium on Drugs and Violence in America (June 18, 1993)).

11. Judge Jim R. Carrigan, *Criminalizing the Federal Courts*, Address at the University of Denver College of Law (Feb. 16, 1994) (on file with author) (citing Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 6-7 (1993)).

Recommendation 2: In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount. Congress should be encouraged to allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses.

.....

(a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity.

.....

(b) The proscribed activity involves substantial multistate or international aspects.

.....

(c) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered.

.....

(d) The proscribed activity involves serious, high-level, or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter.

.....

(e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.¹²

Second, Judge Stanley Marcus of the Southern District of Florida has made a second suggestion. Judge Marcus suggested a list of similar criteria for federal criminal jurisdiction:

- 1) crimes against the United States itself, *i.e.*, against its treasury or its officers, or on its property;
- 2) criminal enterprises that by virtue of their scope and magnitude spill across interstate and/or international boundaries, *e.g.*, international narcotics cartels;

12. LONG RANGE PLAN, *supra* note 6, at 24-25 (bold in original).

- 3) crime that is essentially intrastate, where the scope is so great that there is a need for federal resources and concurrent jurisdiction is justified, *e.g.*, large bank fraud cases;
- 4) enforcement of the rights of insular minorities, *e.g.*, civil rights cases;
- 5) systematic and pervasive corruption of the local system, *e.g.*, Operation Greylord, the investigation of corruption of the Cook County court system.¹³

Third, Professor Kathleen Sullivan of the Stanford Law School submits a suggestion. Professor Sullivan proposed that there are four bases on which the federal government has a comparative advantage over state government in the prosecution of crime (as well as in civil adjudication):

- 1) where the federal sovereign is directly involved, *i.e.*, an offense against the sovereign itself (treason), or against its treasury or its officers, or a crime committed on federal property;
- 2) where efficiency-based considerations favor federal prosecution because of the interstate or international character of the offense, or economies of scale, or where the conduct threatens to overwhelm the local authorities (*e.g.*, the activities of the Klu Klux Klan immediately after the Civil War);
- 3) where uniformity is important, as in the context of antitrust and securities regulation and the criminal enforcement authority that underlies these regulatory schemes;
- 4) where the states are unable or unwilling to face the problem, as in the case of the enforcement of the civil rights statutes.¹⁴

Finally, there is the recommendation of Deputy Attorney General Jamie S. Gorelick:

[We begin with the conviction that] the federal courts are a scarce resource that should be reserved for specialized functions that best employ their distinctive attributes[. T]he allocation principle [should not, however,] be whether [the] area is appropriate for state regulation. . . . [Rather,]

13. Beale, *Reporter's Draft*, *supra* note 1, at 1296-97; *see also* Renee M. Landers, *Reporter's Draft for the Working Group on the Mission of the Federal Courts*, 46 HASTINGS L.J. 1255, 1262-63 (1995).

14. Beale, *Reporter's Draft*, *supra* note 1, at 1295-96; *see also* Renee M. Landers, *Reporter's Draft for the Working Group on the Mission of the Federal Courts*, 46 HASTINGS L.J. 1255, 1257-61 (1995).

Congress should act to create concurrent jurisdiction if it is necessary to address aspects of crime problems that the states cannot adequately address and that the federal government's unique attributes put it in a qualitatively better position to handle. For example, a sophisticated criminal enterprise may spread across numerous states in a way that makes it difficult for any state to investigate and prosecute the enterprise, or a crime may raise issues that are so sensitive locally that the independence of the federal courts is needed. In such cases, even if the *area* is appropriate for state regulation, the particular case calls out for federal prosecution, which cannot be achieved without a grant of federal criminal jurisdiction.

[Our] approach to federalization does not end, however, with the issue of when Congress may create new federal crimes. Rather, our federalization view encompasses an important second screen of prosecutorial discretion. I would like to discuss in greater detail both of these components — jurisdiction and prosecutorial discretion — of our approach to the federalization question.

Our view on the scope of federal criminal jurisdiction is that it is appropriate for Congress to provide for federal involvement in a particular criminal area where: 1) There is a pressing problem of national concern; 2) state criminal jurisdiction is inadequate to solve prominent aspects of the problem; and 3) the federal government by virtue of its investigative, prosecutorial, or legal resources is positioned to make a *qualitative* difference to the solution of the problem.

The point of this approach is to ensure that federal intervention will be available where it is needed. It may be possible for Congress partially to address the federalization issue by attempting to draft statutes in a way that closely tracks the aspects of the problem that call for a federal response. But, in general, there is a reason why federal criminal jurisdiction cannot easily be delimited by statute to predefined "distinctively federal" cases. It is exceedingly difficult to draft a statute in a way that includes only those crimes that are sophisticated, inter-jurisdictional, or sensitive enough to require a federal solution. In order to allow sufficient flexibility to bring a federal prosecution when an aspect of a law enforcement problem requires it, federal criminal legislation will inevitably have to be somewhat overinclusive. It will have to be drafted in a way that includes criminal activities that state and local criminal justice systems can handle, as well as activities that they cannot.

Moreover, law enforcement agencies are generally better situated to appraise the investigative demands of particular cases, and more generally, the circumstances in which federal prosecution is appropriate. At any rate, as a practical and political matter, we should not expect Congress to cut too finely. Congress may act, and I have suggested that it should act, even though it intends the jurisdiction it authorizes to be exercised in only a small percentage of the cases in which it could be. The exercise of prose-

cutorial discretion, then, becomes the most important and effective brake on the excessive federalization of crime.¹⁵

All of these proposals merit careful consideration and analysis. While it is too early to predict what precise shapes the final solution will take, I suspect that it will favor the flexibility advocated by General Gorelick, rather than a more categorical approach.

Also, these thoughtful suggestions illustrate that considerable good may ultimately emerge from what has at times proven to be an overly-strident debate about "federalization" of state crimes. If our three branches of government can successfully forge a working agreement concerning the proper allocation of criminal jurisdiction between state and federal courts, there is every reason to hope that this controversy will truly have generated much more light than heat.

Another very positive thing has already emerged from our consideration of this and other pressing problems facing the courts. My experience as a member of the Judicial Conference of the United States — and especially my service on the Conference's Executive Committee, under the able leadership first of former Chief Judge Charles Clark of the Fifth Circuit, then the late John F. Gerry, Chief Judge of the District of New Jersey, and more recently of Chief Judge Gilbert S. Merritt of the Sixth Circuit — has made me aware of a number of steps that have been taken to ensure the establishment of a better relationship between the judiciary and our sister branches. These include an effective liaison between the staff of the Administrative Office of the Courts and both our elected representatives and members of various congressional staffs; more frequent testimony by Judicial Conference chairpersons and other judges before congressional committees; quarterly conferences between the Attorney General and her staff with our Executive Committee; an increased awareness of the importance of good relations among the three branches; an emphasis on the importance of having individual judges make personal contacts with legislators with whom they are acquainted; and the establishment of regular Three Branch Working Groups, Conferences, and Roundtables, to cite only some of the efforts currently ongoing.

15. Gorelick, *supra* note 4, at 971-73.

These developments convince me, at least, that we will ultimately be able to establish a workable and effective relationship between the federal and state courts — one that will have the maximum impact on the crime problem in the United States.

