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Proposal for Changing the Jurisdictional Provisions of the New Federal Criminal Code

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A PROPOSAL FOR CHANGING THE JURISDICTIONAL PROVISIONS OF THE NEW FEDERAL CRIMINAL CODE

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On January 7, 1971, the National Commission on Reform of Federal Criminal Laws transmitted to the President and Congress its proposal[1] for the complete revision of the substantive federal criminal law.[2] The work was begun under a congressional mandate to improve a body of law that had been the result of patchwork, stopgap legislation.[3] For example, one of the more mechanical improvements proposed by the Commission was to gather under Title 18 practically all enactments dealing with federal criminal law. The Commission, however, did not limit itself to such neutral, uncontroversial changes. It took its mandate to reform and improve literally,[4] and as always, the more radical the reform, the greater the fury of the resulting controversy. This article deals with the most far-reaching and, therefore, the most hotly debated area of reform—the new approach to federal jurisdiction over criminal conduct.

Under the current system, federal crimes are defined in terms of the element that gives the federal government the right to control the conduct—the so-called jurisdictional element. For example, the Dyer Act[5] made it a criminal offense knowingly to transport a stolen auto-

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1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (1971) [hereinafter cited as PROPOSED CODE].

2 18 U.S.C. §§ 1-6005 (1970).

3 The Commission was created by Congress in 1966 to review the federal system of criminal justice. Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, *as amended*, Act of July 8, 1969, Pub. L. No. 91-39, 83 Stat. 44.

4 The Commission was granted authority to recommend sweeping changes in the criminal laws of the United States:

> The Commission shall make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice. It shall be the further duty of the Commission to make recommendations for revision and recodification of the criminal laws of the United States, including the repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the ends of justice.

Act of Nov. 8, 1966, Pub. L. No. 89-801, § 3, 80 Stat. 1516-17.

5 18 U.S.C. § 2312 (1970). The purpose of the Dyer Act was to combat the increas-

mobile or airplane across a state line. The wording of the Act makes it appear that the crux of the criminal offense lies not in the theft of the car, but rather in the relatively neutral action of crossing the state line.

In addition to the philosophic discomfort caused by this type of off-center focusing, some very practical difficulties arise. First, the maximum penalties fixed for federal crimes are often keyed to the obtuse definition of the crime. For example, federal authorities have at times been limited to a prosecution for the crime obliquely defined as conspiracy to interfere with civil rights,[6] or intimidation of a federal witness[7] (crimes with relatively low maximum penalties), when the actual offense was a serious assault[8] or even murder.

Another common difficulty that arises out of defining federal crimes in jurisdictional terms is the problem of extradition from another nation. Extradition treaties often condition the transfer of prisoners on the requirement that the activity for which the prisoner is to be tried be a crime in the extraditing nation as well.[9] In many cases extradition is impossible because no crime similar to the uniquely worded federal offense exists in the other nation.[10]

A third problem involves the possible multiplication of counts for what is essentially one crime. If, for example, the criminal activity is a single fraud scheme, and the only federal statute under which it can be prosecuted defines the crime as *use of the mails* in perpetrating a fraud, the indictment can and often does contain as many counts as there are individual letters mailed.[11]

The proposed new Title 18 strikes directly at these problems. The solution offered by the Commission is to redefine criminal conduct in terms nearly identical to those used in state statutes. The crimes of murder, theft, and prostitution are defined directly,[12] with no express mention of crossing state lines, or of using the telephone or mail, or of any other traditional federal jurisdictional element. One separate

ingly successful operations of criminal syndicates organized to steal a car in one state and sell it in another. The interstate aspects of the business had put it effectively beyond the reach of the authorities of either state.

6 42 U.S.C. § 1985 (1970).

7 18 *id.* § 1505.

8 *See, e.g.,* Ferina v. United States, 340 F.2d 837 (8th Cir. 1965).

9 *See, e.g.,* Treaty of Extradition with France, Jan. 6, 1909, 37 Stat. 1526, T.S. No. 561; Treaty of Extradition with Spain, June 15, 1904, 35 Stat. 1947, T.S. No. 492 (effective May 21, 1908).

10 *See, e.g., In re* Lamar, [1940] 2 W.W.R. 471, 477 (Alta. 1940).

11 *See, e.g.,* Wood v. United States, 279 F.2d 359 (8th Cir. 1960); Becker v. United States, 91 F.2d 550 (9th Cir. 1937).

12 PROPOSED CODE §§ 1601, 1731-41, 1841-49.

section of the code (section 201)[13] catalogues all of the familiar federal jurisdictional bases, such as "the offense affects interstate or foreign commerce,"[14] or "movement of any person across a state or United States boundary occurs in the commission or consummation of the offense."[15] Each of the simple substantive crimes is then keyed to this cataloguing section by providing that "federal jurisdiction over an offense defined in this section" shall exist under specific paragraphs of section 201.

This reorientation in definition of federal crimes is a deceptively simple solution to the problems enumerated above. Dwelling on those

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13 Section 201. Common Jurisdictional Bases.

Federal jurisdiction to penalize an offense under this Code exists under the circumstances which are set forth as the jurisdictional base or bases for that offense.

Bases commonly used in this Code are as follows:

(a) the offense is committed within the special maritime and territorial jurisdiction of the United States as defined in section 210;

(b) the offense is committed in the course of committing or in immediate flight from the commission of any other offense defined in this Code over which federal jurisdiction exists;

(c) the victim is a federal public servant engaged in the performance of his official duties or is the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice President-elect, or any individual who is acting as President under the Constitution and laws of the United States, a candidate for President or Vice President, or any member or member-designate of the President's cabinet, or a member of Congress, or a federal judge, or a head of a foreign nation or a foreign minister, ambassador or other public minister;

(d) the property which is the subject of the offense is owned by or in the custody or control of the United States or is being manufactured, constructed or stored for the United States;

(e) the United States mails or a facility in interstate or foreign commerce is used in the commission or consummation of the offense;

(f) the offense is against a transportation, communication, or power facility of interstate or foreign commerce or against a United States mail facility;

(g) the offense affects interstate or foreign commerce;

(h) movement of any person across a state or United States boundary occurs in the commission or consummation of the offense;

(i) the property which is the subject of the offense is moving in interstate or foreign commerce or constitutes or is part of an interstate or foreign shipment;

(j) the property which is the subject of the offense is moved across a state or United States boundary in the commission or consummation of the offense;

(k) the property which is the subject of the offense is owned by or in the custody of a national credit institution;

(*l*) the offense is committed under circumstances amounting to piracy, as prescribed in section 212.

When no base is specified for an offense, federal jurisdiction exists if the offense is committed anywhere within the United States, or within the special maritime and territorial jurisdiction of the United States.

PROPOSED CODE § 201.

14 *Id.* § 201(g).

15 *Id.* § 201(h).

problems can easily obscure the original purpose and salutary effect of defining crimes in federal jurisdictional terms. Throughout the evolution of constitutional concepts, the theory of federalism has retained some degree of life. The original idea of the framers of the Constitution, implicit in the specificity of the cautiously enumerated areas of federal authority, and capped tightly by the tenth amendment, has unquestionably undergone an evolution in favor of broader, less strictly defined federal power. Modern problems have increasingly demanded national solutions. Yet the original spirit remains alive.[16] While sections of the Constitution can be stretched to justify federal control over nearly every phase of human conduct, the spirit of the document still demands that there be a true need for federal action—a true federal interest—before the federal government may legitimately act. Although we have moved beyond the day when, for example, federal intervention was checked by a narrow reading of the words of the commerce clause, we have by no means arrived at the legitimization of federal activity under that clause in areas of pure state concern where no substantial federal interest can be shown. There is a serious danger in a federal criminal code that invites one to forget the reason that federal crimes were originally defined in jurisdictional terms.

This article is not a plea for rejection of the Commission's new approach to a federal criminal code. The proposal represents an enormous step forward in logic and consistency. It is rather a plea that effective safeguards be built into the new code.

I

SAFEGUARDS

Under the proposed code there is very little criminal activity that could not be shoehorned into federal court on one or more of the broad jurisdictional bases of section 201 if an overzealous federal prosecutor put his imagination to work.[17] For example, the new jurisdictional

16 Professor Henry Hart wrote in 1954 that "[c]onstitutional impediments to centralized direction, in those matters in which there is no compelling need for national action, appear as safeguards against impairments of the viability of the social mechanism as a whole." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 490-91 (1954).

17 The danger of competition between state and federal authorities for power is greatest in the sections of the PROPOSED CODE covering homicide (§ 1601), assault (§§ 1611-19), sex offenses (§§ 1641-50), arson (§ 1701), burglary (§ 1711), robbery (§ 1721), theft (§§ 1731-41), counterfeiting and forgery (§ 1751-55), rigging sporting events (§ 1757), inciting riot (§ 1801), arming rioters (§ 1802), supplying firearms (§ 1811), gambling (§ 1831), and prostitution (§§ 1841-43).

basis introduced in section 201(b) would greatly enlarge the possible scope of federal action. This is so-called "piggy-back jurisdiction," applicable when "the offense is committed in the course of committing or in immediate flight from the commission of any other offense defined in this Code over which federal jurisdiction exists."[18] There are few guidelines indicating how broadly or narrowly the words "in the course of" are to be interpreted. Section 207(c) makes a passing nod at the problem by adding the vague limitation that the section 201(b) offense ought to be "closely related" to the underlying offense.

The decision to take federal control over a specific case of robbery, for example, will involve two very difficult and sensitive questions. First, is there a sufficient and genuine federal interest in the matter to make federal control constitutional? Second, aside from raw constitutional power, is it a wise policy decision to remove the matter from state hands, in view of the need to maximize cooperation and minimize unnecessary friction between state and federal governments?[19]

The system proposed by the Commission contains a serious, but correctable flaw. Full discretion for deciding where to draw the line on federal control over criminal conduct is placed in the local federal prosecutor, the United States Attorney in each district.[20] Complete power to decide whether prosecution of a given case is (*1*) constitutionally permissible, and (*2*) in the best interests of federal-state relations, reposes in each of these numerous federal agents. The exercise of discretion is vested with finality by section 207, which states that "[t]he presence or absence of a federal interest and any other question relating to the exercise of the discretion referred to in this section are for the prosecuting authorities alone and are not litigable."[21] The door is finally bolted

18 PROPOSED CODE § 201(b).

19 It takes little imagination to grasp the practical need for considered and consistent judgment if the delicate system of federalism is to work in this area. Jealousy of authority between federal and state authorities is a fact of life and needs no encouragement from ill-considered or overeager injections of federal control into matters over which state agencies justifiably claim sovereignty. There is the further danger that if decisions in individual cases are made without some apparent consistency, confusion will reign as to which sovereign is to take responsibility for investigating and prosecuting a particular activity. Even without a breakdown in state-federal cooperation, the resultant confusion could leave serious gaps in enforcement by either authority.

20 PROPOSED CODE § 207.

21 There is more than a mere possibility that the "not litigable" clause could turn out to be wishful thinking. Any attack by a state on an excessive exercise of federal jurisdiction could be couched in terms of a constitutional claim under the tenth amendment. An individual defendant would probably raise the issue by attacking the constitutional validity of the indictment or information. Any act of Congress purporting to deny any possible forum to either of these constitutional claims—thereby making the local United

shut to state authorities by section 708 which bars in most instances state prosecution "based on the same conduct or [arising] from the same criminal episode"[22] after federal prosecution. In short, once the federal prosecutor decides to step in, the state authorities are, in effect, out of the ball game. This problem is further exacerbated by the fact that the federal court will apply federal rules covering insanity,[23] justification,[24] self-defense,[25] defense of others,[26] excuse,[27] mistake of law,[28] duress,[29] and other issues. Such applications could easily result in a pattern of contradictory verdicts, depending on whether the case is tried in a federal or state court.

The system has two basic deficiencies: (*1*) lack of workable, understandable guidelines to aid the federal prosecutor in deciding whether a particular case involves the requisite federal interest; and (*2*) lack of any check on the local federal prosecutor's exercise of the broad discretion entrusted to him. The importance of understandable guidelines and checks cannot be overstated.[30] It is the duty of Congress, as far as practicable, to fix the outer boundaries of legitimate federal prosecutorial authority by laying down guidelines that can intelligently be applied to specific fact situations,[31] and then to establish a procedure that will give some realistic assurance that the standards will be observed.

These requirements can be met within the framework of the Com-

States Attorney the final, unchallengeable arbiter of federal constitutional power—would undoubtedly fail its first test of constitutionality.

The plan proposed herein (text accompanying note 41 *infra*) would provide a practical and efficient forum for the claims of the state and could, therefore, be made the *exclusive* forum for these claims. The defendant, despite any congressional attempt at nonlitigability, will probably be held ultimately to retain his adequate remedy by way of challenge to the indictment or information in the federal prosecution itself. In this way, the constitutionality of the overall proposed code would remain intact.

22 PROPOSED CODE § 708.

23 *Id.* § 503.

24 *Id.* § 601.

25 *Id.* § 603.

26 *Id.* § 604.

27 *Id.* § 608.

28 *Id.* § 609.

29 *Id.* § 610.

30 Again in the words of Professor Hart: "Federal intervention has been thought of as requiring special justification, and the decision that such justification has been shown, being essentially discretionary, has belonged in most cases to Congress." Hart, *supra* note 16, at 497 (footnote omitted).

31 The report of the American Law Institute on clarification of the division of federal and state jurisdiction generally, drafted in response to the request of Chief Justice Warren, lists the following four criteria for rules or standards in this area. They must be (*1*) rational; (*2*) clear; (*3*) consistent with efficient judicial administration; and (*4*) designed to reduce friction between the two systems. *See* Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 186-87 (1969).

mission's proposed code. Consider first the question of guidelines. The answer offered by the Commission in section 207 is totally inadequate.[32] The opening sentence keynotes the section's weakness and lack of fair restraint on federal prosecutors:

> Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies *are authorized* to decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial federal interest in further prosecution or that the offense primarily affects state, local or foreign interests.[33]

Words that will certainly be scrutinized and interpreted by every individual United States Attorney in an effort to determine the scope of his delegated power should be scrupulously chosen. First, the words "are authorized" should be replaced by the words "are directed." In this way, local federal prosecutors will be made aware of their *duty* to refrain from injecting federal power into situations where it is not constitutionally permissible.

The second proposed change, although perhaps a technical syllogistic matter, is important since every word and phrase of section 207 will undoubtedly undergo scrupulous interpretation by competing authorities. The language quoted above apparently "authorizes" federal prosecutors to cease prosecution only if two conditions are present:

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32 § 207. Discretionary Restraint in Exercise of Concurrent Jurisdiction.

Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies are authorized to decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial Federal interest in further prosecution or that the offense primarily affects state, local or foreign interests. A substantial federal interest exists in the following circumstances, among others:

(a) the offense is serious and state or local law enforcement is impeded by interstate aspects of the case; (b) federal enforcement is believed to be necessary to vindicate federally-protected civil rights; (c) if federal jurisdiction exists under section 201(b), the offense is closely related to the underlying offense, as to which there is a substantial federal interest; (d) an offense apparently limited in its impact is believed to be associated with organized criminal activities extending beyond state lines; (e) state or local law enforcement has been so corrupted as to undermine its effectiveness substantially.

Where federal law enforcement efforts are discontinued in deference to state, local or foreign prosecution, federal agencies are directed to cooperate with state, local or foreign agencies, by providing them with evidence already gathered or otherwise, to the extent that this is practicable without prejudice to federal law enforcement. The Attorney General is authorized to promulgate additional gnidelines for the exercise of discretion in employing federal criminal jurisdiction. The presence or absence of a federal interest and any other question relating to the exercise of the discretion referred to in this section are for the prosecuting authorities alone and are not litigable.

PROPOSED CODE § 207.

33 *Id.* (emphasis added).

(1) the offense can be effectively prosecuted by nonfederal agencies; *and*
(2) there is no substantial federal interest in prosecution, or the offense primarily affects state interests.

This could logically be interpreted to mean that even if there were no federal interest in the matter, unless in the judgment of the local federal prosecutor nonfederal agencies could "effectively" conduct the prosecution, the federal agent is not even "authorized" to refrain from handling the matter. This casts the federal agent in the unsuitable role of "Big Brother," looking over the shoulder of his state counterpart engaged in purely state affairs, and distorts any concept of federalism. This deficiency in language could be corrected by the following wording of the opening sentence of section 207:

> Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies are directed to decline or discontinue federal enforcement efforts whenever it appears that there is no substantial federal interest in further prosecution or that the offense primarily affects state, local, or foreign interests.

The second sentence of section 207 makes an inadequate and misdirected attempt to fix guidelines for deciding when a "substantial federal interest" exists. Such an interest exists when

(a) the offense is serious and state or local law enforcement is *impeded* by interstate aspects of the case . . . .[34]

The difficulty in finding concrete guidance in this phrase arises because the undefined word "impeded" could mean anything from impossible to merely inconvenient. The permissive, weak spirit of the section invites the latter interpretation. The phrase should be tightened to leave less room for "interpretation" by an overzealous prosecutor. It might, for example, read:

(a) the offense is serious and state or local authorities are unable to enforce state or local law because of the interstate aspects of the case . . . .

Only in such a situation should a matter of primary state concern be transformed into a matter of federal interest.

A "substantial federal interest" also exists when

(b) federal enforcement *is believed to be* necessary to vindicate federally-protected civil rights . . . .[35]

This loose phraseology creates the illusion of standards without provid-

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[34] *Id.* § 207(a) (emphasis added).
[35] *Id.* § 207(b) (emphasis added).

ing them. The boundary of legitimate federal jurisdiction should turn on objective criteria, not on an individual prosecutor's belief. Secondly, the phrase "is believed to be " raises more questions than it answers. What degree of belief is required (beyond a reasonable doubt or mere suspicion)? On what type of evidentiary substantiation must it be based (no evidence at all, or objective showing of probable cause)? These problems can be eliminated and a comprehensible standard established by merely eliminating the words "believed to be" so that the clause would read:

> (b) federal enforcement is necessary to vindicate federally-protected civil rights . . . .

The third instance in which a "substantial federal interest" exists is as follows:

> (c) if federal jurisdiction exists under section 201(b), the offense is *closely related* to the underlying offense, as to which there is a substantial federal interest . . . .[36]

This subsection refers to the new "piggy-back jurisdiction" introduced by section 201 (b). Its loose terminology could easily turn the experimental section 201 (b) into a dangerous Pandora's box. "Piggy-back jurisdiction" is a shoehorn to ease any criminal activity into federal courts as long as it "is committed in the course of committing or in immediate flight from the commission of any other offense defined in this Code over which federal jurisdiction exists."[37] This phrasing could cover any activity of pure, unquestioned state concern which coincides in time, place, or victim with a federal offense. Certainly such a coincidence is not enough to create a true federal interest so as to take the matter out of the hands of state authorities. The words "closely related" merely define the degree of coincidence required, not the type or character of connection between the two crimes. Section 207 (c) might be reworded to define the type of connection in these terms:

> (c) if federal jurisdiction exists under section 201(b), the offense is an integral part of, or necessary to the accomplishment of the underlying offense, as to which there is a substantial federal interest . . . .

The fourth instance of a federal interest is when

> (d) an offense apparently limited in its impact is *believed to be* associated with organized criminal activities extending beyond state lines . . . .[38]

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[36] *Id.* § 207(c) (emphasis added).

[37] *Id.* § 201(b).

[38] *Id.* § 207(d) (emphasis added).

The words "believed to be" give rise to all of the uncertainties and potential for abuse, deliberate or otherwise, as did those of subsection (b) of section 207.[39] The solution again is to delete the words "believed to be":

> (d) an offense apparently limited in its impact is associated with organized criminal activities extending beyond state lines.

It is the connection with organized crime, not someone's mere belief in it, that gives rise to legitimate federal jurisdiction.

The last instance in section 207 in which a federal interest exists is when

> (e) state or local law enforcement has been so corrupted as to undermine its effectiveness substantially.[40]

This subsection is particularly troublesome. It establishes the federal prosecutor as watchdog over state authorities engaged in the conduct of state criminal prosecutions, and short-circuits the properly established political, as well as legal, procedures for dealing with corruption in state government. Also, since it is an unfortunate fact of life that corruption in government, federal or local, is more often a question of degree than of existence, this subsection delegates the authority to each local federal prosecutor to make the highly sensitive decision as to when the degree of state corruption has exceeded some elusive line so as to "legitimize" federal interference. In addition, any activity that truly affects a federal interest can be reached under one of the other definitions of federal interest. This subsection serves no necessary purpose and carries the seeds of dangerous misuse. It places in the hands of the local federal prosecutor the power to generate unnecessary and unwarranted friction between state and federal governments through overeager or ambitious exercise of his unrestrained discretion. This subsection should be deleted in its entirety from section 207.

II

ENFORCEMENT

Defining the outer boundaries of federal interest and directing the federal prosecutor to remain within them is one thing; creating a workable system to see that this is in fact done is quite another. For this reason, section 207 should be expanded to include the following re-

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39 *See* text accompanying note 35 *supra.*

40 PROPOSED CODE § 207(e).

quirement: when the local federal prosecutor decides that federal prosecution should be instituted with respect to any of the federal crimes[41] presenting particular danger of overlap between state and federal concerns, he should be required to obtain from a federal magistrate in his district authorization to commence prosecution. He should bear the burden of establishing that the particular criminal conduct sufficiently affects a federal interest to warrant federal prosecution. Notice of the magistrate's hearing and an opportunity to be heard should be given to the attorney general of the state in which the federal prosecution is to take place.

There are two possibilities as to the appealability of the magistrate's decision. The first, favoring a speedy trial and early finality of this initial question, would be to make the magistrate's decision final and unappealable. The second would be to allow either the state attorney general or the federal prosecutor to appeal the decision to the federal district court. This alternative favors a more considered decision in those relatively few instances in which the constitutional or policy decision is of major significance. Because the purpose of this provision is to protect a healthy working balance between state and federal governments, there is no need to make the defendant a party to the hearing. The process of determining state or federal jurisdiction, however, should be sufficiently expeditious so that the defendant is not unduly hampered in preparing his defense.

This procedure[42] would provide the necessary check on the discretion of the federal prosecutor and draw on the wisdom of the federal judiciary in hammering out consistent interpretations of the guidelines defining "federal interest." It would also provide the means for building a body of case law in this area through the federal judiciary. The two major benefits of this would be (*1*) hopefully, consistency among the numerous federal districts on the critical question of the range of federal jurisdiction; and (*2*) a body of recorded precedent to aid state authorities in predicting what areas of criminal activity will be assumed under federal control and what areas remain under state responsibility.

State contests of federal jurisdiction would undoubtedly be limited

41 *See* note 17 and accompanying text *supra*.

42 This is not a new approach. The framers of the Constitution foresaw the serious danger of violations of the right to be free from unlawful searches and seizures by overzealous enforcement officials. To protect private rights they required a probable cause hearing in the presence of an impartial magistrate before a warrant to search could be issued. The same type of probable cause hearing is required for an arrest warrant, and on the same reasoning. It seems only consistent to require an impartial magistrate to pass on the factors underlying important decisions affecting the constitutional rights of states.

to those few situations in which it would be advisable to have the most considered and authoritative decision on the question. The mistake of an overzealous prosecutor in such a case could have far-reaching effects on state-federal relations. This procedure would not, of course, in any way affect the federal prosecutor's right to bring direct criminal action under any of the numerous clearly federal crimes.

Conclusion

To ensure the continuing viability and salutary effect of the concept of federalism in federal criminal prosecutions, section 207 of the proposed Federal Criminal Code should be amended to provide necessary restraints on the federal prosecutor's exercise of discretion, and to establish a procedure to enforce those restraints effectively.

APPENDIX

Section 207 should be amended to read as follows:

§ 207. RESTRAINT IN EXERCISE OF CONCURRENT JURISDICTION

Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies are directed to decline or discontinue federal enforcement efforts whenever it appears that there is no substantial federal interest in further prosecution or that the offense primarily affects state, local, or foreign interests. A substantial federal interest exists in the following circumstances, among others:

(a) the offense is serious and state or local authorities are unable to enforce state or local law because of the interstate aspects of the case;
(b) federal enforcement is necessary to vindicate federally-protected civil rights;
(c) if federal jurisdiction exists under section 201(b), the offense is an integral part of, or necessary to the accomplishment of the underlying offense, as to which there is a substantial federal interest;
(d) an offense apparently limited in its impact is associated with organized criminal activities extending beyond state lines.

Before the federal law enforcement agency shall commence prosecution for homicide (§ 1601), assault (§§ 1611-19), sex offenses (§§ 1641-50), arson (§ 1701), burglary (§ 1711), robbery (§ 1721), theft (§§ 1731-41), counterfeiting or forging (§§ 1751-55), rigging sporting events (§ 1757), inciting riot (§ 1801), arming rioters (§ 1802), supplying firearms (§ 1811), gambling (§ 1831), or prostitution (§§ 1841-43), under jurisdictional bases 201(b), (e), (f), (g), (h), (i), or (j), authorization to prosecute shall be obtained from a federal magistrate sitting in the district in which the prosecution is to take place. Authorization by the

magistrate shall be granted upon a showing of probable cause to believe that there exists a sufficient basis for proper federal jurisdiction and a substantial federal interest in the prosecution. Notice of the hearing before the magistrate and an opportunity to be heard shall be given to the attorney general of the state in which prosecution is to take place. The decision of the magistrate shall be [final and unappealable] [appealable by either the federal law enforcement agency or the state attorney general to the federal district court in which prosecution is to take place].

Where federal law enforcement efforts are discontinued, federal agencies are directed to cooperate with state, local, or foreign agencies, by providing them with evidence already gathered or otherwise, to the extent that this is practicable without prejudice to federal law enforcement. The Attorney General is authorized to promulgate additional guidelines for the exercise of discretion in employing federal criminal jurisdiction.