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Removal of Indictments by Federal Officers As an Invasion of States' Rights

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REMOVAL OF INDICTMENTS BY FEDERAL OFFICERS AS AN INVASION OF STATES' RIGHTS

It is the author's belief that the federal government has, by a gradual process of legislative enactment and judicial interpretation, usurped many of the rightful prerogatives which originally belonged to the state governments. It is the author's purpose in this thesis to trace the gradual development of what he believes to be one phase of this unwarranted assumption of authority. It is an attempt to show the various stages by which the federal courts have taken jurisdiction of crimes committed by federal officers, under color of their offices, within the boundaries of and against the authority of a state sovereignity.

Government within the United States presents many difficulties in conflicts of sovereignties. The instrument by which these conflicts are regulated is, of course, the Constitution of the United States. In that instrument are enumerated the powers granted by the states to the central government. The distinction between state and federal government is, in principle, clear, and it is elementary that all powers not delegated to the latter are retained by the former. Therefore, if the power is not given to the federal government in the Constitution, expressly or by necessary implication, to justify the removal of these causes, then the right to try the causes belongs to the states. There are two clauses in the Constitution which have a bearing on this problem. Article I, Section 8, Clause 18, provides that "Congress shall have the power to 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." Article III, Section 2, Clause I, provides that "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the

United States, and treaties made, or which shall be made, under their authority." It is from the interpretation of these clauses, and from the implications which flow therefrom, that the rights of the federal government to take jurisdiction of cases which arise within the state, must flow.

The first act of Congress, under this authority, which authorized the removal of causes, by federal revenue officers, to the federal courts, when such officers were sued in state courts for acts done under color of their offices, was the Judiciary Act of September 24, 1789. This Act was passed by the first Congress, many members of which had assisted in framing the Constiution. This, then, would seem to be a legitimate exercise of the original grant of power. This act, framed by many of the makers of the Constitution, presumably embodies the spirit of that document, and the ideals for which it stands. However, this act provides for the removal of civil cases only, and this right is easily seen to flow from the provisions of the Constitution above quoted. Its constitutionality was sustained by the case of *Chicago, etc., R. Co. v. Whitton.*[1] This was the beginning. It was a legal and a just exercise of a valid grant of power. The first steps of an invasion of the rights of another are almost invariably legal and just.

The next step in the development of this doctrine was taken on February 4, 1815, when an act[2] was passed by Congress, providing that if any suit *or prosecution* should be commenced in any state court against any collector, naval officer, surveyor, inspector, or any other officer, agreeably to the provisions of this act, or under color thereof, for any act done or omitted to be done as an officer of the customs, or for anything done by virtue of the act or under color thereof, it might be removed before trial into the circuit court of the United States, provided the act should not apply to any offenses involving corporal punishment. This is the first ampli-

1 13 Wall. 270 (1871).
2 3 Stat. 198.

fication of the original doctrine. It extends the classes of persons to whom the doctrine applies, but this is not the startling step shown in, or rather, read into this act by the courts. The words which at once attract attention in this act are the words "any suit or prosecution which shall be commenced." If this extends the jurisdiction of the federal courts to criminal actions begun in state courts against these officers, then this is a radical and an abrupt step in our development. There is no adjudicated case in the books which interprets these words, and no criminal prosecution was removed under it by a federal officer. From this purely negative, but none the less valid testimony, it appears that the authorities then considered that this act authorized the removal of civil suits only. It is unfortunate that there was not at that time a test of these ambiguous words. Perhaps the spirit of the times and the temper of the courts was then so closely connected with the spirit of state independence which animated the founders of our country, that a halt would have then been called on this phase of the extension of federal powers.

This act was intended to be of short duration, but it was extended by the act of March 3, 1815,[3] and re-enacted in 1817 for a period of seven years. However, as in the above act, no criminal prosecutions against federal officers were removed to federal courts under this act, so we have no judicial interpretation of the meaning of the words "suit or prosecution." The negative argument against the interpretation of this phase as "civil suit or criminal prosecution" is therefore, still valid when raised against this interpretation.

The next act in our series was passed on March 2, 1833.[4] This was the Force Bill, and was passed under unusual pressure of events. At that time one of the States had attempted to pass a statute making penal the collection of

3 3 Stat., p. 233, § 6.
4 4 Stat., c. 57, § 3

duties by United States officers within the State, under the tariff laws. President Jackson recommended the measure, and it was passed by a large majority in both houses. The act itself had three sections. In the first section jurisdiction of the circuit courts was extended to all cases in law or equity arising under the revenue laws for which other provisions are not already made by law, and provision was made to the effect that any revenue officer injured in his person or property, on account of any act done by him for the protection of the revenue, might maintain a suit for such damages in the circuit court for the district where the wrong-doer resided. In the second section, property taken or detained by a revenue officer was declared to be irrepleviable, and that it should be deemed to be in the custody of the law and subject only to the orders and decrees of the Federal court having jurisdiction of the same. Offenders who should dispossess or rescue, or attempt to dispossess or rescue, any property so taken or detained were to be deemed guilty of a misdeameanor, and punished as therein directed. Section three empowered any such revenue officer to remove any suit or prosecution commenced against them in a state court, on account of any act done by them for the protection of the revenue, into the proper circuit court, for trial in the mode therein prescribed.

A survey of this act will show that the only words in it which sustain the interpretation that criminal prosecutions against a federal officer were included under it are the words "suit or prosecution," which were taken from the similar acts of this nature previously enacted and treated above. It is submitted that, even under the particular circumstances surrounding the enactment of this act, this law applies to the removal of civil cases only: that under it a state indictment for an offense against the authority of that state could not be removed from the state court where found into the circuit court for trial in any form of proceeding, unless the case, whether a suit at law or in equity, involved some question

arising under the Constitution, the laws of Congress or treaties made under their authority. In support of this is adduced the fact that from the passage of this act, until the repeal of the section containing the words "suit or prosecution" on July 13, 1866, there was not one case of an indictment, such as was above considered, being removed to a federal court for trial. In view of the circumstances surrounding the passage of the act, and the general temper of the times, this argument now carries much more weight than it did with regard to the other two laws. Also there were many civil cases removed under the act. A few of these are *Wood v. Matthews,*[5] *Murray v. Patrie,*[6] *Fisk v. The Union Pacific Railroad Co.,*[7] *and Tod, realtor, v. Fairfield Com. Pleas.*[8] Certainly in the presence of the frequent removal of civil cases, and the clashes then prevalent between state and federal authorities on revenue matters, if the authorities of that time had considered the provisions of the act applicable to criminal prosecutions, there would not be a total absence of such cases from the record. Also in this case, with the exception of the word "prosecution" there is no word in the act which would sustain the interpretation that the act authorizes the removal of criminal prosecutions, and it contains many expressions utterly repugnant to the theory that the proceedings to effect the removal of process were intended to extend to a criminal and indictable offense.

It is at this point, however, that we have the first radical step in the assumption of authority by the federal government. The provisions of the Act of July 13, 1866,[9] relative to the removal of suits or prosecutions in state courts against internal revenue officers, provisions re-enacted in Section 643 of the Revised Statutes, are almost identical with those of the act of 1833, except that in the latter act the adjective

5 2 Blatchf. 370 (1852).
6 5 Blatchf. 343 (1866).
7 6 Blatchf. 362 (1869).
8 15 Ohio St. 377, 387 (1864).
9 14 Stat. 171, § 67.

"criminal" is inserted before the word "prosecution." Here we have a direct statement of the legislative intent to permit the removal of criminal prosecutions against federal officers. This is the third step of the process by which the powers of the federal government have been extended and stretched. In the first, the removal of civil suits was permitted. In the second, the removal of suits and prosecutions was permitted. In the third the removal of suits and criminal prosecutions is permitted. The conclusion, even at this stage of the development, would have startled the framers of the Constitution, as it would have startled the framers of the first act from which the amazing present development started.

Of course the constitutionality of the act was soon questioned. In the outstanding case of *Tennessee v. Davis*,[10] the act was held to be constitutional. In that case James M. Davis was indicted for murder in a state court in Tennessee. In his petition, duly verified, for the removal of the prosecution to the circuit court of the United States, he stated that, although indicted for murder, no murder was committed; that the killing was done in necessary self-defense, to save his own life; that at the time the alleged act was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue; that the act for which he was indicted was performed in his own necessary self defense while engaged in the discharge of his duties as deputy collector, and while acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his said office; that it was his duty to seize illicit distilleries and the apparatus used for illicit and unlawful distillation of spirits and that while so attempting to enforce said laws, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire, which was the killing mentioned in the indictment. The record having been returned, in compliance with the writ,

[10] 100 S. Ct. 257.

a motion was made to remand the case to the state court. On the hearing, the judges were divided in opinion and certified three questions to the Supreme Court. The first queried as to whether such an indictment was removable to the federal courts for trial. The second concerned the manner of proceeding to be followed, if the first question was answered in the affirmative. The third queried as to whether the defendant could be tried in the federal courts if no such procedure were prescribed.

The most important of these questions is, of course, the first. The importance of that question can hardly be overemphasized. Its answer involves the determination of the true relationship of the state and the federal governments, and of the rights of each.

The majority of the Court answered this question in the affirmative. Certainly the importance of this step justifies a somewhat extended inquiry into the reasoning on which the majority based their opinion, as well as the objections the minority took to that reasoning.

The majority, in answering the first certified question in the affirmative, based their determination on two principal arguments. The first of these maintains that this act, in permitting the removal of such causes, is necessary for the execution of the functions of the federal government. They reason thusly, that the federal government has a right to pass all laws necessary to secure the performance of its governmental functions. But this law is necessary to secure the proper exercise of governmental functions. Therefore the federal government was acting within its rights in enacting this law. In support of the minor proposition, which obviously is the essential step in the argument, the majority argue that without this right of removal of criminal prosecutions, that federal officers may be kept from the performance of their duties by action of the state courts.

The second of the arguments of the majority is that this doctrine has been the law of the land for some time, and that it is endorsed by custom and habit. They mention the laws above considered, and now interpret, sixty-four years after the act was passed, the ambiguous terms "suit or prosecution" to mean "suit or criminal prosecution." Obviously, to make the first authorative interpretation of a doubtful phrase in a law, and then to base an argument on the fact that that law has been in existence and so interpreted for many years, involves in itself a contradiction. The argument presupposes the basic fact that the law has been certain in meaning for those years, in order to base an argument on that existence. And from a dispassionate reading of the history of the predecessors of this act, it would be indeed difficult to sustain such an interpretation.

After thus disposing of the first certified question by answering it in the affirmative, the majority hold the second question to be immaterial, and say that the third question has been answered in the affirmative by answer given to the first question.

This majority opinion was written by Mr. Justice Strong. There is a vigorous dissenting opinion written by Mr. Justice Clifford, and concurred in by Mr. Justice Field. This dissenting opinion maintains that there are three things to be determined to decide the effectiveness of this act. First, did Congress, in passing this legislation, intend to make criminal suits removable by federal officers? And if they did, was the act passed sufficient in legal effect to carry out this intention? And thirdly, if it was sufficient to carry out that intent, is the act itself constitutional, that is, could they, in conformity with the Constitution, effectuate this intent? As to the first question, the dissenting opinion concedes that such was the intention of Congress. As to the second question, they maintain that the act passed was not sufficient to give effect to this intention. They maintain that Congress would have the power to confer criminal jurisdiction on the

federal courts. But they hold that, to do this, Congress must first define the crimes and the punishments to be imposed for them, and the procedure to be followed in their trials. There are no federal common law crimes in our legal system, and there is no federal statute making murder within a state a crime. Therefore the learned judges concluded that the act passed was not sufficient in law to confer jurisdiction on the federal courts to try these crimes.

Also there are the following conflicts, among others, between federal and state court procedure in these cases: in the duty of a state prosecutor to prosecute in federal courts; in the question as to whose is the duty to serve process; as to whose the duty to furnish a copy of the indictment and compel the attendance of witnesses; as to which clerk should ask, before sentence of death, whether or not the defendant has anything to say why judgment of death should not be pronounced against him; as to whether juries should or should not be judges both of the law and the facts; and as to whether state or federal rules of evidence and procedure should govern. Because these matters were not determined by the act, the dissenting judges hold that it is not sufficient to effectuate the legislative intent.

By the negative answer to the second question, the dissenting judges maintain the act is insufficient to give the federal courts the jurisdiction they intended to confer upon them. And since this is thus determined, it did become necessary to consider whether, if the act had been sufficient to execute the intention of Congress, that act would have been in conformity with the constitution. From this reasoning, the dissenting judges answered the three certified questions in the negative.

It is submitted that the majority opinion begs the question in this, that it confines itself to the consideration of whether or not Congress could so legislate that the federal courts would have jurisdiction to try crimes committed within the states, to the exclusion of a consideration of whether

this congressional act is sufficient to give federal courts jurisdiction of crimes committed within the states; and this latter is, of course, the question here presented for decision. It is submitted that the minority's analysis of this question is the correct one, and that the act, as interpreted, is a violation of the rights of the states in this, that it takes from them jurisdiction to try crimes against them by an insufficient law. It is further submitted that the reasoning above given in support of the holding of the minority fully supports this position. However it has become a legal maxim that it is authority and not reason that makes the law, and the majority opinion in this case established the law on the subject. The removal of indictments against federal officers for acts committed under color of their office, to the federal courts is thus by law permitted. The next step is an extension of the officers to whom this doctrine is applicable, and then our cycle will be complete.

But before we pass on to a consideration of this final step, there is a statement in the dissenting opinion of this case which is worthy of attention. It is both a warning and a prophecy. "Viewed in any light, the proposition to remove a state indictment for felony, from a state court having jurisdiction of the case, into the Circuit Court, where it is substantially admitted that the prisoner cannot be tried until Congress shall enact some mode of procedure, approaches so near to what seems to me both absurd and ridiculous, that I fear that I shall never be able to comprehend the practical wisdom which it doubtless contains. *Were the object to give felons an immunity to commit crime, and to provide a way for their escape from punishment, it seems to me that it would be difficult to devise any mode more effectual to that end than the theory embodied in that proposition.*" (The italics are mine. If it were possible to use colors in this paper I would illuminate that statement. For in it is contained a warning that it would have been well to heed, and a prophecy that in this, our day, has come to truth.)

The next step in this gradual assumption of states' rights by the federal government was taken by Congress. This new statute[11] was passed on October 28, 1919. It reads as follows: "The Commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this chapter or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States." This is the legislative step in the progression, and, as in the case of the previous legislative steps, it is halting and uncertain. To attain to its fullest flower, it had to be correctly interpreted by the courts in favor of the federal government. And, as in the preceding steps, this was done only after much diversity of judicial opinion.

But before we consider the conflicting opinions of the judiciary on the meaning of the words used in this act, let us pause to consider the temper of the times in which this act was passed. In 1919, the country was still overwhelmed with war hysteria. The spirit of nationalism, already rampant because of the crisis through which the country was passing, and incited further by skilled propaganda, waxed stronger than the forces of sober reasoning. The country was accustomed to passing new legislation, was used to thinking in the medium of vast sums and of vast undertakings, was hardened to resigning its individual liberties and the rights of its component states for a common purpose against a common enemy. The National Prohibition Act was passed, in this spirit, to abolish liquor, because it induced drunkenness in some, and yet the Act itself was passed by a nation that was itself drunk—drunk of things stronger than alcohol, drunk with power, and ambition, and success. Edmund Burke has said "A people never give up their liberties but under some delusion." The American people and the American

11 Nat. Prohibition Act, Title II, c. 85, § 28, 41 Stat. 316.

states made this, the greatest of the gifts of their liberties to the federal government, under a delusion. They were under a delusion of grandeur.

Here, however, we are concerned with only one aspect of this monstrous movement. Once prohibition was in effect, means were sought to secure the enforcement of the provisions of the act at any price. One of the means employed was the granting of special privileges and of special powers to officers engaged in the enforcement of that law. The statute here under consideration was one of those employed for that purpose. It is worthy of note that even in the mental condition in which this act was conceived, and under the circumstances of its passage, that it does not specifically give prohibition officers indicted in state courts for violations of state laws, committed under color of their offices, the right to remove their causes to federal courts. It rested with the courts to complete the cycle of this particular invasion, by the federal government, of states' rights, by extending their interpretation of this act to cover those contingencies.

The interpretation placed on this act by the inferior federal courts was contradictory. In a petition by a prohibition officer, indicted in a state court for acts committed under color of his office, for removal of his cause to the federal courts, there are two points to be considered. The first of these is a question as to whether or not a prohibition officer is a federal officer under the Judiciary Act, Section 33, which was above considered, giving federal revenue officers the right of such removal. If that question be answered in the affirmative, then there is no need to go into the second question. But if it is answered in the negative, then there remains the further question as to whether such an officer is entitled to the provisions of that act under the provisions of the National Prohibition Act above quoted.

The first of these questions aroused dissent in the lower federal courts. The leading case in those courts, in the affirmative in this dispute, is the case of *State of Oregon v. Wood,*

et. al.,[12] handed down in 1920. It was there held that a federal revenue officer, indicted in a state court for killing a man while enforcing the National Prohibition Act, may remove the proceeding to a federal court under Section 33 of the Judicial Code (Comp. Stat., § 1015), authorizing removal of prosecutions against revenue officers in state courts. This case held that a prohibition officer was a revenue officer under this section of the Judiciary Act, irrespective of the further grant of power in the National Prohibition Act. The learned judge in this case says: "But beyond this (the National Prohibition Act), it is manifest that this is a revenue act, as well as a prohibition act, as witness sections 35 and 37 of Title II, and other provisions of the act." These provisions named relate to the incidental tax to be levied upon the sale of alcohol which is legal under the National Prohibition Act. From this tax, which is only incidental to the purposes of the Act, the court concludes that the men enforcing the Act are revenue officers. This is the only argument the learned judge offers in support of his position that a federal officer engaged in the enforcement of the National Prohibition Act is a revenue officer, within the meaning of Section 33 of the Judiciary Act.

In opposition to this opinion is the leading case of *Smith v. Gilliam.*[13] This case holds that the incidental receipt of money by the government or its officers under the National Prohibition Act does not make it a revenue act, and prohibition officers are not revenue officers, within Section 33 of the Judiciary Act. The court cites many decisions of the Supreme Court to the effect that merely because some revenue may be received by the federal government as an incident to the enforcement of a law, that this does not make such a law a revenue law, where the law was not designed for raising revenue, but for other clearly designed purposes. That the National Prohibition Act was primarily designed for pur-

12 268 Fed. 975 (1920).
13 282 Fed. 628 (1922).

poses other than the raising of revenue, no one can deny. To call an act which abolished laws which had brought to the government hundreds of millions of dollars annually in revenue a revenue law is a marvel of judicial construction from which this court wisely shrinks.

This diversity of judicial opinion in the lower federal courts on this question was ruled upon by the Supreme Court in the case of *Maryland v. Soper,*[14] handed down in 1925. This case holds that agents of a federal prohibition director are, in searching for a still for the purpose of preventing the violation of a federal statute forbidding the making of spirits in any distillery other than one authorized by law, within the protection of Section 33 of the Judiciary Act, although the Section does not apply to prohibition officers when acting as such. Thus the Supreme Court distinguishes between prohibition officers on the basis of the nature of the acts they were performing when the alleged crime was committed. This distinction was a virtual denial of the privileges the prohibition officers and those interested in the absolute enforcement of the 18th Amendment, were seeking. They were not so much interested in the privileges of a prohibition officer who had shot a citizen while that officer was engaged in the collection of revenue, or in the enforcement of the revenue features of the National Prohibition Act. What they were interested in was what would happen to an officer who shot a citizen while that officer was engaged in the enforcement of the prohibiting features of the National Prohibition Act.

The rights they sought were finally secured by the adjudication of our second question, namely whether the right of removal was given to prohibition agents under the provisions of the National Prohibition Act above quoted. However, these rights were secured only after a struggle, and after a long dispute in the lower federal courts on this question.

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14 270 U. S. 9, 70 L. Ed. 449 (1925).

Of course the dispute concerns the interpretation to be placed on the words "shall have all the power and protection . . . which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States." The numerical weight of authority in the lower federal courts maintained that the right of removal given to revenue officers when indicted in a state court was a protection within the meaning of this act, and was therefore given to prohibition officers under the same circumstances as it was formerly given to revenue officers. The leading case in the lower federal courts sustaining this interpretation of the act is *Commonwealth of Massachusetts v. Pogan.*[15] The argument of the learned District Judge Martin is briefly expressed in his own words: "Is it (the right of removal) a protection? The natural meaning of the word would be protection against resistance or attack when carrying out their duties; and there are provisions in the revenue laws to which it might apply. The danger however, which such officer would incur in the performance of his duties, if subject to prosecution or suit in local courts, in perhaps an unfriendly atmosphere or surroundings, might be very considerable. In the case of revenue officers it was recognized as sufficiently serious to require a right of removal of cases against them to the federal courts as a protection to them in the discharge of their duties. While the question is not free from doubt, and . . . it is unfortunate that the authority to remove should be of such uncertain character, I think that the right of removal is a 'protection' to the prohibition agents in the enforcement of the act, within the meaning of Section 28."

Other cases which sustain this interpretation are *State of Oregon v. Wood et. al.,*[16] *United States ex rel Asher v. Com-*

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15 285 Fed. 668 (1923).
16 268 Fed. 975 (1920).

monwealth of Pennsylvania,[17] and *People of the State of Illinois v. Moody.*[18]

The argument denying this interpretation of the law is very fully and ably discussed by District Judge Walter Evans, in the case of *Smith v. Gilliam.*[19] The learned judge thoroughly considered the powers and protections possessed by revenue officers at the time of the passage of the act in question, and found them to be six:

1. To enter at all times upon the premises of a distiller, and, if demand for admission was refused, to break into such premises or a distillery thereon (Section 3177, R. S.), and if they were hindered or obstructed in this, fines were imposed,

2. To collect taxes by distraint, and, if needful, to make repeated seizures of property (Section 3187, R. S.),

3. To break into any distillery by force if refused admission thereto (Section 3276, R. S.),

4. To break up and into the ground on the premises where any distillery was located (Section 3277, R. S.),

5. To make seizures of property under Sections 3166, 3200, 3453, and 3460, R. S. (Sections 5866, 5922, 6355, and 6363 Comp. Stats.), and,

6. District Judges were authorized to issue search warrants.

The learned judge, after a careful analysis of the language of the act, and the circumstances of its passing, concludes that it is these powers and protections that are conferred by the act on prohibition officers. He maintains that, while a case should always be removed when authorized by law, a removal not so authorized should always be refused, and the previously acquired jurisdiction of the state court should be respected. And as to the argument that such a right of removal is necessary for the protection of prohibition officers,

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17 293 Fed. 931 (1923).

18 9 Fed. (2d) 628 (1925).

19 *Op. cit. supra* note 13.

he maintains that the laws of the United States are supreme, and protect citizens sued or prosecuted in the state courts as fully as in the federal courts, whether the plea therein be self-defense, or one based on conduct made lawful by some statute of the United States or of the states. After a full consideration of these matters the learned judge decided that this right of removal was not granted to prohibition officers by this act.

The dispute over the interpretation of this act by the lower courts was finally decided by the Supreme Court in the case of *State of Maryland v. Morris A. Soper, District Judge,*[20] handed down in 1925 by Chief Justice Taft, and concurred in by the entire court. The court gives scant attention to the point so strenuously argued in the lower courts. The arguments presented by Judgs Evans in the case of *Smith v. Gilliam,*[21] above cited, were not considered in this opinion. The parts of the opinion material to this point are as follows: "We have no doubt that the word 'protection' was inserted for the purpose of giving to officers and persons acting under the authority of the National Prohibition Act in enforcement of its provisions, the same protection of a trial in a federal court of state prosecutions as is accorded to revenue officers under Section 33 of the Judiciary Act. . . . Congress not without reason assumed that the enforcement of the National Prohibition Act was likely to encounter in some quarters a lack of sympathy and even obstruction, and sought by making Section 33 applicable to defeat the use of local courts to embarrass those who might execute it."

It is submitted with reference to this decision of the Supreme Court, that it, in common with the other decisions of that tribunal concerning prohibition cases, is marked by an extreme brevity, that is a poor substitute for the full reasoning which accompanies their decisions in ordinary matters. It is further submitted that while the absence of doubt

20 270 U. S. 9, 70 L. Ed. 449 (1925).
21 *Op. cit. supra* note 13.

in the mind of the Chief Justice as to the intention of Congress in passing the act, based on his opinion of what their expectation was of what the fate of the National Prohibition Act would be in certain quarters may be sufficient reasoning to convince the Chief Justice of the truth of the point; yet it reflects no small amount of discredit on the extensively reasoned and exhaustively researched opinion of the lower court, in the case of *Smith v. Gilliam* [22] where the learned court came to the opposite conclusion. The Supreme Court seemed to think that neither the reasoning nor the research was worthy of comment or of refutation. The policy of the Supreme Court in deciding prohibition cases by simple affirmation or denial of conclusions is admirable in this, that it presents a decision which is incapable of being misunderstood; but this benefit seems small when this policy casts upon that tribunal the suspicion that it is determined by expediency rather than by principle in these most controversial matters. But this, being a decision of the Supreme Court of the United States, finally and decisively settles the dispute. It is authority.

Thus the cycle of our development is complete. First the state had jurisdiction over all suits brought against persons within their reach. Then by the first act, passed in 1789, certain civil suits against officers were removed from them to the federal courts. Then, in 1815, the number of officers to whom this right applied was increased, and the doubtful words "or prosecution" were inserted in the act.

It is submitted that this act did not give the power of removal of criminal cases to federal officers, because the grant of power is in itself ambiguous, and because no criminal cases were, in fact, removed under it. From this we draw the legitimate conclusion that the authorities of that time interpreted the act as permitting the removal of civil cases only.

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22 *Op. cit. supra* note 13.

Then, in 1833, the number of persons to whom the act applied was further increased, and the doubtful words were left intact.

It is submitted that this act did not permit the removal of criminal prosecutions any more than did its predecessor, and for the same reasons, namely, that the removal of civil cases, and the complete absence of any attempts at the removal of indictments shows that the authorities of that time considered the act as permitting the removal of civil cases only.

Then, in 1866, the word "criminal" was inserted before the word "prosecution," and after a spirited dispute, and in the face of a strong dissenting opinion, the right of removal was given to the augmented list of federal officers both in civil and in criminal cases.

It is submitted that this act was invalid in this, that it provided for the trial, in the federal courts, of acts which were not offenses against the federal government; and further, because it did not provide any procedure to be followed in those trials, which laws of procedure were necessary before the federal courts could legitimately begin these trials.

Then prohibition officers attempted to bring themselves within the terms of this act, and appealed to the courts to place such a judicial interpretation upon their status. After some dispute this appeal failed.

Then, in 1919, a further act was passed, giving the prohibition agents the "powers and protections" previously possessed by revenue officers. After a long dispute this was interpreted by the courts as permitting prohibition officers to remove their cases from the state to the federal courts.

It is submitted that the removal of indictments by prohibition agents is neither a power nor a protection within the meaning of this act; that there were existing at that time certain well defined powers of revenue officers and protections belonging to them, which were enumerated and grouped

together in the Federal Statutes, in Volume 6, Comp. Stats. (1916), pages 6982 to 7407, and in Volume 1 of the supplement to that compilation, pages 1176 to 1305, inclusive, to which these words, taken in their usual sense, would apply; that to extend these words to cover any privileges of these officers not contained under this heading is an unwarranted invasion of the legislative field by the judiciary. It is further submitted that this act, both by the interpretation of the words used and by the circumstances which attended the passing of the act, at least creates a strong doubt that Congress by it intended to permit the removal by prohibition agents of indictments from state courts. And it is elementary that where such a doubt exists, that the previously acquired state jurisdiction should be respected.

It is submitted that there are the steps of the gradual process of legislative enactment and judicial interpretation by which the federal government has usurped one of the rightful prerogatives which originally belonged to the state governments. None of these steps is abrupt. Each goes a little farther than its predecessor, and each is dependent on the ground gained by the one before it. It is only when we consider the development of this invasion as a whole that we see what a definite inroad the federal government has made into the original rights of the states. Is there any doubt that if this final end were displayed to the original founders of our government, that they would be astounded at the ultimate fate of their basic principle of states' rights? For now the governments of the various states have not the authority to try nor the power to punish the criminal offenses of a veritable army of occupation in their midst; offenses committed against the peace and dignity of the states themselves, and in defiance of their laws. The power has been usurped. The authority has been taken from them.

This situation is not without parallel in American history. It bears a striking resemblance to the situation which existed in the American Colonies shortly before the beginning of the

American Revolution. There was at that time in the Colonies a large force of men, placed there to enforce the laws of another sovereignty, that is, of England. For their offences against the sovereignty of the various Colonies, they were taken from the Colonies to England for trial, as were any individuals who offered violence to them. This was shortly before the Revolution. It may be profitable to recall that this condition is listed by almost every historian as one of the contributing causes of that Revolution.

When the framers of the Constitution met, they did all in their power to insure that this condition of affairs would never again arise in the United States. They framed the Constitution, and in it they limited the jurisdiction of the federal courts strictly. Unfortunately the memories of men are short, and their foresight is shorter. No generation can adequately provide against the stupidity and the blindness and the passions of future generations. While the lesson taught by the interference of the English courts into American jurisdiction was still fresh in the minds of the people, the Supreme Court, in the case of *Marbury v. Madison* [23] held that the federal jurisdiction could not be extended beyond the strict limits placed on it in the Constitution, save by an amendment to the Constitution; that Congress did not have the power to give original jurisdiction to the Supreme Court in other cases than those described in the Constitution. The lesson was soon forgotten, however, and by a gradual process of legislative enactment and judicial interpretation, the federal government has so extended its jurisdiction, and so usurped the rights of the state governments, that we now have an exact parallel to the condition which existed before the Revolution, and which the framers of the government and of its Constitution tried so desperately to avoid.

In conclusion, let us look briefly into the practical results of federal intervention into state jurisdiction. It is perhaps

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[23] 1 Cranch 137, 2 L. Ed. 60 (1803).

a digression from the strict unity which should mark a thesis, but it may not be entirely fruitless to point out a few of the results which flow from an assumption of power that is unwarranted and unjustifiable.

It would be extremely interesting to know exactly the number of persons killed by prohibition officers since 1919; the number of officers indicted in state courts for these killings; the number of officers who transferred their cases to the federal courts; the number of those who actually came to trial there; and finally the number of those who were finally convicted of the offenses with which they were charged. Unfortunately, these statistics are not available. However, we have at hand a very interesting booklet, "Reforming America With A Shotgun," [24] issued by the Association Against the Prohibition Amendment, which provides interesting estimates, and quotes examples of isolated cases. We quote a few of these estimates and cases, condensed to conserve space, as the most acceptable substitute that can be provided for the statistics which it is impossible to obtain.

The booklet prefaces its cases with the following remarks; [25] "As we shall show, the record of killings by federal agents includes a sheaf of homicides for which the shooters have not been prosecuted along ordinary lines. Even where there have been state enforcement acts, the states' legal machinery for bringing killers to justice has been stopped by federal intervention. Local officers have been thrust aside. the defendants have been taken from them under writs of habeas corpus, and the trials have been held in federal courts. Generally, United States attorneys, and sometimes special federal attorneys from Washington, have appeared as counsel for accused agents. The agents have been acquitted, as a rule.

"The Chicago *Tribune* on November 11, 1928, listed the killings of twenty-three citizens for which agents had been

24 National Press Bldg., Washington, D. C., Second edition, 1930.
25 P. 3.

indicted by local grand juries on charges of murder or manslaughter. In every one of these tragedies, the federal courts intervened with the result that the defendant escaped punishment."

A few of the particular instances of this custom may illustrate the point. Elmer Fulton sold whiskey to dry agents. (Pilcher, Okla., Aug. 4, 1927.) He was killed in flight, by an agent who "slipped in the mud as he was firing to warn Fulton to stop, his gun was discharged as he slipped, and Fulton was killed." State prosecution was halted by habeas corpus proceedings, and the agent was discharged by a federal judge.

Lawrence Wengler, a farmer came near a still, which was surrounded by prohibition agents. (Near Madonna, Md., Nov. 19, 1924.) He saw them and ran. They fired warning shots. These warning shots killed him. Three agents were indicted by a county grand jury for manslaughter, but they were acquitted in the federal court.

John Buongore was arrested for bootlegging, in Harve de Grace, Md., Aug. 1, 1925. "Fubershaw alleged that Buongore reached for his hip pocket and he believed he was reaching for a gun and he shot in self defense, killing Buongore immediately." There was no statement in the report as to whether Buongore was armed. Fubershaw was indicted for murder, the federal court intervened, and he was acquitted.

Lonnie Atwell and two other men were stopped in a liquor car by two agents. (In Lincoln County, W. Va., in August, 1921.) "The bootleggers began to run and several shots were fired. Atwell was wounded, and died in a hospital a few hours later." The agents were indicted, but a jury acquitted them in a federal court.

Jacob Hanson, a respected citizen of Niagara Falls, N. Y., was killed May 6, 1928, when he did not stop his car at the hail of two revenue officers, not in uniform, and after dark. Obviously he thought they were bandits. The agents were indicted for manslaughter in the state court. The New York *World* discusses the subsequent proceedings in an editorial

(April 3, 1929): "Thereupon United States District Attorney Templeton began a series of legal maneuvers on behalf of the defendants. No shyster lawyer skating on the edge of disbarment has gone farther to defeat justice than this assistant to the attorney general of the United States." After delays, changes of venue, hung juries, and all of the questionable uses of local prejudice and sharp practices on the part of the district attorney, the defendants were acquitted in the federal courts.

F. M. Ferguson, an innocent person, was run down and killed by a prohibition agent in Huntington, W. Va., Oct. 25, 1926, and the Bureau's latest account shows that nearly four years later the case against the agent is still pending in the federal courts.

However, there is nothing to be gained by multiplying these cases indefinitely. Suffice it to say that these are only a few of the many instances of the complete recklessness of human life which marks the activities of the federal prohibition agents. That recklessness is certainly in no small measure due to their knowledge of their practical immunity from any consequence of that disregard for human life. Their government will protect them from the "unfriendly atmosphere or surroundings" of the state courts. And almost certainly from any punishment in any court. Is it any wonder that they are reckless? In closing, it would be well to call attention, in the light of present circumstances, to the statement made by Mr. Justice Clifford, in the case of *Tennessee v. Davis*,[26] in the year 1866: "Were the object to give felons an immunity to commit crime, and to provide a way for their escape from punishment, it seems to me that it would be difficult to devise any mode more effectual to that end than the theory embodied in that proposition." A warning that it would have been well to heed, and a prophecy that in this, our day, has come to truth.

Notre Dame, Indiana. *John M. Crimmins.*

[26] *Op. cit. supra* note 10.