FEDERAL USE OF STATE INSTITUTIONS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

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The President and the leadership of Congress agree that the federal government should be diminished in size. Department after department, agency after agency, have been nominated for reduction or elimination. Seldom mentioned in this connection are the federal institutions for the administration of criminal justice. This is an unfortunate oversight. The size of the federal police,[1] prosecution,[2] correction,[3] and judicial institutions[4] devoted to the administration of criminal justice can be reduced without important effect on crime rates by using state institutions more and federal institutions less. No reduction in the effectiveness of law enforcement need result, while several benefits would be secured.

The growth of federal institutions for the administration of criminal justice has been steady throughout this century,[5] but has been almost meteoric since 1980.[6] No part of the federal government has grown more rapidly in recent years.[7] The cause of the growth is not hard to understand. Voters want crime prevented. Hence, no candidate for federal of-

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1. In fiscal 1994, the total number of federal law enforcement employees in the Department of Justice was over 96,000. 1994 ATT'Y GEN. ANN. REP. 1 [hereinafter AG ANNUAL REPORT]. Of this number, over 9000 are lawyers, including about 1400 in the Federal Bureau of Investigation.

2. There are now almost 8000 attorneys in the Department of Justice, a little more than half assigned to the offices of United States Attorneys. There is no official calculation of the proportion of their efforts invested in criminal matters, but it is likely a major fraction. *Id.* at 3.

3. The Bureau of Prisons now operates 72 facilities, housing in 1993 about 90,000 prisoners and employing in 1993 almost 25,000 employees. AG ANNUAL REPORT, *supra* note 1, at 3; *see also* 1993 U.S. DEP'T OF JUSTICE, STATE OF THE BUREAU 1, 27, 29 [hereinafter STATE OF THE BUREAU].

4. In 1993, authorized federal district and circuit judges were 649 and 179, respectively. 1993 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 35 tbl. 26 [hereinafter AO ANNUAL REPORT]. The number of persons employed in the federal judiciary was about 24,000. COMM. ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 10 (1995) [hereinafter LONG RANGE PLAN].

5. LONG RANGE PLAN, *supra* note 4, at 9-10.

6. Since 1980, the number of federal prosecutors has increased about 125%. *Id.* at 11. Since 1988, the number of federal prisoners has doubled. STATE OF THE BUREAU, *supra* note 3, at 5.

7. In the last decade, the budgets of the Department of Justice and of the federal courts have increased 171% and 170%, respectively, four times the growth of total federal

fice finds it in his or her interest to say, even though it is true, that the federal government can play only a limited role in crime control and is not very effective at preventing most criminal conduct that people most wish to deter. In our time, almost every Congress enacts new criminal laws and increases sanctions on old ones.

Little thought has been given within the government to the secondary consequences of the resulting redefinition of the federal role in the administration of criminal justice. A few wise observers have pointed to the futility of this course,[8] but they are drowned out by a chorus of those who want the federal government to stand against crime. It therefore seems useless in these times to suggest that Congress enact fewer criminal laws, or to ask that it repeal some of those that are ineffective or unjust. It is politically impossible to de-federalize criminal law enforcement. This article makes no such proposal. It does propose, however, that federal initiatives in crime control employ the services of state and local institutions and personnel.

Federal criminal law was for most of our history limited to a short list of uniquely federal offenses such as treason, espionage, counterfeiting and federal tax evasion.[9] There is still a small core of federal criminal law of that type. But most federal criminal law is now redundant to state systems of criminal justice. Most federal laws regarding the use or sale of controlled substances,[10] kidnapping,[11] bank robbing,[12] auto theft,[13] mail and wire fraud,[14] prostitution,[15] and violence against women[16] prohibit conduct that also offends state law and is subject to investigation by state officers, prosecution in state courts, and correction in state prisons. Because of this enormous overlap between state and federal governments in this field, it is a relatively simple matter to transfer work from federal offices to the state. This requires no diminution of federal control or federal accountability for the results.

There are at least four benefits to be secured by using state and local offices in the administration of criminal justice in preference to redundant federal offices. One is that law enforcement by state and local offices is generally less expensive than federal law enforcement. This is so in part

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government spending and double the rate of increase in the cost of medicare and medicaid. LONG RANGE PLAN, *supra* note 4, at 10.

8. *See, e.g.*, Sara S. Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 984-91 (1995); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1154-59 (1995); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 KAN. L. REV. 503 (1995).

9. 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 776 (1983).

10. 21 U.S.C. § 841 (1994).

11. 18 U.S.C. § 1201 (1994).

12. *Id.* § 2113 (1994).

13. *Id.* § 2312 (1994); *id.* § 2313 (1994).

14. *Id.* § 1341 (1994) (mail fraud); *id.* § 1343 (1994) (wire fraud).

15. *Id.* § 2421 (1994).

16. *Id.* § 2261 (1994).

because compensation for state and local officers reflects local economic conditions and is therefore often lower. Also, state and local institutions operate on larger numbers of cases and function over smaller territories and are hence more cost-effective.

A second consideration is that state and local offices are more accountable to the people they serve. Criminal law enforcement at all levels is messy work evoking resistance and resentment not only from those who are punished, but also from their friends, families, and allies. The odium may be less when enforcement is done locally by officers who are accountable to those whose conduct they control. State officers are less likely to be perceived to be arrogant and overbearing. Moreover, to the extent that the state governments can absorb the odium, we all benefit—that some of us are enraged at our state or local government is a misfortune, but it does not endanger our social order in the way that alienation and hostility toward the national government does.

A third consideration is that maintenance of a large criminal law enforcement arm of the federal government may increase the hazard of misconduct or corruption. These evils are endemic in criminal law enforcement. No reasonable person can suppose that encounters such as those at Ruby Ridge, Idaho[17] can be wholly prevented. The larger the federal criminal law enforcement establishment, the more frequent will be such events. State officers are not less prone to misconduct than federal officers; perhaps the opposite is true. But when these evils appear in the federal government, they evoke responses infecting the whole body politic. Moreover, there is then no higher government to whom we can go to seek redress.

A fourth consideration is constitutional. As the recent decision in *Lopez*[18] reminds us, not all criminal conduct is the rightful concern of Congress. *Lopez* casts a substantial cloud, for example, on federal laws punishing violence against women. The constitutional consideration reflects practical problems associated with the fact that most crime, especially violent crime, is very local, and momentary, and hence beyond the reach of law enforcement of continental proportions. Even by sending in the Marines, the federal government cannot materially reduce the number of guns in our schools. Nor can it do much with its own resources to prevent domestic brutalities. Without undergoing large and fundamental change, the FBI cannot create an "800" telephone number enabling it to respond to urgent calls for help without an exponential increase in its size. Moreover, there is no reason to believe that an FBI response would be more effective than that of the local police. If Congress needs to make a federal response to guns in schools or wife-beating, this proposal offers it a means of doing so that is clearly within the ambit

17. *Hearing of the Terrorism, Technology and Government Information Subcomm. of the Senate Judiciary Comm.: Federal Raid at Ruby Ridge*, 104th Cong., 1st Sess. (1995) (chaired by Senator Arlen Specter), *available in* WESTLAW, 1995 WL 10888340.

18. United States v. Lopez, 115 S. Ct. 1624 (1995).

of its constitutional powers by enabling federal influence and control of state personnel and institutions.

Named above are four types of federal criminal law enforcers: police, prosecutors, courts, and corrections officers. All four can be partially replaced by state officers working on federal budgets and under some form of federal direction or control. The issues presented differ somewhat amongst the four.

1. *Substituting State for Federal Courts.* Even among the categories of criminal cases in which federal law is redundant to state law, there are some cases in which justice is well served by conducting trials in federal rather than state courts. But such cases are few. One example is the trial of complex securities fraud cases threatening the integrity of national and international markets. Others are cases involving corruption of state officials or alleged violations of federal civil rights or civil liberties by state officials. But in the mine run of contemporary federal criminal litigation, there is no reason to believe that the federal judiciary has any special qualifications to conduct criminal trials. Whatever the aims of the federal law in such matters, the purposes could be as well or better achieved by conducting trials in state courts. Kidnappers, bank robbers, drug merchants, and most white-collar criminals would be just as likely to be convicted and just as deterred or punished by their convictions if convicted in state rather than federal court. The Department of Justice could, therefore, prosecute many of its cases in state courts. To the extent that it does, a transfer payment should be made to the states to help bear the cost of their judicial administrations; such payments could be funded by savings of costs otherwise incurred in maintaining and enlarging expensive federal courts. Such transfer payments would be necessary to assure that the federal prosecutors would be given the cooperation of state courts in the conduct of trials.

Federal judges would readily support a movement of judicial business to the state courts. The recent report of the Long Range Planning Committee of the Judicial Conference of the United States[19] is replete with pleas for Congressional sensitivity to the many difficult problems raised by the ever-increasing criminal caseload. I doubt whether there is a single member of the federal judiciary who would dispute the Report's argument that the federal courts need relief from an excess of criminal litigation. The judges' concern, put more bluntly than they have put it, is that United States district courts are becoming police courts. There is no dishonor meant to police courts by this remark; we require police courts and some, perhaps most, of them do good work. But institutions that excel at the work of a police court are seldom well suited to many of the other tasks that must be performed by the federal courts, such as the enforcement of national laws bearing on civil matters, and on the conduct of the national government. And, to use a costly United States district

19. AO ANNUAL REPORT, *supra* note 4, at 18-20, 22; *see also* FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-8 (1990).

court to perform such routine service is a waste of scarce public resources.

The removal annually of tens of thousands of prosecutions from the dockets of federal courts would bring benefits to all other users of the federal courts. The federal court system would be restored to the functions it has so long performed in civil matters and in matters involving the administration of the government of the United States. Direct beneficiaries include all who litigate in those courts. The primary litigant in federal court, one who is involved in a major fraction of all the cases, is the government of the United States,[20] generally represented by the same Department of Justice.[21] And the United States also has an interest in many cases in which it is not a party, and in which no government attorneys appear. Much federal law enacted by Congress, beginning with the civil rights acts of the Reconstruction era[22] and the Sherman Act,[23] is designed for private enforcement in civil cases brought by private lawyers. Private civil claims enforcing federal laws are now often given less attention than they merit because of the preoccupation of federal courts with criminal cases. Resulting economies would benefit the public fisc. For these reasons, there is cause to hope that the whole national legal system would function more effectively if the federal courts were less beleaguered than they are by heavy criminal dockets.

There is almost no apparent down-side to the use of state courts. Because so small a percentage of our litigation, criminal or civil, is conducted in federal courts, the transfer of 20,000 federal prosecutions a year to state courts would have little effect on most state courts. Of the persons prosecuted in 1993, ninety-five percent were prosecuted in state courts.[24] An increase to ninety-seven and a half percent would reduce the federal criminal docket by one-half with little noticeable effect on most state court dockets. If the criminal caseloads of state courts were increased, and if the increase came with a federal subvention to cover the cost of state court administration, it is likely that the additional work would be welcome in state courts, which ought to accept the arrangement as federal recognition of the professionalism and worth of the state courts.

One problem for state courts lies in the federal sentencing laws.[25] Federal judges do not like the guidelines because they confine judicial discre-

20. Of 229,850 civil cases filed in fiscal 1993, the United States was a party in 51,724. AO ANNUAL REPORT, *supra* note 4, at AI-51 tbl. C-1. Of 32,374 civil appeals, the United States was a party in 7858. *Id.* at AI-38 tbl. B-7.

21. *See* U.S. DEP'T OF JUSTICE, LEGAL ACTIVITIES 1993-1994 2 (1994).

22. *See, e.g.*, 42 U.S.C. § 1971 (1988) (elective franchise); *id.* § 1981 (1988) (equal rights under law).

23. 15 U.S.C. § 1 (1994).

24. H. Scott Wallace, *The Drive to Federalize is a Road to Ruin*, 8 CRIM. JUST. 8, 8 (1993). Ninety-five percent of criminal prosecutions in the United States are handled by state prosecutors. OFF. OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, COMBATTING VIOLENT CRIME 4 (1992).

25. UNITES STATES SENTENCING GUIDELINES § 2D1.1 (West Supp. 1995).

tion and require the imposition of some sentences that sentencing judges deem unjust;[26] it is unlikely that state court judges would like the sentencing laws, either. However, in the state courts, federal sentencing law would be an episodic burden and not a daily affront, as they are presently to the federal judges.

2. *Substituting State for Federal Prosecutors.* The Department of Justice could employ state prosecutors to conduct many of its prosecutions, especially those conducted in state courts. Federal policy with respect to most classes of federal prosecutions could be pursued as effectively with the power of the purse as by the present hierarchical means. A relatively small office in the Justice Department could audit the performance of federal contracts with state prosecutorial offices and, by conditioning future contracts on satisfactory performance, induce compliance with the Department's notions regarding the allocation of prosecutorial resources. The Department could keep a presence in particular prosecutions as do the general counsels of major private corporations, who participate in litigation handled by local counsel. Indeed, the auditing of performance would not be fundamentally different from that presently employed to evaluate the performance of United States Attorneys, over whom the control of the Attorney General of the United States is, for political reasons, presently far from complete.[27] And the accountability of state offices in federal cases would likely elevate the quality of their performance in all their work.

Most state and local prosecutors would welcome the proposed increase in their responsibilities. They would be handling some important matters and would be less overshadowed by their more highly-paid federal counterparts. Their professionalism and their worth would be given new recognition by the federal government. Many would respond to the opportunity to serve the federal government with enthusiasm and professional zeal.

3. *Substituting State for Federal Correction.* The prospect of doing time in a state prison must be at least as deterrent as the prospect of doing time in the custody of the Federal Bureau of Prisons. Most existing federal facilities could be transferred to the states without effect on crime rates. Federal corrections officers would place federal convicts in suitable state prisons, contracting to pay appropriate fees for the services provided. They could retain control over parole decisions, but day-to-day prison discipline would be in the hands of state officers.

This kind of contractual arrangement is not unknown at the present time. Indeed, some state and local corrections facilities are now being operated in some places by private organizations. Without turning fed-

26. *See* BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 21-22 (1994); William Polk, *Judges Join Outcry Over New Rules*, SAN DIEGO UNION-TRIB., Dec. 18, 1990, at A1; Joseph B. Treaster, *Two Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993, at 1.

27. *See* Beale, *supra* note 8, at 1001, 1015-1017.

eral corrections into a profit center for such enterprises, competition could be established among state correction programs to win federal contracts. This would induce efficiency and provide an occasion for federal oversight of prisons aimed at assuring appropriate regard for the human rights of prisoners in a role possibly more constructive than prison litigation in federal courts. This oversight might take the form of an administrative agency, perhaps established within the Judicial Conference of the United States,[28] to serve as a forum of first instance to hear claims of prisoners regarding the circumstances of their imprisonment.

Possibly there are some federal convicts who need to be kept in federal custody, but their number must be very small. As recently as 1980, there were less than 30,000 convicts in federal custody; the number has now tripled.[29] The Crime Bill of 1993[30] will shortly double, triple, or quadruple that number.[31] The federal government might have superior ability to fashion high-security or other special kinds of prisons; if so, perhaps it should accept custody of some state prisoners on contract. Imaginably, the federal government could devise a punishment serving as a suitable alternative to costly capital punishment, such as permanent banishment or exile to the shores of the Arctic Ocean. But absent some special consideration of that type, the management of prisons should be an activity of state governments, regardless of whether prisoners are convicted in state or federal court or convicted of state or federal crimes.

4. *Substituting State Police for Federal Police.* Federal investigation is likely essential with respect not only to uniquely federal crimes, but also to high-tech crimes that state offices cannot be equipped to detect, and also with respect to crimes involving activities in more than one state, or having international involvements. It is at least possible, however, that some investigatory work now done by federal officers could be done by state officers temporarily assigned to federal cases and temporarily bearing the badge of the United States.

There is good reason to prefer that violent police work be done at the state or local level. If it is indeed necessary to break and enter a home to secure evidence of crime or capture a criminal, it is far better that this work be done by officers of some government other than the federal government. For example, if, as I believe, it was necessary to enter the compound at Waco to arrest the Branch Davidians,[32] it would have been far

28. *See* 28 U.S.C. § 331 (1988 & Supp. V 1993).

29. *See* STATE OF THE BUREAU, *supra* note 3, at 29.

30. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (to be codified at 42 U.S.C. § 13701).

31. *Senate Crime Bill Will More Than Double American Prison Population by Year 2005*, CORRECTIONS DIG., Mar. 1994, at 1, 1-4; Peter J. Benekos & Alida V. Merlo, *Three Strikes and You're Out!: The Political Sentencing Game*, 59 FED. PROBATION 3, 16-17 (1995). In California, similar provisions quadrupled the state prison population between 1980 and 1992. *Id.*

32. *See "Operation Trojan Horse;" Raid of the Branch Davidian Compound, Waco, Texas: Hearings Before the Subcomm. on Treasury, U.S. Postal Service, and General Government Appropriations*, 103d Cong., 1st Sess. 3 (1995).

better for the health of the nation if the command had been given, not by the Attorney General of the United States, but by the Attorney General of Texas. That officer had, and would have been seen to have had, a much closer relation to, and responsibility for, the people in the compound than could any federal officer. It may even be more likely that the Branch Davidians would have surrendered to the Texas Rangers.

Not only is state law enforcement less likely to be odious to most citizens, but divesting federal law enforcement officers of responsibility for the messiest police work would free them to perform an indispensable federal function—law enforcement to deter occasional misconduct of state and local police. It is an unfortunate consequence of human frailty and the temptations or provocations placed before police officers that corruption and brutality occur in every police department.[33] A special problem with using federal officers to break-and-enter homes and arrest those who resist is that there is lessened capacity to investigate and correct overzealous police work. If state officers are accused of needless gunslinging resulting in the death of an alleged offender, that is an appropriate matter for federal concern.[34] But when it is federal officers who are accused of the gunslinging, it is less clear who can be trusted to make an impartial investigation of the allegations.[35] There is today quite a lot of police activity deemed necessary to secure us from the hazards of crime that also jeopardizes our civil liberties. Police break-ins are much more common than they were a few decades ago. On that account, the recent enlargement of federal police departments is especially untimely.

Despite recent controversies, few would disagree with former President Bush that federal police are generally professional in their work and not a threat to the civil liberties of citizens.[36] But one reason that the Federal Bureau of Investigation has achieved an admirable level of professionalism has been its relatively modest size and the strict definition of its mission. Much of the growth of the federal police has come, and will continue to come, in the Drug Enforcement Agency and the Bureau of Alcohol, Tobacco, and Firearms. One need not question the professionalism of those groups to be alarmed at the prospect that they are each growing into small armies. If we must have such armies, it would be better to have them acting on the command of state governments, but accountable to the Department of Justice for their professionalism as well as their effectiveness.

5. *Achieving Substitutions One Step at a Time.* To achieve the program envisioned here, it would not be necessary to repeal any criminal laws

33. For a recent study of the frequency of use of excessive force, see CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 29-36 (1994).

34. *See, e.g.*, 42 U.S.C. § 1983 (1988).

35. *See* Stephen Labaton, *Separatist Family Given $3.1 Million from Government*, N.Y. TIMES, Aug. 16, 1995, at A1.

36. *See Letter of Resignation Sent by Bush to Rifle Association*, N.Y. TIMES, May 11, 1995, at B10.

enacted by Congress; all would continue to be enforced as now. Nor would it be necessary to constrain Congress; doubtless, Congress would continue to enact newer and ever more severe criminal laws, as demanded by the public. Nor would it be necessary to perform radical surgery on any institution, state or federal. We need not lay off federal judges, prosecutors, corrections officers, or police; the desired result could be fully achieved over a decade with little dislocation to careers now invested in federal administration of criminal justice through non-replacement of retiring or departing personnel. Much of this program could imaginably be achieved by the Department of Justice without enabling legislation, but so important an initiative should not be undertaken without Congressional participation. The program entails three steps that might be taken separately to diminish the risk of adverse unseen consequences.

First, the Department of Justice could gradually commence bringing prosecutions in state rather than federal courts. Funds saved as a result of the diminishing federal court caseload could be used to provide grants to the state court systems in which the prosecutions were brought. A similar arrangement would be made with respect to some corrections facilities.

Second, the number of federal prosecutors and defenders would be gradually reduced, again using most of the funds saved to purchase needed services from state law offices to bring and defend federal prosecutions in state courts. These contracts would empower the Department of Justice to audit the performance of state officers entrusted with matters of importance to the federal government. The Department could retain, in all cases or in individual cases, the power to approve plea bargains. It would also retain the option and the resources to step in and take over when circumstances seem to require that recourse.

Third, positions in federal police forces would be gradually replaced with new federally-funded positions in the state police forces. The contracts with state police departments would again confer substantial authority in the United States Department of Justice to see that the necessary police services were performed professionally and in a manner responsive to federal political concerns. Remaining would be a number of federal officers amply sufficient to investigate criminal activity uniquely federal or crossing state or national boundaries, or requiring the use of high-tech equipment or such exceptional resources as investigators trained in accounting, and to investigate allegations of serious misconduct by state or local officers not adequately managed at the state or local level.

The Justice Department would, of course, remain a formidable organization. Much of its staff reduction would likely come gradually and in the local offices of United States Attorneys. It would continue to prosecute in federal court those few cases that are uniquely federal, or that a federal court is especially suited to try, such as those intended to protect national

or international investment markets. There would, on the other hand, be few drug cases prosecuted in federal court because that is something state offices now do on a large scale and with roughly equivalent effectiveness. In such areas, the Department would purchase available prosecution and defense services from the states.

This proposal is to be distinguished from the Law Enforcement Assistance Act of the balmy days when federal funds were abundant and were generously shared with state law enforcement institutions.[37] This proposal envisions federal use of federal money, using the personnel and institutions of the states to pursue federal objectives. Gradual reduction of the size of the federal criminal justice establishment would improve government at all levels. It would save public money, greatly enhance the efficacy of the federal courts, reduce the mistrust of government associated with criminal law enforcement at the national level, facilitate the protection of civil liberties, and elevate the morale of officers serving in state governments. Problems arising in use of state personnel and institutions for federal purposes could be readily circumnavigated because the resources would always remain available to revert to direct federal administration whenever and wherever that proved to be genuinely beneficial to the public served.

37. For accounts of the experience with LEAA, see MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION 34-61 (1980); TWENTIETH CENTURY FUND TASK FORCE ON THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, LAW ENFORCEMENT: THE FEDERAL ROLE (1976); Howard E. Peskoe, *The 1968 Safe Streets Act: Congressional Response to the Growing Crime Problem*, 5 COLUM. HUM. RTS. L. REV. 69 (1973).