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Keynote Address

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by
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Introduction

This Symposium is organized around a timely and vital topic. Last year's Crime Bill—the Violent Crime Control Act of 1994— represented an historic extension of the frontiers of federal law enforcement. The new Congress recently began consideration of legislation that would extend the borders of federal criminal jurisdiction still further. Although these measures are debated vigorously in Congress and around the nation, the debate is frequently too partisan and shortsighted to permit adequate focus on broader principles. This Symposium provides a welcome opportunity to measure our immediate crime-fighting efforts against the values that underpin our federal system of government.

While the Department of Justice has been an active participant in the debate over particular proposals, it also has attempted to think more generally about the federalization of crime. From her background as a career state prosecutor, the Attorney General brought to Washington a practical understanding of the limits and potential benefits of the relationship between federal and state law enforcement. She has insisted that the Department approach law enforcement problems in partnership with states and localities. She has asked us to take the longer view, and in particular to reconsider, along with colleagues from all three branches of federal and state government, the

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appropriate roles for each partner in the nation's law enforcement system.

To this end, the Attorney General, along with the Chief Justice of the United States and the majority and minority Chairs of the Senate Judiciary Committee, last year convened a "Three-Branch Roundtable." The day-long discussion among state and federal judges, legislators, and prosecutors generated separate Working Groups on four topics: the mission of the federal courts, principles for the federalization of the civil law, principles for the federalization of the criminal law, and federal-state cooperation. The Working Groups have continued the work of the Three-Branch Conference, producing Reports on their separate subjects, which are being published as part of this Symposium.

As Professor Little's and Professor Beale's Articles document, proposals for the creation of new federal crimes have drawn fire on a number of grounds. Some claim that the continuing federalization of crime will swamp the federal courts with "local" crimes, thereby preventing them from fulfilling a traditional role of adjudicating distinctively federal matters. Other critics believe that some of the recently enacted federal crimes inappropriately infringe on federalism interests by taking matters traditionally of local concern out of the hands of local officials. Still others believe that the new federal criminal laws are political gimmicks that will do nothing to address the nation's real crime problems.

I. Proposals to Limit Federal Criminal Jurisdiction by Subject Matter

Many scholars and judges have attempted to address these concerns with proposals that call on Congress to maintain strict subject-matter limits on the business of the federal courts. The Committee on Long Range Planning of the Federal Judicial Conference, for example, recently issued a proposed plan for the future of the federal courts that recommends restricting federal criminal jurisdiction to five narrowly defined categories and prosecuting criminal conduct in the federal courts "only in those instances in which state court prosecution is not appropriate or where federal interests are paramount."

At least two ideas animate such proposals. The first is that the federal courts are a scarce resource with specialized functions that cannot be fully performed in the state courts. The second is that matters of public concern can be neatly divided into fixed spheres of federal and of state responsibility so that it is possible and useful to divide

criminal jurisdiction generally into "inherently state areas" and "inherently federal areas."

The Department wholeheartedly subscribes to the first of these two ideas: for a number of well-known reasons, the federal courts must be viewed as a scarce resource whose specialized functions should be carefully safeguarded. Federal judges have life tenure, have a distinguished record as guardians of individual liberties, and are few in number. By virtue of sheer numbers, the federal courts can handle only a small fraction of the criminal business of the nation's courts: today, well over ninety-five percent of criminal prosecutions take place in the state courts. Given this background, if the federal courts are to have a significant impact on the nation's criminal problems, they must be used selectively. Adding criminal cases indiscriminately to the docket of the federal courts would squander a valuable resource that, if wisely deployed, could make a significant difference in the nation's struggle with crime. At the same time, indiscriminate expansion of the federal criminal docket would impair the ability of the federal courts to fulfill their important responsibilities in the civil realm.

For these reasons, we agree that it is vital to identify where the potential lies for a distinctively federal contribution to the fight against crime and to ensure that, as in other areas of the law, the federal government's role is designed to exploit its peculiar advantages.

But the Department does not agree that the principle for identifying a distinctively federal contribution should—or can—be framed in terms of fixed spheres of federal and state activity. We do not agree, in other words, that the federal courts should never, or even rarely, be able to exercise criminal jurisdiction over areas of criminal law that also fall under the concurrent jurisdiction of the state system. That approach has significant failings.

First, such a limiting principle cannot be squared with the historical development of the federal courts' jurisdiction. Large sections of the federal criminal code—including offenses that today are universally accepted as core federal court matters—originally represented an extension of the federal law into areas traditionally and concurrently subject to state jurisdiction. Federal offenses for fraud, bank robbery, assault, and much more criminalize conduct that may be, and most frequently is, prosecuted under state law. Even civil rights offenses—often cited as the paradigm of proper federal criminal jurisdiction—are clearly appropriate for prosecution under state law. Indeed, a strict application of the "fixed-spheres" approach would leave no room for the Department to respond to state prosecutions that leave

compelling federal interests unvindicated, as in the Rodney King or Crown Heights cases. In the area of the civil law as well, it is a well-accepted legacy of the New Deal that it is appropriate for Congress to regulate areas traditionally subject to state regulation, without supplanting concurrent state regulation of the area. Thus, the verdict of history is that federal regulation has an important yet distinctive role to play in tandem with state efforts.

The most important failing of the fixed-spheres approach to the federalization question is, however, that it provides no solution to grave problems facing this country. It is true that making everything a federal crime will not solve our crime problems, and critics are justified in their skepticism about reflexive efforts to respond to the latest widely publicized genre of crime by passing a new federal statute. But it is equally evident that without federal jurisdiction over the relevant criminal conduct, significant aspects of our crime problems could not be adequately addressed.

It is instructive to reflect on the federalization question against the background of real cases. We choose cases from Northern California, but similar examples may be found across the country. For years, two of the largest drug-dealing gangs in California were the Emanuel Lacy and Anthony Flowers gangs in Oakland. The Oakland Police Department knew that these two gangs were responsible for a significant part of the violence in the Oakland community but was unable to carry out a successful investigation because virtually all prospective witnesses feared for their lives. Through the operation of a joint federal-local task force on gangs, the Department of Justice was able to conduct a successful investigation, combining the police's knowledge of the gangs' operations and structures and the federal government's wiretapping powers and expertise. That investigation culminated last August with the arrest of twenty-five gang members, who now await prosecution on federal guns and drugs charges.

Or consider the case of Marvin Johnson, who is now serving a life sentence following his conviction last year in federal court. Johnson headed an extremely violent cocaine operation in Richmond and was responsible for multiple drive-by shootings, bombings, murders, and other violent acts. When state authorities indicted Johnson for torturing a woman, Johnson arranged for the murder of the victim's mother and teenage sisters, shot at the residence of another witness (who failed to appear at trial), and intimidated jurors. The net result was a hung jury. The U.S. Attorney's Office took over the prosecution, placed some witnesses in the witness protection program, and housed

others before trial at a secret location. As a result, many new witnesses came forward, and Johnson was convicted on all counts without further incident.

Critics of federalization might respond to these anecdotes by claiming that federal criminal prosecution is appropriate in those cases because they involved very serious criminals whom the state could not prosecute effectively, but that prosecution would not be justified in cases in which state prosecution is available. We would make two points in reply. First, and most importantly, to acknowledge that federal prosecution of violent offenders like Marvin Johnson is appropriate is to depart from the fixed-spheres theory. The federal government was able to prosecute Johnson only because federal statutes regulate conduct in areas generally and traditionally governed by state criminal law. If Congress were precluded from regulating in such "inherently state areas," cases like Johnson's would be effectively outside the reach of the criminal law.

Second, cases in which a state is completely unable to prosecute because of, for example, jurisdictional problems or the inability of the state to protect witnesses are only the most extreme examples of cases in which the federal government has a demonstrable advantage in dealing with certain aspects of a crime problem. Just as a federal response is essential to secure any justice in the cases of Johnson and the Lacy and Flowers gangs, a federal response may be needed to secure full justice in other cases. Federal legal and investigative advantages in some instances permit the federal government to undertake a complete and efficient prosecution where a state could not. But such full justice will not be possible unless the federal government is able to assert concurrent jurisdiction over the kind of criminal conduct at issue.

Perhaps we would be forced to accept a fixed-spheres theory of federalism if it were necessary to protect federalism interests or to avoid swamping the federal courts with criminal cases. We are not faced with that dilemma, however. Although the federal courts are a scarce resource that should be reserved for specialized functions that best employ their distinctive attributes, the allocation principle need not be whether an area is appropriate for state regulation. A different principle is available: Congress should act to create concurrent jurisdiction if it is necessary to address aspects of crime problems that the states cannot adequately address and that the federal government's unique attributes put it in a qualitatively better position to handle. For example, a sophisticated criminal enterprise may spread across

numerous states in a way that makes it difficult for any state to investigate and prosecute the enterprise, or a crime may raise issues that are so sensitive locally that the independence of the federal courts is needed. In such cases, even if the *area* is appropriate for state regulation, the particular case calls out for federal prosecution, which cannot be achieved without a grant of federal criminal jurisdiction.

The Department's approach to federalization does not end, however, with the issue of when Congress may create new federal crimes. Rather, our federalization view encompasses an important second screen of prosecutorial discretion. The balance of this Address discusses in greater detail both of these components—jurisdiction and prosecutorial discretion—of the Department's approach to the federalization question.

II. Federal Criminal Jurisdiction

Our view on the scope of federal criminal jurisdiction is that it is appropriate for Congress to provide for federal involvement in a particular criminal area where: (1) there is a pressing problem of national concern; (2) state criminal jurisdiction is inadequate to solve significant aspects of the problem; and (3) the federal government—by virtue of its investigative, prosecutorial, or legal resources—is positioned to make a qualitative difference to the solution of the problem, *i.e.*, a difference that could not be produced by the state's dedicating a similar amount of resources to the problem.

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

Moreover, law enforcement agencies are generally better situated than Congress to appraise the investigative demands of particular

cases and, more generally, the circumstances in which federal prosecution is appropriate. At any rate, as a practical and political matter, we should not expect Congress to cut too finely. The Constitution authorizes Congress to act, and we have suggested that it should act, even though it intends the jurisdiction it authorizes to be exercised in only a small percentage of cases. The exercise of prosecutorial discretion, then, becomes the most important and effective brake on the federalization of crime.

In prosecuting only a small percentage of conduct falling under federal criminal legislation, the Department is not thwarting congressional will or shirking its duty vigorously to enforce the laws. The selective exercise of federal jurisdiction is an essential and unavoidable incident of our criminal justice system. A brief reflection of the potential federal jurisdiction under just one statute, the Hobbs Act, confirms this fact: If the Department was not highly restrained in its exercise of prosecutorial discretion under the Hobbs Act, which makes it a federal crime to interfere with interstate commerce by threat or violence and thus potentially federalizes any convenience store holdup, the criminal business of the federal courts would more than quadruple overnight. Thus, Congress's passage of new criminal legislation incorporates the expectation that the Department will continue to be highly selective in bringing federal charges, particularly in areas of concurrent jurisdiction.

It might be objected that the appropriate way to take advantage of the federal government's expertise and resource advantages is to provide funding to the states in order to enable the states to acquire the necessary tools to address the problems themselves. Indeed, part of the Department's cooperative strategy is to provide resources and training to the states. In general, however, it would be highly inefficient to have fifty separate jurisdictions, each with expertise and resources sufficient to perform specialized law enforcement functions such as electronic eavesdropping and witness protection. It is often more sensible to concentrate the capacity to deal with relatively unusual and difficult law enforcement problems in the federal government.

It remains to address one more potential criticism of the Department's approach to the creation of new federal crimes: that it is without limits. If any "pressing problem of national concern" may be considered appropriate for federal jurisdiction, there is no end to what Congress may federalize. We do not believe any area of criminal law should be the subject of federal criminal legislation merely because

the federal government can help in some way. If, in a particular area, the federal system is able to add no more than the states could achieve with the same commitment of resources, the case for federalization has not been made. For example, a proposal in last year's Crime Bill would have made it a federal offense to use a gun that had passed in interstate commerce in any crime of violence. It would have federalized, in other words, virtually any crime committed with a gun. The Department opposed that measure on explicit federalism grounds, and it was defeated. The proposal, in addition to being breathtaking in scope, would have authorized a federal presence where there is no distinctive federal contribution to make, or any reason to believe that the proposed statute addresses a problem that cannot be adequately handled by the states. This proposal had significant support in Congress, and opposing it obviously carried political consequences. These facts are noteworthy because some critics charge that supporters of new federal criminal legislation are motivated only by politics, and merely give lip service to federalism concerns. In fact, the Department has practiced what it preaches on the question of federalization.

The Child Support Recovery Act provides an example of how our approach to federalization works in practice. We deliberately select a difficult example that has created substantial controversy. The Act, passed in 1992, makes it a federal crime willfully to fail to pay more than $5,000 in court-ordered support for a child living in another state. Those who approach the federalization issue from a fixed-spheres perspective will view this statute as a flagrantly inappropriate expansion of the federal courts' jurisdiction: to such critics, "deadbeat parents" cases belong in state domestic relations courts, not the federal courts, whose resources must be conserved for the adjudication of specially federal matters. It is certainly true that the great run of deadbeat parents cases are properly prosecuted in the state courts. Consider, however, that over $35 billion of court-ordered child support remains uncollected. An important, and limited, aspect of that large problem arises from a relatively small number of egregious offenders who intentionally exploit states' jurisdictional limitations to elude their child support responsibilities. The federal government is uniquely positioned to prosecute these few offenders. So the question is whether to reach these offenders through "federalization" of child support violations combined with a highly selective enforcement policy, or not to reach them at all.

Given that choice, the Department believes that Congress acted appropriately in passing the Child Support Recovery Act, and we are

moving to enforce it selectively against those few offenders who justify the federal presence in the area. Our prosecutorial criteria are designed to target the few cases that states are unable to handle because of interstate barriers. The Department filed charges under the Child Support Recovery Act against 28 persons last year; there are some 200 more currently under active review. Even if all of them are prosecuted, it still will amount to fewer than three cases per jurisdiction. And such charges are typically straightforward and easily proven. Prosecution of these cases, moreover, sends a message to those who would exploit the limits of a state's jurisdiction. We believe that the impact on an otherwise intransigent aspect of the child support enforcement problem justifies this relatively modest commitment of prosecutorial and judicial resources.

As the example of child support enforcement demonstrates, the trend towards federal involvement in new areas of the criminal law does not augur a fundamental alteration in the mission of the federal courts or open the floodgates to a deluge of "state crimes." In the Northern District of California, for example, concerns about federalization have been particularly pronounced—and loudly voiced—over the last few years. It is instructive to appraise these concerns in light of the actual statistical impact of increased federal jurisdiction.

During fiscal year 1993, the most recent year for which comprehensive statistics are available, the Northern District of California disposed of 671 criminal cases and 5,659 civil cases. This works out to about 10 federal criminal dispositions per 100,000 population. By way of comparison, during that same year, the crime index in this jurisdiction—the FBI's survey of seven major crimes—totaled 424,358, which figures out to 6,374 per 100,000 population. The judges in the Northern District on average disposed of about 35 criminal cases each, as compared with a national average for federal district court judges of about 50 cases. The mean guidelines sentence in the Northern District was 47.5 months, somewhat higher than the 41.7-month national average. These statistics indicate that the criminal docket in the Northern District is lighter than average and weighted slightly towards more serious offenses.

If we go back ten years to try to assess the relative impact of new federal criminal jurisdiction, the numbers indicate that the criminal workload of the federal courts in the Northern District of California has actually tailed off in recent years. (The appellate business out of this district, by contrast, is the highest in the country.) During the last five years, criminal filings dropped nearly a third from the previous

five-year period. Between 1984 and 1988, criminal charges were filed against 6,119 defendants, for an annual average of about 1,225; between 1989 and 1993, criminal charges were filed against 4,122 defendants, for an annual average of about 825. Sentencing commission data indicate that over the last few years, the median sentence also has fallen, from 62 months in 1991 to 48 months last year. These statistics indicate that in the overall scheme of things, the growth in federal criminal jurisdiction cannot be singled out as the cause of a grave crisis in the federal judicial workload. The reason is that, while federal criminal jurisdiction has expanded significantly, the Department's exercise of concurrent jurisdiction has remained highly selective.

III. Federal Prosecutorial Discretion

We have argued that in order for federal solutions to be available when necessary, Congress's grants of federal criminal jurisdiction will have to include within their scope many crimes that it would not be desirable to prosecute federally. It is Congress's expectation that only a tiny fraction of the conduct falling under such statutes will be prosecuted federally. The Department's approach to federalization would therefore be incomplete without a requirement that prosecutorial discretion be exercised selectively in accordance with our underlying view about when federal solutions to law enforcement problems are appropriate. Prosecutorial discretion can play an important role—perhaps the most important role—in protecting federalism interests, ensuring that federal criminal justice resources are used in the most effective way, and preventing the federal courts from being overwhelmed with criminal cases that can adequately be dealt with in state courts.

The Department's prosecutorial policy emphasizes two elements: (1) allocation of criminal justice resources according to the *comparative advantage* of the federal, state, and local governments; and (2) *cooperation* between federal and state or local law enforcement officials to promote the most efficient use of criminal justice resources.

The comparative advantage approach rests on the idea that each agency or level of government ideally should handle those aspects of a law enforcement problem that it is best equipped to handle. The federal government's advantages may vary according to the case, but they typically include inter-jurisdictional investigative capabilities, victim- and witness-assistance programs, expertise in traditionally federal areas of law such as organized crime or environmental crime, and favorable procedures, such as preventive detention. The availability

of stiffer penalties in the federal system is also a potential comparative advantage, particularly in multiple-offender cases, where the prospect of a long sentence may induce a low-level figure to plead guilty and cooperate in the prosecution of the most culpable offenders.

The comparative advantage approach does not imply that a federal prosecution should be brought whenever the federal government has a comparative advantage. Rather, federal law enforcement resources should be deployed in the way that federal, state, and local actors jointly believe would be most effective. For example, federal investigative resources or witness- and victim-protection programs can be made available to state authorities in a case in which a state prosecution is brought. This approach can maximize the effectiveness of state and federal criminal justice resources. Nor, incidentally, is our approach to these issues confined to criminal prosecution. We today focus on the extension in federal criminal jurisdiction, but the truly groundbreaking extension in last year's Crime Bill was *programmatic*: the Violent Crime Control Act represented a marked expansion of the federal presence in many aspects of crime prevention. Expansion of programmatic efforts, no less than the expansion of federal criminal law, represents the federal government's decision to commit national resources and assistance in areas formerly left to states and localities.

The prosecution of the Lacy and Flowers gangs in Oakland is a good example of the Department's cooperative approach to the exercise of prosecutorial discretion. That prosecution was made possible by the combination of local familiarity with the gangs and the Department's wiretapping and investigative abilities. Similarly, the Department's anti-violence initiative, which seeks to target for prosecution the most violent repeat offenders within the community, is an ongoing example of the cooperative use of law enforcement resources. The core of the initiative is the creation within each jurisdiction of a working group consisting of representatives of the United States Attorney's office, the local District Attorney's office, and investigative agencies on both the federal and state levels. Each working group makes its own determination of which violent crime problem or which particular offenders to target. During the past year, the initiative has achieved important breakthroughs against violent crime in, to cite just a few examples, the District of Connecticut, where a federal, state, and local task force investigation resulted in weapons and drug distribution charges against sixteen members of the Latin Kings gang; the Western District of North Carolina, where ten members of the "James Gang" were charged in a thirty-count racketeering indictment following an

investigation aided by the police department and seven additional local law enforcement agencies; and the Southern District of New York, where a forty-nine-count racketeering indictment, including substantive charges of murder, attempted murder, and extortion, was brought against members of the "Willis Avenue Lynch Mob" following a joint DEA-NYPD investigation.

Conclusion

In conclusion, our approach to the federalization issue has two components. First, we believe that Congress should not be foreclosed from enacting legislation in areas that are also appropriate for state regulation; rather, where there are aspects of a criminal law problem that states cannot adequately address, and where the federal government would be positioned to make a qualitative difference, it is appropriate for Congress to act. Once Congress has acted, the federalization issue becomes a question of prosecutorial discretion. It falls to the Department, in cooperation with state and local counterparts, to target for prosecution only those few cases in which federal prosecution is the most effective way to bring criminal justice resources to bear on our nation's law enforcement problems. This integrated approach to the federalization issue will, without limiting the jurisdiction of the federal courts to a fixed sphere, prevent the federal courts from being deluged with criminal cases. With selective prosecution, even a statute that covers a wide range of criminal conduct will typically add very few cases to the workload of the federal courts. But a few well-chosen cases may have a significant impact on the nation's crime problem. And that, we suggest, is the ultimate measure of success for any approach to the federalization of crime.