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Federalizing "Gang Crime" Remains Counterproductive and Dangerous

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Gang crime is a serious problem, but making it a federal crime is not the solution. In fact, bad federal criminal laws could detract from effective anti-gang strategies. The Senate's Gang Abatement and Prevention Act of 2007 (S. 456) and its counterpart in the House of Representatives (H.R. 1582) attempt to address gang crime by defining new federal criminal offenses and boosting federal criminal penalties for gang crimes. Although these bills raise fewer concerns than previous federal anti-gang bills,[1] they still contain serious problems. S. 456 is vague, overbroad, and possibly unconstitutional. Whether it is flatly unconstitutional or not, it disregards the constitutional principles underlying the state and federal criminal justice systems, risking myriad unforeseen consequences. If Congress is serious about addressing gang crime, it should consider narrower, more focused policies that build upon, rather than undermine, federalism.

Constitutional Problems. At first blush, it might seem like a good idea for the national government to enact criminal laws that target gang activities. However, Members of Congress need to think more carefully about the unintended consequences of this proposal. S. 456 is still overbroad and disregards the constitutional framework underlying America's state and federal criminal justice systems. Federalizing yet another set of state and local crimes is, among other things, almost certain to accelerate the ongoing erosion of state and local law enforcement's primary role in combating common street crime.

There are also serious constitutional questions about S.456 and H.R. 1582. Congress's power to "regulate Commerce…among the several States" does not include the authority to federalize most non-commercial street crimes, whether they have a minor interstate connection or not. Although expansive readings of the Commerce Clause during the latter part of the 20th century allowed the federal government to regulate more and more *economic* activity, the Supreme Court has limited Congress's attempts to federalize common street crimes, even ones that clearly have some interstate impact.[2] The expansive (many would say virtually unlimited) interpretation of the Commerce Clause employed to justify the creation of most new federal crimes ignores the original meaning of the Constitution. Article I, Section 8 of the Constitution sets forth most of Congress's limited and enumerated powers.[3] As Justice Clarence Thomas wrote in his concurring opinion in *United States v. Lopez*, if Congress had been given authority over any and every matter that simply "affects" interstate commerce, most of Article I, Section 8 would be superfluous—mere surplusage.[4] For this reason, congressional attempts to create a new federal "gang crime" are likely outside of Congress's Commerce Clause power and unconstitutional.

Drafters have attempted to fix the jurisdictional flaws by adding new language in S.456's findings

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section and operative provisions. The findings section includes this statement: "[G]ang presence and intimidation, and the organized and repetitive nature of the crimes that gangs commit, has a pernicious effect on the free flow of interstate commercial activities and directly affects the freedom and security of communities plagued by gang activity, diminishing the value of property, inhibiting the desire of national and multinational corporations to transact business in those communities, and in a variety of ways significantly affecting interstate and foreign commerce." In addition, several of the operative provisions in the bill limit their own application to criminal street gang activities that "occur in or affect interstate or foreign commerce." However, the Supreme Court ruled in *United States v. Morrison* that this sort of language is not alone sufficient to bring an act within the scope of Congress's commerce clause power.[5] Every widespread criminal act has some effect on commerce, but if that were enough to provide Congress with the authority to regulate, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[6]

Overbroad and Vague. Attempting to identify the conduct that they would prohibit, S. 456 and H.R. 1582 use overbroad and vague definitions that cover too much conduct and too many persons. The bills omit the previous drafts' nebulous list of criteria supposedly demonstrating the existence of or membership in a gang, such as common beliefs, creeds, insignia, or clothing. However, the current Senate bill's definition of a "criminal street gang" is any "formal or informal group or association of 5 or more individuals" that has one or more members who commit three of the specified "gang crimes." This definition is not much of an improvement from previous proposals and does not distinguish between Los Angeles's notorious Crips and any group of five people involved in a legitimate business in downtown L.A. if it turns out that one of those five business persons allegedly committed "gang crimes." The definition could cover non-profits, including fraternal organizations or even religious organizations. The heavy weight of federal "gang crime" enforcement should not be available for use against groups that are clearly not dangerous street gangs.

In addition, the bill's extensive and unfocused list of predicate "gang crimes" has little to do with ending the most serious gang activity and expands the bill's overbroad application. The list of predicate offenses that would give rise to federal gang crime prosecution includes many non-violent offenses, such as obstruction of justice, tampering with a witness, misuse of identification documents, harboring aliens, and illegal gambling. Such conduct, regardless of its unlawfulness, is not specific to criminal street gangs or gang crime. Including these offenses is an unfocused and dangerous use of federal criminal law. Under S. 456, for example, members of an association of sports coaches who create a small sports betting pool could be charged as members of a criminal street gang. A single manager in a Fortune 500 company who allows a worker to use a forged work-visa might render the entire company a "criminal street gang."

1. For analysis of previous "gang crime" legislation, see, e.g., Erica Little and Brian W. Walsh, "Federalizing "Gang Crime" Is Counterproductive and Dangerous," Heritage Foundation *WebMemo* No. 1221, September 22, 2006, at *www.heritage.org/Research/Crime/wm1221.cfm*.
2. *See* United States v. Morrison, 529 U.S. 598 (2000) (striking down portions of the Violence Against Women Act of 1994 because the predicate crimes created in the Act were beyond Congress's commerce clause power); *see also* United States v. Lopez, 514 U.S. 549 (1995) (striking down the federal Gun-Free School Zones Act of 1990 as beyond Congress's commerce power to enact).
3. As the Court underscored in *Morrison*, "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." 529 U.S. at 607 (quoting *Marbury v. Madison,* 1 Cranch 137, 176 (1803) (Marshall, C. J.)).
4. 514 U.S. at 589 (Thomas, J., concurring).
5. 529 U.S. at 612-613 (citing *United States v. Lopez*, in which the Court rejected the arguments that an exercise of commerce clause power could be based on the costs of crime and the effect of crime on national productivity.)
6. *Id*. at 613.

Including such offenses also increases the danger that guilt may be imputed to an entire group for the actions of only one member if those actions arguably benefit the group. The bill's definition of a criminal street gang requires only that one member of the group engage in the predicate offenses. Thus, guilt may be imputed by association. If, unbeknownst to the members of a group or business venture, one or two of their colleagues independently engage in criminal activity that is arguably covered by the bill, all could be held criminally responsible. Consider the case of a publicly traded company or a securities firm under this legal regime. If one employee allegedly engages in three acts of obstruction of justice in a securities investigation over a five-year period, nothing other than the goodwill and unfettered discretion of federal law enforcement officials would prevent the entire organization and all of its employees from being prosecuted for "gang crimes."

It should be noted that all of the predicate "gang crimes" listed in the bill are already illegal. If any member of a gang commits any of the "gang crimes" listed as predicate offenses, he can be prosecuted and punished under state law (and usually under federal law, as well). To address group participation in criminal acts, existing conspiracy laws accomplish most, if not all, of what supporters hope to accomplish with the new legislation.

Moreover, the proposed law's overbreadth and vagueness are serious constitutional flaws. Although the bill's definitions were narrowed to target the interstate activities of criminal youth gangs, they still cut too wide a swath, and to narrow them further would risk making the bill ineffective. Gang crime cannot be effectively defined without an unacceptably high risk of criminalizing activities well outside the scope and intent of the bill. This kind of legislation is inherently problematic.

Undermining Federalism and Local Law Enforcement. Even if there were an easy way to craft narrow, new criminal offenses to target street gangs, it still would not be something that the federal government should attempt. Federal crimes should combat problems reserved to the national government in the Constitution, such as offenses against the federal government or its interests, crimes with a substantial multi-state or international aspect, crimes involving complex commercial or institutional enterprises, serious state or local government corruption, and crimes raising highly sensitive local issues.[7] These categories of crime either are expressly identified in the Constitution as not being state responsibilities or cannot be effectively combated by states working alone or in association with one another. The fact that armed robberies committed by gang members may (rarely) involve interstate travel or another incidental interstate connection does not justify federal involvement. In fact, the vast majority of prohibited conduct under S. 456 takes place within individual states. Conduct that is only tangentially inter-state in nature does not justify federal intervention.

More broadly, Congress should end its reflexive habit of expanding federal criminal law. The phenomenon of overfederalization of crime undermines state and local accountability for law enforcement, undermines cooperative and creative efforts to fight crime (which permit the states to carry out one of their vital roles of acting as "laboratories of democracy"), and injures America's federalist system of government.

One of the more concrete problems of federal overcriminalization is the misallocation of scarce federal law enforcement resources, which results in selective prosecution. New demands distract the Federal Bureau of Investigation, the U.S. Attorneys, and other federal law enforcers from truly national problems that undeniably require federal attention, such as the investigation and prosecution of espionage and terrorism. Moreover, federal prosecution is almost always significantly more expensive than state-level prosecution.

Traditionally, state and local officials have been responsible for investigating crime and prosecuting most criminals under the state police power. Approximately 95 percent of all crime is handled by the state and local law enforcement systems.[8] The lesson from

7. *See* William H. Rehnquist, 11 FED. SENT. R. 132 (1998). Other crimes that are appropriately federalized include currency counterfeiting and wiring proceeds of criminal acts across state lines to avoid detection.
8. *See, e.g.*, Ed Meese and Robert Moffit, MAKING AMERICA SAFER: WHAT CITIZENS AND THEIR STATE AND LOCAL OFFICIALS CAN DO TO COMBAT CRIME XIV (The Heritage Foundation, 1997).

New York City and Boston in the 1990s and early 2000s is that when accountability is enhanced at the state and local levels, local police officials and prosecutors can make impressive gains against crime, including gang crime. By contrast, federalizing authority over crime reduces the accountability of local officials because they can pass the buck to federal law enforcement authorities. The result of this drop in accountability may be rising crime rates.[9]

The House and Senate gang crime bills pose all of these risks but promise no clear benefit. Even if federal prosecutors bring no significant cases to trial, the new law would force, or at least permit, state and local law enforcement to yield and allow federal officials to preempt their investigations. Undermining local officials is not the way to enhance the effectiveness of America's primary law enforcement agents. Congress should not extend federal laws against gang activity just to be on record as doing something.

More Unintended Consequences. Fortunately, S. 456 leaves out two problematic provisions that appeared in previous legislation. Omitted is a provision that would have created a new offense called "multiple interstate murders" that apparently was justified as a federal offense because the murders occurred in multiple jurisdictions. Also deleted from this version is a general definition of "crime of violence" in Title 18, Section 16 of the U.S. Code that was so broad that it would have included any offense that involved a substantial *risk* of injury against persons or property.

But S. 456 and its House counterpart would still amend the general federal conspiracy statute[10] and quadruple its current maximum five-year penalty. This increase is unwarranted because, although the bill (mis-)characterizes the change as one of its "Amendments Relating to Violent Crime," the general federal conspiracy statute covers conspiracies to engage in non-violent crimes. With this proposed increased maximum sentence, a charge that an individual has conspired to, for example, defraud via the Internet using a questionable business practice that is only later determined to be fraudulent could result in that individual and his business colleagues being sentenced to 20 years in prison.

This enhanced penalty would also apply to alleged business "gangs" convicted of conspiracy to violate federal mail and wire-fraud statutes, which are themselves extremely broad. The federal mail and wire-fraud statues have already resulted in convictions of business enterprises and executives for conduct that is not clearly criminal. By imposing a 20-year penalty, S. 456 would worsen this instance of overcriminalization.

S. 456 also includes a broad forfeiture authority based on whether or not the property directly or even indirectly facilitated the commission of the offense. This sweeping provision would cover so much of an offender's property that forfeitures could be seriously disproportionate to the seriousness of the offense.

Conclusion. Gang crime is a problem in many states, but so is all crime. The existence of a problem alone does not justify the assertion and expansion of federal jurisdiction and authority. Even though many gangs have interstate connections, S. 456 does not specifically target those gangs and does almost nothing to enhance cooperation among state and local officials, who retain primary responsibility for battling gangs. Congress must tread very carefully when bringing federal criminal law to bear on problems at the state and local level, because doing so invites unintended consequences, including the dilution of accountability among federal, state, and local law enforcement agencies.

The best way to combat gang crime is to adhere to federalist principles that respect the allocation of responsibilities among national, state, and local governments. To address gang-related crime appropriately, the national government should limit itself to handling tasks that are within its constitutionally designated sphere and that state and local governments are not well-equipped to perform.[11]

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9. *See* David B. Muhlhausen, Ph.D., and Erica Little, "Gang Crime: Effective and Constitutional Policies to Stop Violent Gangs," Heritage Foundation *Legal Memorandum*, forthcoming.
10. 18 U.S.C. § 371.
11. *See* Muhlhausen, *supra* n. 9.