The Heritage Foundation
LEADERSHIP FOR AMERICA

LEGAL MEMORANDUM

No. 100 | AUGUST 14, 2013

Making Crime Fighting a Team Effort: Cross-Designating Federal Law Enforcement Officers as State Officers

Paul J. Larkin Jr. and Daniel J. Dew

Abstract

Opponents of overcriminalization have long debated how to address the federal government's need, on occasion, to be involved in the investigation or prosecution of ordinary "street crimes." Rather than have Congress pass new legislation that only adds to the current mess of federal law, federal agents and prosecutors should cooperate with their state and local counterparts in the investigation and prosecution of state law crimes. The authority for such cooperation already exists. Therefore, before reflexively adding to the federal penal code and exacerbating the existing overcriminalization problem, Congress ought to determine whether federal authorities instead should be deputized to act under state law in order to bring offenders to justice in appropriate cases.

The Heritage Foundation has long criticized the phenomenon of overcriminalization[1] and has offered several solutions to the problems that overcriminalization causes.[2] This Legal Memorandum proposes another possible solution: Rather than enact new federal legislation creating new federal crimes, Congress should direct the Attorney General to work out arrangements with state and local governments so that those entities can cross-designate federal prosecutors as state prosecutors. Such direction, in turn, would enable Justice Department lawyers to prosecute felons in state court in those rare instances where the federal government has a special interest in someone who is suspected of violating or has been accused of violating a state criminal law.

This paper, in its entirety, can be found at **http://report.heritage.org/lm100**

Produced by the Edwin Meese III Center for Legal and Judicial Studies

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- Opponents of overcriminalization have long debated how to address the federal government's need, on occasion, to be involved in the investigation or prosecution of ordinary "street crimes."
- Rather than enact new federal legislation creating new federal crimes, Congress should direct the Attorney General to work out arrangements with state and local governments so that those entities can cross-designate federal prosecutors as state prosecutors.
- Such direction would, in turn, enable Justice Department lawyers to prosecute felons in state court in those rare instances where the federal government has a special interest in someone who is suspected or has been accused of violating a state criminal law.
- The authority for such cooperation, including cross-designation of federal authorities to investigate and prosecute alleged violations of state law (and vice versa), already exists.

There will be occasions when the federal government will want to be involved in the investigation or prosecution of what is at bottom an ordinary "street crime." Consider the following example: A suspected terrorist intentionally kills a person who is not a federal official, who has no connection to interstate or foreign commerce, and whom Congress cannot regulate under any of its other powers. That terrorist has committed the state law crime of murder, which is not a federal offense. Moreover, Congress lacks the constitutional authority to make a simple murder a federal offense.[3] That could leave a gap that federal law cannot fill.

Furthermore, if a member of a terrorist cell murders someone who just happens to be in the wrong place at the wrong time—for example, someone who happens to stumble upon a cell having a meeting in the same apartment building where that person lives—the federal government would want to bring that plot to a halt by arresting the killer and his coconspirators for what, under state law, would be a case of "simple" murder. That swift action would bring the case to a close before the group could pull off any additional, more severe crimes.

Similarly, while there is no general federal "attempt" offense, there may be a variety of such offenses under state law.[4] The federal government may find it useful to be able to prosecute someone for attempted burglary or attempted arson of a warehouse, for instance, in circumstances where that conduct or facility is not connected with interstate commerce but is one step in a plot to terrorize a local community.[5]

Even though such offenses would be state crimes, the federal government would have a strong interest in being involved in bringing that suspected terrorist to justice, if for no other reason than to demonstrate to other would-be terrorists that the federal government will pursue and prosecute them for their crimes, whatever they are. In such cases, it would be better for the federal government to partner with state or local law enforcement authorities to prosecute the case rather than rely on Congress to invent some arcane statute justified by a tenuous theory of federal jurisdiction—a statute that would remain on the books and might impinge on the sovereignty of the states to investigate and prosecute genuinely local offenses.

State and local law enforcement authorities know how to prosecute murder cases—in many jurisdictions, they are unfortunately grist for the mill—and cases involving other local laws that protect the welfare, safety, and health of the public. With the federal government's assistance and involvement, state and local jurisdictions can help to ensure that no one escapes justice, and through appropriate use of cross-designation, the federal government can ensure that defendants of particular interest to the federal government get the attention they deserve without the creation of new, unnecessary federal laws that exacerbate the existing overcriminalization problem.

The Problem: Overfederalization of Crime

When an infamous crime or related series of offenses occur, it is common for Congress to respond by enacting new criminal legislation. For instance, a highly publicized case of carjacking in the Washington, D.C., area led Congress to make

1. *See, e.g.*, One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty (Paul Rosenzweig & Brian W. Walsh eds., 2010); Brian W. Walsh & Tiffany M. Joslyn, Heritage Found. & Nat'l Ass'n of Criminal Def. Lawyers, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law (2010); Daniel Dew, *No Joke: Man Jailed for Laughing in Own Home*, The Foundry (Mar. 13, 2013), http://blog.heritage.org/2013/03/13/no-joke-man-jailed-for-laughing-in-own-home/ (last visited Mar. 22, 2013).
2. *See, e.g.*, Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. of Crim. L. & Criminology 725 (2012); Paul J. Larkin, Jr., *Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012*, The Heritage Foundation, Legal Memorandum No. 78 (Mar. 16, 2012), http://www.heritage.org/research/reports/2012/03/defanging-the-lacey-act-the-freedom-from-over-criminalization-and-unjust-seizures-act-of-2012 (last visited Mar. 16, 2012).
3. That is the lesson of recent Supreme Court decisions construing the Commerce Clause. *See infra* note 29.
4. *See, e.g.*, Wayne R. LaFave, Criminal Law § 11.5, at 630–47 (5th ed. 2010).
5. *See, e.g.*, Jones v. United States, 529 U.S. 848 (2000) (the arson of an owner-occupied dwelling not used for commercial purposes does not involve property used in interstate commerce or in an activity affecting interstate commerce and therefore cannot be prosecuted under 18 U.S.C. § 844(i) (2006)).

carjacking a federal offense,[6] even though every state outlaws theft and kidnapping.[7] Likewise, large-scale corporate fraud prompted Congress to enact the Sarbanes–Oxley Act of 2002,[8] even though there already were dozens of federal fraud statutes on the books[9] and both fraud and larceny have been crimes in one form or another since the common law.[10]

Those two statutes are hardly the only examples of the "overfederalization" of the law. Frequently, the conduct that Congress seeks to outlaw is already a crime under state law and cannot be made a federal offense without stretching the boundaries of one of Congress's enumerated powers in Article I, which more often than not is the Commerce Clause. For most of the twentieth century, the Supreme Court was a willing partner in that effort, liberally reading the Commerce Clause as a broad grant of legislative power to Congress.[11]

Recently, however, the Court has signaled that there is a limit to how far Congress can go in relying on the Commerce Clause and, in fact, has twice curtailed Congress's power to outlaw noncommercial activity not shown to be part of or to have a direct effect on interstate commerce.[12] As a result, Congress may not always be able to make undesirable conduct a federal crime, and even if it could do so, that approach might not always be, and likely frequently would not be, the best method to bring malefactors to justice.[13]

A Proposal: Cross-Designation of Justice Department Lawyers as State or Local Prosecutors

Consider this alternative: The federal government could enter into cooperative relationships with state and local investigative and prosecutorial authorities to work together in the pretrial and trial stages of a case. Of course, the standard way for federal prosecutors to pursue offenders is through a federal indictment, but government lawyers also

6. The Anti Car Theft Act of 1992, Pub. L. No. 102-519, title I, subtitle A, § 101(a), 106 Stat. 3384 (1992) (codified as amended at 18 U.S.C. § 2119 (2006)).
7. *See, e.g.*, LaFave, *supra* note 4, § 18.1, at 933–47, §§ 19.1–19.8, at 966–1030.
8. Pub. L. No. 107-204, 116 Stat. 745 (2002).
9. *See, e.g.*, Stuart P. Green, Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime 152 & n.23 (2006); Ellen S. Podgor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 730–31, 740 (1999).
10. *See, e.g.*, Sanford H. Kadish et al., Criminal Law and Its Processes: Cases and Materials 956 (8th ed. 2007); John Kaplan et al., Criminal Law: Cases and materials 861–66 (5th ed. 2004); LaFave , *supra* note 4, §§ 19.1–19.5, at 966–95, § 19.7, at 1006–24; Paul J. Larkin Jr., *When Fighting Crime Becomes Piling On: The Overcriminalization of Fraud*, The Heritage Foundation, Legal Memorandum No. 76 (Jan. 9, 2012), available at http://www.heritage.org/research/reports/2012/01/when-fighting-crime-becomes-piling-on-the-overcriminalization-of-fraud (last visited Jan. 9, 2012).
11. The classic case is Wickard v. Filburn, 317 U.S. 111 (1942). The Court upheld Congress's power to regulate the amount of homegrown wheat on an individual's farm on the ground that, if everyone else also grew wheat, the combined amount of wheat produced would affect the wheat price on the national market.
12. *See, e.g.*, Morrison v. United States, 529 U.S. 598 (2000) (holding unconstitutional, as beyond Congress's Commerce Clause power, a statute making rape a federal offense); United States v. Lopez, 514 U.S. 549 (1995) (holding unconstitutional on the same ground a federal statute making it a crime to possess a firearm in the vicinity of a school). The Court revisited this issue in Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), which involved the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Five justices concluded that Congress's Commerce Clause power is not plenary, but there was no majority opinion. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito concluded that Congress lacked authority under the Commerce Clause to adopt that law, *see Sebelius*, 132 S. Ct. at 2577–609 (opinion of Roberts, C.J.); *id.* at 2642–76 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting), but they were not all on the same side of the judgment. On the other hand, Justices Ginsburg, Breyer, Sotomayor, and Kagan concluded that the statute fell within Congress's Commerce Clause power. *Id.* at 2609–42 (opinion of Ginsburg, J.). Later cases will reveal how the law will play out in this area.
13. Consider the case of Carol Anne Bond. After discovering that her husband had had an affair with and had impregnated one of her close friends, Bond decided to retaliate against her friend by placing caustic substances on items that the friend was likely to touch. Not surprisingly, the friend touched them and received burns. Rather than leave the matter to the local authorities, the federal government decided to prosecute her for violating a federal statute, 18 U.S.C. § 229 (2006), designed to implement a chemical weapons treaty ratified by the United States. The statute forbids knowing possession or use, for nonpeaceful purposes, of a chemical that "can cause death, temporary incapacitation or permanent harm to humans." *Id.* § 229(a), 229F(1), (7) & (8). The facts of the case would appear to amount to an assault, which could easily have been prosecuted under state law. Instead, the case has been through the federal system for years, with two separate trips to the Supreme Court. It is difficult to believe that this federal prosecution constituted a wise use of limited federal resources.

could prosecute state criminal cases in state court if they were so empowered by state law.

Federal law does not limit Justice Department lawyers to the prosecution of federal offenses in federal court. The Attorney General is the nation's senior nonelected law enforcement officer and the President's designee to see to the enforcement of federal law.[14] He or she has the authority to manage the conduct of the federal government's litigation.[15] If he or she found it worthwhile, however, the Attorney General could also enter into a "Memorandum of Understanding" (MOU) with a state attorney general or a local district attorney. Such an agreement would allow the Attorney General to designate Justice Department lawyers to serve as assistant district attorneys for the purpose of bringing traditional state law prosecutions of terrorists, organized crime figures, or other offenders under the same statutes that the state would use to prosecute those same culprits.

The Attorney General may appoint state or local prosecutors as Special Assistant U.S. Attorneys (SAUSAs), and those SAUSAs may prosecute cases in federal court.[16] The proposal in this Legal Memorandum is to regularize the same process, just in reverse.[17]

An MOU is an agreement between different law enforcement agencies—often, but not always, federal—with concurrent jurisdiction over certain offenses or subjects regarding how the agencies will work cooperatively. MOUs often resolve a number of issues, including which agency has primary investigatory jurisdiction; which agency is in charge of operations, seizures, forfeitures, and prosecution; what notice should be given to other agencies; how to coordinate; and how disputes between agencies will be resolved.[18]

Federal law enforcement agencies commonly use this device. For example, in 1990, the Secretary of the Treasury, Attorney General, and Postmaster General entered into an MOU regarding money-laundering statutes to "reduce the possibility of duplicative investigations, minimize the potential for dangerous situations which might arise from uncoordinated multi-bureau efforts, and to enhance the potential for successful prosecution in cases presented to the various United States Attorneys."[19] Likewise, in 1984, the Department of Justice entered into an MOU with the Department of Defense to establish policy with "regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction."[20]

Examples of Federal, State, and Local Collaboration

There are already two examples of cooperation among federal, state, and local law enforcement officers: the Organized Crime Drug Enforcement Task Force (OCDETF) and the National Infrastructure Protection Plan (NIPP).

- The Organized Crime Drug Enforcement Task Force was formed in recognition that no single

14. The President appoints the Attorney General, U.S. Attorneys, the Director of the FBI, and other senior federal law enforcement officials. Those officials, in turn, appoint subordinate federal officers. *See, e.g.*, 28 U.S.C. §§ 503, 532–533, 541–542 (2006).
15. *See* 28 U.S.C. §§ 503, 506, 509–519 (2006).
16. See 28 U.S.C. § 543 (2006); Victoria L. Killion, Comment, *No Points for the Assist: A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 Temp. L. Rev. 789 (2009).
17. The Intergovernmental Personnel Act, 5 U.S.C. § 3372(a)(1) (2006), authorizes the head of a federal agency to assign federal personnel to states or localities "for work that [he or she determines] would be of mutual concern to [both parties]." *See also id.* § 3373. The Attorney General has assigned Justice Department lawyers to act as local prosecutors. *See* Peter F. Neronha, United States Attorney, U.S. Dep't of Justice, *State, Federal Prosecutors Cross-Designated to Prosecute Drugs, Firearms and Neighborhood Crimes*, News Release (Mar. 9, 2010) ("U.S. Attorney Peter F. Neronha and R.I. Attorney General Patrick C. Lynch today jointly announced the cross-designation of several senior prosecutors to bolster the prosecution of neighborhood crimes, particularly crimes involving drugs and firearms. * * * Cross-designation permits prosecutors to cross-over and prosecute cases in either a state or federal court. Targeted cases are jointly reviewed to determine appropriate charges, appropriate jurisdiction and in which court appropriate penalties are likely to be realized. Senior prosecutors experienced in firearms, drugs, organized crime and neighborhood prosecution have been cross-designated.").
18. *See* Office of the United States Attorneys, U.S. Attorneys Manual, 9–2186, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02186.htm (last visited Mar. 22, 2013).
19. *Id.*
20. *See* Office Of The United States Attorneys, U.S. ATTORNEYS MANUAL, 9–938, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00938.htm (last visited Mar. 22, 2013).

government agency is "in a position to disrupt and dismantle sophisticated drug and money laundering organizations alone."[21] It is a coordinated effort between several federal agencies and state and local law enforcement to combat organized drug trafficking.[22] The program allows government agencies to coordinate information and resources and work side-by-side to further each organization's shared law enforcement goal.[23] MOUs in furtherance of the OCDETF have been used to limit turf battles between agencies and reduce duplicative efforts.[24]

- The National Infrastructure Protection Plan is an example of a collaborative effort between federal and state officials.[25] Under the NIPP, the Department of Homeland Security (DHS) formulated a "largely voluntary" plan for securing the nation's critical infrastructure and key resources by coordinating with other federal agencies and state governments.[26] The NIPP identifies the roles and responsibilities of the federal, state, and local governments in order to coordinate federal and state resources and share information. It encourages states to facilitate "the exchange of security information, including threat assessments and other analyses, attack indications and warnings, and advisories, within and across jurisdictions and sectors therein."[27]

Law Enforcement Authority

Can federal law enforcement officers exercise law enforcement authority—for example, make arrests or execute search warrants—solely for a violation of state law? According to the Justice Department's Office of Legal Counsel, the answer is no: Federal agents lack inherent state law enforcement authority.[28] Specifically, the DOJ argues that Congress is limited to the authority granted it by the Constitution, and federal law enforcement officers—such as federal agents and Justice Department lawyers—are limited to the authority that Congress gives them.

The Constitution does not grant Congress the power to create state law, so federal law enforcement officers cannot claim a federal right to exercise state law enforcement authority. For example, because Congress cannot make a simple common law crime such as murder, rape, robbery, or burglary a federal offense (unless the victims are federal officials or the crime occurs on federal property),[29] Congress cannot authorize federal agents to investigate such violations of state law. Moreover, there are a few—but very few—instances in which Congress has authorized the Attorney General to provide federal law

21. U.S. Department of Justice, Privacy Impact Assessment for the Organized Crime Drug Enforcement Task Force Fusion Center and International Organized Crime Intelligence and Operations Center System 2 (June 1, 2009), http://www.justice.gov/opcl/crime-taskforce.pdf (last visited Mar. 25, 2013).

22. *See* U.S. Department of Justice, Organized Crime Drug Enforcement Task Forces, http://www.justice.gov/criminal/taskforces/ocdetf.html (last visited Mar. 25, 2013).

23. *Id.*

24. *See* Joe Palazzolo, *Rival Agencies Agree to Halt Turf Battles*, Main Justice (August 10, 2009), http://www.mainjustice.com/2009/08/10/justice-department-and-immigration-and-customs-enforcement-forge-new-partnership/ (last visited Mar. 25, 2013).

25. *See* U.S. Department of Homeland Security, National Infrastructure Protection Plan: Partnering to enhance protection and resiliency (2009), *available at* http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf (last visited Mar. 22, 2013).

26. *Id.* at iii. DHS has the responsibility to support "the formation and development of regional partnerships, including promoting new partnerships," and to enable "information sharing." *Id.* at 17.

27. *Id.* at 22.

28. A 2012 memorandum prepared by the Justice Department Office of Legal Counsel concludes that federal law enforcement officers have only the arrest power granted them by federal law. *See* U.S. Dep't of Justice, Office of Legal Counsel, *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments* 4–5 (Mar. 5, 2012) (OLC Stafford Act Memo) (so stating and citing earlier OLC opinions to that effect).

29. *See* Morrison v. United States, 529 U.S. 598 (2000) (holding unconstitutional, as beyond Congress's Commerce Clause power, a statute making rape a federal offense); United States v. Lopez, 514 U.S. 549 (1995) (holding unconstitutional on the same grounds a federal statute making it a crime to possess a firearm in the vicinity of a school); *supra* note 5.

enforcement assistance to states or localities, and those laws are limited to instances where there is an emergency.[30]

Federal agencies' expenditures must also be expressly authorized by, or at least fully consistent with, an appropriations bill passed by Congress.[31] As the Justice Department has explained: "If the agency believes that [an] expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission, the appropriation may be used."[32] Accordingly, any enforcement of state laws must bear a clear and logical relationship to the agency's purpose, which in almost all instances is to enforce federal, not state, law.

Significantly, though, there is nothing particularly unusual about a law enforcement officer being empowered to exercise both federal and state laws. For example, the Director of the U.S. Marshals Service has the authority to appoint Special Deputy U.S. Marshals, persons who are not otherwise members of the Marshals Service, "as are necessary to carry out the powers and duties of the Service."[33] The Director has interpreted that authority to include federal, state, or local law enforcement officers[34] and often has designated state and local law enforcement officers to act in that capacity as part of the OCDETF. Moreover, as noted above, the Attorney General has the authority to assign Justice Department lawyers to state or local prosecutors' offices in order to work on matters "of mutual concern" to both parties.[35]

The federal government should exercise that authority more often. Some cases are matters ordinarily of local concern but with an important federal interest at stake, as in the terrorism cases noted at the outset of this memorandum. The authority that Congress has granted to the federal government to engage in cooperative federal–state–local enterprises gives the Attorney General the ability to use already existing personnel, working alongside state or local law enforcement officials, to protect the national interest without needing to add yet another statute to the U.S. Code.

Conclusion

There are times when it is necessary for Congress to make conduct a federal crime, such as where it is necessary to protect uniquely federal interests. The integrity of U.S. currency is one such example that the Constitution expressly recognizes. But there also will be occasions in which cooperation between federal agents and prosecutors and state and local law enforcement authorities in the investigation and prosecution of a state law crime would be a sounder choice than passing a new federal criminal law.

The authority for such cooperation, including cross-designation of federal authorities to investigate and prosecute alleged violations of state law (and vice versa), already exists. Before reflexively adding to the federal penal code and exacerbating the existing overcriminalization problem, Congress ought to determine whether federal authorities instead should be deputized to act under state law in order to bring offenders to justice in appropriate cases.

*—**Paul J. Larkin Jr.,** is a Senior Legal Research Fellow and Manager of the Overcriminalization Project and **Daniel J. Dew** is a Visiting Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

30. *See* 42 U.S.C. §§ 10501–03 (2006) (Emergency Federal Law Enforcement Assistance Act, allowing the Attorney General to provide law enforcement assistance to states during crime emergencies) and 42 U.S.C. §§ 5121–5208 (2006 & Supp. IV 2010) (Robert T. Stafford Disaster Relief and Emergency Act allows (inter alia) deployment of federal law enforcement officers after the President declares a major disaster or emergency).
31. *See* U.S. Const. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").
32. OLC Stafford Act Memo 8 (internal quotations omitted).
33. *See* 28 U.S.C. § 561(f).
34. *See* 28 C.F.R. § 0.112. The Marshals Service has programs that allow each member of local law enforcement in certain areas to be "deputized as a Special Deputy U.S. Marshal, thereby giving each member the ability to travel in an effort to apprehend the worst criminal offenders." U.S. Marshals Service, Southern District of Ohio, Task Force Information, http://www.usmarshals.gov/district/oh-s/taskforces/index.html (last visited Mar. 25, 2013).
35. 5 U.S.C. § 3372(a)(1) (2006); *see supra* note 17.