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The Dangers of the "Trust Us" Approach to Statutory Interpretation

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Abstract

In society's fight against crime, police and prosecutors are the tip of the spear, but U.S. law has never trusted the police or prosecutors with the ultimate authority to resolve legal issues. Yet the government often will attempt to justify a broad interpretation of a criminal statute by urging the courts essentially to "trust us." That is, the government will argue that the courts should not be troubled by an interpretation of a statute that casts a wide net because the government will prosecute only truly guilty and truly heinous offenders. But we are a government of laws, not of men. It is therefore the function of the written law, as construed by the courts, to protect us against unjust deprivations of liberty, regardless of the "conscience and circumspection in prosecuting officers."

In society's fight against crime, police and prosecutors are the tip of the spear. They identify the culprits, collect the evidence, and present it to a judge and jury. The American criminal justice system grants the police and prosecutors broad discretion to decide which parties to arrest and charge and what charges to bring.[1] The law also presumes that such decisions rest on an assessment of the evidence and the importance of the case, not on such factors as the defendant's race, which are impermissible.[2]

But U.S. law has never trusted the police or prosecutors with the ultimate authority to resolve legal issues. America's legal traditions, derived from the English common law and manifested in Article III of the Constitution, vest that power in the courts.[3] Interpretation of the law is the archetypical judicial function;[4] police and prosecutors

Key Points

- America's legal traditions, derived from the English common law and manifested in Article III of the Constitution, vest the power to decide what the laws mean in the courts, not in the police or prosecutors.
- The government often will attempt to justify a broad interpretation of a criminal statute by urging the courts essentially to "trust us."
- From its outset, the American legal system has rested on the principle—laid down by Chief Justice John Marshall in *Marbury v. Madison*—that ours is "a government of laws, and not of men."
- Therefore, Congress has the duty to draft criminal laws with precision, and the courts have the duty to interpret those laws. It certainly is no part of a police officer's or a prosecutor's constitutional function formally to draw the line between lawful and illegal conduct.

This paper, in its entirety, can be found at **http://report.heritage.org/lm93**

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are involved in the "often competitive enterprise of ferreting out crime,"[5] but judges are not. Judges must be indifferent between the prosecution and the defense: Their integrity depends on it.[6] In fact, judges are required to recuse themselves from a case if they cannot administer justice impartially or if their participation would create the appearance of partiality.[7]

With regard to cases involving issues of statutory interpretation, the difference in the roles that the Constitution and our traditions assign to law enforcement authorities and courts is a critical distinction to keep in mind. The government often will attempt to justify a broad interpretation of a criminal statute by urging the courts essentially to "trust us." That is, the government will argue that the courts should not be troubled by an interpretation of a statute that casts a wide net because the government will prosecute only truly guilty and truly heinous offenders.

"At bottom," this argument "is a plea for a favor that no court would grant to a private party: namely, reliance on the exercise of judgment in the enforcement of an overbroad criminal law such that the government will use it against only 'really guilty' parties."[8] The "trust us" argument is that the law should be willing to allow overbreadth in criminal statutes because the courts and the public can rely, as Justices Holmes and Frankfurter once noted, on the "'conscience and circumspection in prosecuting officers.'"[9]

Justices Holmes and Frankfurter were respected jurists, so what they wrote must be given its due. But the proposition that they endorsed 100 and 70 years ago is no longer valid. What is more, the proposition had always been wrong.

"A Government of Laws, and Not of Men"

The Attorney General is the federal government's chief law enforcement officer, and he or she has the authority to direct the federal government's litigation.[10] No Attorney General, however, could hope to manage the federal government's day-to-day criminal litigation.

Most civil litigation is managed or conducted by the lawyers at the Justice Department, but the opposite is true with regard to criminal prosecutions. Most of the federal government's criminal cases are prosecuted by Assistant United States Attorneys who work in the 93 U.S. Attorneys' Offices stationed throughout the United States, Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands. The individual Assistant U.S. Attorneys in those offices are supplemented by a cadre of lawyers at the Justice Department headquarters.[11] Even aided by his lieutenants at the Justice Department, no Attorney General could oversee every criminal prosecution that the government brings. It is inevitable that some prosecutors will pursue a case that the Attorney General never would have approved.

As Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, has noted, some

1. *See*, *e.g.*, *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457–58 (1868).
2. *See*, *e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996).
3. *See* U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
4. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
5. Johnson v. United States, 333 U.S. 10, 14 (1947).
6. *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The impartiality of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").
7. *See*, *e.g.*, 28 U.S.C. § 455 (2006) (a federal judge must recuse himself or herself from a case when he or she "has a personal bias or prejudice concerning a party" to a case, when he or she has "expressed an opinion concerning" the outcome of a case, or when his or her "impartiality might reasonably be questioned").
8. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, (2013).
9. United States v. Dotterweich, 320 U.S. 277, 285 (1943) (Frankfurter, J.) (quoting Nash v. United States, 229 U.S. 373, 378 (1913) (Holmes, J.)).
10. *See* 28 U.S.C. §§ 503, 506, 509–19 (2006).
11. *See United States Attorneys' Mission Statement*, U.S. Dep't of Justice, http://www.justice.gov/usao/about/mission.html (last visited Feb. 6, 2013); Department of Justice, U.S. Attorneys (U.S.A.) FY 2013 Budget Request, *available at* http://naausa.org/publications/11.pdf (last visited Feb. 6, 2013).

targets will prove just too tempting for a prosecutor to pass up.[12] Whatever the case may have been in 1913 and 1943 when Justices Holmes and Frankfurter wrote on the topic, in 2013, it is no longer true that the "conscience and circumspection in prosecuting officers" will prove inerrant.

Justices Holmes and Frankfurter, however, were wrong for a more important, more fundamental reason. From its outset, the American legal system has rested on the principle—laid down by Chief Justice John Marshall in *Marbury v. Madison* and unmentioned by Justices Holmes and Frankfurter—that ours is "a government of laws, and not of men,"[13] a proposition that traces its lineage to the Magna Carta of 1215.[14] Congress has the duty to draft criminal laws with precision, and the courts have the duty to interpret those laws. It certainly is no part of a police officer's or prosecutor's constitutional function formally to draw the line between lawful and illegal conduct.

> The government's "Trust us" argument flips [the *Marbury v. Madison*] principle on its head. It asks the courts to look the other way and force the public to bear the risk of a government that might not be trustworthy. That was the system of government before America became a nation, a system in which the King had the role of making those calls. But the Framers quite clearly opted for a different system of government, a system where the written Constitution interposes itself between the government and the public. One of the virtues of our system is that no one has to rely on the judgment of a benevolent king or fear the wrath of a malevolent one. *Marbury* made clear that it is the function of the written law to protect us against the mistakes of the former and the wickedness of the latter.[15]

Rejecting the "Trust Us" Argument

Rejecting the "Trust us" argument does not require the courts to create any new law or to do any heavy lifting. As long ago as 1876, the Supreme Court wrote in *United States v. Reese* that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[16]

The Supreme Court expanded on that point more than a century later in *United States v. Kozminski*.[17] For much the same reasons given in *Reese*, the Court rejected the government's interpretation of the term "involuntary servitude" under the federal peonage laws, an interpretation that would have outlawed compulsion to work "by any means." As the Court explained in *Kozminski*, the government's interpretation of the statute "would appear to criminalize a

12. United States v. Nosal, 676 F.3d 854, 862 (9th Cir. 2012) (en banc) (Kozinski, C.J.). One example is United States v. McNab, 331 F.3d 1228 (11th Cir. 2003). Abner Schoenwetter was sentenced to eight years in prison for importing marginally small lobsters in plastic rather than paper, in violation of a Honduran law that the Honduran Attorney General later said was invalid. The *McNab* case is discussed in detail at Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. of Crim. L. & Criminology 725, 777–82 (2012). Lawrence Lewis wound up charged with a felony (and pleaded guilty to a misdemeanor) for following the procedure he was instructed to use in order to clean up toilet overflows at a military retirement home (caused by the adult diapers flushed down the toilet by the disabled elderly residents) that wound up shunted into the Potomac River rather than to a sewage treatment plant. *See* Gary Fields & John R. Emshwiller, "*A Sewage Blunder Earns Engineer a Criminal Record,*" Wall St. J., Dec. 12, 2011. Another oft-cited example is *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009). The government prosecuted Lori Drew under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012), for bullying her daughter's classmate online, under the theory that Drew had misrepresented her age, in violation of the MySpace service agreement. For critical evaluations of the government's decision to prosecute Drew, *see* Paul J. Larkin, Jr., United States v. Nosal: *Rebooting the Computer Fraud and Abuse Act*, 8 Seton Hall Cir. Rev. 257, 280–81 (2012); Ryan Patrick Murray, *MySpace-ing Is Not a Crime: Why Breaching Terms of Service Agreements Should Not Implicate the Computer Fraud and Abuse Act*, 29 Loy. L.A. Ent. L. Rev. 475 (2009).
13. 5 U.S. (1 Cranch) 137, 163 (1803).
14. "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any other way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A.E. Dick Howard, Magna Carta: Text and Commentary 45 (Rev. ed. 1998) (quoting Magna Carta Ch. 39); *id.* at 14–15 ("In Magna Carta's 'law of the land' we can find the early origins of the concept of 'due process of law,' one of the cornerstones of our jurisprudence.").
15. Larkin, *supra* note 8, at 776.
16. 92 U.S. 214, 221 (1876).
17. 487 U.S. 931 (1988).

broad range of day-to-day activity" and "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes."[18] Moreover, the government's interpretation "would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction."[19]

Just three years ago, the Supreme Court spoke with exceptional clarity on this point in *United States v. Stevens*.[20] *Stevens* involved the constitutionality of a federal law outlawing the possession for commercial purposes of so-called crush videos depicting animal cruelty,[21] often involving the stomping or slow crushing of puppies by women (whose identities are not disclosed) in bare feet or wearing high heels.[22] Robert Stevens challenged the statute on First Amendment grounds, and the federal government defended the law.

In the course of presenting that defense, the government argued that it construed the law as being limited to depictions of "extreme cruelty," even though that term was not found in the statute, and that in the exercise of its prosecutorial discretion, the government would not bring a prosecution against anyone "for anything less."[23] The Supreme Court gave that argument the back of its hand: "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[24]

Protection Against Unjust Deprivations of Liberty

The logic of that rationale is not limited to cases involving the First Amendment or any other constitutional provision. *Marbury* explained that in this nation, the law is to serve as the protection against unjust deprivations of liberty, and the law can take several different shapes: the Constitution, acts of Congress, agency rules or regulations, and judicial decisions. The *Stevens* rationale therefore fully applies to the job of statutory interpretation.

Indeed, a major criticism of overcriminalization is that oftentimes, because it allows prosecutors to stack criminal charges, defendants are exposed to dramatically longer sentences, which in turn can effectively coerce guilty pleas. That consequence poses an unwise example of contemporary criminal justice policy in a nation that affords defendants the constitutional right to a trial by making that choice potentially very risky. As Henry Hart put it, the notion that a person must rely for his freedom on the discretion of a prosecutor rather than the clarity of the law is "immoral."

> Moral, rather than crassly utilitarian, considerations re-enter the picture when the claim is made that strict liability operates, in fact, only against people who are blameworthy, because prosecutors only pick out the really guilty ones for criminal prosecution. This argument reasserts the traditional position that a criminal conviction imports moral condemnation. To this, it adds the arrogant assertion that it is proper to visit the moral condemnation of the community upon one of its members on the basis solely of the private judgment of his prosecutors. Such a circumvention of the safeguards with which the law surrounds other determinations of criminality seems not only irrational, but immoral as well.[25]

Hart was right when he made that point in 1958, and it still rings true today.

18. *Id*. at 949.
19. *Id*.
20. 130 S. Ct. 1577 (2010). The government made the same argument in the Stolen Valor Act case, United States v. Alvarez, 132 S. Ct. 2357 (2012). *See* Br. for the U.S. 55 ("Section 704(b) permits *carefully chosen prosecutions*—where the government can prove that the defendant's claim was false and that he was aware of its falsity—to deter all knowingly false claims to have received military honors.") (emphasis added). The Court rejected that argument without comment. *See* 132 S. Ct. at 2543–51 (plurality opinion); *id*. at 2551–56 (Breyer & Kagan, JJ., concurring in the judgment).
21. *See* 18 U.S.C. § 48 (2006).
22. 130 S. Ct. at 1583.
23. *Id*. at 1591 (quoting the government's briefs).
24. *Id*.
25. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 424 (1958).

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