

Statement of Gerald B. Lefcourt
Immediate Past President and Chair, Legislative Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Regarding Federalism and Crime Control
Before the Committee on Governmental Affairs, United States Senate
May 6, 1999

Mr. Chairman and Members of the Committee:

The National Association of Criminal Defense Lawyers (NACDL) and I appreciate this opportunity to offer our views on the costs and dangers of over-federalizing criminal law.

I have recently collaborated on an article regarding this subject, with the Immediate Past President of the National District Attorneys Association (NDAA), William Murphy, and the Immediate Past Chair of the American Bar Association's Criminal Justice Section (ABA-CJS), Ronald Goldstock (a former federal prosecutor). In it, we make a recommendation that I hope you will carefully consider: that federalism and cost/benefit analyses accompany all federal criminal justice policy proposals. This article is running simultaneously in the May/Spring magazines of the NACDL, the NDAA, and the ABA-CJS.

The article is careful to note that the opinions expressed in it are those of the authors and do not necessarily reflect the official positions of our respective organizations. In my case, however, the views of the article *do* also reflect the official position of the National Association of Criminal Defense Lawyers. I submit this article to you today as my written testimony on behalf of the NACDL.

In our every deliberation, we must consider the impact of our decisions on the next seven generations.@

From the Great Law of the Iroquois Confederacy

In Our Every Deliberation . . .

Time for Federal Crime Policy Impact Statements

By Ronald Goldstock, Gerald Lefcourt and William Murphy

Ronald Goldstock is Immediate Past-Chair of the Criminal Justice Section of the American Bar Association.

Gerald Lefcourt is Immediate Past-President of the National Association of Criminal Defense Lawyers.

William Murphy is Immediate Past-President of the National District Attorneys Association.

The opinions expressed in this article are those of the authors, and do not necessarily reflect the official positions of the organizations they represent.

Did the Iroquois lawmakers have it right? We have previously written about the common ground we have found on core issues of criminal justice policy. *Justice That Makes Sense* appeared simultaneously last year in the magazines of our three respective organizations. In that article, we express our concern about the recent legislative penchant for over-federalizing criminal law. This article is a refinement of our earlier thoughts on the subject C a subject that has profound consequences for the entire criminal justice system, and for society at large.

In the last several years, many observers agree that too often Congress has come to respond to headlines about crime with a Aquick-fix@ of federal legislation. As United States Supreme Court Chief Justice William H. Rehnquist recently said:

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This February, a 16-member blue ribbon ABA Task Force on the federalization of criminal law, chaired by Reagan Administration Attorney General Edwin Meese III, issued its report, after two years of study (AMEese Report[®]). The 56-page report is backed by hundreds of pages of impressive statistical findings, and mirrors the annual report remarks of the Chief Justice: highly publicized criminal incidents are frequently accompanied by proposals for congressional responses for no reason other than the conduct is serious, even if the activity is already handled by state law.² The Meese Report concludes that the Congressional appetite for new crimes regardless of their merit is not only misguided and ineffectual, but has serious adverse consequences, some of which have already occurred and some of which can be confidently predicted.³

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Moreover, A[t]hrusting additional crimes into federal court places demands on an already

strained federal court system and threatens the quality of essential federal justice.@5 Yet another

adverse consequence of the trend toward over-federalization, discussed in the Meese Report, is

the counter-productive, Aneedless disruption of effective state and local enforcement efforts.@6

Indeed, Asome attempts to expand federal criminal law into traditional state functions would

have little effect in eliminating crime, but could undermine state and local anti-crime efforts.@7

In short, there is now a general consensus that all too frequently, the quick congressional

response to highly publicized societal ills or sensational crimes is a costly federal proposal that

simply worsens matters, duplicating or compromising more effective state and local programs.

Such proposals may have no appreciable impact upon the problem, while squandering substantial

sums of scarce tax dollars.⁸ Often, too, they are at odds with our nation=s fundamental concern

for the civil rights and liberties of its citizens.⁹

With so much congressional activism in this area, we think the Iroquois model is the right one to follow. We propose that Congress dedicate itself to real, specific rules of federalism and cost/benefit principles. This way, crime policy-making would become a disciplined, *statistically justified* exercise, rather than a reckless quest for inefficient sound-bite policies. We suggest a set of impact study guidelines, governing all new federal crime legislation, including all new proposed federal crimes as well as all proposed federal criminal law expansions, reforms, enhanced sentences, and federal grant and other funding schemes.

Our proposal is not radical. It is, in fact, one of the Meese Report's recommendations for limiting the inappropriate federalization of local crimes.¹⁰ It is similar to the sentencing guidelines Congress has imposed on federal courts in an effort to ensure fairness and uniformity in federal sentencing. It is similar to the federalism guidelines imposed upon executive agencies by executive order from the Reagan Administration and the guidelines which Congress recently reaffirmed. Indeed, prior to any legislation that calls for the completion of a federal form, a

paperwork reduction statement is required. Our suggestion also resembles the requirement under the National Environmental Policy Act that an environmental impact assessment be made and considered before the government can take any action which would significantly impact the environment.

We do not advocate that Congress guarantee a *particular result*, only a *particular process of consideration* for passing new federal criminal laws or changes to existing ones. The legislative branch of government should adhere to the basic constitutional principle of federalism, while conserving limited criminal justice resources and scarce tax dollars by insisting on a federalism/cost-benefit assessment for all crime policy proposals.

Crime Policy Impact Statements: A Model of Federalism, Facts and Efficiency

Congress should exercise at least the same degree of care and restraint in its crime policy decisions as it requires of the executive and judicial branches of government. A Fair and

well-reasoned legislative (first branch) restraint is every bit as critical as fair and well-reasoned judicial (third branch) restraint.¹¹

Under our Constitution, the *states* are supposed to have primary jurisdiction over crime. As noted above, when Congress unnecessarily federalizes state crimes, it wastefully duplicates taxpayer-financed state law enforcement, prosecutorial, and judicial efforts. Further, it floods the federal courts with cases that do not belong there, effectively closing the federal courthouse doors to civil litigants C individuals and business entities. Unrestrained over-federalization of criminal laws subverts the fundamental constitutional system of federalism, or state and local government prerogatives. All too often, it does this with no appreciable, positive impact on the crime problem that the federal proposal was supposed to alleviate.

Another disturbing trend to emerge in the last decade or so is an almost whimsical federal criminalization of *administrative and regulatory transgressions*, often at great cost, unfairness, and of negligible effect. Virtually every federal regulatory scheme these days comes equipped

with a criminal law appendage, whether the regulated activity concerns the environment, the securities industry, employee pensions and welfare plans, or the employment of immigrants.

Federal regulations triggering criminal liability are now numerous, complex, and typically vague

C provoking concerns that the federal criminal law is being transformed from a scourge for

wrongdoers into a trap for the unwary or negligent. Indeed, the web of criminal federal

regulations has grown so dense that many observers believe compliance with the law is

unachievable.¹²

Regulatory offenses targeting corporations have especially proliferated in the past few years.

Often, the harm could be redressed as well C if not better C by private lawsuits or

government-initiated civil administrative proceedings.

Certainly, there are also unintended but foreseeable adverse consequences to the criminal justice

system from some non-criminal law decisions. Deregulation of the savings and loan industry,

for instance, has encouraged risk-taking that often veers afoul of the federal criminal code. This

carries substantial costs for both state and federal criminal justice systems, which have to absorb the effects, without additional revenues or other resources with which to respond in a balanced fashion. Congress does not appear to have even contemplated the fallout to the criminal justice system, nor the resource-skewing effect from this and other of its regulatory actions.

We propose a model for congressional decision-making which will assure a higher degree of care, and fewer negative, unintended consequences for the entire criminal justice system. We have considered whether this model should cover legislative proposals which are not criminal justice initiatives *per se*, but which also could well carry profound consequences, such as those in the regulatory arena. We have chosen to describe a narrow, focused model as the most manageable and justifiable, at least as a starting point for discussion. At some point, however, after a period of experimentation with the narrow proposal, Congress may want to expand the concept to cover more C if not all C of its legislative decisions which may have a discernible connection to the balance and effectiveness of the criminal justice system. We have also

considered whether this model should apply not simply to new crime policy proposals, but also serve as a guideline for re-examining current federal criminal laws and programs. For now, we think this is too ambitious. We have decided to focus our model narrowly, as a model for new proposals. Perhaps at some point our proposal could also provide a helpful model for congressional re-examination of the current federal criminal code and accompanying programs.

We urge Congress to exercise needed restraint and additional care in crime legislating. All crime policy proposals should be accompanied by a Crime Policy Impact Statement (CPIS) comprised of two types of assessments, before the measure can receive floor time and a vote in either house of Congress. The CPIS would consist of: (1) a Federalism Assessment (FA), and (2) a Crime and Economic Cost/Benefit Assessment (CBA).

Federalism Assessment (FA): Long Range Plan Criteria

During the last half century, laws passed by Congress have created more and more claims that must be heard in the federal courts of (supposedly) limited jurisdiction. Increasingly, Congress

has strayed from the basic constitutional principle of restraint in its crime policy-making.

Matters that can be adequately handled by states *should be left to them*. Only those matters which cannot be so handled should be undertaken by the federal government.¹³

The rampant over-federalization of criminal law suggests that the legislative branch is not seriously considering whether the states are doing an adequate job in a particular area before rushing in with costly, inefficient, new proposals unduly concentrating police power in the federal government agencies C at an ever greater expense to taxpayers and with little or no appreciable benefit.

As part of the FA aspect of the CPIS, Congress should adopt the *Long Range Plan* standards recently adopted, after much study, by the United States Judicial Conference. Recommendation

1 of the *Long Range Plan* states:

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The *Long Range Plan* specifically recommends what sort of *criminal matters* Congress should create, expand and fund as part of the federal government=s reach. It correctly notes that the federal courts should have criminal jurisdiction in only five types of cases:

- (1) offenses against the federal government or its inherent interests
- (2) criminal activity with substantial multi-state or international aspects
- (3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise
- (4) serious, high-level or widespread state or local government corruption
- (5) criminal cases raising highly sensitive local issues.¹⁵

As Chief Justice Rehnquist recently said: AIf we look at some recently passed federal legislation, and some currently pending legislation [namely, the pending juvenile crime bills], we can see

that it does not come close to meeting these criteria.¹⁶ Just as it insists with respect to federal *executive* and *judicial* branch activity, Congress must carefully restrain itself through discipline and/or legislation ensuring that all crime policies are subject to careful consideration according to these sound criteria.

Crime and Economic

Cost/Benefit Assessment (CBA):

Evolution of Criminal Justice Impact Assessment Standards

18 U.S.C. ' 4047 was enacted as part of the 1994 Crime Act. It calls for *prison impact assessments to accompany crime proposals*. Clearly, its passage reflects a special concern about one particularly expensive cost of current federal crime policy: prison costs. This statute seeks to focus Congress on the increasing costs of processing and imprisoning defendants through the federal criminal justice system.

Section 4047 is an important step in the right direction. But it is too feeble to be effective. First, it applies only to legislation submitted by the judicial or executive branches of government and

to those matters about which Congress requests information. It does not apply to Congress's own legislative proposals, which comprise the vast majority of lawmaking. Moreover, it is effectively only *aspirational*. It seems to be honored mostly in the breach. And there is no remedy for violations of 18 U.S.C. § 4047 to ensure congressional compliance.

While 18 U.S.C. § 4047 needs to be expanded and made enforceable in some meaningful manner, it remains a very good starting point for discussing our specific proposal. The statute currently provides:

(a) Any submission of legislation by the Judicial or Executive branch which could increase or decrease the number of persons incarcerated in Federal penal institutions shall be accompanied by a prison impact statement (as defined in subsection (b)).

(b) The Attorney General shall, in consultation with the Sentencing Commission and the Administrative Office of the United States Courts, prepare and furnish prison impact assessments under subsection (c) of this section, and in response to requests from Congress for information relating to a pending measure or matter that might affect the number of defendants processed through the Federal criminal justice system. A prison impact assessment on pending

legislation must be supplied within 21 days of any request. A prison impact assessment shall include:

- (1) projections of the impact on prison, probation, and post-prison supervision populations;
- (2) an estimate of the fiscal impact of such population changes on Federal expenditures, including those for construction and operation of correctional facilities for the current fiscal year and five succeeding fiscal years;
- (3) an analysis of any other significant factor affecting the cost of the measure and its impact on the operations of components of the criminal justice system; and
- (4) a statement of the methodologies and assumptions utilized in preparing the assessment.

(c) The Attorney General shall prepare and transmit to Congress, by March 1 of each year, a prison impact assessment reflecting the cumulative effect of all relevant changes in the law taking effect during the preceding calendar year.

We propose that Congress revise 18 U.S.C. ' 4047 to make it applicable to *all* criminal justice policy proposals.

Proposed Revision to 18 U.S.C. ' 4047: Congressional Crime Policy Impact Statements

Our proposal for a revised Section 4047 is this:

Any submission of criminal justice legislation, whether to create new federal laws or expand, reform or alter the procedures or penalties for existing federal offenses, or to increase or revise criminal justice grant or other money schemes, must be accompanied by a Crime Policy Impact Statement. The Crime Policy Impact Statement must be supplied within 21 days of any request for a vote on the pending criminal justice policy measure.

(a) The Crime Policy Impact Statement shall consist of a Federalism Assessment in accordance with subsection (b), and a Crime and Economic Cost/Benefit Impact Assessment in accordance with subsection (c).

(b) The sponsors of crime proposals shall, in consultation with the Administrative Office of the United States Courts, the General Accounting Office, and any other relevant sources chosen by the sponsors, prepare and furnish a Federalism Assessment.

(1) A Federalism Assessment shall state whether and how the proposal meets the federalism principles, with cites to any data, analysis, or assumptions made which support the federalism impact conclusions of the assessment.

(2) The Federalism Assessment shall state which, if any, of the following federalism principles is satisfied by the crime policy proposal:

- (i) an offense against the federal government or its inherent interests;
- (ii) criminal activity with substantial multi-state or international aspects;
- (iii) criminal activity involving complex commercial or institutional enterprises most

effectively prosecuted using federal resources or expertise;

(iv) serious, high-level, or widespread state or local government corruption; or

(v) criminal cases raising highly sensitive local issues.

(c) The sponsors of crime policy proposals shall, in consultation with the Administrative Office of the United States Courts, the United States Sentencing Commission, the General Accounting Office, and other relevant state, local and federal government sources, prepare and furnish a Crime and Economic Cost/Benefit Impact Assessment (Cost/Benefit Impact Assessment). The Cost/Benefit Impact Assessment shall reflect consultation with a wide variety of state, local and federal stakeholders in the criminal justice system, including, but not limited to, state attorneys general, state and local prosecutors, state judiciary, the private and public defense bars, mayors and governors, state and federal law enforcement and corrections officials.

(1) The Cost/Benefit Impact Assessment shall provide an analysis of the exact impact the proposal is expected to have on the crime problem to which it is addressed, with cites to any data, methodologies and assumptions used in such analysis.

(2) The Cost/Benefit Impact Assessment shall also provide an economic cost assessment, with cites to any data, methodologies and assumptions used in the analysis supporting the impact conclusions drawn by the legislative sponsor(s), regarding the cost conclusions. This economic

cost assessment shall include:

(i) a statement on the estimated impact of the legislation on state, local and federal law enforcement, prosecutorial and defender services, court, probation, and prison supervision

personnel and populations;

(ii) an estimate of the fiscal impact of such state, local and federal law enforcement, prosecutorial and defender services, court, probation, and prison supervision personnel and populations, on federal, state and local tax expenditures for the current fiscal year and five succeeding fiscal years;

(iii) an analysis of any other significant factor affecting the cost of the measure and its impact

on the operations of components of both state and federal criminal justice systems, including,

but not limited to, prosecution costs, defender services costs and court costs; and

(iv) an analysis of how the legislation might affect the number of defendants processed through the federal criminal justice system and how any costs associated with an increase in such defendants will be covered.

(d) The Attorney General and the Administrative Office of the U.S. Courts shall prepare and transmit to Congress, by March 1 of each year, an Annual Crime Policy Impact Statement, reflecting the actual cumulative effect of all relevant changes in the federal criminal law taking effect during the preceding calendar year. These reports shall reflect consultation with a diversity of those involved in the criminal justice system, including but not limited to state attorneys general, state and local prosecutors, state judiciary, the private and public defense bars, mayors and governors, state and federal law enforcement, and corrections officials.

Enforcement Mechanism

Congress should codify the above policy-making guidelines along the lines of the current 18 U.S.C. ' 4047. Making the CPIS a requirement for any crime proposal to receive floor time and a vote (*i.e.*, passage), is necessary to ensure that the assessment requirements are not ignored without remedy or enforcement. A standing rule in both the House and Senate should accompany, and provide the ultimate teeth for the legislation=s time and content requirements.

It is clearly established that there is no general citizen or taxpayer standing to enforce laws such as 18 U.S.C. ' 4047.¹⁷ At best, Congresspersons might enjoy standing to enforce the statute, but not an individual citizen or citizens= advocacy group. This differs somewhat from the environmental statutes, where it is possible for a direct injury to be threatened against individuals and groups, and thus, for the standing requirement to be satisfied for citizen enforcement of the laws in court. There is no such taxpayer injury/standing available under cost/benefit deliberation laws such as Section 4047. Thus, Congress must secure its own adherence to the crime policy

impact statement model of consideration. For the CPIS requirements to be meaningful, an *internal incentive* for enforcement must be utilized. We suggest that Congress insist upon Crime and Economic Cost-Benefit Assessments (CBAs) as the price of floor vote, because no other internal enforcement mechanism appears workable.

Conclusion

Although it regularly insists upon restraint from the other two branches of government, we believe that Congress too often fails to restrain itself in the area of crime policy-making consistent with basic constitutional and economic principles. Contrary to the best interests of the very nation and citizens it is supposed to protect. The unmistakable consequences include:

- waste of tax dollars;
- undue and inefficient duplication of regulatory and administrative proceedings, as well as often superior state and local law enforcement systems;
- interference with and evisceration of state and local government prerogatives at the expense of fundamental checks and balances;
- crippling of the federal courts' ability to fairly administer criminal and civil justice for all citizens, and

-- unwise concentration of law enforcement power in federal agencies, which threatens individual rights and liberties.¹⁸

We think the time has come for Congress to adhere to a carefully crafted set of cost-benefit/federalism impact principles in considering crime proposals. This appears to be the only way to ensure a sensible and efficient national crime policy C one that comports with the intent of the Constitution. The American people deserve no less.

Notes

1. William H. Rehnquist, 1998 Year-End Report of the Federal Judiciary (Jan.1, 1999), at 4-5. *See also e.g., Rehnquist Blames Congress for Courts= Increased Workload*, Wash. Times, A6, (Jan. 1, 1999).

2.American Bar Association (Criminal Justice Section), Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (hereinafter Meese Report). The members of the Task Force were selected with the explicit goal of including persons with diverse political and philosophical backgrounds. In addition to Chairman Meese, who currently holds the Ronald Reagan Chair in Public Policy at The Heritage Foundation, the members of the Task Force are: LSU Law Professor John S. Baker, Jr.; Duke University Law Professor Sara Sun Beale; Arizona Court of Appeals Judge Susan A. Ehrlich; Charleston, South Carolina Police Chief Reuben Greenberg; former US Senator (and Alabama Supreme Court Chief Justice) Howell Heflin; Harvard Law Professor (and former Deputy Attorney General) Philip Heymann; Nashville, Tennessee District Attorney Victor S. Johnson, III; former congressman Robert W. Kastenmeier; Principal Associate Deputy Attorney General Robert Litt; Chief Watergate Trial Counsel and U.S. Attorney (M.D. Tn.) James Neal; Second Circuit U.S. Court of Appeals Judge (and former U.S. Attorney (D.Conn.)) Jon O. Newman; former U.S. Attorney (S.D.N.Y.) Otto Obermaier; former Chief Executive of the Law Enforcement Assistance Administration Donald Santarelli; former Chair, ABA Criminal Justice Section, William W. Taylor, III; former U.S. Attorney (C.D.

CA), Federal Public Defender (C.D. Ca.), Los Angeles District Attorney, and California Attorney General John K. Van de Kamp; the Reporter, Temple University Law School Professor James Strazzella; and the statistical consultant, Dr. Barbara S. Meierhoefer.

3. Meese Report at 3.

4. *Id.* at 20, 22.

5. *Id.* at 35–36.

6. *Id.* at 41–42, quoting Conference of (State Supreme Court) Chief Justices, Resolution IX (Feb. 10, 1994).

7. National Governors= Association, Policy HR–19, *Federalism and Criminal Justice* (revised 1996), *quoted in id.* at 42.

8. *See e.g.*, Edwin Meese III & Rhett DeHart, *How Washington Subverts Your Local Sheriff*, Policy Review (Jan–Feb. 1996), at 52–53 (regarding how the over–federalization of crime incurs unnecessary expense and undermines state experimentation with innovative approaches to the prevention of crime).

9. As Charles Meeks, Executive Director of the National Sheriffs Association, has put it: A[W]e=re getting closer to a federal police state. That=s what we fought against 200 years ago C this massive federal government involved in the lives of people on the local level.@ *Quoted in* Edwin Meese III & Rhett DeHart, *How Washington Subverts Your Local Sheriff*, Policy Review (Jan–Feb. 1996),

at 51 (ANot surprisingly, many Americans are beginning to share this fear of the federal government@ (citing recent polling data)). *See generally* Meese Report, *supra* note 2, at 26–35.

10. Meese Report, *supra* note 2, at 50, 53–54.

11. Judge Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, Mississippi College L. Rev. 14, no. 2, part 1, at 228 (part of symposium on the access-to-justice future of the federal courts, in light of current and increasing caseload crisis).

12. Timothy Lynch, *Polluting Our Principles; Environmental Prosecutions and the Bill Rights*, Cato Institute Policy Analysis No. 223 (Apr. 20, 1995). *See e.g.*, 15 U.S.C. 78ff (Securities Exchange Act criminal penalties); 18 U.S.C. ' 664 and 18 U.S.C. ' 1027 (fraud, conversion and embezzlement of pension monies and false statements); 8 U.S.C. ' 1324a (criminal penalties for employment of illegal aliens).

13. *See* William H. Rehnquist, Remarks Before the American Law Institute, Washington, DC (May 11, 1998), at 4. *See also* William H. Rehnquist, 1998 Year-End Report of the Federal Judiciary (Jan. 1, 1999), at 4-5.

14. Judicial Conference of the United States, Long Range Plan for the Federal Courts, at 23 (Dec. 1995).

15. *Id.*

16. William H. Rehnquist, Remarks Before the American Law Institute, Washington, DC (May 11, 1998), at 4.

17. *See e.g.*, *Sierra Club v. Morton*, 405 U.S. 727 (1972).

18. *Compare e.g.*, Meese Report, *supra* note 2 (concluding that among the long litany of problems associated with the over-federalization of criminal law are an inefficient allocation of scarce resources; an undue and unwise concentration of police and prosecution power at the

federal level; a debilitating impact on the federal judicial system; and a diversion of congressional attention from true federal crime issues).