

## ARTICLES

JURISDICTIONAL AND SEPARATION OF  
 POWERS STRATEGIES TO LIMIT THE  
 EXPANSION OF FEDERAL CRIMES\*

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## INTRODUCTION

Those knowledgeable enough to be aware of the phenomenon are generally disturbed by the explosive growth of federal crimes, which today number over 4,000.<sup>1</sup> The general public, however, has no such awareness and, if it did, most would likely not be concerned. Indeed, the continuing political appeal of “tough on crime” policies has been driving the growth of federal criminal legislation.<sup>2</sup> No one questions that government must provide protection from crime. Rather, the constitutional question concerns which government should protect the public against which crimes. Much of the public seems to be under a dual misimpression: (1) that the federal government has the primary responsibility for criminal law; and (2) that more criminal laws translate into greater safety.<sup>3</sup>

Popular debate about crime rarely mentions the significant differences between federal and state criminal laws.<sup>4</sup> Despite the large number of federal crimes, federal criminal law enforcement handles only about five percent of total prosecutions in the country.<sup>5</sup> The constitutional allocation of power which leaves general police powers in the states should mean that the federal role is much smaller. Moreover, unless Congress is prepared to destroy the traditional role and quality of the federal courts, the number of federal judges cannot be increased in size for the federal judiciary to handle much more of a criminal caseload.<sup>6</sup>

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1. See JOHN S. BAKER, JR., FEDERALIST SOC'Y FOR LAW & PUB. POL'Y, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004) [hereinafter FEDERALIST REPORT] (explaining the methodology underlying the study's count of 4,000 federal crimes), available at <http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf>.

2. See JAMES STRAZELLA ET AL., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 15-16, 16 n.28 (1998) [hereinafter ABA TASK FORCE REPORT] (asserting that “[t]here is widespread recognition that a major reason for the federalization trend, even when federal prosecution of these crimes may not be necessary or effective, is that federal crime legislation is politically popular”), available at <http://www.abanet.org/crimjust/fedcrimlaw2.pdf>.

3. See *id.* at 16-17 (observing that while legislative attempts to create federal criminal laws are often prompted by the public's “misguided[] perception that federal law enforcement efforts are necessary or even appropriate to deal with a particular law enforcement problem[,]” realistically, federal criminal law can only address a small number of local crimes at any given time).

4. See *id.* at 14 (asserting that countless authors have observed the lack of justification for Congress' desire to create federal criminal law that merely duplicates state criminal law).

5. See PATRICK A. LANGAN & JODI M. BROWN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN NO. NCJ-165149, FELONY SENTENCES IN THE UNITED STATES, 1994 2 (1997) (comparing federal and state felony convictions for various crimes in 1994), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fsus94.pdf>.

6. See ABA TASK FORCE REPORT, *supra* note 2, at 37 (arguing that a significant increase in the number of federal judges “threatens the coherence of circuit law, risks reduction in the quality of appointments as the degree of individual scrutiny given to the selection and confirmation of large numbers of candidates declines, and impairs the close working relationships essential to the deliberations within multi-judge courts”).

Members of Congress seem not to care, or at least, not to be aware that creating new federal crimes does little, if anything, to protect the general public from crime.<sup>7</sup> Some new federal crimes do protect special economic interests.<sup>8</sup> The general public, however, seems to feel that more federal crime protection means protection from violent crimes and theft.<sup>9</sup> That, however, was not the case even following September 11th, when new legislation primarily concerned matters of evidence gathering and procedure.<sup>10</sup> Regardless of these realities, too many members of Congress seem primarily concerned that voters believe these new federal criminal laws are protecting them. Given the mythology that surrounds the crime issue, anyone concerned about the growth of federal criminal law is hard pressed to know what can be done even to slow the pace.

This Article explores remedies for the overexpansion of federal criminal law. Part I establishes that the expansion of federal criminal law continues unabated. This Article then considers three points at which it may be possible to achieve some slowing of the expansion of federal criminal law. Part II suggests that lower federal courts could, as a few courts have done, recognize as-applied challenges to federal crimes. This would take seriously language in *Lopez v. United States*<sup>11</sup> and *Morrison v. United States*,<sup>12</sup> which establishes a basis for jurisdiction in each case under a statute based on the Commerce Clause. Part III argues that the Supreme Court could more clearly distinguish between criminal and non-criminal statutes under the Commerce Clause. That would focus on the separation of powers issue of Congress imposing unconstitutional jurisdiction on the federal courts. Finally, Part IV asserts that the Department of Justice (DOJ) should be forced, as a matter of separation of powers, to discontinue the practice of “detailing” attorneys to the Senate Judiciary Committee, where they have participated in drafting criminal legislation. With Congress unwilling to respect the constraints of federalism and separation of powers on the creation of federal criminal statutes, lawyers and judges might want to consider additional approaches to enforcing those

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7. See *id.* at 20, 22 (observing that several recently enacted federal statutes, championed by many because they would have a claimed impact on crime, have hardly been used at all).

8. See, e.g., Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831-1839) (criminalizing economic espionage and the theft of proprietary trade secrets).

9. See *supra* note 3 and accompanying text (discussing the limited ability of the federal government to prosecute crimes traditionally handled by the states).

10. See, e.g., Panel Discussion, *The USA-Patriot Act and the American Response to Terror: Can We Protect Civil Liberties After September 11th?*, 39 AM. CRIM. L. REV. 1501, 1510 (2002) (discussing the expansion of law enforcement’s right to engage in trap and trace, pen register, and sneak and peek procedures under the United States Patriot Act).

11. 514 U.S. 549 (1995).

12. 529 U.S. 598 (2000).

constitutional limits.

### I. THE EXPANSION OF FEDERAL CRIMINAL LAW<sup>13</sup>

The expansion of federal criminal law has been well documented. As found by a 1998 American Bar Association Task Force on the Federalization of Crime,<sup>14</sup> the growth of federal criminal law has been “startling.” The Task Force’s research revealed that “[m]ore than 40% of the federal [criminal] provisions enacted since the Civil War have been enacted since 1970.”<sup>15</sup> In 2004, the Federalist Society (“Federalist Report”) measured the growth in federal criminal law since the ABA Report and determined that the rate of growth in federal criminal law had continued at the same pace. The 2004 report concluded that the United States Code includes over 4,000 offenses which carry a criminal penalty.<sup>16</sup>

Documenting the precise contours of federal criminal law has proved difficult,<sup>17</sup> because getting an accurate count of federal crimes is not as simple as counting the number of criminal statutes.<sup>18</sup> According to the ABA Report, “[s]o large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes.”<sup>19</sup> Moreover, federal criminal statutes are scattered throughout the U.S. Code and are highly complex.<sup>20</sup> For example, “[o]ne statutory section can

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13. Part I presents an abridged version of this author’s research and conclusions from a report originally commissioned and published by the Federalist Society for Law and Public Policy Studies. See FEDERALIST REPORT, *supra* note 1.

14. The author was a member of the Task Force.

15. ABA TASK FORCE REPORT, *supra* note 2, at 7 (emphasis in original). The ABA Task Force further noted that “more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within a sixteen year period since 1980.” *Id.* at 7 n.9.

16. FEDERALIST REPORT, *supra* note 1, at 12.

17. See *id.* at 4-10 (discussing the problems inherent in counting federal crimes and the various methodologies used to do so). See generally Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998) [hereinafter Gainer, *Past and Future*]; Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99 (1989) [hereinafter Gainer, *Report to the Attorney General*].

18. In theory, federal crimes are strictly statutory, and the federal system does not include common law crimes. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (finding that federal courts lack common law criminal jurisdiction). Locating purely common-law crimes would require consulting judicial opinions. Even then determining what is and is not a common-law crime is problematic. See WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 2.1(e), at 109-16 (2003). So, given that all federal crimes must be statutory, it would seem that it should simply be a matter of counting all the statutes which are designated as crimes. As further discussed in the text, this is not the case.

19. FEDERALIST REPORT, *supra* note 1, at 4, 13 n.3 (quoting ABA TASK FORCE REPORT, *supra* note 2, at 9).

20. See *id.* (citing ABA TASK FORCE REPORT, *supra* note 2, at 93). As noted elsewhere in the Federalist Report, an exact count of the present “number” of federal crimes contained in the statutes, let alone those contained in administrative regulations, is difficult to achieve and, even then, the count is subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex. One statutory section

comprehend a variety of actions, potentially multiplying the number of federal ‘crimes’ that could be enumerated.”<sup>21</sup> This situation presents a two-fold challenge:<sup>22</sup> (1) determining what statutes contain as crimes;<sup>23</sup> and (2) differentiating whether a single statute with different acts listed within a section or subsection includes more than a single crime and, if so, how many.<sup>24</sup>

The first difficulty involves the failure of federal law to establish a means of comprehensively identifying the statutes that include crimes. Federal law does not provide a general definition of the term “crime.” Title 18 of the U.S. Code, although designated “Crimes and Criminal Procedure,” is not a comprehensive criminal code. It is simply a collection of statutes, which contains many, but not all, of the federal crimes.<sup>25</sup> Other crimes are distributed throughout the other forty-nine titles of the U.S. Code.<sup>26</sup>

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can comprehend a variety of actions, potentially multiplying the number of federal “crimes” that could be enumerated. For example, the language of 18 U.S.C. § 2113 encompasses bank robbery, extortion, theft, assaults, killing hostages, and storing or selling anything of value knowing it to have been taken from a bank. Depending on how this subdivisible and dispersed law is counted, the true number of federal crimes multiplies.

21. *Id.* at 13 n.4.

For example, the language of 18 U.S.C. § 2113 encompasses bank robbery, extortion, theft, assaults, killing hostages, and storing or selling anything of value knowing it to have been taken from a bank . . . . Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies.

*Id.* (citing ABA TASK FORCE REPORT, *supra* note 2, at 93).

22. *Id.* at 4.

23. *See id.* (citing ABA TASK FORCE REPORT, *supra* note 2, at 9-10) (observing that federal law does not effectively define crimes, and thus, administrative regulations and penalties designated as “civil” could also be considered criminal statutes). Moreover, although Title 18 of the U.S. Code purports to lay out federal criminal law, it does not comprise the complete body of federal crimes. *Id.*; *see also* Gainer, *Past and Future*, *supra* note 17, at 53 (observing that only 1,200 of the then more than 3,300 federal criminal provisions were contained within Title 18).

24. *See* FEDERALIST REPORT, *supra* note 1, at 4 (“[O]ne statute does not necessarily equal one crime.”). “For example, 20 U.S.C. § 9573 criminalizes knowing disclosure, publication, and use of confidential student data. This could arguably be counted as one offense, or as many as three offenses[.]” *Id.* at 13 n.9. Thus, different scholars will reach different counts depending on how many individual crimes they find in a particular statute. *Id.* at 4.

25. *See* Gainer, *Past and Future*, *supra* note 17, at 53.

The federal statutory law today is set forth in the 50 titles of the United States Code. Those 50 titles encompass roughly 27,000 pages of printed text. Within those 27,000 pages, there appear approximately 3,300 separate provisions that carry criminal sanctions for their violation. Over 1,200 of those provisions are found jumbled together in Title 18, euphemistically referred to as the ‘Federal Criminal Code,’ and the remainder are found scattered throughout the other 49 titles. The judicial interpretations of those provisions, which are necessary for their understanding, are found within the printed volumes reporting the opinions issued by judges in federal cases—volumes which now total over 2,800 and which contain approximately 4,000,000 printed pages.

*Id.*

26. There are fifty titles, but two titles, 6 and 34, currently contain no un-repealed

Until repealed in 1984, Section 1 of Title 18 began by classifying offenses into felonies and misdemeanors, with a sub-class of misdemeanors denominated “petty offenses.” Later amendments re-introduced classifications elsewhere in Title 18.<sup>27</sup> The repeal and later amendments were tied to the Sentencing Act of 1989<sup>28</sup> and the creation of the United States Sentencing Commission. “Congress’ basic goal . . . was to move the Sentencing System in the direction of uniformity.”<sup>29</sup> Unfortunately, the focus on sentencing has done nothing to solve, and probably has exacerbated, the problem of determining just what should be counted as “crimes.” In particular, that has been a problem for offenses not listed in Title 18, which are often regulatory or tort-like.

The second problem is that, whether contained in Title 18 or some other title, one statute does not necessarily equal one crime. Often, a single statute contains several crimes. Determining the number of crimes contained within a single statute involves a matter of judgment. Various people using different criteria are likely to disagree about the number of crimes contained in many statutes. In the absence of a definition of crime, the count depends on the criteria employed to determine what counts as a crime.<sup>30</sup>

The most comprehensive effort to count the number of federal crimes was conducted by the Office of Legal Policy (“OLP”) in the U.S. Department of Justice during the early 1980s, in connection with the effort to pass the proposed Federal Criminal Code.<sup>31</sup> Mr. Ronald Gainer, Associate Deputy Attorney General, who oversaw these efforts and published an article, citing “approximately 3,000 federal crimes,” a number which has been much cited since.<sup>32</sup> In a later article, Mr. Gainer raised the figure to “approximately 3,300 separate provisions that carry criminal sanctions for their violation.”<sup>33</sup> The latter number was based on a count

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statutes.

27. *See, e.g.*, 18 U.S.C. § 3581 (2000); 18 U.S.C. § 3156(3) (2000).

28. 18 U.S.C. § 3551 (2000).

29. *United States v. Booker*, 125 S. Ct. 738, 761 (2005).

30. The criteria primarily depend on how separate acts are counted. Where one statute punishes several acts, do each of the several acts constitute various ways to commit a single crime or do they constitute a separate crime for each act? In general, the OLP Report and the Federalist Report made judgments based on whether the act was or was not a traditional common-law crime, e.g., larceny or burglary. Every act within a section or subsection, which constituted a common-law crime, was designated as a separate crime, even multiple acts contained in the same section or subsection, which were not common-law crimes, were counted as a single crime. *See* FEDERALIST REPORT, *supra* note 1, at 7, 17.

31. The proposal for a new Federal Criminal Code was introduced in the 93rd Congress, and the effort to enact such legislation lasted for about a dozen years. *See generally* Mathews & Sullivan, *Criminal Liability for Violations of the Federal Securities Laws: The National Commission’s Proposed Federal Criminal Code, S. 1 and S. 1400*, 11 AM. CRIM. L. REV. 883 (973).

32. Gainer, *Report to the Attorney General*, *supra* note 17, at 94.

33. Gainer, *Past and Future*, *supra* note 17, at 54 n.8.

done by the Buffalo Criminal Law Center, “employing somewhat different measures.”<sup>34</sup>

The ABA Report noted that the 3,000 number was “surely outdated by the large number of new federal crimes enacted in the 16 or so years since its estimation.”<sup>35</sup> Focusing on the growth in federal criminal law, the ABA Report set out only to measure the growth of federal criminal legislation enacted over periods of time. The ABA Task Force realized that it could not “undertake a section by section review of every printed federal statutory section,” which was too “massive” for its “limited purpose.”<sup>36</sup> It would have had to review 27,000 pages of statutes.<sup>37</sup> Instead, the ABA Report compiled a list of statutes from several sources<sup>38</sup> and then measured the annual growth of federal criminal statutes. The ABA Report did not determine how many new crimes were contained in each statute.<sup>39</sup> That produced measures of the growth of federal criminal statutes since the Civil War, with particular emphasis on the period from 1970 through 1996.<sup>40</sup>

The Federalist Report updated the ABA statutory count for the intervening years as the basis for estimating the total number of federal crimes. Building on the methodology used in the ABA Report, the Federalist Report continued the count of federal criminal statutes enacted for the years 1997 through 2003. From these numbers, the Federalist Report used the rate of growth in federal crimes to update the OLP count. The OLP figure, based on the most comprehensive count, was a complete count as of the early 1980s. Still, the OLP count was something of an estimate, as reflected in its qualified statement of “approximately 3,000 crimes.” Given that it had to employ certain judgments about how many crimes are contained in a particular statute, the OLP count did not put forth a precise number. The Federalist Report explained the criteria used to make judgments about what counts as a separate crime.<sup>41</sup> Using the OLP figure of “approximately 3,000” and a rate of growth of twenty-five percent from then to 2000, the Federalist Report concluded that the number of federal offenses carrying a criminal penalty was over 4,000,<sup>42</sup> given that federal criminal legislation continues to grow.<sup>43</sup>

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34. *Id.*

35. ABA TASK FORCE REPORT, *supra* note 2, at 94.

36. *Id.* at 92.

37. *Id.* at 92.

38. *Id.* at 91-92.

39. *Id.*

40. *Id.* at 5-12.

41. FEDERALIST REPORT, *supra* note 1, at 5. To demonstrate the problem, the Appendix in the Federalist Report counts the crimes contained in the statutes enacted since 1996. The count lays out the criteria upon which judgments were made.

42. *Id.* at 3, 12.

43. *Id.* at 8.

Measuring the rate of growth confirms that Congress continues to expand federal criminal law at a brisk pace. As practitioners in the field know well, however, the number of criminal statutes does not tell the whole story. No matter how many crimes Congress enacts, it remains for federal prosecutors to decide which statutes to invoke when proceeding to an indictment. Many of the new crimes serve no other purpose than to make Congress look good with particular groups and/or on popular issues. The statutory provisions declared unconstitutional in *Lopez*<sup>44</sup> and *Morrison*<sup>45</sup> fit that description. Many new federal criminal statutes are rarely used, suggesting that they are unneeded. Federal prosecutors rely on certain favorites, notably mail and wire fraud statutes,<sup>46</sup> which they use even when other statutes might be more appropriate.<sup>47</sup>

The fact that many statutes are rarely prosecuted, however, does not mean that the addition of more crimes lacks consequences.<sup>48</sup> The federal government is supposedly a government of limited powers and, therefore, limited jurisdiction. Every new crime expands the jurisdiction of federal law enforcement and federal courts.<sup>49</sup> Although a statute may rarely be used to indict, it is available to establish the legal basis upon which to show probable cause that a crime has been committed and, therefore, to authorize a search and seizure.<sup>50</sup> The availability of more crimes also affords the prosecutor more discretion and, therefore, greater leverage against defendants.<sup>51</sup> Increasing the number and variety of charges tends to

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44. See Gun-Free School Zones Act, 18 U.S.C. § 922(q)(2)(A) (2000) (prohibiting the knowing possession of a firearm in a school zone); see also *id.* § 922(q)(1) (enumerating Congress's jurisdictional findings).

45. See Violence Against Women Act, 42 U.S.C. § 13981 (2000) (establishing a federal cause of action for gender-motivated crimes of violence).

46. See Mail Fraud, 18 U.S.C. § 1341 (2000) (criminalizing mail frauds and swindles); *id.* § 1343 (criminalizing fraud by wire, radio, or television).

47. See, e.g., Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 437-38 (1995) (discussing the broad reach of the federal mail and wire fraud statutes to prosecute crimes that were traditionally dealt with at the state level).

48. FEDERALIST REPORT, *supra* note 1, at 9; see also ABA TASK FORCE REPORT, *supra* note 2, at 24-43 (discussing the adverse effects of the federalization of crime, even though many of the crimes are rarely prosecuted). The ABA Task Force lists several adverse consequences, including: (1) undermining the constitutionally-established role of the states as the primary enforcers of criminal law; (2) expanding "federal investigative power"; and (3) establishing a dual criminal justice system where the same conduct is subject to differing criminal penalties at the state and federal levels. *Id.* at 26-31.

49. See FEDERALIST REPORT, *supra* note 1, at 9; see, e.g., Renee M. Landers, *Legislating Federal Crime and Its Consequences: Prosecutorial Limits on Overlapping Federal and State Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 65 (1996) (noting that many of the statutes recently enacted by Congress "expand federal court jurisdiction into areas previously the sole responsibility of the states").

50. FEDERALIST REPORT, *supra* note 1, at 9.

51. *Id.* ("Increasing the number and variety of charges tends to dissuade defendants from fighting the charges, because [they] can usually be 'clipped' for something."); see, e.g., R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines:*

dissuade defendants from fighting the charges, because they usually can be “clipped” for something.

Finally, no count of crimes in the statutes takes account of the expansion of federal criminal law that occurs without new legislation. Federal prosecutors regularly stretch the application of existing statutes.<sup>52</sup> Consider, for example, the prosecution of Arthur Andersen LLP, the appeal of which the Supreme Court granted certiorari.<sup>53</sup> As in *United States v. Arthur Andersen, LLP*, federal courts often cooperate with prosecutors and make new law retroactively.<sup>54</sup> What (then) Professor and (later federal Judge) John Noonan wrote in 1984 about bribery and public corruption continues to be generally true, namely that federal prosecutors and federal judges have been effectively creating a common law of crimes through expansive interpretations.<sup>55</sup>

## II. AS-APPLIED CHALLENGES TO JURISDICTION BASED ON THE COMMERCE CLAUSE

In order to enforce limits on the federalization of crime, *Lopez*<sup>56</sup> and *Morrison*<sup>57</sup> have articulated an analytic framework for determining when Congress exceeds its power under the Commerce Clause.<sup>58</sup> That framework assumes the availability of as-applied challenges to facially valid federal crimes enacted under the Commerce Clause. A few appellate decisions, most notably *United States v. Stewart*,<sup>59</sup> have recognized such

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*Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 749 (2001) (claiming that “prosecutors can, and often do, manipulate the number of charges against a defendant as a way to pressure him or her into agreeing to a plea bargain”).

52. FEDERALIST REPORT, *supra* note 1, at 10.

53. See *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 302 (5th Cir. 2004) (affirming the conviction of Arthur Andersen, LLP for obstructing Securities and Exchange Commission proceedings), *cert. granted*, 125 S. Ct. 823 (2005); see also John S. Baker, Jr., *An Injustice in Houston*, WALL ST. J., June 18, 2002, at A16 [hereinafter Baker, Jr. *Injustice*] (arguing that U.S. District Judge Harmon made “new law as to the proof required on the critical element” of the crime in the Arthur Andersen prosecution when “she gave the jury a very debatable interpretation” of the law “at the request of the Justice Department”).

54. See Baker, Jr., *Injustice*, *supra* note 53 (discussing the dangers of federal judges and federal prosecutors making new law outside of the legislative process). “[A]s the Supreme Court long ago held, but has since often ignored, federal judges do not have the power to create new crimes; only Congress can do so.” *Id.* Moreover, the Ex Post Facto Clause of the Constitution would have prevented Congress from stretching the law as Judge Harmon did retroactively in *Andersen*. *Id.*

55. FEDERALIST REPORT, *supra* note 1, at 10; see also JOHN NOONAN, BRIBES 585-86, 620 (1984) (contending that “broad federal statutes and judicial self-confidence” have effectively removed the two-century-old black letter law that there is no federal common law of crimes).

56. 514 U.S. 549 (1995).

57. 529 U.S. 598 (2000).

58. See *id.* at 608 (observing that under the Commerce Clause, Congress exercises legislative authority over “three broad categories of activity”) (quoting *Lopez*, 514 U.S. at 558).

59. 348 F.3d 1132 (9th Cir. 2003).

as-applied challenges.<sup>60</sup> As suggested by the analytic framework of *Lopez* and *Morrison*, not only Congress, but also federal prosecutors, must establish that the prohibited activity falls within the limits of the Commerce Clause.

A. *The Analytic Framework of Lopez and Morrison*

In this Supreme Court term, in *Ashcroft v. Raich*,<sup>61</sup> the Court is considering a challenge to a federal criminal prohibition on the use of home-grown marijuana, permitted under California law for medical use.<sup>62</sup> *Raich* requires the Court to revisit the framework developed in *Lopez* and *Morrison* in a situation much closer to *Wickard v. Filburn*<sup>63</sup> than either of the prior two cases. *Wickard* allows Congress to regulate local commerce that, aggregated together, “substantially affects” interstate commerce.<sup>64</sup> The interpretation of that principle lies at the heart of *Lopez* and *Morrison*.

The analytic framework begins with the proposition that, under the Commerce Clause, Congress may regulate three broad categories: (1) “the channels of interstate commerce”; (2) “instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “activities that substantially affect interstate commerce.”<sup>65</sup> Both *Lopez* and *Morrison* involve the third category.<sup>66</sup> Both cases reject the argument that the situation should be governed by *Wickard*’s cumulative effects principle.<sup>67</sup> Accordingly, they consider factors which cabin the cumulative effects principle.

*Lopez* observes that the Gun-Free School Zones Act<sup>68</sup> “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise,” and

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60. See *id.* at 1141-42 (“[D]eterminations that statutes are facially invalid properly occur only as logical outgrowths of rulings on whether statutes may be applied to particular litigants on particular facts.”) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327-28 (2000)).

61. 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004).

62. See *id.* at 1234. In *Raich*, the Ninth Circuit ordered the entry of a preliminary injunction prohibiting the federal government from enforcing the Controlled Substances Act against the plaintiffs after finding that the plaintiffs were likely to prevail on the merits of their claim. *Id.*

63. 317 U.S. 111 (1942).

64. *Id.* at 125 (“[E]ven if [the] activity [is] local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”).

65. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

66. See *United States v. Morrison*, 529 U.S. 598, 609 (2000) (noting that Congress justified the civil remedy provisions of the Violence Against Women Act as a regulation of activity substantially affecting interstate commerce); *Lopez*, 514 U.S. at 559 (finding that the Gun-Free School Zones Act did not seek to regulate the channels or instrumentalities of interstate commerce or persons or things in interstate commerce).

67. See *infra* note 69 and accompanying text.

68. 18 U.S.C. § 922(q)(1)(A) (2000).

thus is not governed by the aggregation principle.<sup>69</sup> The second point, and the most important for present purposes as elaborated below, concerns jurisdiction. Finally, the opinion discusses the lack of any congressional findings, which might have compensated for the failure to include a jurisdictional element.<sup>70</sup>

Regardless of whether congressional findings save the facial constitutionality of a federal crime which lacks a jurisdictional element, *Lopez* requires a “case-by-case inquiry” regarding jurisdiction.<sup>71</sup> The Court emphasized this point:

For example, in *United States v. Bass*, . . . the Court interpreted former 18 U.S.C. § 1202(a), which made it a crime for a felon to ‘receive[e], posses[s], or transport[t] in commerce or affecting commerce . . . any firearm.’ . . . *The Court interpreted the possession component of § 1202(a) to require an additional nexus to interstate commerce* both because the statute was ambiguous and because ‘unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.’ . . . *The Bass Court set aside the conviction because, although the Government had demonstrated that Bass had possessed a firearm, it had failed ‘to show the requisite nexus with interstate commerce.’*<sup>72</sup>

The Court distinguished proof of jurisdiction in the particular case from the overall constitutionality of the statute.

The Court thus interpreted the statute to reserve the constitutional question whether Congress could regulate, without more, the ‘mere possession’ of firearms . . . ‘The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative’ . . . *Unlike the statute in Bass, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.*<sup>73</sup>

*Morrison* elaborated the three points covered in *Lopez* into four factors.<sup>74</sup> It considered whether: (1) the activity at which the statute is directed is commercial or economic in nature;<sup>75</sup> (2) the statute contains an express

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69. 514 U.S. at 561.

70. *See id.* at 562-63 (noting Congress’s failure to discuss its legislative judgment as to how the regulated activity affects interstate commerce).

71. *See id.* at 561 (“[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”).

72. *Id.* at 561-62 (emphasis added and internal citations omitted).

73. *Id.* at 562 (emphasis added and internal citations omitted).

74. *See United States v. Morrison*, 529 U.S. 598, 610-13 (2000) (reflecting on the main points that the Court considered in its *Lopez* decision).

75. *Id.* at 610-11.

jurisdictional element involving interstate activity that might limit its reach;<sup>76</sup> (3) Congress has made specific findings regarding the effects of the prohibited activity on interstate commerce;<sup>77</sup> and (4) the link between the prohibited conduct and its purported substantial effect on interstate commerce is attenuated.<sup>78</sup> The fourth factor reiterated *Lopez*'s rejection of the "but-for" reasoning about the "costs of crime" and "national productivity" arguments put forth by the dissent.<sup>79</sup> Like the first factor, the fourth represented a containment of *Wickard*.<sup>80</sup>

*Morrison* held that the Commerce Clause did not provide Congress with the authority to enact the civil remedy provision of the Violence Against Women Act.<sup>81</sup> First, the provision was not a regulation of activity that substantially affects interstate commerce.<sup>82</sup> Second, it lacked a jurisdictional requirement.<sup>83</sup> Third, even though Congress had made factual findings regarding jurisdiction, these findings did not save the statute's constitutionality.<sup>84</sup> The Court did not specifically discuss the fourth factor, attenuation, but that factor was reflected in the references rejecting "but for reasoning"<sup>85</sup> and "aggregate effect" reasoning.<sup>86</sup>

### B. Jurisdiction and As-Applied Challenges

The availability of as-applied challenges is often overlooked, as recently illustrated by the opinions in *United States v. Booker*—a case dealing with

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76. *Id.* at 611-12.

77. *Id.* at 612.

78. *Id.* at 612-13.

79. *See id.* at 612-13 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)); *see also Lopez*, 514 U.S. at 619-24 (Breyer, J., dissenting).

80. *See Morrison*, 529 U.S. at 615-18 (acknowledging that intrastate violence may have an effect on interstate commerce but noting that regulation of violent crime has always been a function of the state's police power and concluding that Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *see also* Bradford C. Mank, *Can Congress Regulate Interstate Endangered Species Under the Commerce Clause? The Split in the Circuits Over Whether the Regulated Activity is Private Commercial Development or the Taking of a Protected Species*, 69 BROOK. L. REV. 923, 947 (2004) (noting that *Morrison* and *Lopez* limited *Wickard*'s aggregation theory to economic activities).

81. 42 U.S.C. § 13981 (2000).

82. 529 U.S. at 613.

83. *Id.* at 611-12 ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress's regulation of interstate commerce.").

84. *Id.* at 614-15 ("Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers.").

85. *Id.* at 615-16 ("The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce.").

86. *Id.* at 617 (rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce").

sentencing guidelines.<sup>87</sup> After a majority of the Supreme Court declared sentencing enhancements based on judge fact-finding a violation of the Sixth Amendment right to jury trial,<sup>88</sup> a different majority declared two sections of the guidelines unconstitutional.<sup>89</sup> Justice Thomas, dissenting on the remedy, argued that the Court should have adhered to its usual practice of rendering only an as-applied ruling.<sup>90</sup> The other dissenters on the remedy also argued that this case did not call for a ruling of facial unconstitutionality.<sup>91</sup> Both dissents made the point that, under the Court's jurisprudence, the unconstitutionality of the specific application does not mean that the statute (or any part of it) is facially unconstitutional.<sup>92</sup> Conversely, it would follow that the fact that a statute is facially constitutional does not preclude the possibility that particular applications will be unconstitutional.

The most familiar examples of the distinction between facial and as-applied challenges occur under the vagueness and overbreadth doctrines, usually in the context of speech.<sup>93</sup> The standard for facial challenges on vagueness grounds is a matter of dispute within the Supreme Court.<sup>94</sup>

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87. 125 S. Ct. 738 (2005).

88. *Id.* at 756 (Stevens, J., with Scalia, Souter, Thomas & Ginsburg, JJ., constituting the majority as to the constitutional question) (requiring that all facts that affect sentencing "be admitted by the defendant or proved to a jury beyond a reasonable doubt").

89. *Id.* at 764 (Breyer, J., with Rehnquist, C.J., O'Connor, Kennedy & Ginsburg, JJ., constituting the majority as to the remedy) (invalidating the provisions of the federal sentencing guidelines "that require[] sentencing courts to impose a sentence within the applicable Guidelines range" and "that set[] forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range").

90. *Id.* at 795 (Thomas, J., dissenting as to the remedy) (maintaining that when a particular application of a statute is unconstitutional, but the statute itself is not, the Court typically invalidates only the application and not the statute itself). According to Justice Thomas: "Absent an exception such as First Amendment overbreadth, we will facially invalidate a statute only if the plaintiff establishes that the statute is invalid in all of its applications." *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

91. *Id.* at 777 (Stevens, J., with Souter, J., dissenting as to the remedy, joined by Scalia, J., except for Part III and footnote 17). "Neither section is unconstitutional. While these provisions can in certain cases, when combined with other statutory and Guidelines provisions, result in a violation of the Sixth Amendment, they are plainly constitutional on their faces." *Id.*

92. *See id.* at 795 (Thomas, J., dissenting as to the remedy) (noting that where the statute is unconstitutional "as applied," the statute is struck down only as it applies to a specific litigant, not on its face); *id.* at 777 (Stevens, J., with Souter, J., dissenting as to the remedy, joined by Scalia, J., except for Part III and footnote 17) (stating that while the statutory provisions could violate the Sixth Amendment, those provisions remain facially constitutional).

93. *See generally* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1022-1039 (2d ed. 1988) (providing that "overbreadth analysis . . . compares the statutory line defining burdened and unburdened conduct with the judicial line specifying activities protected and unprotected by the First Amendment").

94. *Compare Salerno*, 481 U.S. at 745 (maintaining that to succeed on a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid"), and *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (stating that a statute is facially invalid if "it is unconstitutional in every

Nevertheless, in order for a plaintiff to secure either an as-applied or a facial ruling, the statute must be unconstitutional as applied to the plaintiff.<sup>95</sup> Overbreadth challenges, on the other hand, depart from the normal rule.<sup>96</sup> Such challenges need only establish that the statute suffers from substantial overbreadth.<sup>97</sup> Indeed, successful challenges often cannot establish that the statute is unconstitutional as applied to the specific plaintiff.<sup>98</sup>

As for the Commerce Clause, an as-applied challenge might appear to be at odds with *Wickard*, in which the point seemed to be that the individual activity by itself did not fall within the scope of the Commerce Clause.<sup>99</sup> *Wickard*, a non-criminal case, rests on the “market concept”—specifically in that case a national market for wheat.<sup>100</sup> As discussed above, the *Lopez/Morrison* framework explicitly makes the “aggregation” or “cumulative effects” principle generally inapplicable to criminal cases.<sup>101</sup> As *Morrison* observes: “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”<sup>102</sup> So even if *Raich* applies *Wickard*’s market aggregation principle to home-grown marijuana as having a “substantial effect” on a national market for marijuana, that would have no impact on the validity of as-applied challenges to crimes involving non-economic activity.

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conceivable application”), with *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (“To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been a decisive factor in any decision of this Court . . .”). See also *Booker*, 125 S. Ct. at 773 n.1 (Stevens, J., with Souter, J., dissenting as to the remedy, joined by Scalia, J., except for Part III and footnote 17) (noting that the Court continues to debate the proper standard for facial challenges).

95. See *TRIBE*, *supra* note 93, at 1036 (reporting that a party asserting unconstitutional vagueness must either demonstrate that the challenged statute is vague as applied to the particular party or vague as applied to everyone) (citing *Parker v. Levy*, 417 U.S. 733, 753-58 (1974)).

96. *Id.* at 1035 (“Overbreadth analysis is often perceived as an exception to the rule that an individual is not ordinarily permitted to litigate the rights of third parties . . .”).

97. *Id.* at 1024.

98. See *id.* at 1035 (“Those whose expression is ‘chilled’ by the existence of an overbroad or unduly vague statute cannot be expected to adjudicate their own rights, lacking by definition the willingness to disobey the law.”) (citing *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)).

99. See 317 U.S. 111, 124, 127-28 (1942) (“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove [his conduct] from the scope of federal regulation.”).

100. *Id.* at 125-29 (justifying regulation of wheat under Congress’s commerce power with the explanation that a national market for wheat exists, and that even “wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices”).

101. See *supra* Part II.

102. 529 U.S. 598, 613 (2000).

In *United States v. McCoy*,<sup>103</sup> Judge Stephen Trott raised in dissent the issue of as-applied challenges. He argued that *Lopez* had foreclosed as-applied challenges:

My colleagues have finessed an unavoidable issue in this case: whether 18 U.S.C. § 2252(a)(4)(B) is unconstitutional on its face. They have attempted to restrict their holding to McCoy and to others ‘similarly situated,’ but it is not clear to me that the law permits such a limitation. I so conclude because McCoy’s conduct clearly falls within the language of the statute, and because the Supreme Court appears under such circumstances to have ruled out ‘as applied’ challenges in Commerce Clause cases. In my view, if the conduct under review falls within the plain language of the statute, precedent requires us to take the statute head on, not carve pieces out of it . . .

The reason why I believe the majority’s approach is not viable is simple: the Supreme Court said in *Lopez* that ‘where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.’ . . . I take this passage in *Lopez* to mean here precisely what it says: the *de minimis* nexus of Rhonda McCoy’s personal activity to interstate commerce is of ‘no consequence,’ so long as (1) her conduct falls within the purview of the statute, as she has stipulated, and (2) the *statute* itself which covers that activity is valid. The Court in *Lopez* articulated this clarification to make it clear that although Congress may not use a ‘relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities,’ if the general regulatory statute at issue does bear a substantial relation to commerce, an ‘as applied’ challenge is inappropriate.<sup>104</sup>

In *United States v. Stewart*,<sup>105</sup> Judge Alex Kozinski responded that *Lopez* did not preclude as-applied challenges.

The dissent in *McCoy* asserted that as-applied challenges cannot be brought under the Commerce Clause, relying on a single sentence from *Lopez* for support: ‘[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.’ . . . The *McCoy* dissent took this sentence entirely out of context.

*Lopez* itself borrowed this sentence from a footnote in *Maryland v. Wirtz* . . . a case that had nothing to do with as-applied challenges, but instead announced the so called ‘enterprise concept,’ which allows Congress to exercise authority over a large enterprise or industry by regulating its

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103. 323 F.3d 1114 (9th Cir. 2003). McCoy was followed in *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004), which held that 18 U.S.C. § 2252A(a)(5)(B) was unconstitutional as applied. *Id.* at 1063.

104. *Id.* at 1133-34 (Trott, J., dissenting) (internal citations omitted).

105. 348 F.3d 1132 (9th Cir. 2003).

smaller components, even those components that bear no relation to interstate commerce on their own.<sup>106</sup>

Judge Kozinski further explained that all constitutional challenges are as-applied, and that they are the “basic building blocks” of constitutional litigation:

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106. *Id.* at 1140. Judge Kozinski’s opinion continued:

*Wirtz* held that Congress could regulate a group of employees who had no direct connection to interstate commerce, reasoning that labor-related “strife disrupting an enterprise involved in commerce may disrupt commerce,” and that “substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise.” The Court in *Wirtz* was careful to explain that, although the employees’ activities were not themselves in interstate commerce, Congress had reasonably determined they had a material effect on interstate commerce because of their participation in the larger enterprise. The Court employed a similar mode of analysis in *Wickard*. It held that, though *Wickard*’s homegrown wheat may not have traveled interstate, it had a material effect on the interstate price of wheat: “[T]aken together with [the homegrown wheat] of many others similarly situated,” it had an aggregate effect on commerce that was “far from trivial.”

Read in context, the sentence quoted by the *McCoy* dissent can only mean that, where a general regulatory statute governs a large enterprise, it does not matter that its components have a de minimis relation to interstate commerce on their own. What does matter is that the components could disrupt the enterprise, and could thus interfere with interstate commerce. In the *Wirtz* situation, then, the enterprise is the mechanism through which a multitude of the intrastate effects are consolidated and amplified so that they have an effect on interstate commerce. This obviously has no bearing at all on a case such as ours where the activity in question is not part of a large enterprise that itself has an effect on interstate commerce.

Our Commerce Clause jurisprudence supports this reading. Before cases like *Wirtz*, the Court drew a much sharper line between local and interstate commerce, holding that certain activities such as production, manufacturing and mining were exclusively the province of state governments. Cases like *Wirtz* and *Wickard* were thus quite radical in their expansive conception of the Commerce Clause, because they first articulated Congress’s power to regulate persons and things twice and thrice removed from interstate commerce. But this is entirely different than saying Congress can regulate someone with no relation to interstate commerce at all—such as a person who builds a machinegun from scratch in his garage—so long as there is an otherwise valid statute that covers his activities. There is nothing in *Wirtz*, *Wickard*, *Lopez*, or in any of our cases—not even buried in a footnote—suggesting this understanding of the Commerce Clause is plausible. Quite the contrary, the Supreme Court has always entertained as-applied challenges under the Commerce Clause. In *Heart of Atlanta Motel, Inc. v. United States*, for example, the Court found Title II of the Civil Rights Act of 1964 was valid “as applied . . . to a motel which concededly serves interstate travelers.” In *Katzenbach v. McClung*, the Court found the same statutory provision valid “as applied to a restaurant annually receiving about \$70,000 worth of food which has moved in commerce.” If the dissent in *McCoy* were right, we would have only needed one case to say Title II is valid, period. There would have been no need to consider—as the Court did—whether a single hotel or restaurant had a sufficient nexus to interstate commerce, and could thus be federally regulated. *Wickard* was also an as-applied challenge: Had the Court deemed regulation of the business of agriculture a sufficient basis for upholding the application of the Agricultural Adjustment Act to *Filburn*, there would have been no need for it to analyze how his particular activities affected interstate commerce.

*Id.* at 1140-42 (internal citations omitted).

Indeed, it is hard to believe the Court would ever eliminate as-applied challenges for one particular area of constitutional law. As Professor Fallon explains, '[a]s-applied challenges are the basic building blocks of constitutional adjudication.' Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000). An as-applied challenge asks a court to consider whether a statute's application to a particular litigant is a valid one. Whereas the 'enterprise concept' is only relevant when a party is regulated in relation to a large industry or enterprise, whether a given statute can constitutionally be applied to a claimant is an inquiry that occurs in every constitutional case: In order to raise a constitutional objection to a statute, a litigant must always assert that the statute's application to her case violates the Constitution. But when holding that a statute cannot be enforced against a particular litigant, a court will typically apply a general norm or test and, in doing so, may engage in reasoning that marks the statute as unenforceable in its totality. In a practical sense, doctrinal tests of constitutional validity can thus produce what are effectively facial challenges. Nonetheless, determinations that statutes are facially invalid properly occur only as logical outgrowths of rulings on whether statutes may be applied . . . Professor Fallon also notes that '[t]raditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge.' . . . We therefore cannot agree with the bold assertion in the *McCoy* dissent that an as-applied challenge is inapposite in cases such as this.<sup>107</sup>

In *Stewart*, the defendant was convicted of, among other things, five counts of unlawful possession of a machinegun in violation of 18 U.S.C. § 922(o).<sup>108</sup> In concluding that § 922(o) was unconstitutional *as applied* to *Stewart*, the Court targeted the failure of the Government to establish federal jurisdiction.<sup>109</sup> The jurisdictional failure was two-fold: the lack of a jurisdictional element in the statute,<sup>110</sup> and the fact that the machinegun had not traveled in or substantially affected interstate commerce.<sup>111</sup>

Other appellate courts have not directly confronted the issue of as-applied challenges the way the opinions by Judges Trott and Kozinski do. These courts have taken various approaches to the sufficiency of jurisdiction in federal criminal statutes. For the First Circuit, a statute with

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107. *Id.* at 1142 (internal case citations omitted).

108. *Id.* at 1134.

109. *Id.* at 1134-42. The *Stewart* opinion also noted that § 922(o) failed the first and fourth prongs of the *Morrison* test; that is, possession of a machinegun, without more, was not commercial or economic in nature. *Id.* at 1136. Moreover, the effect of *Stewart*'s possession of homemade machineguns on interstate commerce was attenuated. *Id.* at 1137.

110. *See id.* at 1138 (explaining that "section 922(o) contains no jurisdictional element anchoring the prohibited activity to interstate commerce").

111. *Id.* at 1135-36. "Notably absent from this provision is any jurisdictional requirement that the machinegun has traveled in or substantially affected interstate commerce." *Id.* at 1134.

a jurisdictional element is sufficiently distinguishable from *Lopez* and *Morrison*.<sup>112</sup> Even the lack of a jurisdictional element may not, for some courts, invalidate the statute.<sup>113</sup>

On the other hand, the Third Circuit has indicated that a jurisdictional element alone may not suffice.<sup>114</sup> The Second Circuit also questioned the sufficiency of a jurisdictional element,<sup>115</sup> but it ultimately ruled that *per curiam* circuit precedent precluded an as-applied challenge.<sup>116</sup> In contrast, the Eighth Circuit, citing *Stewart*, specifically held that a federal statute adopted under the Commerce Clause was unconstitutional as applied.<sup>117</sup>

To this author, the question of as-applied challenges seems rather straightforward, based on *Bass*<sup>118</sup> as relied upon in *Lopez*.<sup>119</sup> First, the prosecution has the burden of proving all the elements of the crime.<sup>120</sup> If the statute has a jurisdictional element based on the Commerce Clause, then the prosecution must prove that element of the case.<sup>121</sup> If in the particular case, as a matter of law, it is clear from undisputed facts that the prosecution cannot prove the connection required under the Commerce

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112. See *United States v. Capozzi*, 347 F.3d 327, 335-36 (1st Cir. 2003) (finding that the Hobbs Act did not exceed Congress's Commerce Clause authority because the statute specifically "applies only to that specific subset of robberies and extortions that affect interstate commerce").

113. See *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003) (finding the lack of a jurisdictional element insufficient to render the Endangered Species Act invalid); *United States v. Ali Moghadam*, 175 F.3d 1269, 1275-76 (11th Cir. 1999) (finding that the lack of a jurisdictional element in an anti-bootlegging statute did not render the statute invalid).

114. See *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (finding the jurisdictional element in a statute criminalizing the possession of child pornography too attenuated to render the statute constitutional).

115. See *United States v. Holston*, 343 F.3d 83, 89 (2d Cir. 2003) (questioning "whether the mere existence of jurisdictional language [in a child pornography statute] purporting to tie criminal conduct to interstate commerce can satisfactorily establish the required 'substantial effect'").

116. See *id.* at 90 ("[W]hen Congress regulates a class of activities that substantially affect interstate commerce, '[t]he fact that certain intrastate activities within this class, such as growing marijuana solely for personal consumption, may not have a significant effect on interstate commerce is . . . irrelevant.'") (quoting *Proyect v. United States*, 101 F.3d 11, 14 (2d Cir. 1996)).

117. *Klingler v. Dir. Dep't of Revenue*, 366 F.3d 614, 617 (8th Cir. 2004) (holding that the Commerce Clause did not allow Congress to use the Americans with Disabilities Act to prevent Missouri from charging an annual fee for parking placards for the disabled).

118. 404 U.S. 336 (1971).

119. See 514 U.S. 549, 561-62 (1995) (finding the Gun-Free School Zones Act flawed because the statute lacked the necessary jurisdictional element linking the criminalized conduct with interstate commerce) (relying on *Bass*, 404 U.S. at 337, 347, 349).

120. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (forbidding "criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense"); *In re Winship*, 397 U.S. 358, 364 (1970) (requiring explicitly that the prosecution prove beyond a reasonable doubt each element of a charged crime before a defendant may be convicted).

121. See, e.g., *United States v. Latouf*, 132 F.3d 320, 325 (6th Cir. 1997) ("Because the 'substantially affect interstate commerce' requirement is a jurisdictional element [of a crime], it must be proven to the jury beyond a reasonable doubt.") (citations omitted).

Clause, then the court should rule that the constitutionally required jurisdiction does not exist in the particular case<sup>122</sup>—even though the statute may be constitutional on its face.

### III. FEDERAL COURT JURISDICTION: AN OVERLOOKED SEPARATION OF POWERS ISSUE

In *Lopez* and *Morrison*, the Supreme Court focused on the fact that the statutes involved did not regulate commercial activity.<sup>123</sup> Nevertheless, the Court's citations blurred the commercial-criminal distinction. In order to explain the test under the Commerce Clause, *Lopez* reviewed the long line of the landmark Commerce Clause cases—cases which generally have nothing to do with crime.<sup>124</sup> *Lopez* then looked to *Perez v. United States*,<sup>125</sup> a criminal case, to describe the categories of commercial activity covered by the Commerce Clause.<sup>126</sup> By emphasizing *Perez*, the Court perpetuated the blurring of criminal with commercial activity produced by that precedent.

As pointed out in New Deal lawyer Robert Stern's critique of *Perez*, the great Commerce Clause cases had nothing to do with crime.<sup>127</sup> Prior to *Perez*, the Supreme Court often separated criminal cases based on the Commerce Clause by the use of narrow statutory construction in order to avoid the constitutional issue.<sup>128</sup> Indeed, *Bass*, relied on by *Lopez* to explain the case-by-case approach, was such a case. Assuming, however, that the Court is not prepared to repudiate *Perez*, federal criminal cases can still be better distinguished from commercial cases by focusing on the issue of separation of powers between the judiciary and Congress.

In sum, federal statutes that actually regulate commerce do not require federal courts to allow an Executive Branch department, namely the DOJ,

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122. See, e.g., *United States v. DiSanto*, 86 F.3d 1238, 1246 (1st Cir. 1996) (explaining that “if [the jurisdictional] element is not satisfied, then [the defendant] is not guilty”) (citing *United States v. Ryan*, 41 F.3d 361, 363-64 (8th Cir. 1994)).

123. See *Lopez*, 514 U.S. at 561 (emphasizing that the criminal statute at issue has “nothing to do with ‘commerce’”); *United States v. Morrison*, 529 U.S. 598, 613 (2000) (declining to expand the scope of the Commerce Clause to victims of violent crime because of the non-economic nature of the regulation).

124. See *Lopez*, 514 U.S. at 553-67 (outlining the Court's development of Commerce Clause powers based on challenges to regulated commercial activity).

125. 402 U.S. 146 (1971).

126. *Lopez*, 514 U.S. at 558 (citing *Perez*, 402 U.S. at 150).

127. See Robert Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 273 (1973) (observing in 1972 that Congress had only just begun to assert its commerce powers “in a criminal law context”).

128. See, e.g., *United States v. Bass*, 404 U.S. 336, 350-51 (1971) (holding that a federal statute which was unclear as to whether the criminal act must be connected with interstate commerce must be read narrowly so as to require that a nexus with interstate commerce be shown as an element of the offense).

to impose repeatedly on their jurisdiction.<sup>129</sup> Federal criminal statutes require repeated invocations of federal court jurisdiction. Every criminal indictment, based on a federal criminal statute, that on its face or as-applied exceeds the power of Congress, asks a federal court to exercise jurisdiction it lacks.<sup>130</sup> Even if the statute is constitutional on its face, it does not follow that the particular application is constitutional, as discussed above.<sup>131</sup> In non-criminal cases, the Executive Branch need not always, or even normally, resort to a federal court in order to enforce the particular statute.<sup>132</sup> While the Executive Branch *may* use civil suits in federal courts to enforce federal statutes, it *must* file criminal cases whenever it seeks to enforce a criminal statute.<sup>133</sup> For every criminal case, a court must get involved, even for the overwhelming percentage of defendants who enter guilty pleas.

The non-criminal enforcement of Commerce Clause-based statutes generally involves the delegation of regulation by the Congress to the Executive Branch.<sup>134</sup> When a new statute is enacted, it may face a constitutional challenge as to the authority of Congress to pass the particular act.<sup>135</sup> Once that matter is definitively settled, and assuming it is settled in favor of Congress's power, then the Executive Branch is the primary actor with the role of the federal courts being generally secondary, at most. Congress is happy to delegate to the Executive Branch, which is generally willing to accept the delegation. The President, at the time of the law's enactment, accepts the delegation by signing the particular

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129. *See generally* California v. Fed. Power Comm'n, 369 U.S. 482 (1962) (holding that antitrust policy entrusted to the judiciary could not be frustrated by an administrative agency); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by [Article III] may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

130. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.3 (6th ed. 2000) (noting that there are constitutional limitations on federal power and jurisdiction and that Congress "should not be able to exercise its power to create exceptions to federal jurisdiction that would violate the Due Process Clause of the Fifth Amendment, or other Constitutional limits").

131. *See supra* Part II.

132. *See, e.g.*, Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (upholding a federal agency's reasonable interpretation of its governing statute and enforcement measures taken pursuant to such interpretation and implementing regulations).

133. The DOJ has attempted to "regulate" corporations by publicizing prosecutorial guidelines which "encourage" adoption of "compliance programs." John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 316 (2004).

134. *See generally* United States v. Mead Corp., 533 U.S. 218 (2001) (discussing the delegation of regulatory power to administrative agencies and the weight duly enacted administrative regulations carry).

135. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000) (noting that, although Congress has the authority to override and supersede judicially created rules, such authority does not exist where those rules are required by the Constitution).

legislation.<sup>136</sup> The role of the Supreme Court and other federal courts is limited to deciding whether Congress's legislation infringed on the powers of the President, of the states, or on the rights of individuals.<sup>137</sup>

While federalization of crime involves the powers of Congress vis-à-vis the states and individuals, it also involves relationships between the three branches of the federal government. As between Congress and the federal courts, the issue is similar in some sense to the question of as-applied challenges, discussed above,<sup>138</sup> in that both concern the jurisdiction of federal courts. That discussion, however, focuses on whether the prosecution has established that the facts of the particular case bring it within the scope of the Commerce Clause. While similar to that issue, the separation of powers issue involves the institutional relationship between Congress and the federal courts.

The separation of powers issue between Congress and the federal courts should be distinguished from what is called the delegation, or actually the non-delegation, doctrine.<sup>139</sup> As discussed in *Mistretta v. United States*,<sup>140</sup> the non-delegation doctrine is derived from separation of powers.<sup>141</sup> In considering the constitutionality of the U.S. Sentencing Commission, the majority opinion, as well as Justice Scalia's dissent, says that Congress did not violate the non-delegation doctrine by giving broad power to the U.S. Sentencing Commission to establish sentences.<sup>142</sup> However, the two

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136. See U.S. CONST. art. I, § 7, cls. 2, 3 (requiring any bill passed by both Houses of Congress to be presented to the President for approval or veto); *INS v. Chadha*, 462 U.S. 919, 946-51 (1983) (holding that presentment is required bicameral approval of legislation).

137. See *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

138. See *supra* Part II (discussing as-applied challenges).

139. During the 1930s, it was common for a challenge to a new congressional statute to involve unconstitutional delegation challenges, in addition to Commerce Clause challenges. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating an administrative regulation under the non-delegation doctrine); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (reaching the same result). Until the last decade, neither case seemed viable. When *Lopez* opened the way for challenges under the Commerce Clause, a similar effort to revive non-delegation challenges—emerged, but was quashed—at least for now. See *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 472-76 (2001) (reaffirming the broad power of Congress to delegate to the Executive Branch). These delegation cases, however, involved only the relationship between Congress and the Executive.

140. 488 U.S. 361, 371-75 (1989) (upholding the Federal Sentencing Guidelines established by the United States Sentencing Commission on the basis that Congress neither delegated excessive legislative power to the Commission nor violated separation of powers in the Commission's design).

141. See *id.* at 413, 415-16 (Scalia, J., dissenting).

142. See *id.* at 374 (finding that the limited delegation of legislative power to the United States Sentencing Commission did not violate separation of powers because it was "sufficiently specific and detailed to meet constitutional requirements"); *id.* at 416 (Scalia, J., dissenting) (agreeing that Congress did not violate the non-delegation doctrine to the extent that Congress guided the Sentencing Commission's discretion by an "intelligible principle").

opinions view the separation of powers challenge differently.<sup>143</sup> Although the majority rejects the separation of powers challenge, its opinion does note “serious concerns about a disruption of the appropriate balance of governmental power” and the placement of this “peculiar institution” within the judiciary.<sup>144</sup> Justice Scalia’s opinion goes further by insisting that the U.S. Sentencing Commission violates separation of powers because it is an entity which does nothing more than make law, as opposed to making rules as part of some other function.<sup>145</sup>

Congress generally has little occasion to delegate power to the federal judiciary. The major exception concerns the Rules Enabling Act,<sup>146</sup> in which Congress gave to the Supreme Court power to prescribe rules of federal procedure.<sup>147</sup> As Congress has created more federal criminal statutes with attenuated connections to the Commerce Clause, it has in effect delegated to the federal judiciary regulatory matters that would otherwise be handled by an administrative agency. The lower federal courts are creatures of Congress,<sup>148</sup> as are administrative agencies.<sup>149</sup> Separation of powers principles, however, prevent Congress from treating lower federal courts like administrative agencies.<sup>150</sup>

Congress finds it convenient to enact broad legislation with minimal detail to be filled in by administrative agencies. If the agencies are “independent”—that is, of the Executive—Congress can more easily

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143. Compare *id.* at 384 (suggesting that the U.S. Sentencing Commission does generate separation of powers concerns despite its constitutionality), with *id.* at 420 (Scalia, J., dissenting) (insisting that the U.S. Sentencing Commission’s authority to essentially create binding laws violates separation of powers principles).

144. *Id.* at 384.

145. *Id.* at 420-21 (Scalia, J., dissenting).

146. See 28 U.S.C. § 2072 (2004) (authorizing the Supreme Court to promulgate federal rules of practice, procedure, and evidence); see also RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 608 (5th ed. 2003) (noting the need for uniformity in federal rules of procedure and the effectiveness of granting to the Supreme Court the power to create such rules).

147. See FALLON, *supra* note 146, at 608-19 (discussing the development of the rules creation process over the years and concerns about the process and the role of the Supreme Court).

148. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (finding that courts created by statute are limited in jurisdiction to that which the statute confers).

149. See FALLON, *supra* note 146, at 46-47 (stating that administrative agencies and their adjudicatory mechanisms originate from Congress’s Article I legislative authority, not from Article III judicial authority).

150. Congress has been able to influence the operation of administrative agencies not only through the practice of broad delegation, but also by separating out independent agencies. Administrative agencies within the Executive Branch are subject to the control of the President. *But see Morrison v. Olson*, 487 U.S. 654, 691-93 (1988) (upholding a congressionally imposed “good cause” limitation on the firing of an independent counsel). The Supreme Court has allowed Congress to restrict the power of the President to remove appointees to independent agencies. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631-32 (1935) (upholding a section of the Federal Trade Commission (“FTC”) Act which limited the ability of the President to dismiss FTC Commissioners on policy grounds).

pressure them.<sup>151</sup> Even as to agencies nominally under the control of the Executive, Congress has devices to prod the agency towards the desired direction,<sup>152</sup> even though its favorite tool—the Congressional veto<sup>153</sup>—has been formally excluded as unconstitutional.<sup>154</sup> As long as Congress can, to some extent, control the administrative agencies, it is inclined to avoid political accountability by being too specific in statutes.<sup>155</sup>

The actions of and threats by members of Congress with respect to criminal sentencing reflect that Congress, or at least influential members thereof, in some ways view the federal courts like administrative agencies. First, Congress created the U.S. Sentencing Commission as an “independent” agency within the judiciary, to avoid making the tough political judgments about sentencing.<sup>156</sup> Thus, when Congress wanted to register its outrage over Enron and similar corporate scandals, it simply enacted “get tough” directions to the U.S. Sentencing Commission.<sup>157</sup> Predictably, when Congress said “jump,” the administrative agency complied. When some members of Congress did not approve of sentences handed down by some federal judges, they basically limited the discretion of judges to make downward-departing judgments.<sup>158</sup>

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151. See Stephen H. Yuhan, *The Imperial Presidency Strikes Back: Executive Order 13,233, The National Archives, and the Capture of Presidential History*, 79 N.Y.U. L. REV. 1570, 1598-1600 (2004) (discussing the factors which contribute to an executive agency's independence from the Executive and Legislative branches).

152. See NOWAK & ROTUNDA, *supra* note 130, at § 7.4 (discussing the history behind congressional investigations of the Executive Branch and the benefits of such investigations to the democratic process).

153. See *INS v. Chadha*, 462 U.S. 919, 948-60 (1983) (striking down the one-house legislative veto of executive decisions because it violated the principles of bicameralism and separation of powers).

154. *Id.* at 959.

155. See *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting) (noting that Congress will avoid making divisive political choices when given the opportunity).

156. See *id.* at 422 (Scalia, J., dissenting) (“By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of ‘expert’ bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, ‘nowin’ political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research”).

157. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 805, 116 Stat. 745, 802 (codified at 28 U.S.C. § 994) (distributing guidelines and policy statements to all federal courts in order to establish clear directives concerning sentencing). As noted by the U.S. Sentencing Commission, this section “directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter ‘are sufficient to deter and punish organizational criminal misconduct.’” Sentencing Guidelines for United States Courts, 68 Fed. Reg. 75,339, 75,358 (Nov. 1, 2004).

158. See, e.g., Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act) of 2003, Pub. L. No. 108-21, 117 Stat. 650

Congress certainly has authority to craft careful legislation which restrains the sentencing discretion of judges.<sup>159</sup> That is tough work, however—work that Congress does not seem interested in doing. Rather than doing its own job of legislating, it acts as if it is attempting to dictate particular sentences. It can do so by providing for mandatory sentences.<sup>160</sup> As long as Congress or the U.S. Sentencing Commission provides a range, however, sentencing judgments must be judicial ones.<sup>161</sup> Indeed, in mandatory sentencing, no judicial judgment is involved. Congress could more carefully craft the definition of crimes, which in turn could produce more tightly graded sentencing, or Congress could adopt mandatory sentences. Otherwise, Congress's recourse, if it does not like a judge's sentencing judgments, is to impeach him or her.<sup>162</sup> But again, that is hard work that Congress seems uninterested in doing.<sup>163</sup>

Congress has left great discretion to the Executive in prosecution by enacting broad and often ambiguous criminal statutes.<sup>164</sup> For a long time, and even still, the federal courts cooperated with prosecutors in stretching the meaning and coverage of federal crimes. Insofar as the federal judiciary has been compliant, the DOJ has refrained from pressuring the judiciary through Congress. As exemplified by its reaction to the *Booker* case, however, the DOJ is prepared to pressure judges who do not comply with its view on sentencing.<sup>165</sup> Due in large part to the fault of federal

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(eliminating some judicial discretion in sentencing and requiring stronger minimum sentences in an attempt to protect children from abduction and sexual exploitation).

159. Cf. FALLON, *supra* note 146, at 319-20 (noting Congress's power to limit the jurisdiction of federal courts).

160. See, e.g., PROTECT Act § 401 (strictly limiting downward departures from sentences prescribed by the Federal Sentencing Guidelines).

161. See *United States v. Booker*, 125 S. Ct. 738, 759 (2005) (Breyer, J., with Rehnquist, C.J., O'Connor, Kennedy & Ginsburg, JJ., constituting the majority as to the remedy) (finding that the congressional policy of reducing sentencing disparities that underlies the Sentencing Guidelines "depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies crime of conviction").

162. See U.S. CONST. art. I, §§ 2-3 (granting the House of Representatives the sole power of impeachment of federal officers and the Senate the sole power to try all impeachments); see also *Nixon v. United States*, 506 U.S. 224, 237-38 (1993) (refusing to interfere with the Senate's decision to have evidence taken by a committee of the Senate rather than by the full Senate).

163. Consider *Nixon*, where the Senate created a committee to "try" the impeachment of Chief Judge Nixon, who had already been convicted of a federal crime. *Nixon*, 506 U.S. at 226-28. The Senate as a body was apparently not interested in spending much time in a trial when the outcome was pre-ordained by the judge's criminal conviction. *Id.*

164. See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 10 (1994) (suggesting there are considerable logistical and political motivations for Congress to leave many of its bills vague and imprecise).

165. See Assistant Attorney General Christopher A. Wray, Statement Before the House Committee on the Judiciary Concerning Federal Sentencing After *Booker* 6-7 (Feb. 10, 2005) [hereinafter Wray Statement] (imploping Congress to take action to prevent improper and inconsistent factors from informing judges' sentencing decisions), available at [http://www.usdoj.gov/criminal/press\\_room/testimony/2005](http://www.usdoj.gov/criminal/press_room/testimony/2005)

judges, federal prosecutors have been able to ignore the limits on separation of powers.

The federal judiciary is at its strongest and least subject to criticism in the defensive use of judicial review. That is, when the Supreme Court rules that it cannot constitutionally exercise jurisdiction, it does not need the Executive to enforce its judgment.<sup>166</sup> Refusing jurisdiction is certainly not an act of abandonment of its responsibilities and can serve to protect the federal judiciary as a separate institution.<sup>167</sup> Thus, *Marbury v. Madison* established the Supreme Court's authority by denying its power to judge the case on the merits. Chief Justice Marshall ruled the Court could not exercise the jurisdiction given by Congress.<sup>168</sup> Had the result been otherwise, namely issuing an order against Secretary of State Madison's efficacy, it would have depended upon enforcement by the President, which would not have happened. The Court's judgment in *Marbury*, which did not require the President's cooperation, protected the judiciary.<sup>169</sup>

The Supreme Court could more clearly distinguish than it has in *Lopez* and *Morrison* between criminal and non-criminal statutes under the Commerce Clause. It could do so by focusing on the Executive's continued attempts to expand federal court jurisdiction through liberal interpretations of criminal statutes. In cases where criminal defendants make an as-applied challenge to a statute, a federal court could explain that the indictment exceeds the court's jurisdiction.<sup>170</sup> In doing so, it would not jeopardize federal legislation insofar as it actually regulates commerce. Rather, the Court would merely be refusing to exercise criminal jurisdiction.<sup>171</sup>

#### IV. THE VIOLATION OF SEPARATION OF POWERS IN THE "DETAILING" OF DOJ ATTORNEYS TO THE SENATE JUDICIARY COMMITTEE

The Supreme Court's recent decision in *United States v. Booker*, which has thrown the federal sentencing issue back to Congress, offers an opportune occasion for considering the practice of DOJ detailing its lawyers the Senate Judiciary Committee. *Booker* has created upheaval in federal sentencing by making the mandatory sentencing guidelines only

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166. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

167. See *id.* at 177.

168. *Id.* at 177-80.

169. See *id.* at 177.

170. See *supra* notes 118-122 and accompanying text (emphasizing that the Supreme Court can limit the Executive's ability to apply federal criminal law by refusing to exercise jurisdiction where the law fails to meet constitutional requirements as applied to the particular defendant).

171. In statutes that provide both civil and criminal penalties, only the civil penalties would be available, assuming the statute was otherwise constitutional.

advisory. As of this writing, the DOJ is urging Congress to act quickly and to do so in a way that favors federal prosecutors in the balance of power as applied to sentencing.<sup>172</sup> The DOJ's influence, however, extends beyond the process described in civics books, whereby the Executive Branch proposes legislation to particular members of Congress, who oblige by sponsoring the legislation. The DOJ also has its own lawyers assigned to the Senate Judiciary Committee where they draft criminal legislation.<sup>173</sup>

"Inside the beltway" it is no secret that various Executive Branch agencies "detail" their employees to congressional committees.<sup>174</sup> The practice does not simply involve the Executive Branch inserting itself into the workings of a separate branch. Prominent senators have insisted that Executive Branch agencies supply them with more detailees and describe the practice as "mutually beneficial."<sup>175</sup> When in 2003 the Office of

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172. See Wray Statement, *supra* note 165, at 14 (urging Congress to act quickly to prevent sentencing judges from relying on the Supreme Court's *Booker* decision to impose more lenient sentences than the guidelines require).

173. See, e.g., Suzanne Nelson, *Grassley Assails Detailee Cuts*, ROLL CALL, Oct. 6, 2003 (describing the practice of "detailing" in which executive staffers are seconded to congressional offices), available at <http://www.lexis.com>.

174. See *id.* (postulating that the Office of Personnel Management's proposed regulations could have the "far-reaching" effect of limiting the widely-used practice of detailing). The Office of Personnel Management's proposed regulations would have barred any executive agency from detailing an executive employee to the legislative branch without first receiving the approval of the Office of Personnel Management. Detail of Government Employees From the Executive Branch to the Legislative Branch, 68 Fed. Reg. 53,054 (Sept. 9, 2003) [hereinafter Detail of Government Employees]. Congress subsequently rejected the proposed amendments. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. H, tit. VI, § 638, 118 Stat. 2809.

175. See 149 CONG. REC. S13120 (daily ed. Oct. 23, 2003) (statement of Sen. Grassley).

Mr. GRASSLEY. Mr. President, I rise to speak on the amendment Senator Domenici and I offered to address a regulation recently proposed by the Office of Personnel Management; a regulation that is wrong-headed.

Congress and the executive agencies have long enjoyed a mutually beneficial relationship where executive branch employees are detailed to congressional offices. These details typically exist for 1 to 2 years.

As a result, the executive branch has an opportunity to have its employees learn about the legislative process and oversight activities. Likewise, the legislative branch has an opportunity to utilize the expertise of executive branch employees. Everyone benefits.

The regulation proposed by the Office of Personnel Management will inevitably ruin the benefits of this long-term practice.

The regulation proposed by the Office of Personnel Management for example, seeks to reduce to 6 months the time that a detailee can spend in Congress. This is too short a time for even the most industrious of detailees to understand the intricacies of the legislative process and contribute to that process.

Moreover, this regulation attempts to limit the activities in which executive branch employees can engage while under the direct supervision of a Congressional office in an effort to micro-manage from afar. This is unacceptable.

Senator Domenici and I have offered an amendment to prohibit the use of any funds for the implementation of this regulation that will severely reduce the number, availability and benefit of executive branch detailees to the legislative branch to the detriment of all.

Personnel Management (“OPM”) proposed to limit the practice, Congress blocked those regulations.<sup>176</sup> To the unsophisticated “outside the beltway” onlooker, however, the obvious question would seem to be simply this: “Doesn’t such an arrangement violate the separation of powers between the Legislative and Executive Branches?”<sup>177</sup>

As discussed above, the federalization of crime can involve jurisdictional issues which threaten the separation of powers among the three branches.<sup>178</sup> Sometimes the federal judiciary condones what should be understood as violations of separation of powers. Thus, despite the Supreme Court’s decisions of unconstitutionality in *Lopez* and *Morrison*, federal courts often give expansive interpretations of federal crimes which effectively create new criminal law when separation of powers should prevent that from occurring.<sup>179</sup> The current legislative process, however, also involves the lack of separation of powers between the Executive and Legislative Branches.<sup>180</sup> While the public may unwittingly support the federalization of crime, the symbiosis between the DOJ and the Senate Judiciary Committee has driven the process.<sup>181</sup>

As Congress has attempted to wrest control of criminal law policy by federalizing crimes and then curtailing the discretion of federal judges in

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I urge my colleagues to support this amendment.

I yield the floor.

The PRESIDING OFFICER. Without objection, the amendment is agreed to.

The amendment (No. 1949) was agreed to.

*Id.* Mr. Grassley’s amendment to reject the proposed amendments was adopted. Consolidated Appropriations Act, 2005, div. H, tit. VI, § 638.

176. See Consolidated Appropriations Act, 2005, div. H, tit. VI, § 638. Section 638 provides:

Notwithstanding any other provision of law, none of the funds appropriated or made available under this Act or any other appropriations Act may be used . . . to implement the proposed regulations of the Office of Personnel Management to add sections 300.311 through 300.316 to part 300 of title 5 of the Code of Federal Regulations, published in the Federal Register, volume 68, number 174, on September 9, 2003 (relating to the detail of executive branch employees to the legislative branch).

*Id.*

177. The proposed regulations recognized the possibility of separation of powers violations, as well as conflicts of interest, but nevertheless would allow detailing of Executive Branch personnel to Congress, although on a more limited basis. See Detail of Government Employees, *supra* note 174, at 53,054.

178. See *supra* Part III.

179. See *United States v. Wiltberger*, 18 N.S. (5 Wheat.), 76 (1820); see also JULIE R. O’SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 26 (2001) (“Arguably, a central myth of federal white-collar crime jurisprudence is that there are no ‘federal common law crimes.’”). Professor O’Sullivan argues that the prohibition on criminal common law is fundamentally based on the separation of powers. *Id.* Common law making in the criminal realm implicates fundamental separation of powers questions because it involves “a dangerous concentration of power for life tenured judges to both propound the law and to preside over its interpretation and administration.” *Id.*

180. See, e.g., Detail of Government Employees, *supra* note 174, at 53,054.

181. See *id.*

sentencing, it has generated other separation of powers issues. In *Mistretta*,<sup>182</sup> the Supreme Court rejected the separation of powers argument that challenged the creation of the U.S. Sentencing Commission and its location within the Judicial Branch.<sup>183</sup> *Booker*, while primarily about the right of jury trial as to every element of a crime, also involved separation of powers. *Booker* did not reconsider the holding in *Mistretta*.<sup>184</sup> It involved other issues of separation of powers.<sup>185</sup>

The strange, two-part decision in *Booker*, with two different five-four majorities, created a result that only Justice Ginsburg fully supported.<sup>186</sup> The four-four split between the other justices involved separation of powers concerns.<sup>187</sup> The first four justices—those who ruled that sentencing enhancements not based on jury fact-finding violated the right to jury trial—would have otherwise left the congressional sentencing system in place.<sup>188</sup> They dissented, on separation of powers grounds, to the second majority's decision on the remedy.<sup>189</sup> The four justices who disagreed on the jury-trial issue, along with Justice Ginsburg, took the position that the guidelines became merely advisory.<sup>190</sup> In this split, the first four gave priority to Congress on the issue of sentencing.<sup>191</sup> The

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182. 488 U.S. 361 (1989).

183. *Id.* at 390 (“[W]e can discern no separation-of-powers impediment to the placement of the Sentencing Commission within the Judicial Branch.”).

184. *See* *United States v. Booker*, 125 S. Ct. 738, 755 (2005) (Stevens, J., with Scalia, Souter, Thomas & Ginsburg, JJ., constituting the majority as to the constitutional question) (cautioning that the Court's holding in *Booker* does not undermine its prior separation of powers holdings in *Mistretta*). The Court explained that the decision in *Mistretta* “was premised on an understanding that the Commission, rather than performing adjudicatory functions, instead makes political and substantive decisions.” *Id.* The Court reasoned that Congress's promulgation of the sentencing guidelines, which was similar to the creation of the federal rules of evidence, was a delegation of non-adjudicatory powers and did not intrude on the authority of the judiciary. *Id.* Additionally, the Court recognized that the U.S. Sentencing Commission, which exercised a quasi-legislative function and not an adjudicatory function, did not violate Article III. *Id.*

185. *See id.* at 754-55 (Stevens, J., with Scalia, Souter, Thomas & Ginsburg, JJ., constituting the majority as to the constitutional question) (concluding that requiring “sentencing factors to be proved to a jury beyond a reasonable doubt” would not violate separation of powers doctrine as “an unconstitutional grant to the Sentencing Commission of the inherently legislative power to define criminal elements”).

186. *See id.* at 746 (Stevens, J., with Scalia, Souter, Thomas & Ginsburg, JJ., constituting the majority as to the constitutional question); *id.* at 756 (Breyer, J., with Rehnquist, C.J., O'Connor, Kennedy & Ginsburg, JJ., constituting the majority as to the remedy).

187. *See id.* at 755 (Stevens, J., with Scalia, Souter, Thomas & Ginsburg, JJ., constituting the majority as to the constitutional question).

188. *See id.* (Stevens, J., with Scalia, Souter, Thomas & Ginsburg, JJ., constituting the majority as to the constitutional question).

189. *See id.* (Stevens, J., with Scalia, Souter, Thomas & Ginsburg, JJ., constituting the majority as to the constitutional question).

190. *See id.* at 757 (Breyer, J., with Rehnquist, C.J., O'Connor, Kennedy & Ginsburg, JJ., constituting the majority as to the remedy).

191. *See id.* at 751 (Stevens, J., with Scalia, Souter, Thomas & Ginsburg, JJ., constituting the majority as to the constitutional question) (concluding that “[p]rovisions for such enhancements of the permissible sentencing range reflected growing and wholly justified

second four hypothesized that Congress wanted judges to have an important role in sentencing.<sup>192</sup>

Regardless of whether it is preferable for judges to have a large role in sentencing, it was quite implausible for Justice Breyer to contend that the sentencing reform, which included the sentencing guidelines, embodied such a policy.<sup>193</sup> The supposed goal for creating the U.S. Sentencing Commission and the Federal Sentencing Guidelines was to eliminate disparity in sentencing.<sup>194</sup> To do so, Congress attempted to reduce the role of the jury by creating a system in which the sentencing judge could enhance sentences based on facts found by the judge.<sup>195</sup> That much might have appeared to exalt the role of the judge. In fact, however, the sentencing guideline system in practice *forced* judges to enhance sentences.<sup>196</sup> Congress removed sentencing discretion from both the jury and the judge, a point Congress reinforced by adopting the Feeney amendment as an attempt to prevent downward departures.<sup>197</sup> Congress is attempting, as much as it is able, to control the sentencing process and to increase the likelihood and length of imprisonment.

The effect, if not the original goal, of sentencing reform has been to lengthen sentences.<sup>198</sup> Even if disparity were eliminated in federal sentencing, however, the system created by Congress has generated a greater disparity between sentences in federal and state courts for the same

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legislative concern about the proliferation” of crime).

192. See *id.* at 759-60 (Breyer, J., with Rehnquist, C.J., O'Connor, Kennedy & Ginsburg, JJ., constituting the majority as to the remedy).

193. See *id.* (Breyer, J., with Rehnquist, C.J., O'Connor, Kennedy & Ginsburg, JJ., constituting the majority as to the remedy).

194. See S. REP. NO. 98-225, at 38 (1983) (asserting that sentencing disparities can be traced directly to the considerable discretion the law affords judges and parole authorities). See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228-31 (1993) (providing that the sentencing guidelines were designed to minimize the “unwarranted disparity” in sentencing wrought by judges’ unchecked power to determine sentencing for criminal convictions).

195. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 328-30 (2003) (emphasizing that the advent of the federal sentencing guidelines replaced a sentencing system based on the “ideological or emotional dispositions” of judges or juries with a mechanical system based on mathematical “grids prepared in advance by the sentencing commissions”).

196. See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 190 (1991) (emphasizing that under the sentencing guidelines courts no longer retained the traditional ability to control the sentence imposed but rather must impose the sentence the prosecutor recommends provided that reliable evidence supports the facts).

197. See 149 CONG. REC. H2420 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney) (“[T]his amendment addresses long-standing and increasing problems of downward departures from the Federal sentencing guidelines.”).

198. See Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1 (reporting that the Feeney amendment has upset many judges, who argue that the amendment violates the separation of powers and forces judges to enhance sentencing).

crime.<sup>199</sup> That would be an acceptable disparity if federal prosecution reached only those offenses that primarily involved injury to a federal interest. As is well known, however, the expansion of federal criminal law has largely involved a duplication of state crimes.<sup>200</sup> As federal criminal law duplicates more state crimes, the potential for disparity clearly escalates. The disparity in sentencing between those prosecuted in federal versus state court for the same crime reflects the efforts of Congress and the DOJ to take away from state legislatures, judges, and juries control of the police power in their communities.<sup>201</sup>

The DOJ's intrusion into the Judiciary Committee to draft federal criminal law and sentencing policy should be seen as a clear violation of separation of powers. The Executive controls the enormous power of prosecution.<sup>202</sup> In addition, the Executive can advocate before Congress to pass laws to favor the policies it backs.<sup>203</sup> Also, federal prosecutors can present the judge with their views on the proper sentence for an individual defendant.<sup>204</sup> If, however, the DOJ was to "detail" one of its attorneys to a district judge to work as a law clerk, it would obviously be an outrageous violation of the criminal defendant's rights. One might debate whether such a situation would involve merely a conflict of interest or an actual violation of due process. Clearly, however, such a practice would violate separation of powers.

The fact that the DOJ details lawyers to work on the staff of the Senate Judiciary Committee may or may not strike one as equally outrageous. If the focus is due process, it may not seem to be outrageous because the attorney is working on legislation, not on decisions in individual cases. At

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199. See ABA TASK FORCE REPORT, *supra* note 2, at 27-30 (illustrating that the prison term imposed for a federal crime is likely, on average, to be longer than the prison term imposed for a similar state crime).

200. See *id.* at 7 (explaining that concerns over the increase in crime in the 1960s and 1970s pushed Congress to federalize criminal conduct that was previously left to exclusive state regulation).

201. See *id.* at 14-15 (postulating that Congress's justification for expanding federal criminal law arises not out of the states' structural inability to address the problem but rather because such federal regulation is "politically popular").

202. *But see* Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 796 (1987) (providing that in certain circumstances prosecutorial power is not limited exclusively to the Executive Branch).

203. See Andrew D. Goldstein, Note, *What Feeney Got Right: Why Courts of Appeals Should Review Sentencing Departures De Novo*, 113 YALE L.J. 1955, 1965 (2004) (commenting that Jamie Brown, the Acting Assistant Attorney General, in lobbying for the Feeney Amendment, had "vastly" overstated many of the concerns of downward departures on which the Feeney Amendment was based); see also Wray Statement, *supra* note 165, at 1 (urging Congress, on behalf of the executive branch, to adopt legislation that will minimize disparity in the federal sentencing system).

204. See Heaney, *supra*, note 196, at 190 (underscoring that "[t]he prosecutor's control over the ultimate sentence increases the prosecutor's bargaining power in the plea negotiations").

least the proposed OPM regulations recognize the potential for conflicts of interest and the separation of powers issues.<sup>205</sup> The proposed regulations, however, would not prevent the practice. Detailing DOJ attorneys to the Senate Judiciary Committee, where they draft federal criminal legislation, is no different in terms of *separation of powers* from detailing DOJ lawyers to a federal district judge, where they would draft opinions for the judge. The fact that the former does not excite outrage as much as the latter (and why the latter would not occur) reflects that lawyers have been well-educated in matters of due process but not in the principle of separation of powers.

As the *Federalist* warned, the Congress represents the most serious threat to liberty under a democratic form of government.<sup>206</sup> In practice, the only effective means of preserving separation of powers and, therefore, liberty “consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist the encroachments of the others.”<sup>207</sup> The federal judiciary certainly has the motives to enforce separation of powers by separating DOJ lawyers from the staff of the Senate Judiciary Committee. Consistent with the “case and controversy” limitation of Article II, however, the judiciary must await the properly presented case.

#### CONCLUSION

As demonstrated by the ABA Task Force Report and the *Federalist* Report, federal criminal law has undergone a great expansion. Regardless of whether this expansion actually benefits the public, it carries political benefits for members of Congress and the Executive Branch. Naturally, the two political branches will not voluntarily forego those benefits. It is precisely when these two branches join together to violate separation of powers that the federal judiciary should, in appropriately presented cases, enforce that fundamental constitutional protection of liberty. This Article offers three possible strategies which might be employed in the appropriate cases. First, defense attorneys might more often employ as-applied constitutional challenges to federal crimes even if they have been held to be facially constitutional. Then, in ruling on federalism challenges to federal crimes, federal judges might find that such challenges can also be explained in terms of separation of powers as an unconstitutional expansion of federal court jurisdiction. Finally, someone with constitutional standing

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205. See *supra* note 174 and accompanying text (highlighting the distinct separation of powers problems raised by the practice of detailing).

206. THE FEDERALIST NO. 48, at 334 (James Madison, John Jay, Alexander Hamilton, writing as “Publius”) (Jacob Cooke ed. 1961).

207. THE FEDERALIST NO. 51, at 246.

might decide to challenge the practice of detailing Justice Department attorneys to the Senate Judiciary Committee. Success with one or more of these three strategies could have some impact on the relentless expansion of federal crimes.