
CRIMINAL LAW & PROCEDURE

PROJECT SAFE NEIGHBORHOODS AND FAIR-WEATHER FEDERALISM:

“SAVING” THE SECOND AMENDMENT BY UNDERMINING THE TENTH

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Gun rights supporters in the Bush Administration and Congress are currently engaged in a dubious tradeoff: to save the Second Amendment, they’ve decided to undermine the Tenth. For two years running, Congress has appropriated funds for the centerpiece of the Bush crime-control agenda, Project Safe Neighborhoods (PSN), which is designed to ward off calls for additional gun control by ramping up enforcement of the gun laws already on the books.

PSN is a cautionary tale, a lesson in how a clever soundbite can lead to disastrous public policy. In this case the soundbite, heard often from candidate Bush on the Election 2000 campaign trail, is “we don’t need any new gun control laws; we need to enforce the gun laws on the books.” The public-policy disaster is PSN, a half a billion dollar effort to increase prosecutions for unlawful gun possession. Under PSN, gun crimes that would ordinarily be prosecuted at the state level—such as possession of a handgun by a felon or drug user—are increasingly channeled into the federal system. In addition to federalizing gun crimes, PSN acts as a prosecution-stimulus package, funding the placement of more than 700 new prosecutors (over 200 federal, 600 state) who will pursue gun law violations full-time.

What’s wrong with enforcing the gun laws on the books? Several things, actually. First, most of the federal gun laws on the books ought not to be there in the first place. They’re based on an overbroad view of Congress’s authority under the Commerce Clause, and politicians given to invoking the Tenth Amendment on the campaign trail have no business flagrantly violating that amendment upon taking office. Second, the program will likely lead to a mindless “zero tolerance” policy for technical infractions of gun laws, by hiring prosecutors whose sole responsibility is to enforce a narrow slice of the criminal code. Third, PSN threatens to open a Pandora’s box leading to further politicization and centralization of law enforcement priorities. Finally, even if one could sanction the constitutional violations and threats to the rule of law inherent in the program’s structure, PSN does not even do what it promises—it does not reduce crime. If the G.O.P. wants to be the party of federalism, it needs to defund Project Safe Neighborhoods.

Criminal Law in the Constitutional Design

Speaking before the National Governors’ Association shortly after taking office, President Bush declared:

I’m going to make respect for federalism a priority in this administration. Respect for federalism begins with an understanding of its philosophy. The framers of the Constitution did not believe in an all-

knowing, all-powerful federal government. They believed that our freedom is best preserved when power is dispersed. That is why they limited and enumerated the federal government’s powers and reserved the remaining functions of government to the states.¹

But PSN is utterly inconsistent with the “respect for federalism” that President Bush professes to hold. As he acknowledged in his remarks before the National Governors’ Association, the only powers the federal government has are those that have been delegated to it by the people and enumerated in the Constitution. All other powers are, as the Tenth Amendment confirms, “reserved to the states respectively, or to the people.”

In the area of criminal law, the Constitution provides the federal government with an exceedingly slender grant of authority over criminal matters. There are three specifically enumerated federal crimes—counterfeiting (Art. I, sec. 8, cl. 6); piracy (Art. I, sec. 8, cl. 10), and treason (Art. III, sec. 3, cl. 2)—and two general founts of federal criminal authority: Congress’s power to punish “offenses against the law of nations” (Art. I, sec. 8, cl. 6) and its power to “make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers” (Art. I, sec. 8, cl. 18).

The records of the Constitutional Convention debates indicate that this limited federal role was by design. At the Philadelphia Convention, discussion of criminal law issues focused almost exclusively on treason, piracy, counterfeiting, and offenses against the law of nations.² Federal criminal authority, like federal authority in general, was to be directed in the main toward affairs of state and international relations, as well as protecting the federal government and its interests. Ordinary criminal law, all agreed, was the province of the states. Alexander Hamilton argued that this would help the states maintain the affections of the citizenry, and resist encroachments by the federal government:

There is one transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in a clear and satisfactory light. I mean the ordinary administration of criminal and civil justice.³

An Affront to Federalism

Despite President Bush’s professed “respect for federalism,” his main crime-control initiative flies in the face of the Framers’ constitutional vision. By employing federal gun-possession statutes that rest on an overbroad conception of the Commerce Power, PSN threatens to make the ordinary administration of criminal justice a federal responsibility.

More than one federal court has recognized the dangers inherent in federalizing prosecution of firearms offenses. In the 1999 case *U.S. v. Jones*, a three-judge panel in the federal district court for the Eastern District of Virginia, Richmond Division, assailed Project Exile, the prototype for President Bush's PSN. Like PSN, Project Exile was based on channeling firearms cases into the federal system. The *Jones* Court noted that this strategy represented "a substantial federal incursion into a sovereign state's area of authority and responsibility."⁴ District judge Robert E. Payne struck a similar note in *U.S. v. Nathan* (1998): "[T]he federal government has embarked upon a major incursion into the sovereignty of Virginia." According to Judge Payne, the "risk of attenuating the Tenth Amendment" is present even in Project Exile in its current (voluntary) form. Moreover, "carried to its logical extreme [the argument for Exile] would make federal officers responsible for prosecuting all serious crimes in federal courts. Were that the case, we soon would have a federal police force with the attendant risk of the loss of liberty which that presents."⁵

Indeed, the Bush administration, with its embrace of the Exile model, seems bent on obliterating the distinction between what is properly local and properly national. One of the initiatives under the PSN umbrella is Project Sentry, which Attorney General Ashcroft describes as "a vital federal-state project dedicated to prosecuting gun crimes committed at our nation's schools and dedicated to protecting juveniles from gun crime."⁶ Under Project Sentry, the Justice Department will provide every U.S. attorney's office with a new prosecutor to combat "school-related gun violence."⁷ A more brazen affront to the spirit of *U.S. v. Lopez*, the historic 1995 Supreme Court decision striking down the Gun-Free School Zones Act, could hardly be imagined. In that case, Congress's attempt to make a federal crime out of gun possession in the vicinity of a school was held beyond the scope of the Commerce Power. The Court noted that, under the government's theory of the case, "It is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."⁸ But limitations on federal power and respect for the historic role of the states don't seem to be in vogue in the Bush Administration these days.⁹

Assembly-Line Justice

PSN also threatens to further erode prosecutorial discretion, and lead to a mindless, zero-tolerance approach towards marginal offenders. Unlike an ordinary prosecutor, whose bailiwick covers the gamut of criminal law, a Safe Neighborhoods prosecutor is limited to only one category of criminal charges. Where other prosecutors are able to shift their focus to other categories of crime once they've charged the most dangerous and deserving defendants in a given category of offense, Safe Neighborhoods prosecutors will have no other choice but to continue prosecuting violations of gun laws. Their incentive will be to keep focusing on the numbers—to continue producing indictments and convic-

tions regardless of desert. This incentive threatens to result in assembly-line justice and overenforcement. The incentive structure that Safe Neighborhoods sets up will lead to the proliferation of "garbage" gun charges—technical violations of firearms statutes that no rational justice system would expend much effort on; worse, Safe Neighborhoods will likely result in federal and state governments' locking up firearms owners who do not deserve to be in jail.

Federal prosecutors already operate under an incentive structure that forces them to focus on the statistical "bottom line." Statistics on arrests and convictions are the Justice Department's bread and butter. As George Washington University Law School professor Jonathan Turley puts it, "In some ways, the Justice Department continues to operate under the body count approach in Vietnam... They feel a need to produce a body count to Congress to justify past appropriations and secure future increases."¹⁰

That "body count" mentality may help explain federal firearms prosecutions like the case of Katica Crippen, a Colorado woman who was convicted under the felon-in-possession statutes for posing nude on the Internet with a gun. Ms. Crippen was arrested when federal authorities came into the possession of seven nude photos of her in various poses, holding a firearm. Her prior drug convictions made her a felon-in-possession under federal law, and prosecutor James Allison brought the full force of the federal government down on her.

Judge Richard Matsch, who presided over the Timothy McVeigh trial, was outraged at the waste of federal resources and Allison's apparent lack of a sense of proportion. "How far is this policy of locking people up with guns going to go?" he demanded, "I want to know why this is a federal case. Who decided this is a federal crime?"

Indeed, it appears that Project Exile, the prototype for PSN, has already encouraged skewed priorities on the part of prosecutors. As federal judge Richard L. Williams commented of Richmond's Project Exile, "Ninety percent of these [Exile] defendants are probably no danger to society."¹¹

More disturbing still is the prospect that PSN may result in some appalling miscarriages of justice. Even before PSN, overzealous federal prosecutors have taken extraordinarily punitive approaches toward marginal offenders.

One such case is worth studying in some detail: Michael Mahoney, a Tennessee businessman, is currently serving a 15-year term in federal prison as the result of a minor handgun offense. As the owner of the Hard Rack Pool Hall in Jackson, Tennessee, Mahoney had to make nightly cash deposits at his local bank. He carried a .22-caliber Der-ringer for personal protection while he did so. When Mahoney's pistol was stolen in 1992, he bought another one at a pawnshop, filling out the background-check form required by federal law. The problem for Mr. Mahoney was that 13 years earlier, he had been convicted of selling meth-amphetamine to an undercover police officer three times during the course of a three-week investigation. After the conviction, for which he served 22 months in prison, Mahoney cleaned up his act and became a law-abiding citizen. In

1991, he underwent an extensive background check to get a liquor license; because he had stayed out of trouble for over 10 years, the license was granted. Mahoney, wrongly assuming that his lone felony conviction had also been wiped clean with regard to his gun rights, marked down that he was not a felon on the federal background check form for gun purchases. A BATF investigation resulted in Mahoney's indictment as a convicted felon in possession of a firearm as a result of buying the Derringer in 1991. Under federal mandatory minimum sentencing rules, Mahoney's three drug sales during the 1980 investigation were treated as three separate offenses, making Mahoney a career criminal, and earning him a minimum sentence of 180 months. Though U.S. District Judge James D. Todd protested that Mahoney's was "not the kind of case that Congress had in mind," his hands were tied by federal law, and he had no choice but to put Mahoney away for 15 years.¹² Safe Neighborhoods promises to put over 800 full-time gun prosecutors to work. Add to this the fact that a job as a full-time gun prosecutor is likely to appeal disproportionately to attorneys with an ideological hostility towards gun ownership, and PSN begins to sound like something dreamed up by Sarah Brady herself.¹³ As the program is implemented, expect more Michael Mahoneys to go down.¹⁴

Opening the Floodgates

Project Safe Neighborhoods offers an elegantly simple design for federal crimefighting: in the Safe Neighborhoods model, Congress picks a category of criminal offenses, then funds prosecutors at the federal and state level who do nothing but prosecute those offenses full-time. Elegant though this design is, it is dangerous both to federalism and the rule of law.

Do the Republican conservatives who helped enact PSN really want that program to become the model for federal anticrime initiatives in the future? If it does, it's difficult to see any stopping point to the politicization of federal crime policy. The program stands as an open invitation for special interest groups to push their own prosecution-stimulus initiatives. Are hate crimes your pet issue? Well, don't stop with the passage of a federal hate-crimes act—push for several hundred new federal and state prosecutors dedicated to bringing hate-crime indictments. The same method will work with sexual assault offenses. (*U.S. v. Morrison*, which struck down provisions of the Violence Against Women Act, establishes the unconstitutionality of federal legislation criminalizing rape and sexual assault. But it doesn't stand in the way of federal funds to hire full-time state-level sexcrime prosecutors.) Nor is there anything to stop child welfare advocates from promoting the funding of several hundred full-time state-level child-abuse prosecutors. In the past, conservatives have expressed serious concerns about whether overzealous prosecutors have repeatedly gotten swept up in the emotional nature of the child abuse issue and ended up incarcerating innocent people; federal subsidization of such prosecutions

would only increase that risk.¹⁵ But does anyone seriously expect more than a handful of Republican legislators to risk incurring the charge of being "soft on child abuse"?

The Republicans who backed PSN as a means of forestalling new gun-control legislation have been too clever by half. The principle they've endorsed not only runs roughshod over the idea that the states ought to be able to set their own prosecutorial priorities, it fairly begs for those priorities to be set by the most vocal and powerful interest groups in Washington.

Does It Work?

What are the likely effects of PSN on violent crime? What benefits do we get in exchange for weakening our federal structure and undermining the rule of law?

Not much, as it turns out. PSN has been dramatically oversold by politicians and political activists who see in it a means of warding off restrictive gun control legislation. First of all, the legal tools available to state prosecutors pursuing armed felons are, in many cases, essentially the same as those available to federal prosecutors. Second, there is very little evidence that Project Exile, the model for PSN, has been the impetus for any dramatic reduction in crime in any city where it's been implemented.

In *U.S. v. Jones*, a panel of three federal judges (E.D. Va) examined Richmond's experience with Project Exile, and concluded that Exile was superfluous, given that "the Commonwealth of Virginia possesses the same institutional mechanisms necessary to combat the problems Project Exile abdicates to federal prosecutors." According to the Court, the Virginia state statutes governing handgun crime are substantially similar to those at the federal level, and that in some cases Virginia law provides for harsher penalties for firearms offenses.

As for the efficacy of the program PSN is based on, the best available evidence says that Project Exile did little, if anything to reduce crime. Professors Jens Ludwig of Georgetown University and Steven Raphael of the University of California, Berkeley performed a comprehensive statistical analysis of Project Exile's effects on crime, in a study to be published in the forthcoming Brookings Institution book *Evaluating Gun Policy: Effects on Crime and Violence*. According to the study: "the decline in Richmond gun homicide rates surrounding the implementation of Project Exile was not unusual and... the observed decrease would have been likely to occur even in the absence of the program." As Ludwig puts it, federalizing gun crimes was "no magic cure."

Even if PSN had the dramatic impact on crime that its most ardent supporters argue it does, its affront to the Constitution and the rule of law would compel constitutionalists to oppose its expansion. But PSN's supporters have failed to produce any compelling evidence that the program significantly reduces violent crime. Given the costs federalization brings, that's a failure that should end the debate.

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Footnotes

¹ “Remarks by the President at National Governors’ Association Meeting,” *U.S. Newswire*, February 26, 2001.

² See generally Adam H. Kurland, “First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction,” *Emory L.J.* 45 (Winter 1996).

³ Federalist No. 17, in *Id.*

⁴ *U.S. v. Jones*, 36 F. Supp. 2d, 304, 316 (E.D. Va. 1999).

⁵ *U.S. v. Nathan*, 1998 U.S. Dist. LEXIS 15124 at *30 (E.D. Va. 1998).

⁶ Attorney General Transcript, News Conference – Gun Initiative/NICS, February 13, 2002, available at <http://www.usdoj.gov/ag/speeches/2002/021302newsconferenceguninitiativenics.htm>.

⁷ Jerry Seper, “Justice Takes Aim at Illegal Gun Possession,” *Washington Times*, February 14, 2002.

⁸ *Lopez*, 514 U.S. at 564

⁹ Federal prosecutions under Project Sentry will likely be conducted under 18 USC § 922(q), the revamped Gun-Free School Zones Act enacted in the wake of *Lopez*. (Public Law 104-208, signed by President Clinton on September 30, 1996). That act could be considered constitutional only under the narrowest possible reading of *Lopez*.

¹⁰ Mark Fazlollah and Peter Nicholas, “U.S. Overstates Arrests in Terrorism,” *Philadelphia Inquirer*, December 16, 2001.

¹¹ Heinzl, *supra* note 5

¹² Gary Fields, “‘Career Felons’ Feel the Long Arm of Gun Laws,” *Wall Street Journal*, July 3, 2001, p. A16.

¹³ For examples of the kinds of prosecutions that ideologically-driven prosecutors might bring, see, e.g., Guy Taylor, “Self-Defense Stance Defended on Web in Burglar Death,” *Washington Times*, December 17, 2001, p. B1, detailing the state level prosecution, for first-degree murder and various gun charges, of two Maryland men who shot a burglar in self defense. As the state’s attorney prosecuting the case explained, “We have a comprehensive strategy in Baltimore for dealing with crimes with guns and reducing gun violence... the killing of Mr. Walker was not a typical street crime, but it is a crime that needs to be prosecuted.” See also Tom Schoenberg, “Does Punishment Fit the Crime? He Turned in Gun, Now Faces Deportation,” *Legal Times*, January 24, 2000, p. 1, describing the prosecution, by the District of Columbia U.S. Attorney’s office, of one Elwyn Lehman. Lehman, the driver of the tour bus for gospel singer CeCe Winans, brought the singer to the White House for a special tour. The 53-year-old driver had a handgun on board, but only realized this once he was at the gates of the White House. Lehman told the Secret Service officers about the pistol and voluntarily turned it over to them. He was rewarded with a trip to D.C. Jail and charged with three counts of weapons possession. Lehman, a Canadian citizen who had been living in the United States for the past 15 years, also faced deportation. As the spokesman for the D.C. U.S. Attorney’s office explained, “because the District of Columbia, which has one of the strictest gun laws in the country, continues to be plagued by an alarmingly high rate of gun violence, the U.S. attorney’s office has long had a no drop and zero tolerance policy regarding persons found in illegal possession of firearms.”

¹⁴ The incentives set up by PSN may well place Safe Neighborhoods prosecutors in an uncomfortable ethical bind. In some cases, a prosecutor has an ethical obligation to decline to prosecute when circumstances warrant it. The A.B.A. Standards state that “the prosecutor is not obliged to present all charges which the evidence might support.” Among the factors which the prosecutor should consider in declining to prosecute are “the extent of the harm caused by the offense” and “the disproportion of the authorized punishment in relation to the particular offense or the offender.” Will Safe Neighborhoods prosecutors be able to fulfill this ethical obligation?

¹⁵ See, e.g., Dorothy Rabinowitz, “Only in Massachusetts,” *Wall Street Journal*, December 29, 1999, P. A14; Dorothy Rabinowitz, “The Pursuit of Justice, Continued,” *Wall Street Journal*, October 7, 1999, P. A30.