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Renee M. Landers

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Introduction

In a letter dated March 19, 1993, J. Clifford Wallace, the Chief Judge of the United States Court of Appeals for the Ninth Circuit, wrote to Chief Justice William H. Rehnquist, Attorney General Janet Reno, Senator Joseph R. Biden, Jr., then-chair of the Senate Judiciary Committee, and Congressman Jack Brooks, then-chair of the House Judiciary Committee. Judge Wallace urged three-branch cooperation in addressing the problems resulting from the "dramatic growth in the federal caseload" caused by the enactment of "a host of new federal criminal statutes and civil claims." These new statutes have involved the federal courts in handling cases that "at one time would have been handled by state courts." Judge Wallace analyzed the problems and possible solutions, concluding that "[t]he only way to achieve long-
term solutions is to develop a procedure to evaluate new federal law and its impact on the federal court system. The first step is to develop the mission of the federal courts . . . . In other words, we must somehow develop a method to prioritize the types of cases that are to come before the federal courts."2 He proposed that a three-branch conference would be an adequate and effective vehicle for the purpose of establishing a mission for the federal courts.3

Attorney General Reno agreed that a three-branch discussion would be a valuable vehicle for establishing a common ground among the branches on the mission of the federal judiciary and for sharpening the issues raised by legislation expanding the jurisdiction of the federal courts. The Attorney General convened "Overlapping and Separate Spheres: A Three-Branch Roundtable on State and Federal Jurisdiction" on March 7, 1994, to explore the role the federal courts should appropriately play in the United States justice system, along with the practical and theoretical considerations involved when Congress decides to expand federal civil and criminal jurisdiction into areas previously occupied by state law. In addition, the Three-Branch Roundtable explored mechanisms for federal-state cooperation in areas of the law where overlapping federal and state jurisdiction had evolved over time. The Three-Branch Roundtable also reflected the Attorney General's view that the practical and theoretical issues raised by federalization of state law could not be meaningfully explored by conversation among only the federal actors. State justice systems would also bear the effects of any attempts to limit the role of the federal courts and law enforcement agencies and to give responsibility for addressing new criminal and civil law issues to the states. As a result, the participants in the Three-Branch Roundtable included representatives of the three branches of state and local governments concerned with the justice system, as well as representatives of the three branches of the federal government.4

The Working Group Reports presented here have been prepared by the Reporters for each group with review and comment by the Working Group members. These Reports are works in progress and are not intended to provide any definitive positions on, or resolution of, the issues raised by the federalization of state law. Rather, it is hoped that these Reports of the proceedings of the 1994 Three-

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2. Id. at 5.
3. Id. at 7.
Branch Roundtable will contribute to the energetic dialogue concerning the issue of federalization reflected in the attention accorded the issue since the Roundtable by organizations such as the American Law Institute,5 the Association of American Law Schools,6 and the Committee on Long Range Planning of the Judicial Conference of the United States.7 In addition, the Three-Branch Roundtable participants hope that publication of these Reports will engender more comment and dialogue that will help in the formulation and execution of public policy as the spheres of federal and state jurisdiction become less differentiated.

In fact, the Attorney General is already considering various options for continuing with the work already underway. Finally, these Reports reflect the Reporters' own thinking on the issues and the Reporters' efforts to distill the comments of the participants in the March 1994 Roundtable and the suggestions of the members of the Working Groups. These Reports do not necessarily represent the views of the Administration, the Department of Justice, or any of the members of the separate Working Groups.

I. Laying the Foundation for the Dialogue

The substantive discussion of the Three-Branch Roundtable began with a presentation by Professor Kathleen Sullivan of Stanford Law School. Professor Sullivan established a common information base for the participants by providing a brief history of federalization, a description of the current crisis of excessive federalization of the administration of criminal and civil justice, and a suggested set of possible principles by which the appropriate realms of state and federal jurisdiction could be distinguished.8

Professor Sullivan noted that federalization was not an issue confronting the nation for the first time. She identified three major feder-

5. Deputy Attorney General Jamie S. Gorelick, Luncheon Address to the American Law Institute (May 20, 1994) (addressing Department of Justice views on, and responses to, federalization concerns).
7. See PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 29-31 (Mar. 1995) (containing recommendations for defining and maintaining a limited federal jurisdiction in criminal and civil matters).
alization events in the history of the United States. The first such event was the adoption and ratification of the Constitution.\textsuperscript{9} She described the Constitution as a "federalizing document, . . . designed to secure a strong enough national government" to manage a national economy.\textsuperscript{10} Another factor motivating the centralization embodied in the document was a "distrust of state parochialism or factionalism"—a factor which Professor Sullivan identified as influencing some contemporary moves to federalize.\textsuperscript{11}

The Reconstruction constituted the second great federalization event. Professor Sullivan defined the "Reconstruction" as "the set of constitutional amendments and enforcing legislation that so fundamentally restructured federal-state relations in the aftermath of the Civil War."\textsuperscript{12} Although congressional attempts to enforce civil rights based on the Thirteenth, Fourteenth, and Fifteenth Amendments were not upheld by the Supreme Court, these three amendments signaled a permanent redistribution of power from the states to the federal government.\textsuperscript{13} The Commerce Clause served as the foundation for the great civil rights legislation adopted in this century because of restrictive interpretations of the Reconstruction Amendments rendered by the United States Supreme Court during the nineteenth century.\textsuperscript{14}

The Commerce Clause also served as the vehicle for the third great federalization event in the nation's history—the great expansion of federal social and economic power during the New Deal.\textsuperscript{15} This expansion of regulation launched the development of the administrative state and the federal government's power over national life.\textsuperscript{16}

Professor Sullivan noted that a crucial factor in the expansion of federal power accomplished during the New Deal was the acquiescence by the United States Supreme Court to this expansion of commerce power. Through a series of cases beginning in 1937, the Supreme Court demonstrated that it will not stand in the way of Congress when Congress regulates any economic activity having a colorable or conceivable effect on interstate commerce.\textsuperscript{17}

\textsuperscript{9} Roundtable Transcript at 11.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id. See Slaughter-House Cases, 83 U.S. 36 (1873).
\textsuperscript{15} Id. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942); Katzenbach v. McClung, 379 U.S. 294 (1964).
\textsuperscript{16} See also Perez v. United States, 402 U.S. 146 (1971).
After identifying these federalization events, Professor Sullivan noted that every part of the federal government and the states can share responsibility for federalization of state law. The states helped move a great deal of power to the federal government by ratifying the Constitution in 1789.\textsuperscript{18} Congress, as the historical record demonstrates, can federalize by legislation by invoking commerce power or exercising the spending power.\textsuperscript{19} Professor Sullivan pointed out that the executive branch, through its enforcement discretion, may choose to play a more or less active role in the regulation of activities.\textsuperscript{20} "[O]ne of the greatest engines for the federalization of power in America has been the incorporation, by judicial interpretation of the Fourteenth Amendment due process clause," of most of the Bill of Rights, and application of the substantive provisions of the Bill of Rights to limit the exercise of state power.\textsuperscript{21}

Professor Sullivan then described the contours of the current discussions of the problem of federalization. She attributed the "current crisis in federalization" to the problem of the federalization of crime and criminal jurisdiction.\textsuperscript{22} To establish the historical context for the current debate, she reminded participants that the Constitution named only three types of crime: counterfeiting of the securities or coin of the United States, Article I, section 8, cl. 2; piracies and felonies on the high seas or offenses against the law of nations, Article I, section 8, cl. 10; and treason, Article III, section 3.\textsuperscript{23} Today, by some counts, there are more than 3,000 federal crimes. This expansion has been fueled by the Commerce Clause.\textsuperscript{24} The number of federal crimes, without more, she observed, does not create a crisis in federal jurisdiction.

Professor Sullivan then summarized familiar statistics showing the impact of the federalization of criminal law on the dockets of federal court judges.\textsuperscript{25} Professor Sullivan also noted that the time spent

\begin{itemize}
\item \textsuperscript{18} Roundtable Transcript at 14.
\item \textsuperscript{19} Roundtable Transcript at 14-15.
\item \textsuperscript{20} Roundtable Transcript at 15.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Roundtable Transcript at 16.
\item \textsuperscript{25} Roundtable Transcript at 17-18. The impact of federalization of the criminal and civil dockets of the federal courts is discussed in detail in the two Working Group Reports on issues raised by federalization of civil and criminal matters.
\end{itemize}
on criminal cases was much greater than the proportion of federal cases on the docket.\textsuperscript{26} She attributed this increase in the criminal caseload and the increase in the amount of time occupied by criminal cases to several factors: the increase in federal law enforcement activity, resulting from the war on drugs; mandatory minimum sentences imposed for drug crimes; the imposition of mandatory minimum sentences for other new federal crimes; the increase in time spent on sentencing by district courts and courts of appeals using the sentencing guidelines; the creation of new federal crimes such as establishing penalties for failure to pay child support and carjacking.\textsuperscript{27} This increase in time spent on criminal matters has a deleterious effect on the ability of federal courts to give appropriate time to civil matters.\textsuperscript{28}

Professor Sullivan suggested that there are procedural and substantive responses to the problems the federal courts are experiencing as a result of federalization. Procedural solutions include emphasizing better case management and the greater use of alternative dispute resolution mechanisms, increasing the size of the federal judiciary, or creating more specialized courts.\textsuperscript{29} Substantively, the relevant governmental actors could review whether the allocation of federal and state jurisdiction is correct.\textsuperscript{30}

She then suggested four bases on which all might conclude that the federal government is superior to, or has a comparative advantage over, the states in prosecuting crime, administering civil justice, and protecting civil rights.\textsuperscript{31} First, she proposed that the "federal government may be preferable to state government where the federal sovereign is involved, where the United States or a foreign national is a party," or where there is a dispute involving the powers of the branches of the federal government.\textsuperscript{32} A second reason for preferring federal to state jurisdiction is efficiency-based, using federal jurisdiction to achieve economies of scale and to achieve interstate jurisdiction.\textsuperscript{33} Third, federal jurisdiction might be preferred where uniformity in interpretation of federal statutes is an important value, such as in the antitrust, securities, and bankruptcy areas.\textsuperscript{34} Finally, in areas

\begin{itemize}
\item \textsuperscript{26} Roundtable Transcript at 18.
\item \textsuperscript{27} Roundtable Transcript at 18-20.
\item \textsuperscript{28} Roundtable Transcript at 19.
\item \textsuperscript{29} Roundtable Transcript at 20.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Roundtable Transcript at 20-21.
\item \textsuperscript{32} Roundtable Transcript at 21.
\item \textsuperscript{33} Roundtable Transcript at 21-22.
\item \textsuperscript{34} Roundtable Transcript at 22.
\end{itemize}
where the states cannot be trusted, federal jurisdiction might also be highly desirable. Dormant Commerce Clause jurisdiction and diversity jurisdiction are typically supported by the need to protect outsiders from state parochialism or protectionism. Federal civil rights jurisdiction is justified by the perceived need to protect minorities from the tyranny of local majorities. Professor Sullivan closed by noting that these four bases for federalization do not threaten federalism because some liberties and values are too important to be subject to state experimentation and diversity of treatment and these things must be centralized.

II. Views of Conference Participants on the Impact of Federalization on the Justice System and the Mission of the Federal Courts

A. Impact of Federalization on the Justice System

Following Professor Sullivan's keynote remarks, Assistant Attorney General Eleanor Acheson moderated the first discussion among conference participants on the impact of federalization of criminal and civil law on the justice system. The purpose of this discussion was to identify the benefits and disadvantages of federalization to inform the later discussion of the mission of the federal courts, and to identify principles for allocating responsibility between state and federal systems.

Ms. Acheson introduced the topic by asking the Roundtable participants to address whether the interests of both the state and federal justice systems "are being materially and adversely affected" by federalization. She also invited participants to consider whether concerns about federalization could be addressed by assigning additional resources to the justice system in the form of greater numbers of prosecutors and judges who are paid higher salaries and in the form of far greater prison capacity. The answers to these questions, she suggested, would help the group to evaluate whether the American peo-

35. Roundtable Transcript at 22-23.
36. Id.
37. Roundtable Transcript at 23.
38. Roundtable Transcript at 23-24 (relying on dissenting opinion of Justice Brandeis in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), regarding the limits on the value of using states as laboratories of experimentation).
40. Roundtable Transcript at 25.
41. Roundtable Transcript at 26-27.
42. Id.
ple are being served in a way that makes sense given the federal system. She invited Judge Stanley Marcus of the Federal District Court for the Southern District of Florida, who has spoken and written widely on the topic of federalization to begin the discussion.

Judge Marcus began his comments by noting that “defining the nature and extent of federal jurisdiction” is “obviously a political question for the political branches of government to answer.” Judge Marcus then defined the practical aspect of what constitutes federal jurisdiction by analyzing how the Federal District Court for the Southern District of Florida allocated its time in 1992. In 1992, he noted, the district judges spent eighty-four percent of trial time trying criminal cases. Looking at the average over ten years, the judges spent approximately sixty percent of their time trying criminal cases and forty percent, civil matters.

In analyzing the basis for this change in allocation of resources between criminal and civil cases, he noted increases in the number of drug cases, complex international cartel cases, conspiracy cases, and money laundering cases. He stated that most would agree that these cases are properly placed within the federal system. A second factor contributing to the change is the increase in the prosecution and trial of violent felonies. He cited the Armed Career Criminal Statute as the basis for many of these prosecutions. Given the substantial caseload of civil rights, Title VII, admiralty, diversity, antitrust, securities, and other civil cases in the district, he suggested that it was insufficient for the court to have spent only sixteen percent of its time on civil matters and that there was a disproportionate expenditure of time on criminal matters.

43. Roundtable Transcript at 27.
44. Id.
45. Id.
46. Roundtable Transcript at 28.
47. Roundtable Transcript at 29.
48. Id.
49. Id.
50. Id.
51. Id.
52. Roundtable Transcript at 30. The Armed Career Criminal Act subjects any person who ships, transports, or receives firearms or ammunition in interstate or foreign commerce and has three prior convictions for violent felonies or serious drug offenses (as defined in the statute) committed on separate occasions, to a fine of not more than $25,000 and a period of imprisonment of no less than fifteen years. The statute also forbids the sentencing court from suspending the sentence of, or granting probation to, any such persons. 18 U.S.C. § 924 (1995).
Judge Marcus then attempted to address the issue of what types of cases the federal system was designed to handle. He observed that most would agree that the national sovereign had a right to have its cases heard in its courts. In this category, he included crimes against the sovereign itself, against the Treasury, and against its officers. Second, he thought there would be wide agreement that crimes involving an interstate or international dimension belong in the federal system. A third category of intrastate criminal cases having a scope so great that there might be a need for federal resources might also present a basis for the exercise of concurrent federal jurisdiction. The area of enforcing and protecting the rights of insular minorities is a fourth area where the federal government has had a powerful and historical interest. A fifth and last area is where there is an unusual problem of systemic or pervasive corruption in a local system requiring federal resources.

Judge Marcus noted that it was easy to generate broad agreement on such abstract principles, but that concrete questions such as what to do about violent crime, which kinds of violent crime belong in the federal system, and how to handle the question of concurrent jurisdiction in the area of narcotic enforcement fracture the abstract consensus. He noted that for a long period, the traditional notion has been that crimes against persons and property were to be handled in state and local systems.

In suggesting some "practical" answers to these questions, Judge Marcus noted that today approximately ninety-five percent of the serious violent felonies are prosecuted in state court systems and questioned the wisdom and practicality, given traditional notions of federalism, of moving huge numbers of these cases from the state systems into the federal systems. He cited as an example a recent federal prosecution in Miami under the Armed Career Criminal Statute where an essentially local crime was prosecuted in federal court because of the availability of a speedy disposition of the case and the

53. Id.
54. Roundtable Transcript at 31.
55. Id.
56. Id.
57. Roundtable Transcript at 32.
58. Id.
59. Roundtable Transcript at 32-33.
60. Id.
61. Roundtable Transcript at 33.
62. Roundtable Transcript at 34.
much more substantial penalty available under the federal statute. While confessing that, as the United States Attorney, he did the same type of thing, Judge Marcus noted that only a very small percentage of cases involving violent crime could easily be moved from the states to the federal judicial system in its present form and size. Given the limited numerical impact achievable by moving only a very small percentage of cases from the states to the federal system, even if the number of cases were to be doubled, he viewed as "debatable" how marked the effect would be on patterns of crime. However, a doubling of federal criminal prosecutions would have, he concluded, a profound effect on the capacity of the federal trial and appellate courts to handle the increased volume. The impact on the court docket, in particular, would be great. The nature of the federal system would change "markedly" as a result. While acknowledging that these cases are important, Judge Marcus suggested that there are critical issues and critical principles that historically have held the federal courts to be courts of limited and special jurisdiction. Judge Marcus concluded by stating that the present is a watershed time in the history of the federal courts and that discussions of this type are critically important for exploring principled reasons for allocating jurisdiction among the state and federal systems.

In inviting Senator Biden's comments, Ms. Acheson asked him to consider especially whether the creation of new federally enforceable rights should be treated the same as federalizing existing state rights. Also, Senator Biden was asked to consider whether the governmental actors have effectively educated the public about the realities of dealing with violent crime and the impact of federalizing crime on the federal court system as described by Judge Marcus.

Senator Biden began his comments by stating that he thought it possible to arrive at a principled rationale for federal jurisdiction. He argued that the focus of the federal bench was being skewed toward criminal matters and described this skewing as a "dangerous de-

63. Roundtable Transcript at 35.
64. Roundtable Transcript at 35-36.
65. Roundtable Transcript at 36.
66. Roundtable Transcript at 36-37.
67. Roundtable Transcript at 37.
68. Id.
69. Id.
70. Roundtable Transcript at 37-38.
73. Roundtable Transcript at 39-40.
velopment.” Senator Biden offered his view that the nature of crime—whether it is violent—should not have anything to do with the determination of whether federal jurisdiction is appropriate. He noted that the basic Crime Bill, under consideration in the Congress, did not create federal jurisdiction based on any other than the principled reasons articulated by Professor Sullivan, mentioned by Judge Marcus, and detailed in a speech Senator Biden gave to the Third Circuit Judicial Conference in April 1993.

Senator Biden continued by noting that he did not believe that minimum mandatory sentences were the driving force behind cases

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74. Roundtable Transcript at 40.
75. Roundtable Transcript at 40-41.
77. Senator Biden has identified the following principles for determine which types of cases have the strongest claim on federal jurisdiction:
1) Controversies where states are not competent to act because the matter is one of exclusive federal jurisdiction, as where cases involve conduct that occurs on federal territory or across state lines . . . ;
2) where the states are unable or unwilling to protect an important federal interest . . . ,
3) [where the] case[ ] involv[es] conduct that is occurring in many jurisdictions, overwhelming the ability of any one state to respond . . . , [and]
4) where the gravity of an important federal interest and the pervasiveness of the states’ inaction together outweigh the burden to the federal system.


78. Between 1984 and 1990, the U.S. Congress—seeking to deter potential offenders from engaging in drug-related offenses and violent crimes—enacted an array of mandatory minimum sentences targeted at these crimes. At about the same time, the Federal Sentencing Reform Act of 1984 created the U.S. Sentencing Commission to promulgate sentencing guidelines for the district court judges. 28 U.S.C. § 991 (1995). The compound effect of the two schemes has been criticized on a number of grounds, the most serious of which may be

the ‘hit-or-miss,’ inconsistent manner in which [mandatory minimums] are applied to defendants whose actual offense conduct would appear to warrant sentencing under a statutory mandatory minimum provision. This high degree of variability in application of statutory mandatory minimum sentencing provisions flows directly from the fact that, generally speaking, such provisions become applicable only when the prosecutor elects to charge—and the defendant is convicted of—the specific offense carrying a mandatory sentence.


Senator Hatch has analyzed the impact of mandatory minimums and the sentencing guidelines in this way:

Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines provide for graduated increases in sentence severity for
that historically and traditionally were heard in the state court system being pulled into federal courts. Rather, he identified the driving forces as the investigative and prosecutorial competence of federal law enforcement agencies and prosecutors and the swiftness with which the federal courts are forced to deal with federal criminal cases.\(^7\)

Senator Biden then offered some observations about changes in the social and political structure that present a new context for current discussions about the appropriate reach of federal jurisdiction, and he noted that the nature of violence and the amount of violence is fundamentally different than thirty years ago.\(^8\) Senator Biden also noted an increased receptivity on the part of the states to federal financial support for state justice system activities.\(^9\) Increased resources at both levels of the system are needed to address the new problems.\(^10\) In Senator Biden’s view, the federal response should be to confine federal jurisdiction to the principled areas discussed and to send money and expertise to the states.\(^11\) He also stressed that any of these responses for prosecutors, state courts, and state prison systems would be useless unless government also engages in strategies aimed at crime prevention.\(^12\)

These resource issues make it important, according to the Senator, to distinguish between appropriate and inappropriate substantive

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additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a “real offense” approach to sentencing, mandatory minimums are basically a “charge-specific” approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.


\(^7\) Roundtable Transcript at 41-42.

\(^8\) Roundtable Transcript at 42. Senator Biden cited, among other issues, changes in family structure and the pervasiveness of drugs—factors beyond the control of federal or state courts—as factors contributing to this changed context. Roundtable Transcript at 42-45.

\(^9\) Roundtable Transcript at 43. Senator Biden noted that inadequate prison capacity was a major concern to both state and federal lawmakers. Roundtable Transcript at 47-48.

\(^10\) Roundtable Transcript at 43-44.

\(^11\) Roundtable Transcript at 46.

\(^12\) *See* Roundtable Transcript at 49.
law initiatives aimed at federalization. He cited certain Crime Bill provisions federalizing gang offenses and Senator D'Amato's federalization of handgun offenses as examples of inappropriate attempts at federalization.85

In addressing Ms. Acheson's question about how well policymakers have educated the public on crime issues, Senator Biden acknowledged that this task had not been performed well. He stated, however, that this evaluation of the public education effort was somewhat beside the point because the public wanted something done about crime.86

At this point Attorney General Janet Reno intervened to list the efforts of state officials to obtain additional state funding for justice system functions. She noted the extraordinary efforts of officials in states like Florida to handle burdens created by federal court orders establishing population caps on the state prison systems stressed by the large numbers of undocumented aliens. She also noted the high quality of justice dispensed by state court judges faced with overwhelming caseloads.87 She urged Roundtable participants to move beyond stereotypical notions of competence and excellence to engage in a discussion of how all resources could be apportioned most effectively to address the problems raised.88

Senator Biden responded by stating that problems caused by immigration were federal problems and should be handled by the federal government.89

Ms. Acheson then invited the state supreme court justices present to enter the conversation. One state supreme court chief justice stated that he regretted that some federal officials had such a bleak view of state government, noting that in his state, officials were confronting the issues of crime directly.90 The judge continued by observing that justice for all people was at risk if the problems discussed

86. Roundtable Transcript at 51.
87. Roundtable Transcript at 52.
88. Roundtable Transcript at 52-53.
89. Roundtable Transcript at 54.
90. Roundtable Transcript at 54-55.
were not resolved. Addressing these problems would not be possible unless done by the state courts. This judge challenged any implicit premise that federal courts dispense a quality of justice superior to the quality of justice dispensed in state courts. If there is a problem with the quality of justice dispensed by state courts, this judge urged that efforts be directed toward improving the quality of state justice, even if the disparity in quality is just an issue of perception. Only by addressing quality concerns can the nation achieve equal justice under law. Finally, this judge stated his opposition to the use of federal resources to enhance state systems. He objected to the provisions in the crime legislation under consideration tying receipt of federal money for prisons to adoption of federally specified sentencing standards.

Another state supreme court justice noted it was very important for both federal and state court systems to pass muster with the public.

A state legislator offered the view that what was driving the federalization debate was not the issue of competence, but the public reaction to media portrayals of crime. Public dissatisfaction with federal and state legislative bodies, this participant stated, required that policymakers advance solutions rather than respond to public pressure. This participant also noted that increased responsibilities imposed by the federal government placed additional burdens on strained state and local resources. As an example, this legislator noted the requirement that local communities share the cost of additional police officers to be made available through the crime bill under discussion. This participant also noted that for every dollar spent on additional police, there was an additional impact on state court and prosecutorial resources, noting the disparity in the doubling of

91. Roundtable Transcript at 55.
92. Id.
93. Roundtable Transcript at 56-57.
94. Id.
95. Roundtable Transcript at 57.
96. Roundtable Transcript at 58.
97. Roundtable Transcript at 59.
98. Roundtable Transcript at 59-60.
99. Roundtable Transcript at 60-61. The Community Oriented Policing Program (COPS) makes grants available to localities for, among other things, the hiring and rehiring of police officers for deployment in community policing. During the grant period, which cannot exceed three years, the federal government will pay up to 75% (total expenditure not to exceed $75,000) of the cost of hiring or rehiring the officer. The program is structured so that the federal share declines over the life of the grant and is replaced by state and local funds. 42 U.S.C. § 3796dd, 55 Fed. Reg. 3650 (1995).
prosecutorial resources at the federal level without increasing resources available to federal courts by the same amount.100

A local prosecutor noted the rising public expectation that the federal government would do something about the crime problems, but that federalization was not the answer.101 This participant noted that local prosecutors and state justice systems could be more effective in solving problems discussed because of proximity to the people and problems.102

Another local prosecutor noted that the subject matter specialization of the federal system can lead to greater perceptions of competence.103 While federal prosecutions produce a competent product, it is a different type of product than produced by local systems. This local prosecutor also wondered at the relative cost per prosecution for state and federal systems.104 Local prosecutors handle a wide variety of crimes and tend to have greater longevity than federal prosecutors.105

The first local prosecutor added that prosecutor’s office handles as many criminal cases each year as are handled by the federal system.106

Subsequently, Congressman Hughes, then-chairman of the House Subcommittee on Intellectual Property and Judicial Administration, offered some comments, noting that litigants are suffering because many districts are not trying civil cases because of the press of criminal matters.107 He noted that court annexed arbitration may provide some response to delayed civil dockets.108 He noted that the federal system will become as overwhelmed as state systems if the federal system doesn’t do a better job of managing aspects such as the federal prison population.109 The federal role, he stated, should be to manage resources and to exercise leadership.110 Leadership should be provided in articulating what is good policy and providing resources to effectuate good policy.111 The Congressman also noted that not

100. Roundtable Transcript at 61-62.
101. Roundtable Transcript at 65.
102. Roundtable Transcript at 64, 66-67.
103. Roundtable Transcript at 69.
104. Roundtable Transcript at 70.
105. Roundtable Transcript at 70-71.
106. Roundtable Transcript at 71.
107. Roundtable Transcript at 73.
108. Id.
109. Roundtable Transcript at 74-75.
110. Id.
111. Roundtable Transcript at 77.
enough emphasis had been placed on things such as drug diversion programs and increased options for sentencing judges.\textsuperscript{112}

Senator Biden interjected that the type of competence to which he referred was resource competence.\textsuperscript{113} As an example, he noted that a state probation officer with a massive caseload cannot provide the type of supervision a federal probation officer with a more realistic caseload can provide.\textsuperscript{114}

Congressman Hughes concluded by noting that federal funds should be tied, not to state efforts to mimic federal policy, but to better efforts at operating prison systems, for example.\textsuperscript{115}

A federal prosecutor noted that concurrent state and federal jurisdiction over crimes was not a problem as long as rational principles guided the exercise of federal and state discretion.\textsuperscript{116} This prosecutor noted that federal prosecutors cannot pursue everything so that federal prosecutors must set priorities to match local problems.\textsuperscript{117}

The Assistant Attorney General for the Criminal Division commented on the explosion of federal criminal law in recent years.\textsuperscript{118} She also expressed a concern that the large number of federal crimes—estimated at 3,000—requires the exercise of federal prosecutorial and judicial discretion at a time when the exercise of discretion is viewed with suspicion by legislators.\textsuperscript{119}

The Director of the Federal Bureau of Prisons then offered some comments on the impact of federalization on the federal prison system. She noted that the federal prison system is now the second largest prison system in the nation.\textsuperscript{120} She also stated that the federal prison population today includes more violent offenders than in the past.\textsuperscript{121} The federal system is now indistinguishable from state systems. Federal incarceration often entails greater geographic separation of prisoners from family and community making transition from prison to community more difficult.\textsuperscript{122} Disparities in sentences be-

\begin{footnotes}
\item[112.] Id.
\item[113.] See supra text accompanying note 79.
\item[114.] Roundtable Transcript at 78-79.
\item[115.] Roundtable Transcript at 81.
\item[116.] Roundtable Transcript at 82.
\item[117.] Roundtable Transcript at 82-83.
\item[118.] Roundtable Transcript at 84.
\item[119.] Roundtable Transcript at 86-87.
\item[120.] Roundtable Transcript at 87-88.
\item[121.] Roundtable Transcript at 87.
\item[122.] Roundtable Transcript at 89-90.
\end{footnotes}
between state and federal systems are leading to disruptive behaviors among the federal prison population.\textsuperscript{123}

A state supreme court justice noted that state trial courts are increasingly becoming entities with active social service responsibilities.\textsuperscript{124} Developing the capacity for alternatives to incarceration and ways for handling juveniles will give states competencies that the federal system does not have.\textsuperscript{125} Principles of federalism, this judge noted, can help allocate scarce resources.\textsuperscript{126}

The discussion concluded with comments from a federal prosecutor noting that federal prosecutors were being given new laws to enforce without being given more resources.\textsuperscript{127} People affected by new statutes—such as the Child Support Recovery Act\textsuperscript{128}—expect enforcement actions to follow.\textsuperscript{129} The federal bench has been hostile to these new types of enforcement activities.\textsuperscript{130} Federal, state, and local coordination is the key to overcoming these problems.\textsuperscript{131}

B. Mission of the Federal Courts

The discussion of the mission of the federal judiciary, moderated by Professor Sullivan,\textsuperscript{132} followed the exploration of the impact of federalization on the entire justice system. Professor Sullivan noted that if the goal of the panel was simply stating the mission of the federal courts, the matter of jurisdiction for the federal courts was for Congress to determine and there would be no point in continuing the conversation.\textsuperscript{133}

In the beginning of the discussion, a federal appellate judge offered the view that the mission of the federal courts should be based upon neutral principles. This judge stated that if one explores the desirability of federalization of a particular matter, it is always easy to conclude that federalization is appropriate.\textsuperscript{134} This judge recommended starting with some notion of what federal jurisdiction ought

\textsuperscript{123} Roundtable Transcript at 90-91.
\textsuperscript{124} Roundtable Transcript at 91.
\textsuperscript{125} Roundtable Transcript at 92-93.
\textsuperscript{126} Roundtable Transcript at 93.
\textsuperscript{127} Roundtable Transcript at 94-95.
\textsuperscript{129} Roundtable Transcript at 95.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Roundtable Transcript at 99-140.
\textsuperscript{133} Roundtable Transcript at 99-100.
\textsuperscript{134} Roundtable Transcript at 101-02.
to be regardless of the contemporary pressures exerted on the system and then to address the pressures. Recognizing that Congress may, despite the basic concept, jettison the principles, this judge noted that having an abstract idea of federal jurisdiction might provide a principled basis for dialogue. This mission of the federal courts should take into account the operation of the judicial system as a whole.

Noting that the federal courts handle less than two percent of the business of the entire justice system, he stated that the justice system is primarily a state system. The problems with state court systems, such as overcrowded dockets and low judicial salaries, should not be the engine that determines the mission of the federal courts.

A federal district judge expressed agreement with the principles identified and observed that the criminal docket caused problems for giving appropriate and quality attention to important civil matters such as environmental cases and civil rights cases. In this judge's view, federalization on the civil side does not create the same "logjam" that the expansion of criminal jurisdiction creates.

Another district judge voiced concern that current efforts to federalize crime undermine the traditional role federal courts have played in the criminal area and do not fully take advantage of the unique capability of the federal courts. Emphasizing that the federal courts try the cases for which Congress establishes federal jurisdiction and that it is not the role of the federal judges in the constitutional system to determine what legislation is merited, this judge observed that if the federal courts must try cases involving a variety of new crimes, then they will not have the capacity to try criminal cases for which they are "uniquely qualified," such as the constitutionally established crimes and cases of organized crime. This judge urged that the traditional balance between federal and state court systems be maintained.

A third district court judge indicated that the federal court in which he sat did not experience the same congestion as a result of the

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135. Roundtable Transcript at 102.
136. Roundtable Transcript at 102-03 (citing Alexander Hamilton). He also noted that the discussion of federalization would be unnecessary if the anti-federalists had been successful in substituting the words "admiralty and maritime courts" for "inferior courts" in the Constitution. Roundtable Transcript at 104.
137. Roundtable Transcript at 103-04.
138. Roundtable Transcript at 106.
139. Roundtable Transcript at 106-07.
140. Roundtable Transcript at 107.
141. Roundtable Transcript at 108.
criminal or civil caseload. This judge attributed the difference to the sound local relationship between the federal court and the local United States Attorney.142 The United States Attorney brought only those cases in which there was a serious federal offense.143 This restraint in the exercise of prosecutorial discretion can resolve congestion problems and any federal-state relationship problems.144 The federal courts can also take the cases that states do not have the resources to handle.145 In addition, the immigration docket of this court is not substantial.146 Finally, this judge noted that there was a very good working relationship between the federal court and the state court in that district, with a concomitant absence of tension over areas of overlapping jurisdiction.147

There was also discussion of whether the resources Congress has provided the federal courts and prosecutors were adequate to the task. A senior administration official stated that the budget for the Department of Justice is twice the size it would have been had the budget grown at the same rate as the rest of the federal government budget during the 1980s.148 In view of the flow of resources for "investigators, federal prosecutors, federal judges, federal prisons. . .[to work in areas of parallel jurisdiction, these resources serve as] a form of in-kind fiscal relief for state and local governments."149 The federal role in providing such in-kind assistance, as well as the nature of the burden the states and local governments should shoulder, should be analyzed with the same rigor as the question of the mission of the federal courts.150

Another federal judge added that the Chief Justice recognized the connection between the mission issue and the resource question by appointing a Committee on Long Range Planning to explore these questions.151 This judge emphasized the unique mission of the federal courts, which requires them to be preserved as a "distinctive judicial forum of limited jurisdiction in our federalist system, leaving to the state courts the responsibility for adjudicating matters that in light of...

143. Roundtable Transcript at 110.
144. Id.
145. Roundtable Transcript at 111.
146. Roundtable Transcript at 110.
147. Id.
148. Roundtable Transcript at 112.
149. Roundtable Transcript at 113.
151. Roundtable Transcript at 116.
history and sound division of authority rightfully belong there.”152 In this judge’s view, the mission also required preservation of judicial independence.153

Judge Marcus noted, in response to a question from Professor Sullivan, that the role of the federal courts has changed in the 200-year history of the nation, just as other national institutions have changed.154 He opined that “[t]here are principles that can be posited” against which the wisdom of new legislation can be measured or assessed, but that ultimately it is a political question for the political branches of government to decide the nature of federal court jurisdiction.155 Proposed legislation can also be measured against the same principles.156

The Chief Justice noted that many expansions of federal court jurisdiction have been justified on practical, not theoretical grounds. Examples include the Federal Employer Liability Act and civil rights legislation, both of which were enacted as a result of a perception that state courts and state laws were failing to do the job the public wanted.157

Professor Sara Sun Beale of Duke Law School observed that federal criminal jurisdiction has not always grown. She noted that the largest number of criminal cases in the federal system was during Prohibition, and in a sense, there was a “roll-back” after Prohibition.158 The number of cases declined markedly with the repeal. The extra capacity built into the federal system to accommodate the caseload, however, was never eliminated.159 On the heels of the Twenty-First Amendment, not only was there the enactment of the New Deal regulatory legislation, but also some thirty new pieces of criminal legislation including the kidnapping statute and bank robbery statutes.160 Professor Beale noted that the first federal crime dealing with private individuals as crime victims was adopted in 1872 with the passage of the Mail Fraud Act.161 She also noted that it is a lot easier to pass a federal statute providing seed money to states with a sunset provision

152. Roundtable Transcript at 116-17.
153. Roundtable Transcript at 117.
154. Roundtable Transcript at 120.
155. Roundtable Transcript at 120-21.
156. Roundtable Transcript at 121.
158. Roundtable Transcript at 123.
159. Id.
161. Roundtable Transcript at 124.
than it is to undo the appointment of a federal judge with life tenure.\textsuperscript{162}

One of the state attorneys general who was present made several points about the relationship of state and federal prosecutors. First, in handling cases like child abuse cases, state systems have to find multidisciplinary ways to provide treatment for families and victims—a practice the federal system is ill-equipped to handle.\textsuperscript{163} This attorney general noted that very few state or local prosecutors have the ability to exercise discretion to control the quantity or content of their caseloads.\textsuperscript{164} Finally, this attorney general also noted that no state has been able to increase resources available for prison systems or prosecutors to the extent achieved by the Department of Justice.\textsuperscript{165}

Another state attorney general commented on the rise in antisocial behavior experienced in the country and added that one must consider the application of federal resources to the problem.\textsuperscript{166} This attorney general urged taking advantage of the particular competence of each level of the system to handle problems. Use of state prosecutors in federal court and federal prosecutors in state court may help in areas of overlap.\textsuperscript{167} Finally, this attorney general recommended institutionalizing mechanisms of cooperation and partnership among federal, state, and local prosecutors.\textsuperscript{168}

A state appellate judge urged that lay people be involved in the conversation about the allocation of jurisdiction and resources between the state and federal systems. Judges, lawyers, prosecutors, and legislators, he noted, may be too connected to the current system to examine changes effectively and creatively.\textsuperscript{169} This judge also pointed out that there is no justice administered for large numbers of people because the system is too expensive.\textsuperscript{170} In addition, this judge urged that states be permitted to experiment to find ways of handling crime and other pressing social issues that now reach the courts. The worst thing, this judge noted, would be “for all the states to adopt the federal model assuming that it is correct.”\textsuperscript{171}

\begin{enumerate}
\item \textsuperscript{162} Roundtable Transcript at 124-25.
\item \textsuperscript{163} Roundtable Transcript at 127.
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} Roundtable Transcript at 128.
\item \textsuperscript{166} Roundtable Transcript at 130-31.
\item \textsuperscript{167} Roundtable Transcript at 131-32.
\item \textsuperscript{168} Roundtable Transcript at 132-33.
\item \textsuperscript{169} Roundtable Transcript at 135.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} Roundtable Transcript at 136.
\end{enumerate}
During a later discussion at the Roundtable, a senior official in the Department of Justice noted that for all the attention given to criminal issues in the federalization debate, the real potential for expansion in federal jurisdiction exists on the civil side. This official observed that many of the federal criminal statutes could be "civilized." While the exercise of prosecutorial discretion serves to limit the impact of the expansion of criminal jurisdiction on the federal courts, no such discretion would limit the impact on the civil side. This official suggested that to make progress on the federalization debate involved going beyond legal process principles to decide which things that Congress or the people think are sufficiently important to take up the time of the federal courts.

Conclusion

It is fair to conclude that on the basis of the discussions of the impact of federalization and ideas offered for defining the mission of the federal courts that there is broad-based agreement in the abstract on some principles for limiting the reach of federal jurisdiction. There remains disagreement, however, over how such principles can be applied consistently when concrete examples are raised. In addition, there seem to be different views about the appropriate role of the federal courts in the justice system. The Working Group Reports that follow highlight these areas of agreement and disagreement and offer some practical approaches to maintaining mechanisms of communication and cooperation to allocate responsibility among the state and federal systems given the level of federalization reflected in current law.

172. Roundtable Transcript at 271.
173. Roundtable Transcript at 272.
174. Id.
175. See Reports of the Working Groups on issues in federalizing criminal and civil law.