CHAPTER 1

THE UNITED STATES CONSTITUTION AND FEDERAL POLICE POWER

[h1]The Decentralized Nature of American Law Enforcement

Probably the single most unique characteristic of American law enforcement, when compared with law enforcement in other countriesð including democratic onesð is its decentralized nature. American law enforcement is not a single, large system of law enforcement. The reason for this is because American government in general is itself based on the concept of decentralization.

In the United States, there is one national government; but there are also 50 sovereign state governments. Existing under the authority of state governments are literally thousands of county, municipal, and special district governments. Most of these governments employ full-time law enforcement officers whose responsibilities are to police the particular geographic boundaries of the employing government.

When one thinks of any American law enforcement agency, the question of jurisdiction is unavoidably prominent. *Jurisdiction*, for our purposes, is defined as the authority a law enforcement agency has to enforce particular laws in particular political and/or geographic boundaries and to do so coercively (i.e., using force), if necessary.

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There is no law enforcement agency in the United States that has total jurisdiction; in other words, no agency has the authority to enforce all American laws in all American places. The question of an agencyôs jurisdiction is always one of breadth and depth.

Many people in the United States believe that the Federal Bureau of Investigation (FBI) is the premier law enforcement agency in the United States and that it has the broadest police powers of all law enforcement agencies. During the Cold War with the Soviet Union, the FBI and the KGB (the Soviet secret police) were often spoken of as if they were equivalent forces in competing countries. This perception was incorrect, however. Unlike the FBI, the KGB had total police power; the FBI did not and does not.

While it is true that the FBI and other federal law enforcement agencies have very broad geographic jurisdictionð throughout the United States and its territoriesð the laws that they have the authority to enforceð specifically, federal lawsð tend to be rather narrowly focused. As powerful and prestigious as the FBI is thought to be, an FBI agent has no law enforcement authority beyond that of any other private citizen to make an arrest, for example, for drunk driving, because such laws are state laws. In other words, federal law enforcement has geographically broad jurisdictionð but only for federal laws (as a general rule), so it is also shallow. Under certain conditions, however, a federal law enforcement agency can <insert brief text that explains the exceptions to the general rule>.

The conditions of local law enforcement are quite different. A police officer in a town of 500 people can make an arrest within that town for virtually any criminal law

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that is broken– federal, state, or local. However, that officer is generally limited geographically to his or her municipality. The town may only be a square mile in area. Given that there are over 3.5 million square miles in the United States, the reach of the officer's jurisdiction is significantly limited. The officer has no geographic breadth.

In the United States, police powers are intentionally limited in breadth and depth so that no single law enforcement agency or government jurisdiction has too much power. Further, there is a premium on local control. Police agencies with the greatest scope of powers tend to be local. Americans and American politicians have historically been more inclined to bestow greater law enforcement authority on agencies over which citizens have the greatest control, through their politicians (mayors, city council members, sheriffs). In the town of 500 people mentioned earlier, it is safe to say that any citizen could contact the police chief and voice a grievance with relative ease. It would be much more difficult for that same citizen to get an audience with the FBI director.

Today in the United States, there are 12,666 local police departments. There are also 3,070 sheriff's departments. Further, 49 states maintain some type of uniformed state police or state patrol organization; Hawaii is the lone exception. The decentralized nature of American law enforcement provides some advantages and significant disadvantages. These advantages and disadvantages mirror those identified by political scientist Thomas Dye [1],[1] which accrue generally to American government entities.

The primary advantage of decentralized law enforcement in the United States has already been mentioned– the dispersion of power. Our system of government is purposefully federal. Federalism is the form of government where power is divided between the national and state governments, with each state maintaining its sovereignty

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in relation to other states. The federal model extends to local jurisdictions within each state. By dispersing police power across thousands of governmental entities in the United States, the risk of unchecked tyranny by government using its enforcement apparatus is greatly diminished.

Another advantage of the decentralized nature of American law enforcement is that law enforcement efforts are more manageable and efficientð at least locally. As it is, a common complaint among police officers relates to the bureaucratic hassles and red tape associated with their jobs. This complaintôs merit would be significantly compounded if decisions affecting local law enforcement operations had to pass a gauntlet of scrutiny from bureaucrats stationed in state capitals located many miles away or in Washington, D.C.

Akin to the benefit of manageability is accountability and responsiveness to the public. Even though some police organizations are very large in comparison to others, there is no national police force within which officers and managers can bury themselves and their actions to avoid public scrutiny. The chain of command for all law enforcement agencies in the United States ultimately leads to a civilian public official who is accountable to regular citizens. Given the decentralized nature of law enforcement, the relative influence of individual citizens on police practice and strategies in their communities is greater than if there were fewer and larger police agencies around the country.

Still another advantage of decentralized law enforcement is that there is an opportunity to observe many different ways of policing and to identify best practices within the profession. With so many local and state law enforcement agencies

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independent of each other, there are likewise many examples of successes and failures of police work. Innovations that work in a larger community do not necessarily work as well in a smaller one, and vice versa. Directed problem-solving approaches to policing in one county may be inappropriate in another because the problems from one county to another are different. Indeed, Americaôs decentralized law enforcement structure affords communities the chance to tailor policing efforts to their own specific local needs.

While the advantages of a decentralized law enforcement structure in the United States are many, there are also significant disadvantages. One is the fact that the quality of police services from community to community and state to state is uneven. Some communities have <insert text>, while others do not. Such disparities in the provision of public services have long fueled criticism of federalism. Critics point out that wealthier communities, counties, and states have can deliver better, more professional police services than can impoverished locales.

Another disadvantage is the inability of the federal government to mandate to the states and local governments specific public policy in the area of policing. For example, if the federal government determines that community-oriented policing is a model worth implementing around the country, only a limited amount can be done by the national government to ensure that implementation of its suggested policy takes place. Typically, the federal government can provide or withhold funds or other benefits to encourage state and local governments to follow its lead, but it cannot simply require that its will be done around the country.

Yet another disadvantage of decentralized law enforcement is the disjointed response to public safety problems. A crime spree of burglaries might take place across

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several suburbs of a metropolitan area. Each suburb may have its own police department investigating its portion of the crime spree without realizing the larger picture. Unless a concerted effort is made between law enforcement agencies to coordinate information, communications, operations, tactics, and so forth, public safety problems that overlap jurisdictions may receive inadequate or disconnected attention.

Another disadvantage is the potential for competition between agencies that can promote an intentional lack of cooperation. Although many scholars have written about ñpolice culture,ò there exists, in fact, many police subcultures; each views the other subcultures with some suspicion. While a police funeral will surely bring all of law enforcement together, the typical relationships across subcultures can frequently be strained.

City officers might hold the county deputies in contempt for always showing up and interfering with city matters. State troopers may similarly feel a little irritation at city police personnel who always respond to accident scenes under the jurisdiction of the state police or patrol. City and county officers may be united in their dislike for cocky troopers who, among all of law enforcement, are most likely to give a fellow officer a ticket. And state, county, and local law enforcement all have a common enemy in the ñFeds,ò as federal agents frequently act as if they know it all, steal cases and publicity, and sometimes investigate other police officers (at least as far as the state and local officers are concerned).

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[h1]The U.S. Constitution and Federal Police Power

The United States Constitution does not grant the federal government general police power. Instead, the Constitution reserves police powers for the states. In the light of the absence of an affirmative statement granting the federal government broad police power, the single sentence of the 10th Amendment seems to be clearly saying that law enforcement is a function of state government:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Given that nowhere in the Constitution is there an article or clause that specifically envisions a broad police power to be held by the federal government, it is reasonable to conclude from the 10th Amendment that police power would be one of many responsibilities of the sovereign states making up the Union. After all, the States were indeed sovereign. Sovereign governments can police their own people as they see fit.

Yet at the same time, other parts of the Constitution do seem to imply the existence of a federal authority to enforce criminal laws that includes police powers. Consider the following portions of the U.S. Constitution:

Article III, Section 3:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason…

While treason is narrowly defined in the Constitution, it does nonetheless amount to a criminal offense expressly assigned to the federal government, through

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Congressô role as legislature (and presumably the Presidentôs role as chief executive), for investigation and prosecution.

There is also the Necessary and Proper Clause of the Constitution. The final sentence of Section 8 within Article I of the Constitution states that Congress has the power:

To make all Laws which shall be necessary and proper for carrying into the Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The ñforegoing Powersò refer to those explicit powers granted to Congress in Section 8, including the following powers:

- To regulate Commerce with foreign Nations and among the several States and with the Indian Tribes;
- To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
- To provide for calling forth the Militia to execute the Laws of the Union, and suppress Insurrections and repel Invasions;

Each of these powers implies a federal law enforcement function.

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Further, the catchall phrase from the Necessary and Proper Clause, which gives Congress the authority to make laws that are needed for the carrying out of ñall other Powersò granted to it, has been interpreted by some as giving the federal government a fairly broad police power. In fact, many point to the Preamble of the Constitution for instruction on the scope of the federal governmentôs responsibilities, and by extension, the authority to carry out those responsibilities. The Preamble declares that the people of the United States in ordaining the Constitution, seeks to ñé establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Libertyé ò for present and future generations of Americans.

If the Preamble represents the purpose of the U.S. Constitution and the federal government it creates, then the Necessary and Proper Clause seems to suggest that Congress has considerable leeway to pass laws and create agencies that do those very things that the Preamble articulatesð namely, establishing justice, keeping the peace, and protecting the welfare of Americans.

Critics of that position contend that the Preamble merely states the purpose of the Constitution. That is, it introduces the document; it does not serve as a clause of it. The Preamble is not legally binding, according to this view, because it is a statement of ideals, not of specific powers granted to specific recipients.

Still other elements of the Constitution that clearly envision a federal law enforcement role, however limited, are certain amendments found in the Bill of Rights. The Bill of Rights is the first 10 Amendments to the Constitution. Their quick inclusion in the Constitution was a compromise to get the Constitution adopted between pro-Constitution federalists and the Anti-federalists, who were suspicious of federal power.

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The Bill of Rights primarily protects individuals from an overzealous national government, including in criminal justice contexts. This fact implies that the Framers envisioned the federal government engaged in criminal justice activities.

Consider the 4th, 5th, 6th, and 8th Amendments to the Constitutionð all ratified in 1791.

4th Amendment - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5th Amendment – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6th Amendment - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

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witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

8th Amendment - Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In recent decades, the limitations imposed upon government vis-à-vis individual criminal suspects and defendants have been applied to state and local criminal justice actions through the amendmentsô incorporation into the 14th Amendment of the Constitution. The 14th Amendment specifically requires of state and local governments their conformance with due process. Since the adoption of the 14th Amendment in 1868, the U.S. Supreme Court has ruled in an accumulation of cases that the ñdue processò required of law enforcement at the state and local level encompasses the very notions contained in the 4th, 5th, 6th, and 8th Amendments.

However, in 1791, these amendments addressed the police powers of one government in particularð the federal government. Therefore, there can be little doubt in the existence of the 18th century supposition that the American federal government indeed possessed police power. Otherwise, there would be no need to describe, under what conditions searches and seizures of suspects and evidence could take place (4th Amendment); the process requirements for charging and trying violators of federal crimes (5th and 6th Amendments); the right of criminal defendants in federal cases to have the assistance of counsel and to have their cases heard by an impartial jury (6th

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Amendment); and the conditions under which someone can be held in custody or otherwise punished prior to and after a conviction of a federal crime (8th Amendment).

The existence of federal police power notwithstanding, there is also little doubt that the power was thought to be more limited than that possessed generally by the states. The notion of limited federal police power was reinforced on many occasions in the Federalists Papers. The Federalists Papers were a series of essays written by James Madison (commonly considered the Constitutionôs chief author), Alexander Hamilton, and John Jay. These essays were written prior to the adoption of the U.S. Constitution and in support of that adoption.

In some cases, the authors of the Federalist Papers (all of whom took the pen name ñPubliusò when these essays appeared in newspapers) went to great lengths to remind Americans that this new Constitution, which granted significantly expanded powers to the federal government when compared to the Articles of Confederation that it would replace, was nonetheless sensitive to the sovereignty of the states. In other words, Madison, Hamilton, and Jay all held to the view that the Constitution would properly limit the role of the federal government and any inclination it had to be come tyrannical; therefore, they argued, people had little to fear from the Constitutionôs adoption.

In *Federalist 41*, James Madison confronts the concern raised by many who opposed the proposed constitution. Many critics took objected to Article I, Section 8, which first grants the federal government the power to tax so as to ñé provide for the common Defence and general Welfare of the United States.ò Indeed, some of the same language of the Preamble appears in Section 8 to justify Congressô need to levy taxes and pay debts. What then follows are the many additional enumerated powers of Congress,

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including some of those with criminal justice implications that were mentioned earlier in the chapter.

Madison mocks the criticsô concern by pointing out that the specified, enumerated powers listed in Section 8 are the embodiment of Congressô fulfillment of providing for the common defense and general welfare. In other words, according to Madison, common defense and general welfare are expressions with particular manifestationsð namely those that are enumerated immediately after those expressions appear.

Madison wrote in *Federalist 41* **[2]:**[2]

Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the

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course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for the general welfare.

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.

Madison was also instructive in *Federalist 45*. In that article, Madison addressed the concern that the power of the states would be subordinated to the federal government. That was a grave concern for many Anti-federalists who found the Necessary and Proper Clause especially offensive in light of Article VI, which stated; ñThis Constitution and the Laws of the United Statesé shall be the supreme Law of the Land; and the Judges in

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every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.ò

Madison wrote in *Federalist 45* **[3]**:[3]

Having shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is, whether the whole mass of them will be dangerous to the portion of authority left in the several States…

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

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It is clear from the preceding passageð especially in the second paragraphð that Madison, who is by all accounts a key Framer of the Constitution and our present form of government, envisioned that general powers, including law enforcement powers, would rest with states, save for some national emergency exigencies such as war.

Earlier in the chapter, it was noted that many of the provisions of the Bill of Rights (i.e., the first 10 amendments) imply the existence of police power because certain amendments relate specifically to the criminal justice functions of government. Alexander Hamilton wrote *Federalist 84* to address, in part, that very subject. At the time that the Federalist Papers were written by Madison, Hamilton, and Jay, no Bill of Rights had yet been proposed. The promise of pro-Constitution federalists to adopt a Bill of Rights came later as a compromise for ensuring passage of the Constitution itself by indecisive state legislatures.

In Federalist 84, Hamilton reasoned against the inclusion of a Bill of Rights because it would imply powers of the federal government that do not exist. He wrote **[4]**:[4]

The most considerable of the remaining objections is that the plan of the convention contains no bill of rights…

But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be

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too strong for the constitution of this State. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: in the first place, I observe, that there is not a syllable concerning it in the constitution of this State; in the next, I contend, that whatever has

been said about it in that of any other State, amounts to nothing. What signifies a declaration, that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

[h1]Interstate Commerce

The power of the American federal government to engage in law enforcement activities has expanded considerably in practice since the late 18th century and the adoption of the U.S. Constitution. As already noted, there are many provisions of the Constitution that specifically envision a federal law enforcement role. For example, treason against the United States is a federal offense and requires Congress to craft punishments for that crime. The Constitution also speaks to Congressô power to regulate immigration and to pass tariffs. Those who would violate immigration or customs laws would necessarily be violating criminal laws that are the exclusive domain of the federal government.

Whether speaking of treason, immigration violations, or violations of import or export laws in order to circumvent tariffs, violators face federal prosecution. It is reasonable to conclude that law enforcement officials acting on behalf of the federal

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government (federal agents) should necessarily exist and be equipped with the power to bring violators of federal law to justice.

However, much of federal law enforcement today is not concerned with the issues mentioned here– or at least is not primarily concerned with them. The federal criminal code is extremely large and covers many types of criminal conduct that could not have been envisioned by the Constitution's framers.

The federal criminal laws of the United States are found primarily (but not exclusively) in Title 18 of the United States Code. Well over 100 chapters (see Appendix A) appear in Title 18. Each chapter relates broadly to an area of criminal law. Each chapter typically contains several sections, and each section deals with a specific criminal offense that could investigated and adjudicated as a federal offense, regardless of whether comparable state laws exist that would address the same criminal conduct.

On what basis has the federal government (Congress) passed so many criminal laws that require tens of thousands of federal agents to enforce? For most of these laws, the constitutional nexus for their passage and enforcement is the Interstate Commerce Clause. As noted earlier, Article I, Section 8 of the Constitution gives Congress the power to regulate commerce with foreign countries as well as among and between the states of the Union. This power has become the primary basis for the federal government's involvement in criminal matters. In some cases, the criminal statutes adopted and enforced by the federal government can be rather obscure.

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Whoever transports by mail or otherwise to or within the District of Columbia or any Possession of the United States or uses the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory any set of artificial teeth or prosthetic dental appliance or other denture, constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed to practice dentistry under the laws of the place into which such denture is sent or brought, where such laws prohibit;

(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under such laws to practice dentistry;

(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under such laws to practice dentistry; or

(3) the construction or supply of dentures from impressions or casts made by a person not licensed under such laws to practice dentistry -

Shall be fined under this title or imprisoned not more than one year, or both.

Congress has determined it necessary and proper to regulate the practice of dentistry through this statute by insisting that those engaged in the business of providing dentures are licensed. Every American state also has laws regulating the practice of dentistry. Many proponents of limited federal government argue that it is the respective states where such laws should originate. Nonetheless, in an effort to help maintain high standards of dental practice, Congress made it a federal criminal offense to engage in

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dispensing dentures without a license (ironically, the licensing process is itself a state-level process).

Commonly present in federal criminal laws is language similar to that which appears in the opening sentence of the above statute: ñWhoeveré uses the mail or any instrumentality of interstate commerceé ò There is no provision for regulating the quality of dentures or the licensing of dentists in the Constitution. However, Congress is permittedð indeed expectedð to regulate the mail and interstate commerce. To the extent that the dispensing of dentures involves interstate commerce, Congress has seen fit to legislate the matter. Because it has done so by creating a criminal law, the enforcement of this statute is part of the job of federal law enforcement.

Of course, not all federal criminal laws are as obscure as the statute just described. Many criminal laws of the United States are intended to accomplish things that are considered more urgent and serious. However, even noble and well-intentioned federal criminal laws must have roots in federal authority; further, it is not always the case that the power to regulate interstate commerce is sufficient to trigger proper federal authority.

In 1990, Congress passed the Gun Free School Zones Act. Title 18, Section 922 was amended to make it a federal felony-level crime to knowingly possess a firearm while inside a school zone. A ñschool zoneò was defined as that area within 1,000 feet of the grounds of a public, private, or parochial school. Proponents of this legislation noted that Congress had the authority to pass the law because of the power to regulate interstate commerce that was granted to it by the Constitution.

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But when 12th grader Alfonso Lopez was arrested at his high school for carrying a concealed handgun and was charged federally under the Gun Free School Zones Act, his attorney disputed the authority of the federal government to even pass such a law into existence. The Supreme Court heard Lopezô contention in 1995 and ruled that Congress indeed exceeded its authority in passing this law. Therefore, the Gun Free School Zones Act was ruled unconstitutional.

At the time, Bill Clinton was President of the United States. Gun control was one campaign issue that President Clinton had ran uponð and indeed delivered. His administration vehemently defended that statute. Despite this effort, the Supreme Court ruled in a 5-4 decision that the law was unconstitutional. Chief Justice William Rehnquist, author of the majority opinion, summarized the logic behind the governmentôs defense of the statute **[5]**:[5]

Possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived unsafe.

It was further argued that the fear of guns in schools distracts students from learning. The governmentôs position was that: ñé the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That,

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in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that [the Gun-Free School Zones Act] substantially affects interstate commerce.ò

In other words, the government believed that if students fail to learn, then they may fail to graduate and succeed later in life. If that happens, the failures will result in an adverse impact on the economyð not only in their own states, but also in other states that never benefited from the interstate commerce these students would have engaged in had they been successful and made positive societal contributions.

Five Supreme Court justices ruled that this logic, if upheld, would permit the federal government to connect any and all issues for which there was a desire to regulate to the Interstate Commerce Clause. The Court wrote **[6]**:[6]

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. …The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, …and that there never will be a distinction between what is truly national and what is truly local… This we are unwilling to do.

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The Supreme Court in this case determined that there were limits to the federal governmentôs role in matters of criminal justiceð particularly when the rationale for the governmentôs involvement is rooted in notions of interstate commerce.

In the Lopez case, several justices chose to write opinions that concurred with or dissented from the majority opinion written by Chief Justice Rehnquist. All of the opinions in this case referred back to the 1824 case of Gibbons v. Ogden. In that case, the United States Supreme Court under Chief Justice John Marshall ruled that the Commerce Clause of the Constitution conferred broad authority upon Congress to regulate commercial matters.

At issue was the fact that the State of New York had granted certain individuals the right to operate their steamboats in New York waters. A steamboat operator from New Jersey who did business between New York and New Jersey challenged the New York law that required him to pay special operating fees while other select individuals paid nothing.

Gibbons v. Ogden did not relate to criminal justice. The case genuinely related to commerce. But the Supreme Court for the first time provided the Interstate Commerce Clause of the Constitution with a dynamic characterization. The language in the Courtôs decision was used in future cases as the basis for arguing for the authority of Congress to regulate matters beyond mere trade occurring between the states.

Chief Justice Marshall wrote for a unanimous court in defining what interstate commerce essentially means. He wrote **[7]**:[7]

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The subject to be regulated is commerce; . . . it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. . . . Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. . . . The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation. . . .

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The subject to which the power is . . . applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word among is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose. . . . The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those

which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

The language of the Chief Justice Marshallôs opinion provided ammunition for both sides of the Lopez decision. Commerce is not merely ñtrafficòé it is ñintercourse.ò Further, the ability to regulate it is a power of Congress ñcomplete in itself.ò But also, the power to regulate commerce does not extend to those matters with only internal relevance to a particular state. Such matters, even those affecting commerce, are left to the states themselves, according to the Gibbons decision, as long as there is no affect on other states.

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In the end, Congressô willingness to rely on the Interstate Commerce Clause of the Constitution to enact legislationð including criminal laws and other statutes that create the executive police agencies that enforce those laws and statutesð has usually been the result of political rather than judicial processes. When the American people have put political pressure on their elected representatives to do something, something has usually been done. This fact was no doubt envisioned and sanctioned (at least somewhat) by John Marshall when he concluded in the Gibbons decision:

"The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often they solely, in all representative governments."

-- John Marshall

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