

## ***There Goes the Neighborhood The Bush-Ashcroft Plan to “Help” Localities Fight Gun Crime***

**by Gene Healy**

### **Executive Summary**

The centerpiece of President Bush’s crime-fighting program is an initiative called Project Safe Neighborhoods. That initiative calls for the hiring of some 700 lawyers who will be dedicated to prosecuting firearm offenses, such as the unlawful possession of a gun by a drug user or a convicted felon. The basic idea is to divert firearm offenses from state court, where they would ordinarily be prosecuted, to federal court, where tougher prison sentences will be meted out. Project Safe Neighborhoods will also provide funding to escalate gun prosecutions at the state level.

Praise for Project Safe Neighborhoods comes from quarters as diverse as Handgun Control, Inc. and the National Rifle Association. Unfortunately, those disparate parties have unit-

ed in support of a singularly bad idea. Project Safe Neighborhoods is an affront to the constitutional principle of federalism. The initiative flouts the Tenth Amendment by relying on federal statutes that have no genuine constitutional basis. Moreover, the program will very likely lead to overenforcement of gun laws and open the door to prosecutorial mischief affecting the racial composition of juries. As the constitutional and policy implications of Project Safe Neighborhoods become more apparent, the Bush initiative looks less like a commonsense solution to crime and more like a political gimmick with pernicious unintended consequences. If the “respect for federalism” he has repeatedly professed is sincere, President Bush must reconsider his support for Project Safe Neighborhoods.

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## **Introduction**

The centerpiece of President Bush's crime-fighting program is an initiative called Project Safe Neighborhoods, which calls for escalating enforcement of gun control laws. Under the program, for which funds have been appropriated in the fiscal year 2002 budget, firearm offenses that would ordinarily be prosecuted in state court—such as possession of a handgun by a felon or a drug user—will now be diverted to the federal court system, where mandatory minimum sentences, tougher bond requirements, and the fact that convicts often serve their time out of state are said to provide a harsher deterrent. Project Safe Neighborhoods will cost taxpayers more than \$550 million over a two-year period by, among other things, hiring more than 700 new lawyers to serve as full-time gun offense prosecutors. According to President Bush, the message of Project Safe Neighborhoods is, "If you use a gun illegally, you will do hard time."<sup>1</sup>

Project Safe Neighborhoods has its roots in Project Exile, an initiative begun in 1997 by federal prosecutors in Richmond, Virginia, and subsequently embraced by various other jurisdictions. Praise of the Project Exile program, which, like Project Safe Neighborhoods, involves diverting state-level gun prosecutions to federal court, has come from diverse quarters. People who are normally at odds with one another over gun control—such as Sarah Brady and Charlton Heston and Sen. Charles Schumer (D-N.Y.) and Attorney General John Ashcroft—have lauded Exile for its supposedly tough-minded approach to crime.<sup>2</sup>

Agreement among people of disparate viewpoints might be taken to indicate the reasonableness of the Bush initiative, but a closer look at Safe Neighborhoods and Exile reveals that such programs are an affront to the constitutional principle of federalism. Moreover, such initiatives will likely lead to overenforcement of gun laws and allow prosecutors to select their preferred forum—federal or state—on the basis of the racial composition of the respective jury pools. As the constitutional and policy implications of Project Safe Neighborhoods and Project Exile emerge, the Bush initiative looks less like a commonsense solution to crime and more like a political gimmick with pernicious unintended consequences.

## **The Genesis of Project Safe Neighborhoods**

In the late 1990s conventional wisdom held that the movement for gun control was in its ascendancy. Columbine and other school shootings gave rise to new gun control proposals and the Million Mom March—an organization that many commentators saw as a potential rival to the National Rifle Association's political strength. Confronted with what they perceived to be a groundswell of anti-gun sentiment, supporters of gun rights faced a dilemma: how to address the problem of criminal incidents involving guns without giving in to the demand for new gun control laws. The NRA and the Republican Party thought they had hit on the answer with Project Exile, a gun prosecution initiative that originated in the office of the U.S. attorney for the Eastern District of Virginia. On the eve of the Million Mom March, then-Republican national chairman Jim Nicholson issued a statement saying, "Republicans share the concerns of the many marchers who will come to our nation's capital to call for an end to gun violence" and offered a nationwide expansion of the Project Exile program as an alternative.<sup>3</sup>

### **Exile on Main Street**

Project Exile, the prototype for President Bush's Project Safe Neighborhoods, began in Richmond in 1997, when an ambitious federal prosecutor, David Schiller, started aggressively prosecuting handgun offenses that would normally have been handled in state courts. At that time, Richmond suffered disproportionately from violent crime, routinely

landing a spot among the 10 cities with the highest per capita murder rates.<sup>4</sup> Schiller took it upon himself to try to reduce that rating. As Schiller described his strategy, under Project Exile, “all felons with guns, guns/drug cases and gun/domestic violence cases in Richmond are federally prosecuted, without regard to numbers or quantities.”<sup>5</sup> The billboards advertising the program along Interstate 95 put it concisely: “An Illegal Gun Gets You Five Years in Federal Prison.”

Helen Fahey, then-U.S. attorney for the Eastern District of Virginia and Schiller's boss, describes Exile as being “named for the idea that if the police catch a criminal in Richmond with a gun, the criminal has forfeited his right to remain in the community. . . . [He] will be ‘exiled’ to federal prison.”<sup>6</sup> From Fahey and Schiller's perspective, there were several distinct advantages to bringing firearm cases in federal court. First, federal bond statutes would allow the majority of offenders to be held without bail. Second, offenders prosecuted in federal court would be subject to mandatory minimum sentences under federal law, resulting in stiff penalties. Finally, according to Fahey: “Defendants know that a federal jail term will likely be served elsewhere in the country. This has a major impact because serving a jail sentence among friends . . . is seen by defendants as much less onerous than serving time in a prison out of state.”<sup>7</sup>

To further their goal of getting guns off Richmond's streets, Schiller and Fahey helped assemble a coalition of business and community leaders that eventually became the Project Exile Citizen Support Foundation. That foundation raised money for radio ads, billboard space, and a city bus painted black and bearing the warning that illegal possession of a gun brings with it a five-year term in federal prison.<sup>8</sup> The NRA contributed \$125,000 to Richmond's advertising programs.<sup>9</sup>

Exile featured extensive cooperation between local and federal officials. Each Richmond police officer was given a 24-hour pager number for an on-call agent from the Bureau of Alcohol, Tobacco and Firearms

and cue cards listing federal gun possession crimes.<sup>10</sup> Richmond police were directed to pursue suspects for, among other offenses, carrying a weapon while possessing drugs, being a convicted felon in possession of a weapon, and being an illegal alien in possession of a weapon—all federal crimes.<sup>11</sup>

By March 1999, two years after Exile's inception, 512 guns had been seized, and federal prosecutors had secured 438 indictments and 302 convictions with an average sentence of more than 53 months.<sup>12</sup> Other federal prosecutors followed Schiller and Fahey's lead; the program was expanded to the Norfolk and Tidewater areas of Virginia as well as Rochester, New York. Philadelphia, Oakland, Birmingham, and Baton Rouge are also implementing their own versions of Project Exile.<sup>13</sup>

Congressional Republicans took notice of Exile and praised its hard-line approach to the enforcement of existing gun laws. In April 2000 the House of Representatives passed Rep. Bill McCollum's (R-Fla.) Project Exile Act, which would have provided \$100 million in federal funds for Exile programs across the country.<sup>14</sup> Presidential candidate George W. Bush touted Exile on the campaign trail and called for nationwide expansion of the program along the lines proposed by the House.<sup>15</sup>

### **The Bush-Ashcroft Program**

Making good on his campaign promise, in May 2001 President Bush unveiled his anti-crime initiative, Project Safe Neighborhoods, which uses Project Exile as its model. The program would “take Exile national,” bringing to cities all across America what David Schiller brought to Richmond. Safe Neighborhoods' centerpiece is a plan to hire a host of new federal prosecutors, dedicated to bringing federal gun charges for offenses that would normally be handled in state courts. The Bush proposal would fund 113 new assistant U.S. attorneys to serve as full-time gun prosecutors.<sup>16</sup>

Safe Neighborhoods also aims to promote gun prosecutions at the state and local level. In addition to the funds for new federal prosecutors, the president's proposal dedicates \$75

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million to hiring and training full-time state and local prosecutors. That money is expected to fund around 600 new gun prosecutors.<sup>17</sup> Other funding will be available through Project Safe Neighborhoods to “coordinate all gun-related programs,” including community outreach programs, but Safe Neighborhoods’ central goal is to raise the number of firearm offense prosecutions in America. As the president put it in his remarks announcing the program, “This Nation must enforce the gun laws which exist on the books.”<sup>18</sup>

## **Constitutional Federalism and Crime**

President Bush’s concern with violent crime is understandable, and his desire to tackle the problem without adding to the gun laws already on the books is laudable. But as Bush himself would acknowledge, good intentions are not enough; reformers must operate within the bounds of our Constitution—a charter that divides powers and responsibilities between the federal and the state governments.

Speaking before the National Governors Association soon after his inauguration, President Bush declared:

I’m going to make respect for federalism a priority in this administration. Respect for federalism begins with an understanding of its philosophy. The framers of the Constitution did not believe in an all-knowing, all-powerful federal government. They believed that our freedom is best preserved when power is dispersed. That is why they limited and enumerated the federal government’s powers and reserved the remaining functions of government to the states.<sup>19</sup>

Is Project Safe Neighborhoods, the centerpiece of the president’s anti-crime program, consistent with the “respect for federalism” that President Bush professes? To answer that

question, it is necessary to review the constitutional framework for federal criminal law.

### **The Original Design**

As President Bush recognized in his remarks to the governors, the Constitution’s enumeration of the federal government’s powers was meant to limit the reach of the federal government. The only powers the federal government possesses are those that have been delegated to it by the people and enumerated in the Constitution. All other powers are, as the Tenth Amendment confirms, “reserved to the states respectively, or to the people.”

The Constitution provides the federal government with an exceedingly slender grant of authority over criminal law. There are three specifically enumerated federal crimes—counterfeiting, piracy, and treason—and two general founts of federal criminal authority—Congress’s power to punish “offenses against the law of nations” and its power to “make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”

The records of the Constitutional Convention indicate that the federal role in criminal law was limited by design. At the Philadelphia Convention, discussion of criminal law issues focused almost exclusively on treason, piracy, counterfeiting, and offenses against the law of nations.<sup>20</sup> Federal criminal authority, like federal authority in general, was to be directed in the main toward affairs of state and international relations, as well as protecting the federal government and its interests. As James Madison noted in Federalist Paper no. 45:

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, such as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several states will extend to all

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.<sup>21</sup>

Alexander Hamilton agreed that criminal laws were the province of the states and argued that this would help the states maintain the affections of the citizenry and resist encroachments by the federal government:

There is one transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in a clear and satisfactory light. I mean the ordinary administration of criminal and civil justice.<sup>22</sup>

Early federal practice hewed closely to that understanding. The first Congress enacted the Crimes Act of 1790, which established 17 federal criminal offenses. For the most part, the Crimes Act was directed at ends unquestionably federal in nature—interference with the federal government and its operations. For example, the act proscribed perjury in federal court, theft of government property, revenue fraud, treason, and bribery of federal officials. Except in areas where the federal government had exclusive jurisdiction, as in the District of Columbia, federal territories, and military bases, early federal criminal law did not reach crimes against individuals, such as murder and ordinary theft.<sup>23</sup>

### **The Creeping Expansion of Federal Criminal Law**

In the post-Civil War era, Congress began to expand into areas traditionally within the ambit of the states' police powers. In response to both state and private violence against the freedmen in the South, Congress enacted a number of civil rights statutes that provided for federal prosecution of certain violations of the freedmen's rights.<sup>24</sup> In addition, the increasing integration of the national economy during the late 19th century provided fur-

ther impetus for the federalization of crime, in the form of the first mail fraud statute (1872), the criminal provisions of the Interstate Commerce Commission Act (1887), and the Sherman Antitrust Act (1890).

The federal war on alcohol, which began in 1919, also greatly increased the number of federal prosecutions. Despite the fact that Prohibition was repealed in 1933, federalization of crime continued to increase, thanks in large part to an increasing number of regulatory crimes and a newly expansive interpretation of Congress's power to regulate interstate commerce, sanctioned by the Supreme Court.<sup>25</sup>

But the real surge in the federalization of crime has come over the last 30 years, as Congress has ramped up the drug war and increasingly involved itself in the punishment of intrastate acts of violence. According to a report published by the American Bar Association, more than 40 percent of the federal criminal provisions enacted since the Civil War have been enacted since 1970.<sup>26</sup> By the early 1990s, there were more than 3,000 federal crimes on the books.<sup>27</sup> Whereas once federal criminal statutes focused principally on crimes affecting federal interests, today most such statutes proscribe conduct that is already covered by state criminal law. In 1997, for example, 95 percent of federal prosecutions involved federal statutes that duplicate state criminal statutes.<sup>28</sup> Thus, Congress has seen fit to proscribe offenses such as car theft, drive-by shootings, burning a church, and even disrupting a rodeo.<sup>29</sup> Congress's penchant for involving itself in matters as mundane and local as those was merely one indication that in the post-New Deal era the federal government had slipped its constitutional moorings.

### **Project Safe Neighborhoods: A Frontal Assault on Federalism**

When the Republican Party won historic majorities in the Senate and House in

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November 1994, there was good reason to expect that the trend toward overweening federalization had crested and that the distinction between what was properly federal and what was properly local would once again be respected. Republican candidates for the House in that election tried to take advantage of a burgeoning Tenth Amendment movement in the country, and their Contract with America included a pledge to end unfunded mandates on states and localities.<sup>30</sup> As then-senate majority leader Robert Dole (R-Kans.) put it in his first speech to the 104th Congress, "If I have one goal for the 104th Congress, it is this: that we will dust off the 10th Amendment. . . . Our guide will be this question: Is this program a basic function of a limited government?"<sup>31</sup> To stress the point, Dole took to carrying a copy of the Tenth Amendment in his coat pocket and taking it out during speeches.

And indeed there were significant victories for the Tenth Amendment during the period of Republican ascendancy. Not least among them was the advent of a Supreme Court jurisprudence that started to take federalism seriously. Perhaps emboldened by the political trends sweeping the country, the Court in 1995 issued a landmark ruling in *United States v. Lopez* that made clear that the long-dormant doctrine of enumerated powers had not lost its vitality.<sup>32</sup> In *Lopez*, the Court struck down as unconstitutional the Gun-Free School Zones Act, which criminalized gun possession "at a place the individual knows, or has reasonable cause to believe, is a school zone." According to the Court, to allow Congress to invoke the Commerce Power to regulate a matter so quintessentially local and noncommercial would "bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states."<sup>33</sup> When *Lopez* was followed by *Printz v. U.S.*,<sup>34</sup> prohibiting Congress from "commandeering" state and local police officers into enforcing the Brady Handgun Violence Prevention Act, and *U.S. v. Morrison*,<sup>35</sup> striking down the civil suit provisions of the Violence against Women Act as improperly

directed toward intrastate crime and beyond the scope of the Commerce Power, it became clear that a historic opportunity to restore federalism was at hand.

Still, a true restoration of the proper relationship between the states and the federal government would have to wait until Republicans took the White House—or so supporters of the Tenth Amendment were told. And in January 2001 the heralded event came to pass. Long-suffering constitutionalists finally saw the day when a president who had named Antonin Scalia and Clarence Thomas as his favorite justices and had pledged himself to "make respect for federalism a priority" in his administration assumed office.

Yet any rejoicing on the part of constitutionalists would be premature, to say the least. In several important areas of domestic policy, President Bush's initiatives suggest that, where it counts, political expediency will trump respect for federalism. For instance, it is hard to think of an issue more undeniably local in nature than education. And yet the president's education initiative, signed on January 8, 2002, dramatically increases federal spending on education and mandates state testing of pupils in reading and math.<sup>36</sup> With Project Safe Neighborhoods, respect for the Tenth Amendment has once again yielded to political calculation.

The political calculation of many supporters of Exile and Safe Neighborhoods is that an aggressive effort to "enforce the gun laws on the books" can forestall the gun control lobby's efforts to enact still more gun laws. Unfortunately, in attempting to preserve Second Amendment rights, supporters of Exile and Safe Neighborhoods are conducting a frontal assault on the constitutional principle of federalism.

### **Bush and Rehnquist Court at Cross-Purposes**

The Supreme Court has noted that the division of power between the states and the federal governments is

one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." To quote Madison, . . . "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."<sup>37</sup>

To prevent an excessive accumulation of federal power, the Framers refused to grant plenary police power to the federal government; instead, the Constitution grants Congress authority, pursuant to various enumerated powers, to fashion criminal statutes to protect distinctly federal interests. General law enforcement authority—"the ordinary administration of criminal justice," in Hamilton's phrase—is reserved to the states. With *Lopez*, *Printz*, *Morrison*, and other cases, the Rehnquist Court has begun to slowly shift the balance and restore American criminal law to the original understanding.

Exile and Safe Neighborhoods, in contrast, proceed on the assumption that the federal government has general police powers. By employing federal gun possession statutes that rest on a dubious reading of the power to "regulate commerce . . . among the several states," those programs threaten to make the ordinary administration of criminal justice a federal responsibility. More than one federal court has recognized the dangers inherent in such initiatives. In *United States v. Jones* (1999), a federal appeals court called Project Exile "a substantial federal incursion into a sovereign state's area of authority and responsibility."<sup>38</sup> District Judge Robert E. Payne struck a similar note in *United States v. Nathan* (1998): "The federal government has embarked upon a major incursion into the sovereignty of Virginia." According to Judge

Payne, the "risk of attenuating the Tenth Amendment" is present even in Project Exile in its current (voluntary) form. Moreover, "carried to its logical extreme [the argument for Exile] would make federal officers responsible for prosecuting all serious crimes in federal courts. Were that the case, we soon would have a federal police force with the attendant risk of the loss of liberty which that presents."<sup>39</sup>

Indeed, the Bush administration, with its embrace of the Exile model, seems bent on obliterating the distinction between what is properly local and what is properly national. One of the initiatives under the Project Safe Neighborhoods umbrella is Project Sentry, which Attorney General Ashcroft describes as "a vital federal-state project dedicated to prosecuting gun crimes committed at our nation's schools and dedicated to protecting juveniles from gun crime."<sup>40</sup> Under Project Sentry, the Justice Department will provide every U.S. Attorney's Office with a new prosecutor to combat "school-related gun violence."<sup>41</sup> A more brazen affront to the Rehnquist Court's landmark ruling in *Lopez*—striking down the Gun-Free School Zones Act—could hardly be imagined. In that case, Congress's attempt to make a federal crime out of gun possession in the vicinity of a school was held to be beyond the limited powers delegated to the federal government. The Court noted that, under the government's theory of the case, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."<sup>42</sup> Needless to say, the actions of President Bush do not match his statements with respect to federalism.

### **Clogging the Courts**

Disregarding our constitutional structure, as Exile and Safe Neighborhoods do, brings with it a host of troubling consequences.<sup>43</sup> In 1998 the American Bar Association's Task Force on the Federalization of Criminal Law examined the grave problems caused by promiscuous federalization of crime. Many of

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the concerns the task force addressed are inherent in Project Exile and the president's Project Safe Neighborhoods. Among those concerns are “the centralization of criminal law enforcement power in the federal government,” the threat of “disparate results for the same conduct,” “diminution of a principled basis for selecting a case as a federal or local crime,” and “increased power at the federal prosecutorial level,” leading to less local control of prosecutors.<sup>44</sup>

But perhaps the most immediate danger lies in Project Safe Neighborhoods' “adverse impact on the federal judicial system.”<sup>45</sup> Simply put, the federal government's primary responsibility is to provide a legal forum in which citizens with valid federal claims can promptly and dependably vindicate their rights. Project Safe Neighborhoods' federalization of crime will distract the federal courts by greatly exacerbating the strain on the federal court system—a phenomenon that Chief Justice Rehnquist has repeatedly decried.<sup>46</sup> Mindful of Rehnquist's warnings, Judge Richard L. Williams, chief judge of the U.S. District Court in Richmond, complained in a letter to the chief justice that Project Exile has “transformed [our court] into a minor-grade police court,” reducing the amount of time judges can spend on matters that are properly federal.<sup>47</sup>

Judge Williams is right to worry; federal criminal cases do appear to be crowding out complex civil matters. Despite a growing absolute number of civil cases on the federal docket, the number of civil trials has decreased to make way for a growing number of federal criminal cases, often involving run-of-the-mill crimes traditionally handled by the states. Although many of the federal criminal cases involve ordinary street crimes, they consume a disproportionate amount of judicial resources, in part because of federal sentencing procedures.<sup>48</sup>

Judge Fred Motz, chief judge of the U.S. District Court for the District of Maryland in Baltimore, says that Project Safe Neighborhoods could be “devastating” to the federal court system. Given that many gun arrests

involve drawn-out evidence suppression hearings, according to Judge Motz, “If these [gun possession] cases flood the federal courts, then it is going to have a tremendous impact.” Although the effect is “unseen,” the diversion of federal resources will adversely affect the rights of civil litigants seeking redress in federal court. In concrete terms, it means that, if someone files a lawsuit seeking redress, that case will not be resolved by a court for years. As Louisiana State University law professor John S. Baker noted, if Safe Neighborhoods is implemented, then “in some places, if you have a civil case, forget it. It's not going anywhere.”<sup>49</sup> Thus, the Bush-Ashcroft program is a perfect illustration of an unintended consequence noted by the Nobel laureate economist Milton Friedman, among others—that when government begins to do what it should not, it ceases to do what it should.

### **Interfering with State Law Enforcement**

Safe Neighborhoods' assault on federalism goes beyond simply increasing the number of federal gun prosecutions; its plan to provide funding for state and local prosecutors should also be deeply troubling to people who understand that with federal money come federal “strings.” As noted above, the Bush plan includes \$75 million for a program that would hire about 600 state and local prosecutors; the funding would be conditioned on those prosecutors pursuing gun law violations full-time. That is a dangerous precedent—one that strikes at the very notion of separate spheres of authority for the state and federal governments. By employing the spending power, Congress can direct the administration of state-level criminal justice in areas where there is absolutely no federal interest. In so doing, Congress can circumvent constitutional limits on its enumerated powers.<sup>50</sup> Indeed, using the tactic approved by the Bush administration in Project Safe Neighborhoods, the federal government could dictate increased prosecution of virtually any crime within the ambit of the states' police powers. As federal funding increases relative to state law enforcement budgets, the danger of creeping federal influ-



ence over state priorities will likely increase.

Do the Republican conservatives who support Project Safe Neighborhoods really want that program to become the model for federal anti-crime initiatives in the future? If it does, it is difficult to see any stopping point to the politicization of federal crime policy. The program stands as an open invitation for special interest groups to push their own “prosecution-stimulus” initiatives. Take hate crimes, for example. Why should left-leaning pressure groups stop with the passage of a federal hate crimes act? Following the Safe Neighborhoods model, they can push for several hundred new federal and state prosecutors dedicated to bringing hate crime indictments. Feminists will doubtless push for more prosecutors for sexual assault offenses.<sup>51</sup> Nor is there anything to stop advocates of child welfare from promoting the funding of several hundred full-time state-level child abuse prosecutors. In the past, conservatives have expressed valid concerns about whether overzealous prosecutors have been swept up in the emotional nature of the child abuse issue and ended up incarcerating innocent people; federal subsidization of such prosecutions would increase that risk exponentially.<sup>52</sup>

The Republicans who supported Exile and Safe Neighborhoods as a means of forestalling new gun control legislation have been too clever by half. The principle that they have endorsed not only runs roughshod over the idea that the states ought to be able to set their own prosecutorial priorities, it fairly begs for those priorities to be set by the most vocal and powerful interest groups in Washington. If the “respect for federalism” he has repeatedly professed is genuine, President Bush must reconsider his support for Project Safe Neighborhoods.<sup>53</sup>

### **The Closer One Looks, The More Problems One Sees**

Federalism issues to one side, it is easy to understand the superficial appeal of Project

Safe Neighborhoods. The program has the merit of relying on existing laws, rather than calling for new ones; moreover, the laws it relies on are targeted at offenders unlikely to get much sympathy from the general public: felons and drug users with guns, in large part. But as with many anti-crime initiatives coming out of Washington, a closer look at the program raises questions. What kinds of cases are Safe Neighborhoods prosecutors likely to bring? What opportunities for prosecutorial mischief might be presented by the program?

#### **Assembly-Line Justice**

Unlike an ordinary prosecutor, whose bailiwick covers the gamut of criminal law, a Safe Neighborhoods prosecutor is limited to only one category of criminal charges. Whereas other prosecutors are able to shift their focus to other categories of crime once they have charged the most dangerous and deserving defendants in a given category of offense, Safe Neighborhoods prosecutors will be expected to continue prosecuting violations of gun laws. Their incentive will be to keep focusing on the numbers—to continue producing indictments and convictions regardless of merit. That incentive threatens to result in assembly-line justice and overenforcement. The incentive structure that Safe Neighborhoods sets up will lead to the proliferation of “garbage” gun charges—technical violations of firearms statutes on which no sensible prosecutor would expend his energy.<sup>54</sup> Worse, Safe Neighborhoods will likely result in federal and state governments’ locking up firearms owners who do not deserve to be in jail.

Federal prosecutors already operate under an incentive structure that forces them to focus on the statistical “bottom line.” Statistics on arrests and convictions are the Justice Department’s bread and butter. They are submitted to the department’s outside auditors, are instrumental in assessing the “performance” of the U.S. Attorneys’ Offices, and are the focus of the department’s annual report. As George Washington University Law School professor Jonathan Turley puts it, “In

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some ways, the Justice Department continues to operate under the body count approach in Vietnam. . . . They feel a need to produce a body count to Congress to justify past appropriations and secure future increases.”<sup>55</sup>

When this focus on charging and conviction rates is combined with Safe Neighborhoods’ prosecutors’ inability to bring charges under other statutes, overenforcement will be the very likely result. Simply put, not every technical violation of federal or state gun statutes deserves to be prosecuted, particularly where, as is the case on the federal level, convictions will lead to mandatory minimum sentences and substantial jail time. But a Safe Neighborhoods prosecutor likely will not have the luxury of eschewing trivial cases.

And the federal criminal code contains a number of trivial gun offenses that will be useful to any Safe Neighborhoods prosecutor who is anxious to keep his or her numbers up. Should the full power of the federal government really be directed at a defendant who has sold a gun to someone he may have reason to believe is an unlawful user of controlled substances or has been discharged from the Armed Forces under dishonorable conditions?<sup>56</sup> Moreover, as at least one federal court has noted, the provision of the federal criminal code that prohibits gun possession by someone under a restraining order in a domestic dispute allows a defendant to be stripped of his Second Amendment rights and imprisoned without even a factual finding that he has ever threatened anyone with violence.<sup>57</sup> Indeed, it appears that Project Exile already encourages skewed priorities on the part of prosecutors. As federal Judge Richard L. Williams commented on Richmond’s Project Exile, “Ninety percent of these [Exile] defendants are probably no danger to society.”<sup>58</sup>

The same could be said of the defendants incarcerated under Colorado’s Project Exile. Reporter David Holthouse examined every Colorado Project Exile prosecution from the program’s inception in September 1999 through January 2002. The vast bulk of

Colorado Exile defendants were prosecuted under the “prohibited-person-in-possession” statutes (i.e., felon, drug user, etc.). Of those defendants, the overwhelming majority—154 of 191—had no violent felonies at all on their records. Two of them were simply illegal aliens without criminal records. Another—in an item picked up by “News of the Weird”-style columns nationwide—went to jail for posing nude with a firearm.<sup>59</sup>

That defendant, a 33-year-old Colorado Springs resident, was arrested when federal authorities came into possession of seven photos of Katica Crippen in various poses, holding a firearm. Her prior drug convictions made her a felon in possession under federal law, and prosecutor James Allison brought the full force of the federal government down on her.

Judge Richard Matsch, who presided over the Oklahoma City bombing trial, was outraged by the poor prosecutorial judgment and the waste of federal resources. “How far is this policy of locking people up with guns going to go?” Judge Matsch demanded. “I want to know why this is a federal case. Who decided this is a federal crime?”<sup>60</sup>

### **Fomenting Miscarriages of Justice**

More disturbing still is the prospect that Safe Neighborhoods will result in some appalling miscarriages of justice. Consider some of the cases that have been prosecuted in the pre-Project Safe Neighborhoods world.

In April 1999 Brian I. Ford went into a Fairfax City pawnshop to hock a Civil War-era rifle for \$35. A few weeks later, thanks to a police background check, Ford was arrested for being a felon in possession of a firearm, because of prior convictions for burglary and robbery. Had the case gone to federal court, Ford would have faced extensive jail time. But because Fairfax did not have a federal Project Exile program, and because Virginia’s state-level Exile program had not yet been implemented, the jury was free to recommend only a \$1,250 fine and no jail time.<sup>61</sup>

Michael Mahoney wasn’t quite so lucky.

Mahoney, a Tennessee businessman, is currently serving a 15-year term in federal prison as the result of a minor handgun offense. As the owner of the Hard Rack Pool Hall in Jackson, Tennessee, Mahoney had to make nightly cash deposits at his local bank. He carried a .22-caliber Derringer for personal protection while he did so. When Mahoney's pistol was stolen in 1992, he bought another one at a pawnshop, filling out the background-check form required by federal law. The problem for Mahoney was that 13 years earlier he had been convicted of selling drugs to an undercover police officer three times during the course of a three-week investigation. After the conviction, for which he served 22 months in prison, Mahoney cleaned up his act and became a law-abiding citizen. In 1991 he underwent an extensive background check to get a liquor license; because he had stayed out of trouble for more than 10 years, the license was granted. Mahoney, wrongly assuming that his lone felony conviction had been wiped out completely, marked down that he was not a felon on the federal background-check form for gun purchases. A BATF investigation resulted in Mahoney's indictment as a convicted felon in possession of a firearm as a result of buying the Derringer in 1991. Under federal mandatory minimum sentencing rules, Mahoney's three drug sales during the 1980 investigation were treated as three separate offenses, making Mahoney a "career criminal" and earning him a minimum sentence of 180 months. Though U.S. District Judge James D. Todd protested that Mahoney's was "not the kind of case that Congress had in mind," his hands were tied by federal law, and he had no choice but to put Mahoney in a jail cell for 15 years.<sup>62</sup>

Safe Neighborhoods promises to put more than 700 full-time gun prosecutors (600 state, 113 federal) to work. Add to that the fact that a job as a full-time gun prosecutor is likely to appeal disproportionately to attorneys with an ideological hostility toward gun ownership and one has the makings of a nationwide "zero tolerance" policy for tech-

nical infractions of gun laws. As the program is implemented, one can expect more miscarriages of justice.<sup>63</sup>

### **Threatening the Right to Trial by Jury**

The Sixth Amendment guarantees defendants in "all criminal prosecutions" the right to a public trial "by an impartial jury of the State and district wherein the crime shall have been committed." The Supreme Court has held that the constitutional guarantee of equal protection found in the Fourteenth Amendment and (implicitly) in the Fifth Amendment's Due Process Clause further protects a federal defendant's right to a jury trial by curtailing prosecutorial decisions that affect the racial composition of juries.<sup>64</sup> Nonetheless, in some cases, federal prosecutors have deliberately used Project Exile to secure a jury with a different racial composition than would otherwise be available at the state level. Project Safe Neighborhoods' mission to take Exile nationwide will only exacerbate that unseemly tactic.

In Richmond, Virginia, where Project Exile was first implemented, the jury pool for the state-level circuit court is approximately 75 percent African-American. In contrast, the jury pool for the Eastern District of Virginia, from which federal criminal juries are drawn in the Richmond area, is only about 10 percent African-American. Those facts were not lost on the federal prosecutors working on Project Exile cases in Richmond. At a Richmond Bench-Bar conference discussing Project Exile, a federal prosecutor stated that one of the program's goals was avoiding "Richmond juries." Another prosecutor made a similar admission at the sentencing hearing in *United States v. Scates*, a Project Exile case.<sup>65</sup>

In the 1999 case of *United States v. Jones*, a federal district court considered, and rejected, a Project Exile defendant's claim that such statements of bias revealed a prosecutorial design to affect the racial composition of his jury and thus violated his right to equal protection of the laws. While the court expressed its "concern about the discretion afforded individuals who divert cases from

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state to federal court for prosecution under Project Exile,” it was unwilling to hold that that discretion had been improperly exercised in this case, or that Project Exile had been systematically used to divert black defendants into the federal system and away from “Richmond juries.” According to the court, the “desire to avoid Richmond juries” could be given “a less nefarious construction”: “A ‘Richmond jury’ could simply be one bound by the laws of the Commonwealth of Virginia.” The court invoked “the presumption of regularity afforded prosecutorial discretion” and refused to interpret the statements of the federal prosecutors as discriminatory.<sup>66</sup>

However, the court was disturbed by the lack of any discernible or judicially reviewable standards governing when a case should be assigned to federal rather than state court. It noted that Exile’s design presented a real risk of selective federalization on the basis of race:

If the process of diverting cases for federal prosecution is indeed independently accomplished by one unsupervised individual who is aware of the defendants’ race, then Project Exile unnecessarily invites a substantial risk of selective prosecution. Indeed, if, as proponents of Project Exile maintain, there are disparities in the effectiveness of federal and state prosecutions then those disparities only increase the potential for discriminatory diversions for federal prosecution.<sup>67</sup>

Those risks are multiplied by Safe Neighborhoods’ extension of the Exile model throughout all 50 states. Thus far, Safe Neighborhoods does not appear to include any standards to use in determining when it is appropriate to bring gun charges in federal, as opposed to state, court. That absence of standards for diverting cases to federal court, coupled with the close cooperation between federal and state officials that Safe Neighborhoods envisions, creates a real risk that prosecutors

will divert cases that they perceive as racially charged to the federal system. Such forum-shopping tactics violate the guarantee of equal protection and undermine the constitutional right to a jury trial.

## **Are There Any Benefits? Is It Worth It?**

The problems associated with the Bush administration’s attempt to nationalize Project Exile under the auspices of Project Safe Neighborhoods have been noted. But what about the benefits? What do the American people get in exchange for weakening our federal structure and undermining our constitutional liberties?

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

In *United States v. Jones*, a panel of three federal judges examined Richmond’s experience with Project Exile and concluded that Exile was superfluous, given that “the Commonwealth of Virginia possesses the same institutional mechanisms necessary to combat the problems Project Exile abdicates to federal prosecutors.”<sup>68</sup> According to the court, the Virginia state statutes governing handgun crime are substantially similar to those at the federal level. Moreover, given its tough “three strikes” statute and its abolition of parole, Virginia law in some cases provides for harsher penalties for certain firearms offenses. Though rarely used in Virginia, the statutory provisions allowing the prosecutor to oppose pretrial release are also “substantively identical” to those available to federal prosecutors.<sup>69</sup>

In addition, the court found that Exile prisoners were not really “exiled” at all, despite

U.S. Attorney Helen Fahey's claim that the prospect of serving time out of state was a major deterrent for criminals. As the court noted, "The vast majority of Project Exile defendants are incarcerated at the Northern Neck Regional Jail while awaiting trial and at the Federal Correction Institute in Petersburg, Virginia, following conviction."<sup>70</sup> Since the Virginia state penitentiary system has facilities located further away from Richmond than either of those institutions, "Project Exile actually results in incarceration in facilities closer than many available in the state system." Accordingly, the court concluded that "the location of incarceration provides no justification for Project Exile."<sup>71</sup>

There is little evidence that Exile is the miracle cure its proponents claim. The homicide rate in Richmond fell 36 percent from 1997 to 1999, the period when Exile was most aggressively enforced.<sup>72</sup> But gun-related homicides and other violent crime dropped significantly all across the country during the same period, and criminologists do not agree about the cause of that decline.<sup>73</sup> For example, violent crime in New Orleans dropped 18 percent between 1997 and 1998, before it implemented an Exile program (Richmond's violent crime rate dropped by 19 percent during the same period).<sup>74</sup> Given the dearth of detailed research in the area, and the lack of a scholarly consensus on the causes of the nationwide decline in violent crime, a bit of humility about Project Exile's claims is in order.

Nonetheless, it stands to reason that if prosecutors make an aggressive effort to incarcerate armed felons—and if they focus on defendants who are likely to be a future threat to society—such prosecutions can have an effect on the crime rate by getting a certain number of potential repeat offenders off the streets. But if a more aggressive crime control effort would bring substantial benefits, there is absolutely no reason that it cannot be undertaken by state law enforcement personnel. As the court in *United States v. Jones* put it, "While vigorous prosecution of firearms offenses has undoubtedly con-

tributed to some unascertainable decline in the city's murder rate, there is no compelling reason to suspect that a comparable effort by local prosecutors would not achieve a comparable effect."<sup>75</sup>

Indeed, state legislatures are, all other things being equal, more responsive to local concerns than is the federal government. More important, state prosecutors are, for good or ill, generally more responsive to local pressure than are their federal counterparts. In most states, prosecutors are elected, whereas U.S. attorneys are presidential appointees. Thus, the states are likely to have greater incentive than the federal government to provide the level of protection that their citizens demand.

Even if Project Exile had the dramatic impact on crime that its most ardent supporters argue it does, its affront to the Constitution and the rule of law would compel constitutionalists to oppose it. But the available evidence suggests that its impact has been far more modest. Thus, the supporters of Project Exile and Project Safe Neighborhoods have failed to produce any compelling reason why systematic federal intervention is necessary. Given the costs federalization brings, that is a failure that should end the debate.

## **Federalism's Fair-Weather Friends**

In the course of defending Project Exile, NRA executive director Wayne LaPierre Jr. attacked federal judges who have criticized the program: "They consider these nuisance cases, and the last thing federal judges want are armed felony cases in their courts. . . . That's shameful. Killing people is wrong, and . . . it needs to be changed. Every cop on the street knows it."<sup>76</sup> While everyone can agree with LaPierre that "killing people is wrong," that obvious moral principle does not quite settle the debate over the federalization of crime. Something more is needed: a constitutional justification for nationalizing matters that have always been viewed as essentially local in nature. But no such justification has been

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forthcoming; NRA officials such as LaPierre and Charlton Heston repeatedly assailed President Bill Clinton for failing to enforce federal firearms statutes, without ever explaining why such cases should be in federal court. The supporters of federalizing gun crime lack even a compelling policy rationale—let alone constitutional grounds—for ignoring the distinction between local and interstate matters.

It is fairly clear that for supporters of the Second Amendment the main justification for federalizing gun crimes is political. Advocates of gun rights such as the NRA got behind the idea of nationalizing Project Exile because they made the judgment that a call to “enforce the gun laws on the books” could help ward off further gun control legislation. But even as a matter of political calculation, that may have been ill-considered. The strength of the gun control movement has been overestimated. For example, Al Gore’s tough stance on guns was likely a net liability for him in the 2000 presidential election, costing him states such as West Virginia, Tennessee, and Arkansas. Al From of the centrist Democratic Leadership Council notes that 48 percent of voters in the 2000 election had guns in their households and many feared Democratic gun control proposals.<sup>77</sup> As Gore’s running mate, Sen. Joe Lieberman (D-Conn.), described the ticket’s experience with the gun issue, “We lost a number of voters who on almost every other issue realized they’d be better off with Al Gore.”<sup>78</sup> And after September 11 support for gun control has eroded still further, according to a Gallup poll taken a month after the attacks.<sup>79</sup> “Any gun-control legislation of any kind is a non-starter now,” says University of Virginia political scientist Larry Sabato.<sup>80</sup> Thus, the NRA’s support for federalization initiatives seems to be a case where political strategy has outlived the conditions that gave rise to it.

The “respect for federalism” President Bush and Attorney General Ashcroft publicly profess ought to find expression in their official conduct. There are disturbing indications, however, that it will not. As has been widely reported, where the administration disagrees with policies pursued by particular states,

such as the legalization of assisted suicide and the use of medicinal marijuana, it has used the power of the federal government to intervene forcefully.<sup>81</sup> Project Safe Neighborhoods is of a piece with those actions, and no one who truly respects the Tenth Amendment and the doctrine of enumerated powers can support such an ill-conceived program.

## **Conclusion**

In the wake of the September 11 terrorist attacks, some commentators have suggested that the constitutional principle of federalism is a luxury we can no longer afford.<sup>82</sup> But precisely the opposite is the case. The constitutional distinction between what is properly local and what is properly national has never been more important.<sup>83</sup> Combating the international threat of terrorism is a job for which the Constitution provides the federal government ample authority, in the form of the power to declare war and to punish offenses against the laws of nations.<sup>84</sup> Prosecuting firearms offenses is a local issue, one that the Constitution properly leaves to states and localities. It is unwise to squander federal resources in the pursuit of offenders that the states and localities are perfectly equipped to handle. Even more important, we cannot afford to squander our constitutional heritage of limited government.

Project Safe Neighborhoods violates the constitutional principle of federalism. It also threatens to lead to overenforcement of gun laws and serious miscarriages of justice. If President Bush has the respect for federalism he professes, and if he takes seriously his oath to uphold the Constitution, he must drop Project Safe Neighborhoods.

## **Notes**

1. George Bush, “Remarks Announcing the Project Safe Neighborhoods Initiative in Philadelphia, Pennsylvania,” *Public Papers of the Presidents*, May 21, 2001.
2. See “Sarah Brady Statement on White House

- Gun Safety Initiative," *U.S. Newswire*, May 14, 2001 ("Handgun Control has long supported strong enforcement of this nation's gun laws and tough prosecution programs like Project Exile"); "Schumer Lauds Project Exile Success in Rochester, Calls for National Expansion," Press release, office of Sen. Charles E. Schumer, March 30, 1999; and Tim Bryant, "Ashcroft Would Boost Efforts Here to Fight Illegal Guns," *St. Louis Post-Dispatch*, March 4, 2000, p. 8 ("Ashcroft said he favors implementation in St. Louis of the kind of anti-gun-crime effort authorities use in Richmond, VA [i.e., Project Exile]").
3. "Nicholson Urges Stronger Enforcement of Gun Laws: 'Republicans Share Million Mom Marchers' Goal of Ending Gun Crime," *PR Newswire*, May 12, 2000.
  4. Toni Heinzl, "Richmond's Project Exile Criticized by Attorneys, Federal Judge," *Fort Worth Star-Telegram*, September 17, 2000, p. 21.
  5. David Schiller, "Project Exile," [www.vahv.org/Exile](http://www.vahv.org/Exile).
  6. Helen F. Fahey, Testimony before the Senate Judiciary Committee, March 22, 1999. Copy in author's files.
  7. *Ibid.*
  8. *Ibid.*
  9. See Michael Janofsky, "Attacking Crime by Making Federal Case of Gun Offenses," *New York Times*, February 10, 1999.
  10. See David S. Cloud, "Prosecutor's Strategy Scrambles Gun-Control Alliances," *Wall Street Journal*, August 31, 1998.
  11. See 18 U.S.C.A. § 922(g).
  12. Fahey.
  13. Elaine Shannon, "Have Gun? Will Travel," [www.cnn.com/ALLPOLITICS/time/1999/08/09/gun.html](http://www.cnn.com/ALLPOLITICS/time/1999/08/09/gun.html).
  14. Jim Abrams, "House OKs Bill Backing Gun Laws," *AP Online*, April 12, 2000.
  15. R. H. Melton, "Bush Favors Va.-style Gun Control; Candidate Has National Hopes for Program Penalizing Felons," *Washington Post*, June 23, 1999.
  16. "Project Safe Neighborhoods Fact Sheet," White House press release, May 14, 2001, [www.whitehouse.gov/news/releases/2001/05/20010514-2.html](http://www.whitehouse.gov/news/releases/2001/05/20010514-2.html). But note that in remarks given November 29, 2001, before the United States Attorneys Conference, President Bush stated that by September 2002, "we hope to have 200 new attorneys hired to prosecute crimes committed with a gun." *Public Papers of the Presidents*, December 3, 2001.
  17. "Project Safe Neighborhoods Fact Sheet."
  18. Bush.
  19. "Remarks by the President at National Governors' Association Meeting," *U.S. Newswire*, February 26, 2001.
  20. See generally Adam H. Kurland, "First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction," *Emory Law Journal* 45 (1996): 1.
  21. Federalist Paper no. 45, in *The Federalist*, ed. George W. Carey and James McClellan (Dubuque, Iowa: Kendall-Hunt, 1990), p. 238.
  22. Federalist Paper no. 17, in *The Federalist*, p. 85.
  23. Thomas J. Maroney, "Fifty Years of Federalization of Criminal Law: Sounding the Alarm or 'Crying Wolf?'" *Syracuse Law Review* 50 (2000): 1319-20.
  24. See Kathleen F. Brickey, "Criminal Mischief: The Federalization of American Criminal Law," *Hastings Law Journal* 46 (1995): 1139-40.
  25. See generally, Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," *Notre Dame Law Review* 68 (1993): 507.
  26. American Bar Association Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998, p. 7.
  27. Sara Sun Beale, "Legislating Federal Crime and Its Consequences: Federalizing Crime: Assessing the Impact on the Federal Courts," *Annals of the American Academy of Political and Social Science* 39 (January 1996): 43.
  28. John S. Baker Jr., "State Police Powers and the Federalization of Local Crime," *Temple Law Review* 72 (1999): 683.
  29. 18 U.S.C. § 2119; 8 U.S.C. § 1120; 18 U.S.C. § 247; and 18 U.S.C. § 43.
  30. Given that the second plank in the Contract with America, the anti-crime Taking Back Our Streets Act, included federal aid to local law enforcement, there was also reason to be skeptical of the GOP's commitment to federalism. The

Contract with America is available at [www.house.gov/house/Contract/CONTRACT.html](http://www.house.gov/house/Contract/CONTRACT.html).

31. “We Will Continue in Our Drive to Return Power to Our States and Our People,” *Washington Post*, January 5, 1995.

32. 514 U.S. 549 (1995).

33. *Ibid.* at 567.

34. 521 U.S. 898 (1997).

35. 529 U.S. 598 (2000).

36. Pub. L. 107-110 (2002).

37. *Printz* at 921–22.

38. *United States v. Jones*, 36 F. Supp. 2d, 304, 316 (E.D. Va. 1999).

39. *United States v. Nathan*, 1998 U.S. Dist. LEXIS 15124 at \*30 (E.D. Va. 1998).

40. John Ashcroft, “Gun Initiative/NICS,” News conference, February 13, 2002, transcript, [www.usdoj.gov/ag/speeches/2002/021302newsconferenceguninitiativenics.htm](http://www.usdoj.gov/ag/speeches/2002/021302newsconferenceguninitiativenics.htm). Federal prosecutions under Project Sentry will likely be conducted under 18 U.S.C.S. § 922(q), the revamped Gun-Free School Zones Act (Pub. L. 104-208, signed by President Clinton on September 30, 1996) enacted in the wake of *Lopez*. That act could be considered constitutional only under the narrowest possible reading of *Lopez*.

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

42. *Lopez* at 564.

43. Thus far, Project Exile has proved itself largely immune to constitutional challenge in the federal courts. Despite the serious concerns about federalism expressed by the courts in *Jones*, *Nathan*, and other cases reviewing Exile’s constitutionality, the federal judiciary has found itself constrained by existing precedents to uphold Exile. For example, although Exile uses state officers to enforce federal law, the jurisdictions participating in Exile programs are doing so voluntarily, not in response to a binding federal mandate. Thus Exile does not fit precisely within the rule of *Printz v. United States*, the Brady Act case that held that the federal government could not forcibly “commandeer” state executive branch officials to enforce federal law. Similarly, the federal gun possession statutes on which the program principally relies have been upheld by various federal courts against *Lopez*-based challenges. See *United States v.*

*Lewis*, 100 F.3d 49, 52 (7th Cir. 1996) (“A single journey across state lines, however remote from the defendant’s possession, is enough to establish the constitutionally minimal tie of a given weapon to interstate commerce”); and *United States v. Pierson*, 139 F.3d 501, 504 (5th Cir. 1998) (“Evidence that a gun was manufactured in one state and possessed in another state is sufficient to establish a past connection between the firearm and interstate commerce”). It is difficult to see any reason—apart from judicial timidity—why that should be so. If, as *Lopez* held, Congress lacks the power under the Commerce Clause to proscribe carrying a gun within a school zone, it is hard to understand why the simple fact that a gun was manufactured out of state should be sufficient to proscribe intrastate possession of the weapon. If, as *Morrison* held, “the Constitution requires a distinction between what is truly national and what is truly local,” and gender-motivated crimes of violence fall into the latter category, it is difficult to see why unlawful possession or use of a gun would fall in the former. Nonetheless, that is how the courts have come down. The Bush administration is no doubt counting on such case law to protect Safe Neighborhoods as well.

44. American Bar Association Task Force on the Federalization of Criminal Law, pp. 27–35.

45. *Ibid.*, pp. 35–40.

46. Roberto Suro, “Rehnquist: Too Many Offenses Are Becoming Federal Crimes,” *Washington Post*, January 1, 1999.

47. Tom Campbell, “Bull’s Eye or Wasted Shots? Federal Judges Not among Gun Program’s Supporters,” *Richmond Times Dispatch*, January 22, 1999.

48. Beale, pp. 47–51.

49. Quoted in James Gordon Meek, “Is Federal Court Logjam on the Way?” *LexisONE*, August 30, 2001.

50. See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (holding that despite the Tenth Amendment, Congress can use spending power to encourage state-level legislative change by attaching conditions to receipt of federal grants).

51. *United States v. Morrison*, which struck down provisions of the Violence against Women Act, establishes the unconstitutionality of federal legislation criminalizing rape and sexual assault. But it doesn’t stand in the way of federal funds to hire full-time state-level sex crime prosecutors.



52. See Dorothy Rabinowitz, "Only in Massachusetts," *Wall Street Journal*, December 29, 1999; and Dorothy Rabinowitz, "The Pursuit of Justice, Continued," *Wall Street Journal*, October 7, 1999.

53. Case law cannot be used to excuse the president's official actions. The president's duties as a constitutional official go beyond simply doing whatever the courts will let him get away with. As Justice Felix Frankfurter put it, "The ultimate touchstone of constitutionality is the Constitution itself and not what [the Court] has said about it." *Graves v. O'Keefe*, 306 U.S. 466, 491 (1938). The president has an independent duty arising from his oath of office to ensure that his powers are exercised pursuant to the Constitution.

54. To take one example of a garbage gun charge, a few years ago federal prosecutors charged Candisha Robinson with "using" a firearm during a drug offense. That dubious charge arose out of the following circumstances. Undercover police officers made a controlled drug buy from Robinson at her apartment. The police later returned and executed a search warrant. Inside a locked trunk in the bedroom closet, the police found an unloaded handgun. Robinson received a 60-month term of imprisonment on that charge. See *Bailey v. United States*, 516 U.S. 137 (1995) (companion case). While it is true that the conviction was ultimately overturned by the Supreme Court, the point here is to show the poor prosecutorial judgment in bringing that charge in the first place.

55. Quoted in Mark Fazlollah and Peter Nicholas, "U.S. Overstates Arrests in Terrorism," *Philadelphia Inquirer*, December 16, 2001.

56. See 18 U.S.C.A. § 922(d)(3), (6)

57. 18 U.S.C.A. § 922(g)(8)(c)(ii), prohibiting gun possession by anyone under a court order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury"; See also *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999); but see *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (suggesting that such a finding of fact is necessary in most states before a restraining order can be issued).

58. Quoted in Toni Heinzl, "Richmond's Project Exile Criticized by Attorneys, Federal Judge," *Fort Worth Star-Telegram*, September 17, 2000, p. 21.

59. David Holthouse, "Living in Exile: Federal Prisons Are Filling Up with People Whose Only Crime Is the Possession of a Gun," *Denver Westword*, March 21, 2002.

60. Quoted in *ibid.*

61. Tom Jackman, "Va. Jurists Denounce Mandatory Sentences; Felons with Guns Get No Breaks," *Washington Post*, October 9, 1999.

62. Gary Fields, "'Career Felons' Feel the Long Arm of Gun Laws," *Wall Street Journal*, July 3, 2001. For examples of the kinds of prosecutions that ideologically driven prosecutors might bring, see Guy Taylor, "Self-Defense Stance Defended on Web in Burglar Death," *Washington Times*, December 17, 2001, detailing the state-level prosecution, for first-degree murder and various gun charges, of two Maryland men who shot a burglar in self-defense. As the state's attorney prosecuting the case explained, "We have a comprehensive strategy in Baltimore for dealing with crimes with guns and reducing gun violence . . . the killing of Mr. Walker was not a typical street crime, but it is a crime that needs to be prosecuted." See also Tom Schoenberg, "Does Punishment Fit the Crime? He Turned in Gun, Now Faces Deportation," *Legal Times*, January 24, 2000, p. 1, describing the prosecution, by the District of Columbia U.S. Attorney's Office, of one Elwyn Lehman. Lehman, the driver of the tour bus for gospel singer CeCe Winans, brought the singer to the White House for a special tour. The 53-year-old driver had a handgun on board, but only realized this once he was at the gates of the White House. Lehman told the Secret Service officers about the pistol and voluntarily turned it over to them. He was rewarded with a trip to D.C. Jail and charged with three counts of weapons possession. Lehman, a Canadian citizen who had been living in the United States for the past 15 years, also faced deportation. As the spokesman for the D.C. U.S. Attorney's Office explained, "Because the District of Columbia, which has one of the strictest gun laws in the country, continues to be plagued by an alarmingly high rate of gun violence, the U.S. attorney's office has long had a no drop and zero tolerance policy regarding persons found in illegal possession of firearms."

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

64. See *Batson v. Kentucky*, 476 U.S. 79 (1986).
65. *Jones* at 307-8 cites the sentencing transcript of *U.S. v. Scates*, 2001 U.S. App. LEXIS 10624, 11 Fed Appx 208 (4th Cir. 2001) to show that in at least one other Exile case a prosecutor admitted that one motivation for federalization was to get a different jury pool.
66. *Ibid.* Similar results were reached in *United States v. DeLoach*, No. 99-4441, 2000, U.S. App. LEXIS 3824 (4th Cir. 2000) and *United States v. Scates*
67. *Jones* at 312.
68. *Ibid.* at 315.
69. *Ibid.* at 315; see also *United States v. Nathan*, 1998 U.S. Dist. LEXIS 15124 at \*26.
70. *Jones* at 316.
71. *Ibid.*
72. See "Call in the Feds," *The Economist*, April 3, 1999.
73. Lorraine Adams and David A. Vise, "Crime Rates Down for 7th Straight Year; Experts Disagree about Reasons for Drop and the Meaning of Conflicting Trends," *Washington Post*, October 18, 1999.
74. Baker, p. 683.
75. *Jones* at 315.
76. Quoted in Janofsky.
77. Miles Benson, "Demos Drafting Own Contract with America; Party Leaders Want to Close 'Culture Gap,'" *New Orleans Times-Picayune*, July 18, 2001, p. 6.
78. Quoted in "DNC: Get Your Stinking Paws Off Gun Policy!" *The Hotline*, August 13, 2001.
79. Dante Chinni and Tim Vanderpool, "More in US Carry Guns; Restrictions Lose Support," *Christian Science Monitor*, December 6, 2001.
80. Quoted in *ibid.*
81. See Nelson Lund, "Why Ashcroft Is Wrong on Assisted Suicide," *Commentary*, February 2002; and "U.S. Raid Sets Off Protests," *New York Times*, February 13, 2002.
82. See Linda Greenhouse, "Will the Court Reassert National Authority?" *New York Times*, September 30, 2001, suggesting that "the Supreme Court's federalism revolution has been overtaken by events."
83. See Marci Hamilton, "Federalism and September 11: Why the Tragedy Should Convince Congress to Concentrate Fully on Truly National Topics," *Findlaw Legal Commentary*, writ.news.findlaw.com/hamilton/20011025.html.
84. Though even here much of the responsibility for domestic safety will fall to states and localities. See Jonathan Walters, "Safety Is Still a Local Issue: This Is a Time for Every Level of Government to Remember the Things It Does Best," *Governing*, November 2000.

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