17. The Ominous Powers of Federal Law Enforcement

Congress should

- shield the citizenry from abusive prosecutors by enacting an ''ignorance-of-the-law'' defense,
- restore the constitutional immunity against double jeopardy by abolishing ''dual prosecution'' by federal and state prosecutors,
- restore the constitutional right of trial by jury by abolishing ''real-offense'' sentencing, and
- halt the deputization of private industry by repealing the Bank Secrecy Act of 1970 and the Communications Assistance for Law Enforcement Act of 1994.

Federal law enforcement agencies have assumed extraordinary police and prosecutorial powers over the American people during the last 30 years. In some cases the government can now circumvent basic constitutional guarantees such as trial by jury and the prohibition against double jeopardy. The government is also employing disturbing surveillance strategies, such as enlisting the help of private industries to spy on American citizens. It is no overstatement to say that our national government is taking on too many attributes of a police state. The 106th Congress should reverse those ominous trends by restoring our constitutional safeguards against an overweening government.

Our Unavoidable Ignorance of the Law

History is filled with examples of tyrannical governments that were able to persecute unpopular groups and innocent individuals by keeping the law's requirements from the people. The Roman emperor Caligula, for example, posted new laws high on the columns of buildings so that

they could not be studied by ordinary citizens. The Framers of the U.S. Constitution recognized that this type of rank injustice could arise even under a democratic form of government. As James Madison noted, ''It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today, can guess what it will be tomorrow.'' Unfortunately, Madison's vision of unbridled lawmaking is an apt description of federal regulatory policy in the 1990s. The Environmental Protection Agency, for example, set up a special hotline to answer legal questions from citizens. But the EPA does not guarantee that the information given over the hotline is correct—and reliance on incorrect information will not constitute a defense in a government enforcement action.

The sheer volume of modern law makes it impossible for an ordinary American household to stay informed—and yet the U.S. Department of Justice vigorously defends the old legal maxim that ''ignorance of the law is no excuse.'' That maxim may have been appropriate for a society that simply criminalized inherently evil conduct, such as murder, rape, and theft, but it is wholly inappropriate in a labyrinthine regulatory regime that criminalizes activities that are morally neutral. It has been estimated that the number of new enactments by legislative bodies ranging from city councils to Congress is 150,000 per year. At that rate, a conscientious citizen would have to study 410 laws each and every day all year round—a full-time task, to say the least.

It is simply outrageous for the U.S. government to impose a legal duty on every American citizen to ''know'' all of the mind-boggling rules and regulations that have emanated from Washington over the years. The 106th Congress can remedy that unjust situation by passing a law that would require U.S. attorneys to prove that regulatory violations are ''willful'' or, in the alternative, permit a good-faith belief in the legality of one's conduct to be pleaded and proved as a defense. The former rule is already in place for our complicated tax laws—but it should also shield unwary Americans from all of the other regulations.

An Ever-Expanding Double Jeopardy Loophole

The Fifth Amendment's double jeopardy clause bars government from subjecting any person to multiple prosecutions for the same offense. But the Supreme Court has interpreted that clause in a way that allows separate

state and federal prosecutions for the same conduct. That legal doctrine, which is known as the ''dual sovereign'' exception to the double jeopardy principle, gives federal prosecutors the power to retry thousands of state cases in federal court.

The double jeopardy principle has been recognized as one of the great bulwarks against government oppression. Without that protection, the government could use its vast resources to wear political dissidents and others down with repeated prosecutions. Multiple prosecutions also allow government attorneys to hone their trial tactics before new juries, which only increases the risk of an erroneous conviction. To guard against that danger, the Framers of the Constitution explicitly incorporated the immunity against double jeopardy into the Bill of Rights in 1791.

The Bill of Rights, however, constrained only the federal government until the ratification in 1868 of the Fourteenth Amendment, which extended the protections in the Bill of Rights against state government actions. Because federal criminal prosecutions were few and far between for much of our history, the question of how the double jeopardy principle fit into our federalist system remained a theoretical issue for many years. American courts were vexed early on, for example, by the question of whether the state and federal governments could make the same conduct a crime. The powers of the federal government are set forth in article I, section 8 of the Constitution, and the Tenth Amendment makes it clear that the ''powers not delegated to the United States by the Constitution'' are reserved to ''the States respectively, or to the people.'' Early American courts believed that, by virtue of the separation of powers and the creation of separate jurisdictions, ''double trials would virtually never occur in our country.'' In the rare instances of concurrent jurisdiction, the courts expected the prosecutors themselves to respect the double jeopardy principle. In *Jett v. The Commonwealth* (1867), for example, the Supreme Court of Virginia stated, ''We must suppose that the criminal laws will be administered, as they should be, in a spirit of justice and benignity to the citizen, and that those who are entrusted with their execution will interpose to protect offenders against double punishment, whenever their interposition is necessary to prevent injustice or oppression; and that if, in any case, they should fail to do so, the wrong will be addressed by the pardoning power.''

As long as the concurrent jurisdiction of the federal and state governments was limited, the potential for prosecutorial mischief was relatively minor. But the legal landscape was drastically altered after the turn of the century as the federal government expanded its criminal jurisdiction

beyond ''the unique areas of national concern listed among its constitutionally enumerated powers.'' Attorney Daniel A. Braun writes,

> The criminal legislation enacted during this century, especially the sweeping crime control measures passed since the 1960s, has greatly increased the quantity of substantive criminal offenses covered by parallel federal and state statutes. The criminal codes of the states and the nation presently identify many of the same wrongs and share many of the same goals. For this reason, an individual who violates the criminal law of a state stands a considerable chance of violating a provision of the federal code as well.

The Supreme Court has repeatedly upheld successive state and federal prosecutions. The Court's legal analysis typically emphasizes the law enforcement interests of government over the potential abuse of individual defendants. A common argument is that one sovereign might try to subvert the policies of the other. A state, for example, might try to undermine a national law by enacting a similar statute with a very light penalty so that defendants would rush to plead guilty in state court and thereby avoid a stiffer punishment under federal law. Although there may be some merit to that argument, the Court all but ignores the risks associated with its current rule, namely, that federal and state authorities may join forces to pursue common governmental interests. Justice Hugo Black, among others, insisted on viewing the legal issue ''from the standpoint of the individual who is being prosecuted.'' In a biting dissent, Black observed, ''If danger to the innocent is emphasized, the danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone.''

It is imperative that the mischievous ''dual sovereign'' loophole in double jeopardy law be closed immediately. A number of state governments have, to their credit, restricted their prosecuting officials from initiating a criminal case against anyone who has already undergone a federal prosecution for any particular incident. The 106th Congress should restrain federal prosecutors with a similar rule.

Bypassing Trial by Jury

The Sixth Amendment says that any person accused of a crime ''shall enjoy the right to a speedy and public trial, by an impartial jury.'' Trial by jury, however, is increasingly being bypassed by a concept known as ''real-offense'' sentencing. As unbelievable as it may seem, our courts can now punish an individual for an offense even after the jury has

unanimously rendered a ''not guilty'' verdict. That pernicious doctrine is nothing less than an assault upon our entire constitutional system of justice.

When America declared independence from England, the jury trial was regarded as one of the most important safeguards against arbitrary and oppressive governmental policies. Thomas Jefferson, for example, considered the jury trial ''the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.'' During the contentious ratification debates, Alexander Hamilton pointed out that the right to jury trial was something that everyone could agree on. In *Federalist* no. 83, Hamilton wrote, ''The friends and adversaries of the [proposed constitution], if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.'' Those firmly held convictions among America's early leaders were undoubtedly formed as a result of their colonial experience. Because colonial juries routinely refused to convict citizens who were prosecuted under oppressive British laws, Americans saw the jury as an indispensable ''check'' upon government abuse.

When the time came to form a new American government, the Framers of the U.S. Constitution placed the jury at the heart of our criminal justice system. They did so for a very specific reason. The Framers did not want the federal government to have the power to unilaterally brand a citizen as a criminal. In America, prosecutors must first persuade a jury of laymen that the accused is a criminal who must be punished. The jury's unanimous assent to the government's indictment was to be a prerequisite to punishment.

''Real-offense'' sentencing, however, undermines the constitutional safeguard of trial by jury in at least two ways. First, if the prosecutor fails to persuade a jury of the defendant's guilt at trial, he can now ask a judge for a second opinion. For example, *United States v. Watts* (9th Cir. 1995) involved a prosecution for cocaine and firearms possession. Vernon Watts was arrested after police detectives discovered cocaine base in his kitchen cabinet and two loaded guns in his bedroom closet. At trial, the jury convicted Watts on the drug charges but acquitted him of ''using a firearm'' during a drug offense. Despite Watts's acquittal on the weapons charge, the sentencing court announced that Watts had indeed possessed the guns in connection with the drug offense and that his sentence would be increased accordingly. As bizarre as it may sound, the defendant will serve several additional months in prison for the acquitted conduct.

Second, U.S. attorneys can withhold shaky evidence on some allegations until the sentencing phase by filing an indictment with a single charge. If the government is able to secure a conviction on the charge set forth in the formal indictment, prosecutors can then seek ''enhanced penalties'' for offenses the jury never heard about. The government has a strong incentive to employ that strategy against defendants because the evidentiary standards before a sentencing judge are well below those required at trial. Prosecutors have to prove ''sentencing factors'' by only a preponderance of the evidence instead of the traditionally high standard of ''beyond a reasonable doubt.'' And because the Federal Rules of Evidence do not apply at sentencing, federal judges can add years to a defendant's sentence on the basis of flimsy hearsay evidence.

Justice Department officials defend real-offense sentencing by claiming that no person is being punished for unconvicted criminal conduct; some individuals are merely being punished more severely for the factual circumstances surrounding the crime of which they were convicted. That is a dangerous play on words. For if the connection between trial and sentencing procedures is severed, Congress can simply manipulate the statutory maximum penalties for the thousands of actions that are now criminal. Such manipulation would effectively obviate the government's burden to prove the bulk of criminal activity before juries by proof beyond a reasonable doubt. Law professor Elizabeth Lear observes that ''under the current regime of nonconviction offense sentencing, only the judge and the prosecutor need approve the bulk of punishment decisions.'' Such unbridled governmental power, Lear concludes, ''eviscerates the jury's ability to control executive and judicial abuse.''

The 106th Congress should not allow prosecutors to bypass the constitutional safeguard of trial by jury. Congress should jettison the present ''real-offense'' sentencing paradigm and move to a ''conviction-offense'' model. That would not be a move into uncharted territory. The state of Minnesota has been operating on a conviction-offense model for several years, and it is among the most respected of the state systems. Congress should adopt the wisdom of the Minnesota model.

The Deputization of Private Industry

Perhaps the most disturbing legal trend in recent years is the extent to which the federal government is compelling private organizations to assist in law enforcement investigations. Banks, for example, are legally required to spy on their customers and make periodic reports to the police. Telephone

companies must open their records and facilities to government agents and give them whatever technical assistance they need to conduct electronic surveillance. And, with those precedents firmly in place, the federal government is now seeking to expand its network of private informers by deputizing the hotel, airline, and financial services industries. The American tradition of voluntary cooperation with the police is being perverted into an insidious system of compulsory cooperation.

That trend began with the Bank Secrecy Act of 1970. The Department of Justice and the Internal Revenue Service convinced Congress that they could launch a more effective attack on organized crime if our domestic banks could be made to provide greater evidence of financial transactions. The result was a massive imposition of reporting and record-keeping requirements on America's banking institutions.

Under the Bank Secrecy Act, banks must spy on their customers and report any transaction involving more than $10,000 to the police. Every bank must also microfilm or copy every check drawn on it or presented to it for payment. That record-keeping requirement is extremely burdensome. A 1970 report from the House Committee on Banking and Currency estimated that a minimum of 20 billion checks would have to be photocopied every year. Congress made no attempt, however, to compensate banks for that unfunded mandate.

The Supreme Court upheld the constitutionality of the Bank Secrecy Act in a 6–3 decision in 1974. The Court found no Fourth or Fifth Amendment violation and did not find the cost burden to be unreasonable. But Justice Thurgood Marshall took issue with the Court's Fourth Amendment analysis in a dissenting opinion: ''By compelling an otherwise unwilling bank to photocopy the checks of its customers, the Government has as much a hand in seizing those checks as if it had forced a private person to break into the customer's home or office and photocopy the checks there.'' Justice William O. Douglas expressed his discomfort with the act by extending the government's logic beyond the context of banking: ''It would be highly useful to government espionage to have like reports from all our bookstores, all our hardware and retail stores, all our drugstores. These records too might be 'useful' in criminal investigations.'' Like Marshall, Douglas believed the act to be unconstitutional.

Unfortunately, Justice Douglas's dissenting opinion has proven to be prescient. After the banks, the government deputized the telephone industry. For many years the regional Bell telephone companies had been quietly cooperating with law enforcement investigations, but in 1976 the New

York Telephone Company refused to give the FBI ''the facilities and technical assistance necessary'' for it to determine the numbers dialed by certain gambling suspects. The case wound its way through the courts, and the Supreme Court ultimately ruled against New York Telephone. Turning the right to be left alone on its head, the Court said that the telephone company had no ''substantial interest in *not* providing assistance'' to the FBI. Federal district courts can now compel innocent third parties to render assistance to law enforcement.

In 1992 the FBI took its notion of civic responsibility even further. When the telephone companies began developing new technologies such as fiber optics and cellular phones, the FBI complained that the new technology was outpacing the agency's eavesdropping abilities. Congress yielded to the FBI's ''top legislative priority'' by passing the Communications Assistance for Law Enforcement Act of 1994 (CALEA). That act is forcing every telephone company in America to make its networks more accessible to police wiretaps. The cost of the necessary technology makeover is expected to be several billion dollars. Any communications carrier that fails to meet the standards of the attorney general can be fined up to $10,000 per day.

CALEA is a truly ominous precedent for America. The subordination of private industry to the directives of a national police agency is an authoritarian concept that is completely at odds with the philosophical underpinnings of the U.S. Constitution. Unfortunately, that disturbing legal trend shows no sign of abating. Recent ''anti-terrorism'' proposals seek to draw the airline, hotel, and financial services industries into the government's network of private informers and data gatherers. Such proposals will probably resurface in the near future.

A free society should never let crime reduction become an end in itself. When that happens, government tends to destroy the rights and liberties that it was supposed to maintain. That is precisely the dynamic that is at work in modern America. The 106th Congress must recognize that dynamic for what it is and take corrective action. Laws such as the Bank Secrecy Act and CALEA should be taken off the books. The American tradition of voluntary cooperation with law enforcement should be restored.

Suggested Readings

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