Testimony of Edwin Meese III
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Mr. Chairman and members of the Committee: Thank you for your invitation to appear at this hearing on the topic of "Federalism and Crime Control." As a former Attorney General of the United States and as the Chairman of the American Bar Association Task Force on the Federalization of Crime, I appreciate the opportunity to share these thoughts with you. At the same time, let me make it clear that these views are my own and do not necessarily represent those of the organizations with which I am affiliated or the policy of the American Bar Association.

The Criminal Justice Section of the American Bar Association created a task force in response to widespread concern about the number of new federal crimes that have been created over the past several years by Congress. Its initial objectives were to look systematically at whether there has been, in fact, an increase in federal crimes which duplicate state crimes, and if so, to determine whether that development adversely affects the proper allocation of responsibility between the national and state governments for crime prevention and law enforcement.

The members of the Task Force were selected with the explicit goal of including persons with diverse political and philosophical backgrounds. It was hoped that the Task Force's conclusions and recommendations would be the product of a consensus among respected persons whose views on criminal justice issues generally would vary widely.

As previously mentioned, I served as Chairman of the Task Force. Its members included a former United States Senator, Howell Heflin, a former Congressman, Robert Kastenmeier, a former Deputy Attorney General of the United States, a former Chief Executive of the Law Enforcement Assistance Administration of the Department of Justice, former State Attorneys General, present and former Federal and State prosecutors, State and Federal appellate judges, a police chief, private practitioners who specialize in criminal defense, and scholars from the legal academic community.

I might mention that the Task Force benefited greatly from the skillful assistance of Professor James Strazzella, of Temple University Law School, who served as reporter for the Task Force and who was the principle author of its report. We also had the invaluable research assistance of Barbara Meierhoefer, Ph.D., who handled the collection and analysis of criminal justice statistical data.

The Task Force undertook to examine the United States Code, data available from public sources, the body of scholarly literature on the subject, the views of professionals in federal and state criminal justice systems, and the experience of the task force members themselves.

The Task Force concluded that the evidence demonstrated a recent dramatic increase in the number and variety of federal crimes. Although it may be impossible to determine exactly how many federal crimes can be prosecuted today, it is clear that of all federal offenses enacted since 1865 over 40% have been created during the past three decades since 1970. The Task Force examined in detail, and this is explained in the report, how the catalogue of federal crimes grew from an initial handful to the several thousand that exist today.

The Task Force also concluded that much of the recent increase in federal criminal legislation significantly overlaps crimes traditionally prosecuted by the states. This area of increasing overlap lies at the core of the Task Force study and report.

The federalization phenomenon is inconsistent with the traditional notion that prevention of crime and law enforcement in this country are basically state functions. The Task Force was impressed with nearly unanimous expressions of concern from thoughtful commentators, including participants within the criminal justice system and scholars, about the impact of federalization. The task force was also impressed that new federal crimes duplicating state crimes became part of our law without requests for their enactment from state and federal law enforcement officials.

As the size of the national government has grown, it is reasonable to expect that there would be some expansion of federal crimes if, for no other reason, than to protect federal programs. That is quite a different matter, however, from the indiscriminate federalization of local crime for no reason other than that certain spectacular incidents have brought it to public attention, or that the enactment of new federal laws appear to be politically popular.

The Task Force looked systematically at whether new federal criminal laws, which were popular when enacted, are actually being enforced. It determined, based on available data, that in many instances they are not. While there are more people in federal prisons than ever before and they are serving longer sentences, that condition is not the result of increased federal prosecution of crimes formerly prosecuted by states. It is principally a function of increased resources devoted to federal law enforcement, particularly for drug offenses, and the impact of the sentencing guidelines.

The American Bar Association Task Force Report supports the position of Chief Justice William Rehnquist, who deplored the expanded federalization of crime in his annual report on the federal judiciary, issued last December. The Chief Justice cited the tendency of Congress "to appear responsive to every highly publicized societal ill or sensational crime."

Furthermore, as the Task Force found, "increased federalization is rarely, if ever, likely to have any appreciable affect on the categories of violent crime that most concern Americans, because in practice federal law enforcement can only reach a small percent of such activity." Court statistics show that federal prosecutions comprise less than 5% of all the prosecutions in the Nation. The other 95% are state and local prosecutions.

The Task Force concluded that numerous damaging consequences flow from the inappropriate federalization of crime. Among them are the following:

- An unwise allocation of scarce resources needed to meet the genuine issues of crime;

- An unhealthy concentration of policing power at the national level;

- An adverse impact on the federal judicial system;

- Inappropriately disparate results for similarly situated defendants, depending on whether essentially similar conduct is selected for federal or state prosecution;

- A diversion of Congressional attention from criminal activity that only federal investigation and prosecution can address; and

- The potential for duplicative prosecutions at the state and federal levels for the same course of conduct, in violation of the spirit of the Constitution's double—jeopardy protection.

Perhaps the most compelling reason to oppose nationalizing crime is that it contradicts constitutional principles. The drafters of the Constitution clearly intended the states to bear responsibility for public safety. The Constitution gave Congress jurisdiction over only three crimes: treason, counterfeiting, and piracy on the high seas and offenses against the law of nations.

As he wrote in The Federalist No. 45, James Madison envisioned little or no role for the federal government in law enforcement:

"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. . . . 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 property of the people, and the internal order, improvement, and prosperity of the state."

Even Alexander Hamilton, the greatest proponent in his day of a strong national government, saw law enforcement as a state and local concern. If Hamilton were alive today, he would be appalled at the use of the police power by federal agencies. To reassure the states that the federal government would not usurp state sovereignty, Hamilton wrote in The Federalist No. 17 that law enforcement would be the responsibility of the states:

"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."

Unfortunately, the damage caused by the federalization of crime is not merely abstract or academic. The more crime that is federalized, the greater the potential for an oppressive and burdensome federal police state. As early as the 1930s, FBI Director J. Edgar Hoover warned of

the dangers of a "national police force." In fact, Hoover was so fearful of an expansive federal role in law enforcement that he resisted efforts by his allies in Congress to make the FBI independent of the Justice Department and to expand the bureau's jurisdiction over additional crimes. As an alternative to a federal police force, Hoover instead created the National Academy as an adjunct to the FBI's own training facilities, where local law-enforcement officers could be trained and then return to lead their own forces. This greatly enhanced the quality of law enforcement nationwide without creating the federal police force that Hoover so feared.

As the National Sheriff's Association recently stated, with every additional federal crime, "we're getting closer to a federal police state. That's what we fought against 200 years ago – this massive federal government involved in the lives of people on the local level." The National District Attorneys Association has expressed a similar view, saying the trend "not only places an intolerable burden on the federal criminal justice system, but is changing the very nature of that system by intruding on cases that by every standard should be handled by local prosecutors."

For years following the adoption of the United States Constitution in 1789, the states defined and prosecuted nearly all criminal conduct. The federal government confined its prosecutions to less than a score of offenses. As Sara Sun Beale, Professor of Law at Duke University School of Law and an expert on this subject, recently stated, originally federal criminal offenses generally "dealt with injury to or interference with the federal government itself or its programs. The federal offenses of the time included treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud. Except in those areas where federal jurisdiction was exclusive (the District of Columbia and the federal territories) federal law did not reach crimes against individuals. Crimes against individuals – such as murder, rape, arson, robbery, and fraud – were the exclusive concern of the states. State law defined these offenses, which were prosecuted by state or local officials in the state courts."

Crime was seen as a uniquely local concern and the power to prosecute rested almost exclusively in the states, whose law enforcement activities covered nearly all the activity believed worthy of criminal sanction. Crime did not become a national issue in presidential campaigns until 1928, but today it is the resonating staple of federal as well as state electoral politics. The ABA Task Force Report provides extensive statistical data concerning the current high level of federal legislative activity involving crimes that have traditionally been handled at the state level. This is collected in the report, which I will provide to the committee and suggest that it be made a part of the record of this hearing.

I believe it is important to present to the Committee the Task Force's findings concerning the reasons for continuing legislative federalization of crime. As the extensive bibliography in the report shows, writer after writer has noticed the absence of any underlying principle governing Congressional choice to criminalize conduct under federal law that is already criminalized by state law.

The study found that new crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need. Observers have recognized that a crime being considered for federalization is often "regarded as appropriately federal because it is serious and not because of any structural incapacity to deal with the problem on the part of state and local government."

This particular finding was expressed by Professors Franklin E. Zimring and Gordon Hawkins in their article, *Toward a Principled Basis for Federal Criminal Legislation*, published in volume 543 of the Annals of the American Academy of Political and Social Sciences, in 1996.

There is wide-spread recognition that a major reason for the federalization trend – even when federal prosecution of these crimes may not be necessary or effective – is that federal crime legislation is politically popular. For example, police executives noted in communications to the task force that despite recognized problems with federalization, "the trend has not declined, in part because federalization is politically popular. Because relatively little hard research on effective crime control has been conducted or disseminated to lay people, they are easily convinced that making an offense a federal crime means we are taking a tougher stance against such actions. Most citizens believe that by federalizing crime, we will somehow rid our communities of violence. Herein lies the greatest danger in federalization: creating the illusion of greater crime control while undermining an already over-burdened criminal justice system." This was the position on federalism taken by the Police Executive Research Forum, an organization of most major city Chiefs of Police, which was transmitted to the Task Force.

The Task Force recognized, and I present to you today, the conclusion that excessive federalization of criminal law is a difficult problem that is not likely to be countered effectively by a neatly packaged blue print for action. Because of the political ramifications as well as the pattern of legislative activity that has grown up over the past several years, it is unlikely that this pattern of activity will be easily changed. On the contrary, what the Task Force believes is required has more to do about how the Congress and the public *think* about these issues – more to do with a careful approach, rather than any specific proposal for mechanical action or line drawing. If the legitimate concern to deal effectively with criminals is met only by a generalized response of passing more federal criminal laws and funding more federal law enforcement resources, then the serious risks we have identified will only increase. That is why the Task Force's most fundamental plea is for all who are concerned with effective law enforcement – legislators and members of the public alike – to think carefully about the risks of excessive federalization of the criminal law and to have these risks clearly in mind when considering any proposal to enact new federal criminal laws or to add more resources in personnel to federal law enforcement agencies.

Because inappropriate federalization produces insubstantial gains at the expense of important values, it is important to legislate, investigate and prosecute federal criminal law only in circumstances where limited legislative time and law enforcement efforts can most realistically deal with the serious problem of crime and do so without intruding on long-standing values. Congress should not bring into play the federal government's investigative power, prosecutorial discretion, judicial authority, and sentencing sanctions unless there is strong reason for making wrongful conduct a federal crime – unless there is a distinct federal interest of some sort involved.

The opportunity to limit the excessive federalization of local crime provides both a challenge and an opportunity to the Congress. It is conceivable that at some point the Supreme Court might adopt a more narrow construction of the Commerce Clause that would inhibit Congress's authority to federalize local crimes. Indeed this has already been hinted at in some

recent opinions. For now the extent to which new legislation will federalize local crimes and the extent to which added federal funds will permit increased federal prosecution of such local crimes as are already covered by federal statutes rests primarily with Congress. It is for this reason that the Task Force suggests that Congress should consider several steps to limit the federalization of local crime:

(1) *Recognizing How Best to Fight Crime Within the Federal System*. The first step is a frank recognition that the understandable pressure to respond to constituent concerns about public safety can be met by taking constructive steps that aid law enforcement without incurring the risks inherent in excessive federalization of criminal law. While recognizing the pressure placed upon members of Congress, there must also be recognition that a refusal to endorse a new federal crime is not a sign that a legislator is "soft on crime." On the contrary, it means that the legislator wants to strengthen law enforcement within the traditional federal structure of this nation by leaving local crime to local authorities. The press, the public, and Congress itself must recognize these important truths.

(2) *Focused Consideration of the True Federal Interests in Crime Control and the Risks of Federalization of Local Crime*. Congress can avoid inappropriate federalization by recognizing its limited constitutional authority to criminalize conduct and by exercising restraint in passing new criminal laws dealing with essentially local conduct. Congress should insist on focused debate about what criminal conduct should and should not be federalized. This is especially true given the scarcity of funds to meet all needs. In the usually piecemeal debates over what to do about crime, it is critical in allocating federal resources that congressional attention focus on areas that most appropriately fit long-understood federal values and those most likely to produce practical, demonstrable benefits in dealing with crime.

If the increasing federalization were to have a demonstrable practical impact on crime, it would be expected that there would be a significant number of prosecutions, prosecutions that might act as a deterrent or have an incapacitating effect on criminals. This does not seem to be the case. The new waves of federal statutes often stand only as symbolic book prohibitions with few actual prosecutions. This means that whatever the reasons for any recent crime reduction, the reduction can not realistically be attributed to the creation of more localized federal crimes. There is no persuasive evidence that federalization of local crime makes the streets safer for American citizens.

Where a clear federal interest is demonstrated, especially to meet a public safety need not being adequately dealt with by the states, the federal interest should be vindicated — if needed, by new laws and new resources. Otherwise, the federal response should be limited to aiding state and local law enforcement, not duplicating their efforts.

(3) *Institutional Mechanisms to Foster Restraint on Further Federalization*. Congress should consider mechanisms to assist its analysis of proposed crime legislation and proposed federal law enforcement funding to provide the systematic, coherent analysis that is needed. One possible mechanism, for example, might require that the costs to the federal/state system of any new federal crime law be the subject of concrete, Congressionally supervised analysis before passage— perhaps by an impact statement of the sort provided by Congressional Budget Office assessment or by Congressional Research Service analysis. Such an analysis would provide

Congress with objective data upon which to base legislative decisions. It could discern federal/state comparative costs, as well as the real need and the extent of benefits, and the risk of adverse impacts of the legislation. The use of such analysis in the highly charged debate about crime could be particularly useful in light of the reasons that account for most of the legislation at issue in this Report.

Beyond an impartial, technical staff analysis, Congress might consider institutionalizing an impartial public policy analysis by its own members, perhaps through the mechanism of a joint Congressional committee on federalism. Such a committee could assess proposed crime legislation and other proposals with significant impact on federal/state jurisdictional relationships. In any event, the federalization aspect of proposed crimes calls for close, on-going scrutiny in those standing Congressional committees with criminal law jurisdiction, as well as those with oversight responsibilities.

A federalization assessment, by Congressional staff and by a select joint committee, could usefully be made both as to proposed new federal crime bills and proposed new funding for federal law enforcement personnel.

(4) *Sunset Provisions*. When, after careful analysis, new federal criminal laws are thought warranted, the new legislation should include a fairly short "sunset provision," perhaps no more than five years. Congress has found the sunset safeguard acceptable in other contexts and it would seem particularly valuable in this arena. Use of this safeguard will afford future Congresses an opportunity to assess claims made prior to enactment about what a particular statute might accomplish in dealing with crime. The use of a sunset provision might also be of value where the claimed need for federal legislation has to do with a perceived state deficiency in dealing with certain crimes; in due time, that deficit may be cured at the state level.

(5) *Responding to Public Safety Concerns with Federal Support for State and Local Crime Control Efforts*. Congress can significantly respond to public safety concerns without enacting new federal statutes or adding new funds for federal law enforcement. Virtually all of the criminal behavior that most concerns citizens is already a state crime. Congressional allocations of funds to state systems in support of state criminal justice efforts have, in modern times, been one of the alternative techniques used by the federal government in assisting with crime problems without duplicating efforts. That approach to combating crime is believed by many to be an appropriate technique which avoids many of the undermining effects of legislating a federal crime in areas properly left to the states. Federal funding for crime control can take the form of block grants, of specifically targeted program funds, or a combination of the two.

The expanding coverage of federal criminal law, much of which has been enacted without any demonstrated or distinctive federal justification is moving the Nation rapidly toward two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it.

As the Task Force Report concluded:

The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases. There are no persuasive reasons why both federal and state police agencies should be authorized to investigate the same kind of offenses, federal and state prosecutors should be directed to prosecute the same kinds of offenses, and federal and state judges should be empowered to try essentially the same kind of criminal conduct. When the consequences of these parallel legal systems can be so different, increases in the scope of federal criminal law and the areas of concurrent jurisdiction over local crime make it increasingly difficult, if not impossible, to treat equally all persons who engaged in the same conduct and these increases multiply the difficulty of adequately regulating the discretion of federal prosecutors. Moreover, it makes little sense to invest scarce resources indiscriminately in a separate system of slender federal prosecutions rather than investing those resources in already existing state systems which bear the major burden in investigating and prosecuting crime.

In the important debate about how to curb crime, it is crucial that the American justice system not be harmed in the process. The nation has long justifiably relied on a careful distribution of powers to the national government and to state governments. In the end, the ultimate safeguard for maintaining this valued constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization.

In the course of these remarks, I have included liberal references to portions of the Task Force Report. Again, let me mention that I alone am responsible for the totality of the views I have expressed today and that the Task Force Report is not official policy of the American Bar Association since such policy can only be expressed after approval by the Association's House of Delegates.

However, let me also state that I believe that these comments and conclusions, as well as the recommendations, would be helpful to the Congress in its consideration of the federal responsibility for crime as well as those areas where the federal government should not be directly involved.

Thank you for the opportunity of presenting these views before the Committee. I would be happy to respond to questions and to provide whatever further information might be of assistance to you in your endeavors.