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## Uses and Potential Abuses of Federalism

by Robert Batey

For the Criminal Cases Panel<sup>1</sup> at the symposium celebrating the fiftieth anniversary of the Middle District of Florida, the United States Attorney's Office proposed seven prosecutions that in the words of one of the panel's participants, the office was "particularly proud of." Given my choice of those cases to discuss, I picked four that give perspectives on the uses and potential abuses of federalism.

As any political scientist will tell you, federalism is an inefficient form of government.<sup>2</sup> Parallel sets of courts, prosecutors, and law enforcement officers are by definition wasteful. But this parallelism can become an advantage. This is especially true when corruption infects one system, which the other system can investigate and prosecute. One of the cases nominated by the Middle District's prosecutors, *United States v. Waldon*,<sup>3</sup> provides a textbook example of this advantage of federalism.

*Waldon* involved a group of rogue Jacksonville cops who routinely assaulted, robbed, and/or kidnapped their victims; they

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1 I was honored to be included on this panel with former Eleventh Circuit Judge Joseph W. Hatchett and Senior Judge William J. Castagna of the Middle District of Florida.

2 This was the topic of a paper I wrote in freshman political science more than 45 years ago, comparing the greater ease with which a unitary system of government (Great Britain) responded to a regional poverty crisis than did a federal system (West Germany).

3 See 363 F.3d 1103 (11<sup>th</sup> Cir. 2004).

even murdered one of them. As indicated in an in-depth article in the *Florida Times-Union*,<sup>4</sup> state investigation of the many complaints against the officers was going nowhere<sup>5</sup> when the United States Attorney's Office got involved. Diligent federal investigation (led by Assistant United States Attorney James R. Klindt) broke the blue wall of silence one defendant at a time, ultimately yielding six guilty pleas and one conviction, with effective sentences ranging from time served to life imprisonment.<sup>6</sup> The "wasteful" parallelism of federalism showed its worth.<sup>7</sup>

Despite examples like *Waldon*, in recent years a claim has arisen that federalism can be abused. Scholars have complained about "overfederalization," most notably in drug prosecutions.<sup>8</sup> Even Justice Anton Scalia has joined the chorus.<sup>9</sup> The essence of the complaint is that many federal drug (and other) prosecutions concern local matters that would be better left to the state courts. The three drug cases nominated by the United States Attorney's Office for consideration by the Criminal Cases Panel provide an opportunity to evaluate this claim.

*United States v. Valencia-Trujillo*<sup>10</sup> provides a strong argument that some drug cases can only be pursued at the federal level, with its far greater resources and scope.<sup>11</sup> *Valencia-Trujillo* ran a cocaine

4 Jim Schoettler, *The Terror in Blue*, Fla. Times-Union, Jan. 19, 2003, at G-1.

5 "State prosecutors . . . showed little interest." *Id.*

6 An interesting footnote to *Waldon* is *Arnold v. Secretary, Dep't of Corrections*, 595 F.3d 1324 (11<sup>th</sup> Cir. 2010), in which the Eleventh Circuit affirmed Judge Corrigan's grant of habeas corpus relief to a state defendant whose case was investigated by one of the defendants in *Waldon*; both courts ruled that the investigator's failure to out himself during Arnold's prosecution constituted a *Brady* violation. See *Arnold v. McNeil*, 622 F. Supp.2d 1294, 1309-23 (M.D. Fla. 2009).

7 Another of the cases nominated by the United States Attorney's Office (but not discussed by me at the symposium), *United States v. LaBrake*, involving a fraudulent scheme to defraud by local Tampa officials and others, exemplifies this use of federalism. See *United States v. McCarter*, 219 Fed. Appx. 912 (11<sup>th</sup> Cir. 2007).

8 See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747 (2005).

9 See Mark Sherman, *Judges "Aint What They Used to Be"*, Associated Press (Oct. 5, 2011) (reporting Scalia's comments that expanded federal jurisdiction over drug crimes has burdened and weakened the federal judiciary).

10 See 573 F.3d 1171 (11<sup>th</sup> Cir. 2007).

11 Another of the cases nominated by the United States Attorney's Office (but not discussed by me at the symposium), *United States v. Trofimoff*, an international espionage prosecution, also shows the need for federal action. See 54 Fed. Appx. 689 (11<sup>th</sup> Cir. 2002).

trafficking enterprise that involved three different Colombian drug cartels and was truly international in scope. To expose this enterprise and convict its kingpin, the federal government created "Operation Panama Express," which involved in the words of Judge Ed Carnes, "a virtual alphabet soup of federal law enforcement agencies."<sup>12</sup> The result was a forty-year sentence for Valencia-Trujillo. It is highly unlikely that the state of Florida could have mounted an equally successful investigation and prosecution.<sup>13</sup>

*United States v. Lorenzo*<sup>14</sup> and *United States v. Schweickert*,<sup>15</sup> on the other hand, give some support to the argument of overfederalization. Lorenzo, occasionally with Schweickert's assistance, drugged young gay men and then subdued and raped them; two of the victims were killed. Rather than being tried in state court for these serious violent felonies, the federal government prosecuted Lorenzo for multiple counts of possession of drugs with intent to commit a crime of violence, and Schweickert for being an accomplice to some of Lorenzo's crimes. The federal courts sentenced Lorenzo to two hundred years and Schweickert to twenty.

The willingness of the United States Attorney's Office to prosecute these hate crimes is highly commendable. But more appropriate convictions, with even stiffer sentences, would have been available in state court. Was the federalization of these cases appropriate?<sup>16</sup>

A defender of federalization in these cases would be quick to point out that the state of Florida has yet to prosecute Lorenzo and has only recently begun to try Schweickert, five years after his conviction in federal court.<sup>17</sup> The rejoinder might be that the state was waiting until it was clear that Schweickert's confession would be admissible against him (an issue not resolved until the United

12 573 F.3d at 1173.

13 One wonders, however, whether a combined federal-state operation, with prosecution in state court, would have been possible.

14 See 312 Fed. Appx. 189 (11<sup>th</sup> Cir. 2008).

15 See 298 Fed. Appx. 857 (11<sup>th</sup> Cir. 2008).

16 The same question might be raised by another of the cases nominated by the United States Attorney's Office (but not discussed by me at the symposium), *United States v. Payne*, a case involving a fraudulent investment scheme. See 566 F.3d 1276 (11<sup>th</sup> Cir. 2009).

17 See James Jackson, *Scott Schweickert Indicted on Murder Charges*, [http://www.abcactionnews.com/dpp/news/region\\_hillsborough/scott-schweickert-indicted-on-murder-charge](http://www.abcactionnews.com/dpp/news/region_hillsborough/scott-schweickert-indicted-on-murder-charge) (Sept. 28, 2012).

States Supreme Court's decision in *Florida v. Powell*<sup>18</sup>). And the delay in prosecuting Lorenzo may be attributable to a desire to convict Schweickert first, so that he might be persuaded to testify against his accomplice (the same ploy used so successfully in *Waldon*).

*Lorenzo* and *Schweickert* at least raise the question of whether charges that should be tried in state court too often end up in federal court. I suspect that many of the cases not chosen by the United States Attorney's Office for discussion by the Criminal Cases Panel raise that question even more strongly.

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18 130 S. Ct. 1195 (2010) (upholding the version of the *Miranda* warnings used for years by the Tampa police).