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Reporters' Draft for the Working Group on Federal-State Cooperation

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I. Mechanisms of Cooperation and Communication

Having explored the theoretical underpinnings of federal court jurisdiction, the Three-Branch Roundtable took up, as its final topic, mechanisms for federal-state cooperation. Participants at the Conference repeatedly emphasized that the most important factor in ensuring cooperation among federal, state, and local law enforcement officials is close personal relationships between key players in each jurisdiction. Although close personal relationships cannot be created by fiat, they can be fostered by formal structures (such as the Three-Branch Roundtable itself) that promote or reward cooperation.

The Conference considered four prominent mechanisms for federal-state cooperation within the executive branch: the Executive Working Group of federal, state, and local prosecutors; Law Enforcement Coordinating Committees; individual federal-state task forces; and coordinated case targeting. Participants considered the effectiveness of each of these mechanisms and discussed the factors responsible for the success of the more effective mechanisms. Turning from executive branch mechanisms, the Conference closed with a brief consideration of judicial and legislative cooperative mechanisms.

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A. The Executive Working Group

The Executive Working Group (EWG) operates at the national level. It consists of representatives of the National Association of Attorneys General, the National District Attorneys Association, the Department of Justice, and various federal agencies. The group has formal meetings at least biannually. These meetings, participants at the Conference noted, serve to establish personal cooperative relationships among state, local, and federal prosecutors.

At the suggestion of the Attorney General, the EWG in 1992 created a Task Force on Federal/State/Local Law Enforcement Cooperation. The Task Force, which is chaired by Massachusetts Attorney General Scott Harshbarger and includes United States Attorneys, State Attorney Generals, and District Attorneys, was formed with the explicit purpose of changing the "culture of noncooperation" among federal, state, and local prosecutors.

In March 1994 the EWG Task Force issued a "Memorandum of Cooperation" signed by the representatives of the highest levels of federal, state, and local government, including members of the Task Force, the Attorney General, the President of the National Association of Attorneys General, and the President of the National District Attorneys' Association. The Memorandum applies to prosecutors at federal, state, and local levels of law enforcement and to federal agencies under the authority of the Department of Justice. The Task Force has further recommended that an executive order be issued that would extend the policies articulated in the Memorandum to all federal agencies with prosecutorial and investigative functions.

The primary principles articulated in the Memorandum closely parallel the priorities emphasized by the Conference. The Memorandum lists five major policy goals: personal relationships between chief prosecutors and investigators and their counterparts at other levels of government; free exchange of information between coordinate law enforcement agencies; joint enforcement initiatives, or task forces, between law enforcement agencies; mechanisms for promptly resolving disputes between federal and state law enforcement; and administrative reporting requirements and financial incentive awards.

Recognizing the importance of structures that foster personal relationships, the EWG Memorandum suggests requiring every new chief prosecutor or investigator to hold an introductory meeting, and subsequent quarterly meetings, to discuss common priorities and problems, to delineate areas of possible cooperation, and to apprise counterparts of ongoing cases that may be of interest to them. The

Memorandum stresses that the chief prosecutors and investigators should personally participate in these meetings; they also should ensure that regular meetings take place between corresponding key staff members.

One obvious benefit of strong personal relationships between the various levels of law enforcement is an increase in the flow of information within the law enforcement community, which can both increase the efficient use of limited law enforcement resources and stem counterproductive competition between the agencies. The Memorandum cites some impediments to the free flow of information: mistrust between agencies, miscommunication or misuse of information, resentment over incomplete reciprocity, and conflicting agency goals or interests. To combat these impediments, the Memorandum recommends a presumption in favor of sharing information. Specifically, the Memorandum recommends that agency heads notify their counterparts in advance of relevant information in the following specific circumstances: when an agency is involved in an investigation that it knows would be of interest to a coordinate office; when a prosecutor is planning to take an action he or she knows or should know will have a negative impact on a coordinate prosecutor; and when an agency uses resources or personnel from another level of law enforcement. Exceptions should be made only when there are "good faith and articulated reasons" for not sharing information; for example, there is a reasonable fear of a leak to the press that would have a negative impact on the investigation.[1]

Conference participants agreed with the EWG Memorandum that task forces are a concrete and effective mechanism for cooperation among federal, state, and local prosecutors. This Report discusses task forces in Section I.C. below.

A strong theme of the Conference was the need to establish mechanisms for the resolution of disputes between agency heads that cannot be resolved within the cooperative structures themselves. While again stressing the importance for avoiding such disputes of strong personal relationships between agency heads, participants acknowledged that situations will inevitably arise in which agency heads cannot satisfactorily resolve disagreements. One possible mechanism is a neutral mediator. The EWG Memorandum includes a recommendation for a panel comprising officers from the Department of Justice, NAAG, and NDAA. The panel would act as a fail-safe mechanism to

1. EWG Memorandum at 10-12.

ensure that abiding substantive disagreements or communication problems not undermine the overall working relationship. Mediation by this panel would be at the option of the parties and would be available upon the request of any agency head who had already attempted to resolve the conflict through the cooperative structure.

The Conference did not take up the topic of incentive systems, but the EWG Memorandum proposes that agency heads create such systems—incorporating both rewards and penalties—to promote cooperation with other agencies. The Memorandum further proposes that funding awards to agencies be tied in part to demonstrated cooperative efforts. The Memorandum's more specific recommendations for incentive programs are that U.S. Attorneys be required to identify their efforts to cooperate with state and local law enforcement agencies; that the Department of Justice, in evaluating and determining merit raises, take into account agencies' and officials' commitment to cooperative law enforcement; and that Department of Justice grants be used to support joint initiatives.

B. Law Enforcement Coordinating Committees

The second major mechanism for cooperation identified at the Conference is the Law Enforcement Coordinating Committee, or LECC. Although every federal district has an LECC, the structure and scope of LECCs vary widely from jurisdiction to jurisdiction. The LECCs typically include representatives from federal, state, and local prosecutorial and law enforcement offices, and many include private individuals or members of non-law enforcement agencies. In some cases, agency heads participate actively; at the other extreme, representation in some LECCs is entirely at the staff level. The frequency and subject matter of LECC meetings also vary widely from jurisdiction to jurisdiction, with the LECC playing little more than a ceremonial function in some jurisdictions and serving as an active and effective focus for cooperative ventures in others.

The LECC's most basic, and perhaps most important, function is to provide a permanent, flexible mechanism for communication and fence mending between different levels of government. Conference participants recognized that, here as elsewhere, the success of cooperative ventures depends heavily on the personalities and commitment to cooperation of the heads of the agencies involved. For instance, it was noted at the Conference that federal and local prosecutors in Los Angeles had had little communication until the current District Attorney personally called his federal counterpart. Nevertheless, even

when agency heads do not make cooperation a priority, a structured LECC can provide a continuing, if low profile, link between offices. Similarly, an LECC provides a stable line of communication that can facilitate the resumption of cooperation after a change in personnel. Finally, LECCs provide a natural mechanism for the establishment of task forces on particular issues, either directly under the LECC's aegis or as a byproduct of the interchange fostered within the LECC.

A comparison between Conference discussions of the EWG and of the LECCs suggests that the EWG has been a more consistently productive mechanism for cooperation than the LECCs, the effectiveness of which has varied considerably from jurisdiction to jurisdiction. The EWG has been successful in formulating a flexible set of policy guidelines for cooperative efforts and in providing a framework for fostering personal relationships. The EWG has clearly defined goals, a stable membership, and regularly scheduled, formal meetings at least twice a year. Although structured, the EWG also has the flexibility to attack specific issues by creating subcommittees, such as the EWG Task Force on Federal/State/Local Cooperation, which report to the larger group. In contrast, the membership, meeting frequency, and scope of LECCs vary dramatically from district to district. The Memorandum notes that LECCs might better serve the functions for which they were created if their composition, structure, and procedures were standardized. This standardization would enable the LECCs to benefit from the kind of stability and continuity that has contributed to the effectiveness of the EWG.

In general, the EWG Memorandum emphasizes that clear articulation of the roles of participating agencies in every phase of a joint venture promotes successful cooperation by avoiding misunderstandings. The Memorandum's principles of cooperation provide a blueprint for a cooperative enterprise that particular institutions can tailor to their needs.

C. Task Forces

Many jurisdictions have established task forces to provide a coordinated approach to specific law enforcement problems, such as health care fraud or organized crime. Task forces can be established under the auspices of a nationwide program, by an LECC, or simply on the initiative of law enforcement officials motivated by common concern about a pressing local problem. The task force brings together representatives of federal, state, and local law enforcement agencies to plan a coordinated strategy that will make efficient use of

the expertise, resources, and legal tools available to different levels of government. Conference participants noted that this kind of cooperative approach serves to minimize discord and turf wars.

Task forces have resulted in more effective use of limited resources, a reduction in duplication, and more rational and coherent approaches to particular crime problems. The Memorandum suggests a formal structure for task forces that would address some of the traditional pitfalls of cooperative efforts by requiring the resolution of central procedural matters prior to the formation of the task force. These matters include identification of interested agencies; determination of the level of resources committed by each agency; designation of participants; and establishment of mechanisms for resolving disputes, dealing with the media, and sharing credit. The Memorandum also urges task forces to develop guidelines to determine in individual cases how federal, state, and local resources should be used and in which jurisdiction a prosecution should be brought. These recommendations apply to informal cooperative undertakings as well as to task forces.

As the Conference discussion of task forces made clear, task forces have implications for the broader issues of federal jurisdiction that the Conference addressed. On the one hand, task forces can bring more cases into the federal system in order to take advantage of the stricter penalties and favorable procedures the federal system affords. On the other, task forces can help reduce the federal caseload by making federal expertise and resources available to state and local counterparts. For example, cases often are brought in the federal system in order to take advantage of federal investigative expertise and federal victim- and witness-assistance programs. Through the operation of task forces, these federal resources can be made available to state and local law enforcement officials, removing the need to bring the cases federally. Task forces also can be used to train state and local officials in areas of federal investigative expertise such as organized crime or environmental crime, thus reducing pressure on federal resources and increasing effectiveness throughout the criminal justice system.

D. Coordinated Case Targeting

Finally, the Conference considered the use of coordinated case targeting as a means of promoting the most efficient use of limited law enforcement resources. In coordinated case targeting, federal, state, and local law enforcement agencies join in cooperative efforts to tar-

get certain types of cases or offenders for federal prosecution in order to take advantage of stiffer federal penalties or favorable procedures.

Conference participants agreed that coordinated case targeting has been a highly successful cooperative mechanism. The two most noteworthy examples have been the Triggerlock program and the Anti-Violence Initiative. The Triggerlock program targets violent career offenders for prosecution under tough federal firearms statutes. The program integrates state and local officials' knowledge of violent career offenders with the availability of strict federal penalties. The result is a more effective targeting and incarceration of violent career offenders than federal and state forces could separately achieve. The Triggerlock program has successfully targeted over 13,000 violent offenders for federal prosecution since its inception in 1991.

The Conference also focused specifically on the DOJ Anti-Violence Initiative. This program makes broader and more flexible use of federal, state, and local coordination than Triggerlock in targeting communities' most violent repeat offenders. The core of the Initiative is the creation within each jurisdiction of a working group consisting of representatives of the United States Attorney's Office, the local District Attorney's office, and investigative agencies on both the federal and state levels. Each working group makes its own determination of which violent crime problem or which particular offenders to target. The group then considers how best to bring to bear the combined federal, state, and local resources at its disposal.

Central to the operation of the Anti-Violence Initiative is the idea of *comparative advantage.* For each aspect of the targeted problem, the working group considers whether the federal, state, or local government has a comparative advantage in prosecutorial, investigative, or other criminal-justice resources. Although the comparative-advantage analysis should be carried out on a case-by-case basis, some generalizations may be drawn regarding the different comparative advantages of local and federal agencies. The vast majority of overall law enforcement, judicial, and penological resources are at the state and local levels. As the example of Triggerlock illustrates, state and local law enforcement agencies typically have greater knowledge of particular communities and access to street intelligence than do federal agencies. Local agencies also may have a better understanding of which crime problems should be targeted for coordinated attack.

Federal advantages in resources and expertise typically include inter-jurisdictional investigative capabilities, electronic eavesdropping techniques, victim- and witness-assistance programs, and expertise in

traditionally federal areas such as organized crime and environmental crime. Federal legal advantages can include long sentences, favorable procedural rules such as preventive detention, or far-reaching statutory provisions (such as RICO or CCE). As one participant noted, however, the comparative advantages of different levels of government may vary according to the case. For example, the local government will sometimes have the statutory advantage and be in the best position to take the case to trial. Decisions on where the comparative advantage lies in each targeted area and in each phase of the case are made jointly by the working group members.

Participants discussed the factors that make for effective use of the coordinated-case-targeting approach. Careful definition of the targeted problem ensures that agency time and resources are not wasted on problems, such as random street crime, that can be more effectively addressed locally and that local agencies do not perceive federal agencies to be invading their territory or cherry-picking cases. A division of duties within the project according to the neutral principle of comparative advantage promotes efficiency and reduces strife. For example, in Triggerlock, in accordance with the idea of comparative advantage, local law enforcement agencies were entrusted with the task of identifying and arresting the targeted violent repeat offenders because local authorities had closer relations to the community and greater access to street-level intelligence than federal law enforcement officers. For prosecution, the comparative advantage shifted to the federal agencies because federal law generally imposes longer sentences for gun offenses than state law. Similarly, Attorney General Reno cited as an example of a successful coordinated effort a New Haven initiative in which the district working group successfully used the intelligence information of the local agencies to identify the major players in local gangs, and then prosecuted them under federal statutes.

Conference participants noted that local agencies may be reluctant to cooperate, fearing that federal agencies will control the operations and take the lion's share of the credit for them. Relatedly, local agencies worry that cooperation with federal agencies will reinforce the public perception that federal investigative and prosecutorial agencies are superior to local agencies. Local law enforcement representatives also expressed concern that relying on federal expertise in entire areas of criminal investigation and prosecution will inhibit the development of state expertise in these areas. These concerns can be dealt with to some extent by providing local officials with increased

access to federal training programs, by sharing information between federal and local agencies, and by carefully structuring cooperative efforts so that responsibility, resources, and credit are fairly apportioned.

E. Judicial Branch

There are fewer mechanisms for judicial-branch cooperation than for law enforcement cooperation, but conference participants noted the advent of a few important mechanisms in recent years. In 1990 the Conference of Chief Justices (CCJ) had a fruitful meeting with the Judicial Conference of the United States. This was the first and only occasion on which these bodies have met in plenary joint session. The meeting resulted in the establishment of the National Judicial Council, composed of four federal judges designated by the Chief Justice and four state chief justices designated by the President of the CCJ. The Council meets semi-annually, most recently in March 1994. The participants in the CCJ-Judicial Conference meeting also called attention to the work of judicial councils of state and federal judges, which already exist in many states. In the Ninth Circuit, for example, all nine states, Guam, and the Northern Marianas have state-federal judicial councils that meet regularly to address substantive and procedural matters of joint concern, such as habeas corpus. Other mechanisms for state-federal judicial cooperation include the Committee on Federal State Jurisdiction of the Judicial Conference, which includes three state chief justices, and the State Federal Relations Committee of the CCJ, with two federal judges. Judicial cooperation is also fostered by a variety of conferences, including the Orlando Conference of 1992, the Northwest Conference of 1993, and the Mid-Atlantic Conference of 1994.

Conference participants suggested that the judicial councils of state and federal judges be put to greater use and their existence and work be more widely publicized. Participants also pointed out that the council also could serve as an informal conduit for dialogue between judges and the law enforcement community. A model for that kind of ongoing dialogue already exists in the working group formed by the Department of Justice and the Criminal Justice Committee of the Judicial Conference. The working group, chaired by Judge Maryanne Trump Barry, has been effective in fostering communication on issues of common concern to the federal judiciary and federal law enforcement, in particular the issues raised by the increased federal

criminal jurisdiction resulting from the Violent Crime Control Act of 1994.

F. Legislative Branch

Conference participants remarked on the absence of formal mechanisms for communication between state legislatures and either Congress or federal law enforcement, and on the importance of promoting such communication. To narrow the communication gap, Conference participants recommended increasing the use and dissemination of impact statements. The Governance Institute is currently studying the circumstances in which impact statements are useful and feasible and the ways in which federal-state cooperation can improve them. Conference participants also noted the importance of improving communication between Congress and the federal executive branch with respect to federal policies affecting the states.

There are established avenues of communication between state and local law enforcement and Congress. Organizations such as the National District Attorneys' Association, the National Association of Attorneys General, and the National Association of Police Officers have a regular and strong influence on congressional action affecting the interests of state and local law enforcement.

II. The Principled Exercise of Concurrent Jurisdiction

A principal aim of the Three-Branch Roundtable Conference was to formulate principles to guide, and perhaps to stem, the increasing federalization of the civil and criminal laws. The results of these efforts are described in the Reports of the other three working groups. But the federalization problem, at least in the criminal law, may in the final analysis present itself primarily as an issue of prosecutorial discretion. The federal-state boundary in the criminal law is ever more indistinct: Congress has created federal jurisdiction over a broad range of criminal activity, and the span of the federal criminal law seems likely to expand yet further in the 104th Congress.[2] More and more primary conduct, therefore, is subject to both federal and state criminal prosecution. Compared with this dramatic growth in federal criminal jurisdiction, federal prosecutorial resources remain relatively constant, and in the aggregate a small fraction of state and local re-

2. *See* H.R. 3, 104th Cong., 1st Sess. (1995).

sources.[3] Thus, even as the federal government's reach continues to grow, its grasp continues to be limited to approximately 35,000 actual felony prosecutions per year, which means that upwards of 95 percent of all prosecutions are handled locally. As a practical matter, therefore, the most pressing "federalization" issue becomes what principles (if any) will guide the exercise of concurrent federal-state jurisdiction. This issue surfaced repeatedly, but only in passing, in the Conference. The working group on federal-state cooperation undertook to examine it more carefully and to set out for discussion some basic points and principles.

A. Why Should There Be Principles for the Exercise of Concurrent Jurisdiction?

Principles governing prosecutorial discretion avoid arbitrariness and ensure that appropriate considerations guide the selection of cases for federal prosecution. At the same time, United States Attorneys need flexibility to shape law enforcement strategies that will best address local problems and concerns. For this reason, the content of principles governing the exercise of concurrent jurisdiction should consist of overarching general standards. Such principles can direct prosecutorial decisions to take into account certain underlying values, but are to be applied in the light of the specific circumstances of each local community.

Principles for the exercise of concurrent jurisdiction serve a number of important values. First, such principles may be the only real means to ensure that federalism values are taken into account. Historically, the courts have looked out for federalism by scrutinizing the source of Congress's authority to pass legislation. This constitutional constraint is now effectively all but abandoned. In consequence, federalism is left to congressional restraint and prosecutorial discretion. Congressional restraint, however, is not a sufficiently sturdy protection for federalism values. For one thing, Congress has been increasingly unrestrained in federalizing crimes that are in the public eye, and, as the new House Crime Bill illustrates, the trend is not likely to reverse itself soon.[4] It is nevertheless a good idea to develop principles to guide Congress in enacting criminal legislation.

3. *See, e.g.*, Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1797 (1994) (creating many new federal crimes but authorizing only enough additional appropriations for fifty to a hundred new prosecutors).

4. *See* H.R. 3, 104th Cong., 1st Sess. (1995).

But there is a reason why such principles cannot be framed too narrowly.

Federal criminal jurisdiction cannot be limited to certain discrete, specially federal areas of the law. A federal solution to a law enforcement problem is needed when the states are not fully able to cope with a specific aspect of a problem of national dimension, and the distinctive attributes of the federal government put it in a qualitatively better position to handle this aspect of the problem. For example, a sophisticated criminal enterprise may spread across numerous states in a way that makes it difficult for any one state to investigate and prosecute, or a crime may raise issues that are so sensitive locally that the independence of the federal courts is needed. It is difficult, however, to draft a statute in a way that includes only those crimes that are sophisticated, inter-jurisdictional, or sensitive enough to require a federal solution. In order to allow sufficient flexibility to bring a federal prosecution when an aspect of a law enforcement problem requires it, federal criminal legislation inevitably will have to be somewhat overinclusive. It will have to be drafted in a way that includes criminal activities that state and local criminal justice systems can handle, as well as activities that they cannot. Thus, principles governing prosecutorial discretion stand as the last frontier for the protection of federalism interests.

Principles for the exercise of concurrent jurisdiction also serve the goal of uniformity in the application of federal law. Although it is not possible (and perhaps not even desirable) to eliminate all differences in the application of federal law in different federal jurisdictions, uniformity is nevertheless a fundamental goal that promotes fairness, predictability, and certainty. Other things being equal, federal law ought to treat like cases alike. There are, of course, reasons for departing from this norm, but, without principles, the legal system will depart from it arbitrarily. Even if Congress passes equal laws and the courts apply them evenhandedly, uniformity in the application of the law cannot be achieved without a principled exercise of prosecutorial discretion. Especially as federal criminal jurisdiction expands, it is important that the Department strive to exercise its expanding discretion in a principled way. Principles for the exercise of concurrent jurisdiction also help to ensure a fair and uniform allocation of federal resources, such as investigative resources, to states and local communities.

Moreover, the federal courts are a limited resource, and the increase in federal criminal legislation threatens to overwhelm their

docket with criminal cases. Federal prosecutorial decisions have a large impact on the business of the federal courts. Principles governing those decisions can therefore be a significant factor in protecting the important functions of the federal courts.

Finally, principles governing prosecutorial discretion can help to make federal law enforcement efforts effective. As a general matter, the federal role in prosecuting crime, especially violent crime, is necessarily secondary to that of local authorities because the vast majority of criminal justice system resources are state and local. As noted above, upwards of ninety-five percent of all prosecutions are handled by state or local prosecutors. Thus, if federal efforts directed at violent crime are to have a meaningful impact, they must be selectively targeted where they can best complement the efforts of local authorities. Prosecutorial principles can guide such a discriminating use of federal resources.

B. A Presumption of State Prosecution

Once the case has been made for development of principles to govern the exercise of concurrent jurisdiction, the next inquiry becomes what should be the content of such principles. A sensible first, grounding principle, for at least the ordinary run of cases, is a presumption of prosecution in the state system. This is a sound organizing principle for a number of reasons. It is a tenet of our federal union, supported by long practice and tradition, that the basic governance of day-to-day affairs, including criminal law, rests with the states. Second, practical benefits flow from observation of this principle. These include the opportunity for states to experiment with different ways of dealing with crime. For example, the Violent Crime Control Act of 1994 included provisions for special drug courts and a "three strikes and you're out" federal penalty, both of which had been pioneered in state systems. Third, democratic values support allowing different communities to make their own determinations about the appropriate response to anti-social, criminal behavior. Relatedly, state and local legislatures arguably are more directly accountable to the people and therefore more likely to reflect the popular will in their policy determinations.

It could be objected that Congress's passing a statute manifests a choice to override these considerations. We are concerned, however, with cases in which Congress has chosen to supplement, and not to preempt, state law. The enactment of a federal statute simply demonstrates that Congress thought there was a need to have a federal crimi-

nal remedy available, not that Congress determined that the entire area of law should be given over to federal regulation.[5]

The selective exercise of federal jurisdiction is an essential and unavoidable incident of our criminal justice system, in which the states conduct the great majority of all criminal prosecutions. Consider, for example, the Hobbs Act. If federal prosecutors were not highly restrained in their exercise of prosecutorial discretion under the Hobbs Act, which potentially criminalizes any convenience store holdup, the criminal business of the federal courts would expand exponentially. Congress thus understands that choices have to be made about which subset of cases over which there is concurrent federal and state jurisdiction should be federally prosecuted. The federalism reasons that state law should generally govern most conduct bear on those choices as much as on legislative decisions.

Although there are reasons generally favoring state prosecution in the run of cases, those reasons are not applicable in certain categories of cases. For those categories of cases, a presumption of state prosecution is not appropriate. Furthermore, even when the presumption is applicable, it will be rebutted in particular cases when the reasons generally favoring state prosecution are overridden by factors specific to the circumstances.

C. The Conditions Under Which a Presumption of State Prosecution Is Appropriate

In considering to which categories of cases the presumption of state prosecution should apply, it is important to distinguish two classes of federal interests. First, the federal government can have an interest, such as prevention of violence, that is substantially shared by the state. In such cases, although it is no doubt legitimate for Congress to act to advance the federal interest (and for the Department of Justice to make enforcement a priority), the presumption of state prosecution probably should be applicable. All the theoretical and practical reasons for safeguarding the primary role of the state system apply. Since the state has substantially the same interest as the federal government and since it is preferable, other things being equal, to rely on state or local government, the best way to promote the federal interest within the context of the federal system is to allow the state to

5. *Cf.* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) ("When Congress acts in an area traditionally occupied by the States, federal legislation does not preempt state law unless that is the 'clear and manifest purpose of Congress.' ").

vindicate that interest. If all goes well, the federal interest will be vindicated without the federal government's having to intervene and without burdening the federal courts. It is only when the presumption is rebutted because, in the particular circumstances of a case, the state cannot fully vindicate the common interest, that the federal government should step in.

In contrast, some federal interests are distinctively federal, that is, they are interests that the states do not share. Federal and state laws may regulate the same conduct in order to serve different interests. So, for example, a crime against a foreign government or national may implicate the state's general interest in crime prevention, while the federal government will have, in addition to the same general interest, an interest derived from its special role in the protection of international relations. Similarly, the conduct that constitutes a federal securities crime will in many cases violate some state criminal law, but that law will not be designed to vindicate the national interest in a reliable and stable securities market.

In categories of cases in which there is a distinctively federal interest, the presumption should not hold because it no longer stands to reason that the state will be able to vindicate the federal interest. Indeed, it could be argued that the presumption should be reversed, so that unless, in the particular circumstances of a case, there are countervailing factors, a federal prosecution should be initiated. Since Congress has, within its constitutional powers, determined that an interest needs to be promoted and since that interest will not reliably be advanced without a federal prosecution, practical and general federalism reasons favoring state prosecution lose their force.

Crimes against foreign governments and securities crimes epitomize the types of offenses that implicate distinctively federal interests. Closer cases are crimes occurring on federal property. Such crimes implicate a federal interest that is different from the state's interest. On the other hand, at least in general, the federal interest in such cases is different from the state interest only in that it is the federal government's property that happens to be involved. If we are earnest about preserving states' control over the run of criminal prosecution, the fact that a crime happens to occur on federal property may not by itself give rise to a sufficiently distinct or intense federal interest to make the presumption of state prosecution automatically inapplicable. A better solution might be to leave the presumption in place and take into account on a case-by-case basis the significance of any peculiarly federal interest in considering whether the presumption is rebutted.

In addition to having a special federal interest in certain kinds of cases, the federal government also may have resource advantages in particular classes of cases. For example, the federal government is generally better positioned to investigate interstate crimes and generally more experienced in combatting sophisticated financial crimes. Resource considerations, while they may serve to *rebut* the presumption of state prosecution in individual cases, should not serve to remove or reverse the presumption for whole categories of cases. The federal government has a potential resource advantage in many categories of cases. It is neither feasible nor desirable to prosecute federally most cases falling within those categories. Moreover, in many cases, federal resources can be made available to the states for a state prosecution (which has the additional advantage of facilitating the development of expertise and investigative techniques within the states). A principle that the presumption is removed for categories of cases in which the federal government has a resource advantage therefore seems too crude and sweeping a mechanism for dealing with resource advantages. It is more sensible to consider case-by-case whether resource advantages rebut the presumption.

D. Rebutting the Presumption of State Prosecution

When the presumption of state prosecution applies, the pivotal determination becomes whether it is rebutted in the individual circumstances of the case. This Section considers some of the factors relevant to that determination.

One factor to be considered is whether the state is unlikely to be committed to vindication of the shared state and federal interest. For example, in a case involving the rights of an insular and unpopular minority, there might be reason to fear a lack of resolve to protect those rights on the part of state actors. However, it seems inappropriate and destructive of state-federal relations to assume that a state will not act in good faith in exercising its prosecutorial discretion. Only when there is strong and concrete evidence that the state will not seek to vindicate the shared state and federal interests should the presumption be rebutted. In other cases, the federal government would do better to rely on the *Petite* policy, which governs dual or successive prosecutions following a state trial, to protect its interests. Under this approach, a federal prosecution would not be brought in the first instance merely because there was some reason to doubt state willingness fully to protect the common state and federal interest; if the state

prosecution failed to vindicate the federal interest, however, federal charges could be entertained under the *Petite* policy.

As discussed in the last Section, resource advantages of the federal government may sometimes be relevant in deciding whether the presumption of state prosecution is rebutted. Examples include investigative resources (particularly for inter-jurisdictional investigations), investigative expertise or techniques, or special federal programs such as the witness-protection program. But the argument that the presumption generally should apply notwithstanding a federal resource advantage for a category of cases is relevant to the rebuttal of the presumption as well. In general, a federal resource advantage is not, without more, a compelling reason to overcome the presumption. This is particularly so since, despite the overall scarcity of federal resources, federal resource advantages could be used as a justification for rebutting the presumption in the majority of cases of concurrent jurisdiction. Rather, where the federal government has resource advantages, the preferred strategy should be to make its resources available to the states for their use in state investigations and prosecutions. This approach—combining federal resources with state prosecutions—maximizes the effectiveness of federal resources, helps the states develop technical and investigative expertise, and maintains the prosecutorial function in the hands of the more closely accountable sovereign.

Another possibly relevant factor is the possible availability of legal advantages in the federal system. The most noteworthy of these is longer sentences for certain crimes, particularly firearm and drug offenses. Again, however, if the presumption of state prosecution is to be meaningful, it cannot be rebutted simply by the potential availability of a longer federal sentence. This advantage, after all, will exist in a significant percentage of cases, far more than could be prosecuted federally. Thus, if a set of principles for the exercise of concurrent jurisdiction justified federal prosecution merely because of the potential for a longer sentence in the federal system, a choice would still have to be made whether to bring a federal prosecution. Since the presumption would already be rebutted, the choice would be made without consideration of the federalism values favoring state prosecution. Moreover, prosecuting federally merely because a stiffer sentence is available is dubious as a matter of principle: local legislatures determine the degree of punishment they believe is appropriate for a given crime, and if they have set a punishment lower than that provided by the federal system, it is problematic to override that judg-

ment by imposing federal penalties on a wholesale basis for that crime. (This point presumes, of course, that the federal and state interests are essentially the same; otherwise, the presumption of state prosecution does not apply in the first place.) The state retains the power to make its sentences as long or longer than those provided in the federal system, as indeed many states are now doing. Other kinds of legal advantages, such as the availability of preventive detention, the possibility in some cases of a longer statute of limitations, and potential advantages in jurisdiction or venue, present similar issues to longer sentences, though allowing such advantages to rebut the presumption does not threaten to narrow the effective scope of the presumption as severely.

In sum, neither federal resource advantages nor federal legal advantages should themselves be sufficient to defeat the presumption of state prosecution. In order for the presumption to have force, and to serve the interests that give rise to it, a more particularized reason should be required. The most obvious reason would be a specific nationwide initiative that represents a policy choice selectively to use federal resources to target certain offenses, such as carjacking, or certain offenders, such as repeat violent offenders. The Department's Triggerlock program is an example of such a nationwide initiative. Along similar lines, federal law enforcement, in conjunction with state and local law enforcement, may identify an important local problem that can be attacked by discriminating use of federal resources; for example, an emerging gang problem may be uprooted by targeting a small handful of leaders for federal prosecution. The Department's Anti-Violence Initiative applies this kind of strategy at the national level, seeking to identify within each community a particular problem that can be addressed through the selective deployment of federal legal or resource advantages. In contrast to the fact of longer federal sentences, which applies generally to every case falling under the relevant statute, specific national initiatives provide a principled basis for deciding which cases should be prosecuted. Moreover, an initiative manifests a particularized policy choice to use federal resources in a certain way (unlike the mere enactment of a federal statute providing for concurrent jurisdiction), thus counterbalancing general federalism concerns. The initiatives also may take into account federalism values by providing for federal-state cooperation.

E. Implementation of Principles

A detailed consideration of how these principles might be implemented is outside the scope of this Report. Nevertheless, it is worth considering a few basic questions of implementation. A first question is who should implement the principles of concurrent jurisdiction: who is best suited to make the determination whether the presumption of state prosecution is not applicable or whether it has been overcome in a particular case? The most sensible answer to the question seems to be that since these principles are intended to guide federal prosecutors in deciding whether to exercise federal jurisdiction, it should be federal prosecutors, with input from their local colleagues, who should implement the principles in the individual case, under the guidance and direction of the Department of Justice. This conclusion in turn suggests an answer to another important question of implementation, which is what form the principles should take. The principles would most naturally be adopted as part of the U.S. Attorneys' Manual's exposition of Guidelines of Federal Prosecution, which could be achieved by issuance of a bluesheet from the Attorney General, and applied in individual cases by federal prosecutors. Such a regime of general DOJ guidance and application in the particular case by individual AUSAs should not fence out state and local prosecutors from the process. The principles should provide, among other things, for regular interaction and consultation with state and local prosecutors. Moreover, through the mechanisms for cooperation outlined above, the federal, state, and local participants should hold regular meetings at which they can monitor whether the principles are being effectively implemented.

Another basic question of implementation is what should happen when the state decides not to prosecute, or when it specifically requests that the federal government take the case. Such a decision or request should weigh in favor of federal prosecution. The federalism interests that underlie the presumption of state prosecution are substantially weaker where the state asserts no interest in going forward. The principles therefore could treat the state's declination as an important factor in favor of the presumption's rebuttal. But it should be noted that some of the reasons for implementing a presumption of state prosecution still may apply when the state has declined to prosecute, and particularly when the state not only has declined to prosecute but also has requested that the federal government do so. In such circumstances, the interests in conservation of limited federal resources and in promoting the accountability of the state and local sys-

tem support resisting efforts to turn prosecutions over to the federal system. In any event, particularly in politically controversial cases, a cornerstone should be consultation among federal, state, and local prosecutors, with the goal of reaching a prosecutorial decision that is principled and fair.