

No. 09-1227

IN THE
Supreme Court of the United States

CAROL ANN BOND, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

**BRIEF *AMICUS CURIAE* OF
GUN OWNERS FOUNDATION,
GUN OWNERS OF AMERICA, INC., AND
CONSERVATIVE LEGAL DEFENSE AND
EDUCATION FUND IN SUPPORT OF
PETITIONER**

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INTEREST OF AMICI CURIAE¹

Gun Owners Foundation (“GOF”) (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code (“IRC”). GOF is an educational and legal defense organization defending the Second Amendment. **Gun Owners of America, Inc.** (“GOA”) (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax under IRC section 501(c)(4). GOA is a citizens’ lobby to protect and defend the Second Amendment. **Conservative Legal Defense and Education Fund** (“CLDEF”) (www.cldef.org) was incorporated in the District of Columbia in 1982, and is exempt from federal income taxation under IRC section 501(c)(3). CLDEF is dedicated to the correct construction, interpretation, and application of the law. Each of the *amici curiae* was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, such as the construction of state and federal constitutions, and of criminal and regulatory statutes, federal and state, related to the right of citizens to bear arms, and related issues.

¹ It is hereby certified that the parties have consented to the filing of this brief (counsel for petitioner having filed a blanket consent for *amicus curiae* briefs with the court on November 23, 2010) and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

After learning that her closest friend was carrying her husband's baby, petitioner attempted to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. Rather than referring the matter to local officials, the United States Attorney made a "federal case" out of it — as if this domestic dispute were a major trans-national incident. Petitioner was indicted under a federal law passed by Congress (Chemical Weapons Convention Implementation Act of 1998), purportedly enacted to implement the United States' obligations under a treaty (Chemical Weapons Convention of 1993) addressing the proliferation of chemical and biological weapons (18 U.S.C. § 229(a)).

Because the statute required no nexus to any federal interest, international or otherwise, petitioner filed a motion to dismiss on the ground that the statute exceeded the federal government's enumerated powers in violation of the Tenth Amendment. After the district court denied the motion, petitioner entered a plea of guilty, reserving her right to appeal.

The Third Circuit affirmed, ruling that petitioner — even though convicted and sentenced under the statute — had no "standing to claim that [the statute] imping[ed] on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." Bond v. United States, 581 F.3d 128, 137 (3d Cir. 2010).

Before the Third Circuit, the United States argued that petitioner lacked standing, but “[u]pon further reflection,” the government reversed its position and “concluded ... that petitioner has standing to bring her claim.” Gov. Br., p. 13, n.6. The Government first filed a brief supporting the petition for certiorari (July 9, 2010), and now has filed a brief on the merits denominated a “Brief of the United States Supporting Petitioner” (“Gov. Br.”) (Dec. 3, 2010) urging this Court to reverse the decision of the Third Circuit.

In order to maintain the adversarial posture necessary for resolution, on November 10, 2010, this Court appointed Stephen R. McAllister, Esquire, to brief and argue this case, as *amicus curiae* in support of the judgment below.

ISSUE PRESENTED

Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government’s enumerated powers and inconsistent with the Tenth Amendment.

SUMMARY OF ARGUMENT

This case presents an unusual situation where the government has reconsidered its previous position and embraced the position of a criminal defendant petitioner in seeking to overturn a lower court decision. These *amici* fully agree that the decision of

the Third Circuit should be overturned, establishing the standing of the petitioner to challenge the statute under which she was convicted as unconstitutional under Article I, Section 8, as well as the Tenth Amendment, of the U.S. Constitution.

As the federal government possesses only enumerated powers, enjoying no federal police power, it is without authority to criminalize any behavior without an express grant of authority found in the text of U.S. Constitution. Failing to find Constitutional authority for a federal crime also results in a violation of the Tenth Amendment's reservation of all non-enumerated powers to the States and the people. Contrary to the understanding of the Third Circuit, the Tenth Amendment protects both state and individual rights. Contrary to its holding, there is no requirement that a state join with a criminal defendant in order to permit that individual to challenge a federal criminal statute under which he is charged.

While petitioner and the government both agree that this defendant has standing, neither challenges the position of the Third Circuit that a defendant must not only demonstrate standing under this Court's three-part test, but also meet the nebulous standard of "prudential" considerations. Under such a view, courts have discretion to turn a deaf ear to the claims of a criminal defendant charged with the violation of a crime believed to be unconstitutional. The text of Article III, Section 2, and a series of early decisions of this Court demonstrate that no such prudential discretion exists. Chief Justice Marshall explained

that federal courts have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.

Lastly, it is important that the standing of all individual criminal defendants who meet the standard three-part test to establish standing be reaffirmed so that the judiciary can renew its role of protecting individuals against prosecution under unconstitutional laws. The text of the U.S. Constitution and the Federalist Papers demonstrate that no significant body of federal criminal law was ever envisioned by the Framers. Nevertheless, a long succession of Congresses and Presidents have chosen to federalize criminal law, creating thousands of federal crimes with little or no constitutional authorization. If criminal defendants are deprived of standing to challenge such laws in court, an important check on the political branches will be lost, and the judiciary will become complicit in punishing individuals accused of doing no more than violating unconstitutional laws, such “laws” being a nullity — that is, no law at all.

ARGUMENT**I. The Opinion Below Was Based on a Fundamental Misunderstanding of the Federal Government's Authority to Criminalize Behavior and the Purpose of the Tenth Amendment to the U.S. Constitution.**

Petitioner has described this case as “one of the easiest standing cases to reach this Court in some time.” Pet. Br., p. 14. Indeed, it is difficult to understand how the court of appeals could have reached the result that it did. If the words “cases” or “controversies” in Article III of the Constitution mean anything at all, they would “extend [the] judicial Power” to decide the merits of a claim raised by a person charged with violation of a criminal statute on the grounds that a statute exceeded the enumerated powers of Congress in contravention of the Tenth Amendment.

Almost 222 years into our federal experiment, it should be unnecessary to repeat that “[t]he government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess.” Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, Fifth Edition

(1883) p. 10.² “When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it....” *Id.*, p. 207. However, if a criminal defendant has no right — no standing — to challenge the law, the judicial inquiry would never be made unless a state or state official were to intervene as a party to the case. Such a precondition, an extremely remote possibility, would accelerate the already lawless expansion of federal authority by the political branches, where individuals can be prosecuted for violating a criminal statute which, properly viewed, is no law at all — a legal nullity.³

The appellate court’s flawed decision below is the product of at least three distinct mistakes of law. First, the court below erroneously viewed the Tenth Amendment as though it protected only states against

² The U.S. Constitution is not like the “constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess.” *Id.*, pp. 10-11.

³ If “the people” who delegated power to the federal government in the first place cannot trust the federal courts to constrain the political branches in their criminalization of behavior, it will give even greater impetus to the effort for the people in their role as jurors to take this responsibility to themselves — to do what the courts will not do — through jury nullification, “the act of a criminal trial jury in deciding not to enforce a law where they believe it would be unjust or misguided to do so....” Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine, Carolina Academic Press (1998) p. xix. *See also* Professor James Duane, Juror’s Handbook, Fully Informed Jury Association, http://www.fija.org/docs/JG_Jurors_Handbook.pdf.

federal government usurpations of authority. The Tenth Amendment is not so limited: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the **States** respectively, or to the **people**.” If the court below had understood that the text of the Tenth Amendment protects “the people” as well as “the States,” it would seem impossible to conclude that petitioner’s challenge fails on the theory that the “requisite representation by the states or their officers is notably absent’ from her suit,” as the court of appeals below ruled. *See* Bond, 581 F.3d at 137.

Second, having characterized petitioner’s challenge as a “Tenth Amendment claim[]”⁴ (*id.*), the court below looked to Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 143-144 (1939), a civil case challenging the constitutionality of a federal agency to sell surplus electrical power, and decisions of the First, Second, Eighth, Ninth, and Tenth Circuits which it believed were in accord. Bond, 581 F.3d at 136. However, Tennessee Electric did not involve the

⁴ Although it is unclear from the opinion below whether Petitioner ever directly invoked the Tenth Amendment in District Court, she did so in briefs filed with the Court of Appeals. *See* Bond, 581 F.3d at 134. Had the court viewed petitioner’s challenge exclusively in terms of the absence of federal government power under Article I, Section 8 to criminalize her behavior, the challenge would likely not have triggered the court’s analysis under the Tenth Amendment. Seeing the court’s curious reaction to any mention of the Tenth Amendment in her Petition for Rehearing En Banc, the Petitioner characterized her Tenth Amendment argument as only “ancillary” to her main claim. Pet. for Reh’g En Banc, p. 6. *See generally* Gov. Br., pp. 9-10.

right of a criminal defendant such as is the case here. In Oregon v. Legal Services Corp., 552 F.3d 965 (9th Cir. 2009), the state’s suit against the Legal Services Corporation for infringement of its rights under the Tenth Amendment was dismissed for lack of injury, and the court’s discussion of instances when an individual lacks standing was dictum only. Of the five circuit court cases denying standing, only two involved criminal law. United States v. Parker, 362 F.3d 1279 (10th Cir. 2004), involved no federal criminal law, as the federal government was enforcing state law in a federal enclave under the Assimilative Crimes Act, 18 U.S.C. section 13. Only United States v. Hacker, 565 F.3d 522 (8th Cir., 2009), was at all analogous to the instant case, and it appears that the appellant appeared *pro se*, and that the decision was based on the same misreading of Tennessee Electric embraced by the court below.

Third, before addressing the standing issue (Bond, 581 F.3d at 134-35), the court of appeals misconstrued the case before it, analogizing a federal criminal prosecution against an individual to a conflict between the federal and state governments — completely losing sight of what is at stake here — the rights of the petitioner as an individual. Instead, the court of appeals became entangled in a discussion of petitioner’s challenge to her criminal conviction as if it were a “federalism” issue arising from a conflict between national and state governments — “the ability of the treaty power to override ‘state prerogatives’” (*id.* at 135) as well as invoking “the fundamental principle of national supremacy” (*id.* at 135 n.4).

In recognition of the difference between this case and a federalism challenge raised in a case where the state is a proper party, the government now agrees with petitioner that there is no requirement that a state be required to assert the Tenth Amendment claim of a criminal defendant. Indeed, when the federal government exceeds its constitutional authority and targets the citizen of a state, the petitioner ought not be saddled with a requirement for an intervening party representing the state's interest in the federal system.

II. Prudential Considerations Cannot Be Invoked to Deny Standing to a Defendant in a Criminal Case in a Challenge to the Constitutionality of a Federal Criminal Statute.

It is an unusual situation indeed when the government and a criminal defendant petitioner take the same side in a case before this Court, and the Court is compelled to appoint counsel to represent the now-repudiated position taken by the government below. While these *amici* agree with both petitioner and the government that this petitioner has standing, these *amici* believe that the court's decision to resolve such issues raised by defendants who meet the Court's three-part test is mandatory, not subject to any prudential considerations.

The scope of Article III is often summarized as limiting the judicial power to actual "Cases" and "Controversies." *See, e.g.*, Gov. Br., p. 21. This general

rule is dictated by the text of Article III, Section 2, which reads in full:

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to **all Cases** affecting Ambassadors, other public ministers and Consuls;--to **all Cases** of admiralty and maritime Jurisdiction;--to **Controversies** to which the United States shall be a Party;--to **Controversies** between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. [U.S. Constitution, Art. III, Sec. 2 (emphasis added).]

This case invokes only the first clause, which dictates that the judicial power “**shall extend**” to “**all cases** arising under this Constitution [and] the Laws of the United States.” These are words of obligation, not discretion.

The apposite constitutional text is designed to ensure that only legal “cases” and “controversies” are resolved by the federal courts. Thus, it is required that a party must demonstrate standing, in that: (i) he

suffered an “injury in fact” that is “concrete and particularized,” and not hypothetical or speculative; (ii) the injury is “fairly ... trace[able] to the challenged action ... and not ... the result [of] the independent action of some third party not before the court”; and (iii) it is “likely’ ... that the injury will be ‘redressed by a favorable decision.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

While both petitioner and the government agree that this particular criminal defendant has Article III standing under this three-part test to challenge her conviction (Pet. Br., p. 16; Gov. Br., p. 22), neither asserts that, having concluded that there is a “case” before it, the federal judiciary has an obligation to hear her case on the merits.

Instead of insisting the court meet its constitutional obligation to decide her case on the merits, petitioner contends that her claim “satisfies [both] the ordinary requirements for constitutional **and prudential** standing...” Pet. Br., p. 16. Specifically, petitioner asserts that her claim falls within the Court’s “prudential ‘zone of interests test.” *Id.*, pp. 23-24 (emphasis added).

Similarly, the government asserts that “[e]ven when a litigant satisfies the Article III standing requirements, **prudential** considerations may counsel against the exercise of federal jurisdiction....” Gov. Br., p. 23. The government describes these prudential principles as being “‘essentially matters of judicial self-governance,’ designed to protect the federal courts from deciding abstract questions that may be more

suited to resolution by the political branches or to judicial resolution in a different case.” *Id.*, p. 24. However, in this case, the government believes that “[i]n sum, petitioner is the appropriate litigant to pursue the claim” that the statute in question is unconstitutional. *Id.*, p. 25.

The court below tried to justify its decision because other courts “point to varying **prudential** considerations,” including whether allowing individuals to challenge federal laws under the Tenth Amendment “might induce a ‘substantial increase ... in litigation before the federal courts.’” Bond, 581 F.3d at 137 (emphasis added). On this crucial point, the assumption of the court below that no federal court is under any obligation to protect an individual charged with an unconstitutional crime goes unchallenged by the parties.

Unlike the court below, the petitioner, and the government, these *amici* fundamentally reject any such “prudential consideration” doctrine. According to the plain meaning of Article III, Section 2, federal courts have no discretion whatsoever to turn a deaf ear to any challenge, by any defendant, to the constitutionality of any statute under which that defendant is being prosecuted — all such challenges being within the scope of such matters over which the federal power “shall extend.”

In Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824), Chief Justice Marshall explained that, under the third article of the Constitution — “the judicial power shall extend to all cases in law and

equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority” — in these terms:

This clause enables the judicial department to **receive jurisdiction** to the full extent of the constitution, laws, and treaties of the United States, when **any question** respecting them shall assume **such a form that the judicial power is capable of acting** on it. That power is **capable of acting only when the subject is submitted to it by a party** who asserts his rights in the form prescribed by law. It then **becomes a case**, and the constitution declares that **the judicial power shall extend to all cases** arising under the constitution, laws, and treaties of the United States. [*Id.*, 22 U.S. at 818 (emphasis added).]

When the federal government decides to prosecute an individual for the violation of a criminal statute, and that individual challenges the validity of that statute as being outside the powers conferred upon Congress in Article I, Section 8, or in violation of the limitations of the Tenth Amendment, that defendant is asserting that the federal crime is *ultra vires* — a nullity, no law at all. Assuming that the “question” is raised in “a form that the judicial power is capable of acting on,” then it “becomes a case” and “the judicial power” extends to cover it. *Id.* at 819.

The government's position that a court could choose to allow an individual to be incarcerated so that a court could engage in an act of "judicial self-governance" yields to the federal courts a power that they do not have — the power to elevate some notion of "self-governance" above its responsibility to protect each and every American citizen from a Congress that has criminalized behavior over which it has no power, and a prosecutor who determines to use that illegitimate statute.

The federal courts do not have the power to disregard "questions that may be more suited to resolution by the political branches or to judicial resolution in a different case," as argued by the government. Gov. Br., p. 24. Once behavior beyond the reach of Congress has been criminalized, there has already been a failure of the political branches — they cannot be trusted to resolve a problem that they joined to create. And it matters not whether a federal court believes that "a different case" could be brought in the future which would be a better vehicle to resolve an issue — for it is the freedom of an individual that is being decided in the case before it.

As Chief Justice Marshall so persuasively stated:

The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it

be brought before us. **We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.** The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. [Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added).]

Any so-called “principle of law” by which federal courts have the latitude to overlook an unconstitutional prosecution and incarceration, potentially destroying the life, family, and finances of an individual before them, while waiting for a better case to come along to set matters right, impairs the constitutional role of the federal judiciary. Since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the federal courts have interposed their judgment to protect individuals from the unconstitutional misuse of legislative or executive power lest the political branches override the will of “the people” as expressed in the written text of the Constitution. *Id.*, 5 U.S. at 176-77. The federal judiciary must not show partiality — ignoring the plight of an illegitimately-charged individual for reasons related to institutional concerns, no matter how prudential. Rather, judicial power must be exercised without even the appearance of partiality: “Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the

person of the mighty: but in righteousness shalt thou judge thy neighbour.” Leviticus 19:15.

Finally, the apparent “prudential” concern of the court below that the adoption of a proper view of standing “might induce a substantial increase ... in litigation before the federal courts” (Bond, 581 F.3d at 137) is no reason to leave men and women incarcerated wrongly because the political branches have exceeded their Constitutional authority.⁵

This case presents an excellent opportunity for this Court to clarify what appears to be a widespread misunderstanding about the role of the judiciary in cases arising under the Constitution — that the Court is not only granted the power of judicial review, but also the concomitant duty to exercise that power within the limits placed on it by the written Constitution. Thus, this Court should issue an opinion that makes it clear that in a federal criminal case, a federal court is presented with not just an **opportunity to decide** whether a federal crime is a legitimate exercise of constitutional authority or an unconstitutional nullity — but the **responsibility to decide** such issues once raised.

⁵ The substantial increase in federal criminal cases is not to be attributed to defendants imposing on the system by wanting their day in court, but to the proliferation of new crimes created by the political branches which are not grounded in any enumerated power, as discussed in Section III, *infra*.

III. Granting Petitioner Standing in this Case Is Necessary to Preserve the Constitutional Role of this Court to Check the Federalization of Criminal Law.

Petitioner's brief raises an important issue: that this case should be viewed in the context of the increasing federalization of criminal justice, and the need to preserve judicial checks on what it calls "federal overreach." Pet. Br., pp. 33-37. Unsurprisingly, the government's brief raises no such policy issue.

Petitioner's brief discusses this issue in policy terms: that this rampant increase in new federal crimes applies to behavior already criminalized under state law, and that such federalization swells federal judicial dockets, promotes sentencing disparities, and leads to abuses of prosecutorial discretion. *Id.* All of this is true. However, the problem of the federalization of crime is even more profound, as it implicates the constitutionality of broad categories of those crimes. For too long the political branches have reacted, not unsurprisingly, to every "violent" headline with the cry to pass a new law, frequently by creating a new crime, or ratcheting up the penalties for an existing one.⁶

⁶ The ABA Task Force on the Federalization of Crime reported that "many of these new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular. Put another way, it is not considered politically wise to vote against crime legislation, even if it is misguided,

Being tough on crime has been, and apparently continues to be, “good politics,” and Congress has demonstrated again and again its desire not to allow the Constitution to get in the way.⁷ And, for too long, the judiciary has avoided taking hard looks at the text of the Constitution to uncover the source of federal power to criminalize behavior.⁸

unnecessary, and even harmful.” ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law, American Bar Association (1998), p. 2.

⁷ Congressional efforts to require the identification of the Constitutional provision authorizing each bill have not moved in either chamber. See Enumerated Powers Act, S.1319, 111th Congress, introduced by Senator Tom Coburn (R-OK) (providing “Each Act of Congress shall contain a concise explanation of the specific constitutional authority relied upon for the enactment of each portion of that Act”). In introducing this bill, Senator Coburn explained its limitations:

This bill says you can still cheat on the Constitution, but now you have to explain to the American people why you are cheating, and there will be a point of order against any bill that doesn't provide an explanation to the people.

That is one of the ways we get our country back because the American people become informed. **I guarantee you many will become outraged when they hear some of the statements on why the Senate thinks we have the authority to do some of the things we do.**

[Statement of Sen. Coburn, 155 *Cong. Rec.* S6934 (June 23, 2009) (emphasis added).]

See also “Enumerated Powers Act,” H.R. 450, 111th Congress, introduced by Congressman John B. Shadegg (R-TX).

⁸ In the area of federal firearms law, the lax form of review being utilized by federal courts in considering challenges to federal

By way of contrast, there was a time that Congress was deeply concerned about the constitutionality of the laws it was considering enacting. The seriousness and precision with which members of Congress once debated great Constitutional issues was brilliantly catalogued by legal historian David P. Currie in his series on the Constitution and Congress.⁹

Sadly, today, the routine practice of Congress is to abdicate its duty and oath to “support and defend the Constitution of the United States,” pass the law, and

criminal laws is detailed in the Amicus Curiae Brief of Gun Owners Foundation, Gun Owners of America, Inc., Gun Owners of California, Inc., Virginia Citizens Defense League, and Conservative Legal Defense and Education Fund in Support of Petitioner in Steven Skoien v. United States, Supreme Court, No. 10-7005 (Nov. 15, 2010), pp. 5-20, <http://www.lawandfreedom.com/site/firearms/SkoienAmicusSC.pdf>.

Lack of judicial concern about the limitations of the Commerce power is discussed in the Amicus Curiae Brief of Gun Owners Foundation, Gun Owners of America, Inc., and Virginia Civil Defense League in Montana Shooting Sports Association, Inc., et al. v. Holder, U.S. District Court for the District of Montana, Case No. 9:09-cv-147-DWM-JCL (Apr. 12, 2010), pp. 10-18, http://www.lawandfreedom.com/site/firearms/MontanaSSA_Amicus.pdf.

⁹ *See generally* The Constitution in Congress: The Federalist Period, 1789-1801, Univ. of Chicago Press (1996); The Constitution in Congress: The Jeffersonians, 1801-1828, Univ. of Chicago Press (2001); The Constitution in Congress: Democrats and Whigs, 1829-1861, Univ. of Chicago Press (2005); The Constitution in Congress, Descent into the Malestrom, 1829-1861, Univ. of Chicago Press (2006).

claim the credit for having acted decisively, while leaving questions of the Constitution to the courts.¹⁰

The identification of specific constitutionally enumerated powers gives not the slightest hint that any significant federal criminal code was anticipated by the Framers. For example, Article I, Section 8, clause 5 vests in Congress the power “[t]o coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.” And the very next clause — Article I, Section 8, clause 6 — vests Congress with the power “to provide for the punishment of counterfeiting the Securities and current Coin of the United States.” By explicitly vesting Congress with the power to criminalize counterfeiting, the Framers demonstrate that one should not imply that the “necessary and proper” clause (Art. I, Sec. 8, cl. 18) vested a general police power in Congress to use the criminal law as a “necessary and proper” means to carry out its enumerated powers.

¹⁰ Certainly the Congress is not only to blame. When President George W. Bush signed the Bipartisan Campaign Reform Act of 2002, he indicated that portions of the law which criminalized certain speech were unconstitutional, but felt no obligation to veto the bill just because of that concern. Weekly Compilation of Presidential Documents, Vol. 38 (Mar. 27, 2002). (“I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election. I expect that the courts will resolve these legitimate legal questions as appropriate under the law.”) <http://www.gpo.gov/fdsys/pkg/WCPD-2002-04-01/pdf/WCPD-2002-04-01-Pg517.pdf>.

Even Alexander Hamilton, a proponent of a strong national government, rejected any significant federal role in criminalizing behavior: “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.” Federalist No. 17 (emphasis added). The Federalist Papers give little indication that any federal crimes were anticipated, except for establishing the crime of treason — the principal subject matter of the only two uses of the word “crime.” *See* Federalist No. 43; Federalist No. 74 (Liberty Fund, Indianapolis: 2001). Likewise, the five uses of the word “criminal” in the Federalist Papers gave no indication of any meaningful federal criminal code. *See* Federalist Nos. 17, 42, 66, 74, and 83.

The insightful study of federal crimes by the American Bar Association’s Task Force on the Federalization of Criminal Law (chaired by former Attorney General Edwin Meese) concluded that “it may be impossible to determine exactly how many federal crimes could be prosecuted today ... but the catalog of federal crimes grew from an initial handful to several thousand which exist today.” ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law, American Bar Association (1998) p. 2. Moreover, “[e]nactment of each new federal crime bestows new federal investigative power on federal agencies, broadening

their power to intrude into individual lives.”¹¹ *Id.*, p. 27.

Over the past several years, with increasing frequency and intensity, the word has been getting out to the American people. A series of studies and popular books have focused renewed attention on the lawlessness of the criminal justice system, and particularly on the lack of Constitutional constraint on federal usurpation of the police power. *See generally* Paul Craig Roberts and Lawrence M. Stratton, The Tyranny of Good Intentions: How Prosecutors and Law Enforcement are Trampling the Constitution in the Name of Justice, Three Rivers Press (2008); In the Name of Justice, CATO Inst. (Timothy Lynch, ed., 2009); Harvey A. Silverglate, Three Felonies a Day: How the Feds Target the Innocent, Encounter Books (2009); Paul Rosenzweig and Brian W. Walsh, One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty, Heritage Foundation (2010); and Go Directly

¹¹ As Seventh Circuit Judge Richard A. Posner has observed: “The machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps, DNA tests, bulldog prosecutors, pretrial detention, broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, **it can nail anybody**. There is some truth to this, since there are **literally thousands of federal criminal laws, many of them at once broad, vague, obscure**, and underenforced.” R. Posner, An Affair of State, Harvard Univ. Press, p. 87 (1999) (emphasis added).

to Jail: The Criminalization of Almost Everything, CATO Inst. (Gene Healy, ed., 2004).

While the issue before the Court in the instant case will not solve the problem of the unwise, and often unconstitutional, federalization of crime, it will ensure that individual defendants will have the right to challenge federal prosecutors using tools given to them by Congress and the President which have largely abdicated their constitutional conscience to the judiciary. While “the people,” newly awakened, assert themselves, and new members of Congress are being elected to replace the old order, it falls particularly to the judiciary to stand in the gap and protect the individual from prosecution under unconstitutional laws.

CONCLUSION

This case should be viewed as one of great import simply because it deals with the rights of a single individual. But it also presents the Court with the opportunity both (i) to reject decisively an artificial and dangerous constraint on judicial authority to protect individuals from abuses of federal power; and (ii) to ensure that the judiciary understands that its responsibility to protect individuals is not discretionary. “[I]t is the successful appeal, in which reasons of ... general applicability are given for reversing a conviction, that helps establish operative norms.” J. Packer, The Limits of the Criminal Sanction, p. 232, Stanford University Press (1968). To re-establish proper operative norms, and for the

foregoing reasons, the judgment of the court of appeals should be reversed.

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