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## The impact of federalization: an original analysis of local cases in federal court

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The Impact of Federalization:  
An Original Analysis of Local Cases in Federal Court

By

Ben Hagglund

Accepted in Partial Completion  
Of the Requirements for the Degree  
Master of Arts

Kathleen L. Kitto, Dean of the Graduate School

ADVISORY COMMITTEE

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## **MASTER'S THESIS**

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Ben Hagglund  
November 12, 2013

The Impact of Federalization:  
An Original Analysis of Local Cases in Federal Court

A Thesis  
Presented to  
The Faculty of  
Western Washington University

In Partial Fulfillment  
Of the Requirements for the Degree  
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November 2013

**Abstract**

Critics of federalization argue that the federal duplication of state criminal laws places an undue burden on the federal courts and there are too many total federal crimes. Federalism proponents claim that the federal overlap threatens the states' roles as laboratories of democracy. This thesis examines criminal cases in the federal court in the Western District of Washington in 2010 and finds concurrent cases are regularly charged by U.S. attorneys in cooperation with state prosecutors. However, the impact on the court is a direct result of the discretion that U.S. attorneys exercise in filing concurrent cases.

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## **I. Introduction**

Critics of federalization argue that the federal duplication of state criminal laws places an undue burden on the federal courts because there are too many total federal crimes that federal prosecutors can charge. Barkow describes a continuing debate over the proper role of the federal government in state and local law enforcement when she writes, “jurisdiction over crime . . . is the quintessential question of federalism and state power” (2011, 529 and 521). While the debate over the proper role continues, Congress continues to pass federal laws that duplicate state criminal laws, leading to an “increasing overlap in federal-state criminal jurisdictions” (Miller and Eisenstein 2005, 240). Stuntz summarizes the situation more bluntly, stating that “America’s criminal justice system has a federalism problem” (2006, 843).

Most criminal enforcement is local in nature, “Local police have primary responsibility for the mass of crime control” (Stuntz 2001, 665-666, 673). The federal government, on the other hand, is exclusively responsible for crimes that occur in certain locations and certain areas of law (e.g. military reservations and federal tax laws). As Congress continues to federalize state criminal statutes by enacting federal criminal laws that merely duplicate those crimes, scholars ask, “Why indeed should the federal government be interested in a whole host of cases primarily involving violations of state law?” (Miner 1992, 682). One example of a federal law that overlaps a state criminal law is the federal carjacking statute, which federalized Maryland’s carjacking law (Little 1995, 1032; Richman 2000, 89; U.S. Congress 2009, 2). Kadish complains that such duplication wastes resources, threatens to break down the civil system in federal courts, compromises the “virtues of federalism,”

and will lead to additional federalization (1995, 1251). A feature of federalism is the difference of responsibilities between the federal government and the states. This arrangement would be threatened if Congress continues to duplicate state criminal laws to the point where there is a complete overlap.

Federalization of crime creates concurrent jurisdiction where the same criminal conduct can be charged in federal or local court. Concurrent cases filed in federal court include federal investigations and local cases adopted by federal prosecutors. When concurrent cases are filed by federal prosecutors, numerous costs are shifted to the federal government including pre-trial detention, prosecution staffing, court costs, public defender staffing, probation, and prison costs. This shift in criminal justice costs away from local and state expenses may be welcome news for local authorities, and even local populations, who are happy to see federal law enforcement targeting local violent criminals (Richman 2006, 402). But not everyone is equally enthusiastic about this. Federal judges have traditionally opposed the federal government's new focus on local crime because of the possibility of increased workloads (Richman 2006, 402; Simons 2000, 910). Chief Justice William Rehnquist (1999) is often quoted describing the pending disaster:

The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system. The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level.

As a result of federalization, assistant U.S. attorneys can choose from a large number of "extraordinarily broad" federal crimes when selecting a case for prosecution (Richman

2009, 2090). Federal prosecutors are “cherry-picking” the best local cases for federal prosecution (Richman 2006, 379). The most common examples of concurrent jurisdiction include drug cases and firearms offenses (Miller and Eisenstein 2005, 251). Stuntz writes that about 70% of federal cases were concurrent jurisdiction in 1998, “just about all of this portion of federal criminal dockets can fairly be called discretionary” (2001, 673).

But discretionary cases are elective, or optional, because federal law enforcement does not have “primary responsibility” to investigate most crime compared to local law enforcement, and federal prosecutors are not obliged to prosecute the cases. Further, Stuntz’s estimate assumes that all thefts, drug cases, violent crimes, and fraud cases are concurrent jurisdiction, which may be insufficient. This definition is too broad for concurrent jurisdiction because it includes cases that may have been exclusive crimes or cases that occurred in exclusive federal locations.

Although continued federalization adds to the number of statutes available to federal prosecutors, an increase in the number of federal laws does not necessarily lead to an increase in the number of prosecutions. There is a minimal impact of new federalization on the federal courts because federal prosecutors regularly use the same set of criminal charges (Klein and Grobey 2012). If the ongoing duplication of state crimes has little effect, then how much impact is there from existing concurrent (criminal) statutes? How many concurrent cases are filed in federal court and how many of these are actually local cases? How do concurrent cases impact the federal court compared to all other criminal cases and civil cases? These questions can be summarized in my research question: Does the number of

concurrent cases filed in federal court empirically substantiate the criticism from judges and scholars that federalization is a significant threat to the federal court?

In order to answer this question, it was necessary to examine each individual case filed in federal district court. Every available criminal case was reviewed and placed in one of three categories based on jurisdiction or interest: exclusive, primary, or concurrent. This has not been done before and allowed for an accurate inventory of how many concurrent and local cases are in federal court. Differentiation between concurrent and local cases is important to determine the impact of the cases that are normally expected to be charged in local courts.

This thesis categorizes criminal cases in the federal court in the Western District of Washington in 2010. This thesis finds that the majority of cases in U.S. district court is exclusive jurisdiction or primarily affects the federal government, despite previous complaints from judges and scholars. This thesis concludes there is a minimal impact on the federal courts from concurrent cases based on duplicative federal laws and this is because U.S. attorneys use their discretion to select only a few cases of the many possible to prosecute in federal court. Based on my research, the conventional view of federalization critics is wrong.

## II. Data and Methods (Methodology)

The research question focuses on the number of concurrent cases in federal court: How many concurrent cases are filed in federal court and how does that affect the court's workload? The results will confirm or disprove the concerns expressed by Chief Justice Rehnquist and other federalization critics. This thesis is a case study of criminal charges filed in the Western District of Washington in 2010. There are two federal district courts in the state: Western and Eastern Districts of Washington. The Western District includes all 19 counties west of the Cascade Mountains, bordered by the Pacific Ocean to the west, international border to the north and Columbia River to the south. Major population centers include Seattle, Tacoma, and Vancouver.

**Figure 1 Federal District Courts in Washington State**



Source: State of Washington, Department of Social and Health Services<sup>1</sup>

<sup>1</sup> <http://www1.dshs.wa.gov/rda/research/clientdata/2003/county/default.shtm>

All criminal case numbers filed in the Western District of Washington in 2010 have been included for study to provide recent data. The examination of cases filed in a calendar year allows for a complete accounting since they are filed sequentially. There were 1,183 criminal case numbers in the district in 2010 including felonies, misdemeanors, petty offense appeals, and probation proceedings.

### **A. Sources**

It is necessary to categorize federal criminal cases in order to determine how many concurrent cases are in federal court. It is relatively easy to categorize cases if enough information is available. The following sources were most useful in this research in order to accurately describe the population of cases. Federal cases were categorized by analyzing original court documents through a federal public access court database (PACER).<sup>2</sup> PACER allows fee-based access to federal court documents such as charging documents and sentencing memorandums. This is used by media and is available to anyone who signs up for an account. Criminal complaints are the best source of information to categorize and classify cases. Complaints are generally signed by federal law enforcement agents and presented to U.S. magistrate judges for review.<sup>3</sup> These documents describe the circumstances of the case in order to establish probable cause that a crime has been committed and the defendant is

<sup>2</sup> The U.S. Courts' website allows public access to court documents by users who set up an account. This access allows a user to search by location, date range, and offense level, or by individual case numbers. Users can review summary reports and court documents for individual cases.

<sup>3</sup> All but two complaints reviewed for this paper were signed by federal law enforcement or local law enforcement officers assigned to a federal task force.

responsible. The facts presented often include the location of the case, how evidence was collected, and investigative action taken by law enforcement agencies.

Criminal complaints are not always available or a part of a case. If the best information is not available, my research (or future research) depends on other accessible sources to review the facts of a case. Charging documents completed by a grand jury (indictment) or the U.S. attorney's office (information) contain basic details of a case including the location of the offense and the unlawful conduct that is in violation of federal law. These documents usually contain limited information and additional sources are necessary in order to place a case in the appropriate category. Sentencing memos from the government or defense often outline the circumstances of the case with enough information and details to categorize and classify the case. The PACER docket report (e.g. summary) details how charges were resolved, what charges are pending (if any), and respective sentences. The U.S. attorney's office often provides press releases for federal arrests, indictments, convictions, and sentencing. Press releases and information from local media sources provide additional details specific to the case to help make determinations.

Finally, the Washington Office of Administration of Courts maintains a public access database which allows users to search for defendants by name. The results from the state indicate whether or not felony charges have been brought against an individual and what the status (or disposition) is. In many cases the state docket is available and describes the charge and corresponding dates. This information can be cross-checked with federal court information to help determine if a case was charged in a local court before federal court. This

process allows firm statements to be made about the exclusive or concurrent nature of nearly every case reviewed.

## **B. Categorization and Classification**

It should be clear from the circumstances of a case if the conduct could be charged in local courts. It is imperative to have categories to work with in order to address the concerns about federalization. A critic cannot argue there are too many concurrent cases in the federal courts unless the same critic knows how many concurrent cases there are (unless the argument is that any amount is too much). This sorting of cases into categories will allow an understanding of how many cases exist that the critics complain about.<sup>4</sup>

All criminal cases in 2010 were examined and categorized depending on available information. Many cases were excluded from consideration if there was no crime (e.g. probation proceedings) or if the crime did not occur in Western Washington. The remaining cases were divided into exclusive, primary, or concurrent jurisdiction categories. Cases that are exclusive jurisdiction cannot be tried in local courts based on the location of the conduct or the nature of the offense because local courts do not have jurisdiction. Examples include crimes on military reservations, Indian reservations, or locations outside of the United States. Other cases include immigration offenses, tax crimes and patent offenses. For the purposes of this paper, primary cases include offenses against the United States such as theft of

<sup>4</sup> Cases are categorized and classified based on my training and experience with criminal laws in Washington, and definitions listed in federal statutes. I am a career law enforcement officer employed by a local law enforcement agency. My training and duties require a thorough knowledge of current criminal laws in the state. In 2009, one of my cases was adopted by the Bureau of Alcohol, Tobacco and Firearms, and prosecuted in federal court, resulting in a guilty plea. I have also been (minimally) involved in a second case adopted by the FBI which resulted in a guilty plea.

government property or funds, false statements, or assault of a government employee. These cases have loosely corresponding state statutes but are not expected to be charged in local courts because of the obvious federal interests. I believe it is reasonable to expect federal prosecutors to charge a case when the federal government is the primary victim of a crime, such as theft cases. Further, there is no criticism in the federalization literature regarding these types of cases. Categories and subcategories are described in Table 1.

**Table 1 Categories and Subcategories of Federal Criminal Cases**

<b>Cases Excluded</b>	<b>Exclusive Jurisdiction</b>	<b>Primary Interest</b>	<b>Concurrent Jurisdiction</b>
Probation Matters	Military	Theft	Drugs
Sealed Cases	Immigration	False Statements	Firearms
Transfer Cases	Federal Locations	Other Cases	Financial
Other Cases	Delayed Mail		Sex Offenses
	Fail to Appear		Robbery
	Indian Reservations		Other Cases
	Other Cases		

Cases are categorized as concurrent jurisdiction if there is a corresponding state statute that is applicable to the criminal conduct charged. These cases could be charged in either local court or federal court. The language or elements may vary somewhat between federal and state statutes, but the criminal act is the focus. Concurrent cases in federal court typically include drugs, fraud, and weapons offenses (Shermer and Johnson 2010, 397). Concurrent cases are divided into similar subcategories and then classified according to the nature of the case: federal interest, joint investigations, and local cases. These cases are

classified based on the nature of involvement of federal or local law enforcement, as described below.

Federal investigations are those in which a federal law enforcement agency performs the majority of the investigation. A federal investigation may include assistance or a limited role performed by local law enforcement, but the majority of the work was performed by federal agencies.<sup>5</sup> Joint investigations reflect cases that are handled in cooperation with local and federal law enforcement, or sequentially. A combined federal and local response to a bank robbery call would be classified as a joint investigation, if both agencies continue to investigate. An extensive financial scheme investigated by multiple local agencies and consolidated by federal law enforcement would also be classified as a joint investigation.

Cases are classified as a local case if local law enforcement conducts the majority of the investigation. Local cases in federal court regularly begin with local law enforcement action, such as a traffic stop or other investigation, which results in felony charges. An arrest by local law enforcement, booking into jail, locally issued search warrants, or charges filed in local courts provide support for a case to be classified as local. This classification scheme is necessary to determine how many local cases are present within the concurrent jurisdiction category. Accurate data will enhance the ongoing debate about federalization because we will know exactly how many cases we are talking about instead of having to rely on assumptions.

<sup>5</sup> There were 15 cases that were not classified, out of 215 concurrent cases total. With a model that provides a presumption of federal interest, these are prioritized above joint investigations and local cases.

### **C. Cases Excluded**

Nearly 1,200 federal cases were reviewed using the criteria described above. There were 116 case numbers (about 10%) that were excluded from consideration because there was not an original criminal charge, or because the criminal conduct occurred outside the Western District of Washington. Most of the cases excluded were probation proceedings, and the remainder includes sealed cases, cases transferred from other federal district courts, and appeals from U.S. magistrate judges' decisions. The results are summarized in Table 2.

<b>Total Cases in 2010</b>	<b>1183</b>
<b>Total Cases Excluded</b>	<b>116</b>
Probation Matters	86
Sealed Cases	14
Transfer Cases	8
Other	8
<b>Remaining Criminal Cases</b>	<b>1067</b>

There were 86 case numbers in 2010 that were probation proceedings. All of these cases were transfers of probation jurisdiction from one federal district court to the Western District of Washington, except one. The remaining case is an arrest warrant for violation of probation conditions. Probation cases make up 7.3% of case numbers in 2010. Fourteen cases were sealed and not available for review.<sup>6</sup> These cases were originally checked in the fall of 2012, and again in August 2013.

The number of criminal cases that was transferred to the Western District of Washington is also small. Only seven cases were transferred in 2010, including cases from Eastern Washington, Florida, Illinois, Pennsylvania, Northern Mariana Islands, and two cases

<sup>6</sup> All 14 cases were still sealed as recently as August 2013.

from California.<sup>7</sup> These cases were not included for analysis because the criminal conduct did not occur in the Western District of Washington; the transferred cases could not have been charged in local courts. Although the case from Eastern Washington is a drug case, and is likely concurrent, it is important to remain consistent and this is accomplished by including criminal cases where the circumstances all occurred in the same location. A nation-wide study of federalization would include cases that are transferred from one federal district court to another, but it is not helpful or appropriate for a case study of a single district court.

Four case numbers were appeals of speeding tickets and a driving while license suspended citation from U.S. magistrate judges' decisions. These cases were not included for consideration because they were not criminal actions commenced in 2010. Other cases that were excluded from consideration include two case numbers that were determined to be repeated because the same conduct and defendants were addressed in separate case numbers. As a result, the original case numbers were evaluated in the appropriate categories and the duplicate case numbers were placed here.

The final two case numbers that were excluded were associated with offenses that occurred outside the United States, specifically in Thailand and Cambodia. Both cases were related to sex crimes involving minor children. The Thailand case was actually an extradition request related to a criminal complaint filed in 2007. The Cambodia case was a new charge filed by the U.S. attorney's office.

<sup>7</sup> One case was transferred out of the district for sentencing but was included for analysis because the conduct and charges occurred in Western Washington. It was placed in the corresponding subcategory. An additional case includes transfer of jurisdiction between the Western District of Washington and the Eastern District of New York. Although the criminal conduct appears to have occurred in Western Washington, at least in part, the case was originally charged in 2009 and as a result, it is outside the scope of consideration for this paper.

#### **D. Perspective**

I interviewed a local prosecutor and a federal prosecutor to gain perspective in how they choose local cases for federal prosecution.<sup>8</sup> Assistant U.S. attorneys and deputy prosecuting attorneys are responsible for implementing policy decisions of their respective offices. Their role in the criminal justice process is to evaluate cases investigated by law enforcement and determine if criminal charges are warranted. Alternatively, prosecutors may find a case needs further investigation, the case is not likely to be proven beyond a reasonable doubt, or the case is more appropriate in a different venue (e.g. a concurrent case in federal court). I conducted interviews in order to try to learn why concurrent cases are charged.<sup>9</sup> The prosecutors' responses combined with the research results provide a better understanding of how cases are selected for prosecution than relying on raw data alone. A list of questions was prepared and used as a guide through each interview. Responses from the prosecutors were generally consistent with explanations that appear in the federalization literature. The answers were especially helpful because they provide current perspectives from different vantage points regarding concurrent cases. A discussion with individuals who deal with federalization issues as a part of their duties enhances and updates the information available from scholars.

<sup>8</sup> Neither prosecutor speaks for their respective office, but they were each able to provide explanation based on their professional experience. Interview questions are listed in Appendix A.

<sup>9</sup> The charging discretion of prosecutors is a separate, but related, topic. I only conducted two interviews, but the results provided me with an overview of why cases are selected for federal prosecution in this district. Additional interviews would have essentially comprised a survey, which was outside the scope of this paper.

### **III. Findings**

A review of 1,067 criminal cases filed in the Western District of Washington in 2010 resulted in a number of findings. First, most federal criminal charges are exclusive jurisdiction. The majority of criminal cases in the district (nearly 75%) were categorized as exclusive jurisdiction, because the cases could not have been charged in local courts. This is largely due to criminal cases occurring on military reservations, specifically Joint Base Lewis-McChord. About 50 cases (almost 5%) were classified as primary jurisdiction because, although the criminal act could be charged as a local crime, it does not seem likely because the federal government or a federal employee is the victim. The second finding is that concurrent cases charged in federal court regularly demonstrate federal interests or comply with principles listed by critics. Finally, concurrent cases in federal court actually represent a smaller percentage (about 20%) of total charges than critics suggest, and the percentage of local cases adopted by federal prosecutors is even smaller. There were only 58 cases that were classified as local cases, which represent 5.4% of all federal criminal charges in 2010. The categories and subcategories are described in detail below in order to give a full account of the nature of cases charged by federal prosecutors. The purpose is to demonstrate that the highest degree of certainty for discussing cases is obtained by evaluating the circumstances of each case instead of making assumptions based on the types of crimes or the titles of charges filed. Cases were sorted into three categories based on jurisdiction criteria and further divided into subcategories according to the type of crime. I will provide a detailed analysis of exclusive jurisdiction and primary jurisdiction cases, which should help provide a

better understanding of concurrent jurisdiction cases. A discussion of the findings follows in Part IV.

#### **A. Exclusive Jurisdiction Cases**

Exclusive jurisdiction cases are defined as cases that occurred in the Western District of Washington but cannot be prosecuted in local courts. The majority of these cases include offenses that occurred on military reservations, immigration cases, and investigations from other federal locations. Exclusive cases are by far the largest category of cases in the Western District of Washington in 2010, making up over two-thirds of all case numbers. Cases that occurred on military reservations are the largest subcategory and make up over half of all case numbers in 2010. Immigration is also a significant subcategory with over 100 cases. The subcategories and totals are listed in Table 3.

**Table 3 Exclusive Jurisdiction Cases**

<b>Total Criminal Cases</b>	<b>1067</b>
<b>Total Exclusive Jurisdiction Cases</b>	<b>798</b>
Military Reservations	595
Immigration	108
Other Federal Locations	39
Other Crimes	13
Mail – Unlawful Delay	13
Fail to Appear for Court	11
Indian Reservations	9
Taxes	5
Interstate	5
<b>Primary Jurisdiction Cases</b>	<b>54</b>
<b>Concurrent Jurisdiction Cases</b>	<b>215</b>

There were 595 criminal cases on military reservations filed in 2010, including Joint Base Lewis-McChord<sup>10</sup> (507 cases), Naval Base Kitsap (68 cases) and Naval Air Station Whidbey Island (20 cases). Many cases result from driving offenses such as driving under the influence of alcohol or driving with a suspended license. Another high volume crime is theft of U.S. property (e.g. shoplifting).

The second largest group of crimes in the district was immigration-related crimes, which are the exclusive jurisdiction of the federal government according to the U.S. Supreme Court in *Arizona v. United States*.<sup>11</sup> There were 108 cases related to immigration filed in 2010 in the Western District of Washington, nearly nine percent of all criminal proceedings. The majority (103) of these charges were for illegal reentry, charging defendants with being in the country illegally after previously being removed or deported.<sup>12</sup> Many of these defendants were in custody in local jails at the inception of the federal investigation. Other immigration offenses include smuggling aliens for gain, conspiracy to bring in and transport aliens, concealment of facts about reentry, and eluding examination at entry. Complaints are signed by U.S. Immigration and Customs Enforcement (ICE) agents or U.S. Border Patrol agents. Immigration-related cases are generally found in urban areas: there were 39 cases in King County, 14 in Vancouver, 11 cases in Tacoma and nine in Everett. There were only nine cases in Whatcom County, including Blaine, Lynden, and Sumas, where the border crossings are. Additionally, there were cases in maritime border cities such as Friday Harbor and Port Townsend.

<sup>10</sup> Cases are specifically charged as having occurred at Joint Base Lewis McChord, Fort Lewis, or McChord Air Force Base.

<sup>11</sup> 567 U.S. \_\_\_\_ (2012)

<sup>12</sup> 8 USC §1326 (a) – Reentry of removed aliens

There were 39 cases in other federal locations such as national parks or forests. These types of locations are referred to as “special maritime and territorial jurisdiction of the United States.”<sup>13</sup> These locations include Olympic National Park, Mount Baker-Snoqualmie National Forest, Mount Rainier National Park, American Lake Veterans Center, Tongass National Forest, and North Cascades National Park. As displayed in Table 4, most of the cases are driving offenses (e.g. drunk driving), and the remainder includes vandalism, violation of a court order, and harassment. All of the cases were misdemeanors except for one felony: conspiracy to distribute marijuana in the Mount Baker-Snoqualmie National Forest. Some crimes in national forests or national parks are specifically listed as exclusive, which corresponds with state laws regarding jurisdiction. The state of Washington recognizes the exclusive jurisdiction of the federal government in Mount Rainier National Park and Olympic National Park.<sup>14</sup>

**Table 4 Offenses Charged in Other Federal Locations**

<b>Location</b>	<b>Driving Cases</b>	<b>Other Cases</b>	<b>Total Cases</b>
Olympic National Park	14	4	<b>18</b>
Mt. Baker-Snoqualmie National Forest	8	1	<b>9</b>
Mt. Rainier National Park	6	1	<b>7</b>
Other Locations	3	2	<b>5</b>
<b>Total Cases</b>	<b>31</b>	<b>8</b>	<b>39</b>

<sup>13</sup> 18 USC § 7 (3) – Special maritime and territorial jurisdiction of the United States, which states, in part, “Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof.”

<sup>14</sup> RCW 37.08.200 – Rainier National Park; and RCW 37.08.210 – Olympic National Park

The next subcategory of cases involves 13 misdemeanors related to opening or delaying the mail by a U.S. Postal Service (USPS) employee.<sup>15</sup> One case involved 100 items and a second case involved prescription drugs. There is no indication of related local court cases for any of the defendants and these cases do not appear to be included in the federalization criticism in recent decades. These cases would be categorized as primary if there were details to show theft had occurred since the actor is a federal employee. However, without information to establish that a corresponding state statute applies, the cases are presumed to be exclusive jurisdiction. Mail theft is a crime under state law in Washington, but there must be mail addressed to three different addresses, and there must be at least 10 pieces of mail, although theft of any amount is criminal.<sup>16</sup> A single piece of stolen mail would constitute theft under state law, but there is not a theft specifically detailed in these cases.<sup>17</sup>

Eleven cases were categorized within exclusive jurisdiction for defendants who failed to appear for federal court, because there is not a corresponding state law. The most relevant state statute defines bail jumping as failing to appear when required “before any court of this state,” but this arguably does not include the federal court system.<sup>18</sup>

Crimes committed on Indian reservations by enrolled tribal members are the exclusive jurisdiction of the federal government, if the conduct is not charged within the

<sup>15</sup> 18 USC § 1703 (b) – Delay or destruction of mail or newspapers. One case was charged under 18 USC § 1701 – Obstruction of mails generally, but still involved a USPS employee.

<sup>16</sup> RCW 9A.56.370 – Mail Theft; RCW 9A.56.020 – Theft – Definition, defense

<sup>17</sup> Mail fraud is a separate charge and will be discussed separately as a concurrent case.

<sup>18</sup> RCW 9A.76.170 – Bail jumping

tribe's legal framework.<sup>19</sup> State law also recognizes that criminal jurisdiction does not apply to Indians when on their tribal lands.<sup>20</sup> Crimes committed by non-tribal members are charged in county district courts or superior courts. In 2010 there were nine criminal cases against tribal members for offenses committed on Indian reservations including assault, sex offenses, burglary, and dealing explosives without a license.

Five cases were placed in a subcategory for taxes. Each case has unique circumstances and presents a difficult situation because in some instances the majority of the criminal conduct would be categorized as a concurrent crime, but the presence of an income tax crime causes it to be categorized as an exclusive jurisdiction crime. This creates a decision-making process where one exclusive crime in a series of multiple charges, even if they are concurrent, would cause the case to be categorized as exclusive jurisdiction. Federal tax crimes are naturally exclusive because Washington does not have a corresponding statute related to federal taxes.

The interstate subcategory includes two sex offenses and three cases related to transporting stolen goods. The nature of the charges is the focus of the case being categorized as exclusive. The sex offenses are specifically related to interstate travel or transportation. While components of the cases related to stolen goods could be concurrent crimes, the scheme continues until it is elevated to a federal case.

<sup>19</sup> 18 USC § 1153 – Offenses committed within Indian country

“Any Indian who commits against the person or property of another Indian or other ... within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, *within the exclusive jurisdiction of the United States*” (emphasis added).

<sup>20</sup> RCW 37.12.010 – Assumption of criminal and civil jurisdiction by state.

The subcategory for other crimes includes 13 cases with a wide variety of offenses. Cases include misuse of a Social Security number, unlawfully taking a marine mammal, and a drug user in possession of a firearm. Remaining cases include violation of the clean air act, conspiracy to damage a protected computer, tampering or false labeling of commercial products, and offenses related to record-keeping.<sup>21</sup>

### **B. Primary Federal Jurisdiction**

A separate category of offenses was required for cases that could technically be charged in local court, but primarily involve the federal government. This was necessary because there was no information to indicate that these types of cases were investigated, or are expected to be investigated, by local law enforcement. The purpose of this thesis is to accurately identify concurrent cases that are complained about in the federalization literature; I want to analyze the cases critics complain about. There is not criticism in the literature regarding theft from the federal government or offenses against federal employees. An accurate account of concurrent cases is accomplished by separating cases that directly affect the federal government from cases that do not. Primary cases reflect federal law enforcement agencies investigating crimes against the United States or its officers. The types of cases included here originated in 1789 when a number of state crimes, such as bribery and false statements, were duplicated for federal interests (Little 1995, 1063-1064). This category is limited to 54 cases and includes three subcategories: Theft, False Statements, and Other Crimes. The number of cases is detailed in Table 5.

<sup>21</sup> One case was for unauthorized wearing of military decorations (18 USC § 704), which was later declared unconstitutional by the U.S. Supreme Court in *United States v. Alvarez*, 567 U.S. \_\_ (2012)

Theft of U.S. government funds was committed against a number of federal agencies including the Department of Agriculture, Veterans Administration, Social Security Administration, and Department of Health and Human Services. Strictly speaking, these cases could be considered concurrent, but they have been categorized as primary jurisdiction because the federal government has a primary interest as a victim.

**Table 5 Primary Jurisdiction Cases**

<b>Total Criminal Cases</b>	<b>1067</b>
<b>Total Exclusive Jurisdiction Cases</b>	<b>798</b>
<b>Total Primary Cases</b>	<b>54</b>
Theft	34
False Statements	10
Other Crimes	10
<b>Concurrent Jurisdiction Cases</b>	<b>215</b>

False statements to government agencies or officials are included in the primary category because a federal government officer or department is primarily involved. Five cases are for making a false statement and three cases were charged for false statements related to passports.<sup>22</sup> Two false statement cases are a part of financial crimes, with losses over \$3,000,000. A third case is for making a false statement while crossing into the country from Canada. A separate false statement case originated from falsified log books on board a commercial ship, investigated by the U.S. Coast Guard. The state law for false information to a public servant is the most relevant statute and does not appear to limit the definition of a public servant to state or local employees.<sup>23</sup> As a result, this type of crime could conceivably

<sup>22</sup> 18 USC § 1001 – Statements or entries generally; 18 USC § 1542 False statement in application and use of passport

<sup>23</sup> RCW 9A.76.175 – Making a false or misleading statement to a public servant

be charged in local court, but it is not a part of the criticism of overlapping federal and state laws.

There were ten remaining crimes which include a variety of charges, but all primarily involved the federal government or its officers such as escape, assaulting a federal employee, or threatening a federal official. Escape cases were placed in the primary jurisdiction category because Washington state law does not limit its definition of correctional facilities to city, county, or state locations and could conceivably include federal cases, but this does not seem likely.<sup>24</sup> The final case in this subcategory involved a federal employee as the defendant, who was charged with stealing from luggage at SeaTac airport.

### **C. Concurrent Jurisdiction Cases**

If a case is to be considered concurrent jurisdiction, there must be a corresponding state statute, similar to the standard for primary jurisdiction. As discussed above, the crime must also have occurred in Western Washington, and not have occurred on federal property.

Concurrent cases are the types of cases that would be expected to be found in local courts.

Criticism of federalization frequently focuses on drug offenses and firearm crimes. My research found that financial crimes are also prevalent among concurrent cases. Drug offenses comprise the largest number of concurrent cases. Drug cases are regularly investigated by federal law enforcement or jointly investigated with local law enforcement. Firearms offenses include a high percentage of local cases that are selected for federal prosecution. This is one component of federalization criticism which argues against the

<sup>24</sup> RCW 9A.76.010 – Definitions

federal government investigation or prosecution of what is otherwise a local issue, such as Chief Justice Rehnquist referred to in 1998. This type of criticism generally insists on local crimes being investigated by local law enforcement and charged in local courts, unless there are compelling federal interests such as interstate or international aspects. Firearms investigations are significantly different from drug cases because they are commonly charged in local courts before being adopted for federal prosecution. A third type of overlapping crime in federal court involves financial crimes charged as wire fraud, bank fraud, or mail fraud. Other dual jurisdiction crimes include sex offenses and robbery, which are also occasionally charged in local courts and adopted. After a case was reviewed and categorized, I was also able to determine the appropriate subcategory. The results are detailed in Table 6.

**Table 6** Concurrent Cases by Type and Number

<b>Concurrent Cases</b>	<b>Fed</b>	<b>Unk<sup>25</sup></b>	<b>Joint</b>	<b>Local</b>	<b>Total</b>
Drugs	38	3	31	19	<b>91</b>
Firearms	5	2	6	30	<b>43</b>
Financial	22	9	10	3	<b>44</b>
Sex Offenses	8	0	5	3	<b>16</b>
Robbery	0	1	4	2	<b>7</b>
Other	5	0	8	1	<b>14</b>
<b>Total</b>	<b>78</b>	<b>15</b>	<b>64</b>	<b>58</b>	<b>215</b>

## **1. Drugs**

Drug cases are by far the largest category of concurrent cases in federal court. There were 91 drug cases in 2010 in the Western District of Washington, which represent 42% of all concurrent cases.<sup>26</sup> This count does not include drug offenses that occurred on military

<sup>25</sup> Unknown cases were categorized as concurrent jurisdiction based on available information, but there were not enough details to classify these cases.

<sup>26</sup> Drug investigations are sensitive in nature and the total may be higher if any of the sealed cases are related to drugs.

reservations or federal lands because those are categorized as exclusive jurisdiction based on the location. This subcategory does include cases coming through the international border because the defendant simultaneously enters the country and the state.<sup>27</sup> The defendant is instantly subject to state and federal laws concerning drug offenses. If the actual charges focused on interstate or international trafficking the categorization might be different. Cases in this subcategory reflect trafficking, possession with intent to distribute, and conspiracies, but they do not include simple possession. Most of the cases involve distribution in the first charge listed in the charging document. These cases involve many types of drugs including marijuana, methamphetamine, cocaine, ecstasy, oxycodone, and heroin. At least 38 cases involve more than one type of drug in the investigation, although they are not always charged or recovered.<sup>28</sup> Guns were involved in at least 22 drug cases, although there were not always firearms-related charges. A drug investigation where firearms were incidentally a component can be distinguished from a firearms case where drugs are ultimately discovered.

Although there are 91 case numbers, it appears that they represent no more than 87 investigations. Defendants are charged separately in some instances. Additionally, two defendants have case numbers in other areas: immigration and robbery. There were 175 defendants charged in the 91 cases reviewed. The largest number of defendants in a single case is 13.<sup>29</sup>

The location of drug cases varies; many cases occurred in urban areas while others are in rural areas. There were 36 cases in King County, including 11 cases in Seattle.

<sup>27</sup> There are nine cases charged related to drugs crossing the Canadian border.

<sup>28</sup> Some cases with more than one type of drug include personal use of marijuana.

<sup>29</sup> The press release from the U.S. attorney's office for one case notes there are 54 defendants. However, this is not necessarily reflected in available charging documents filed in the calendar year 2010.

Additionally, there were six cases in Tacoma, four cases in Vancouver, and three in Everett; some cases occurred in multiple counties within the state. There were 18 cases which involved interstate aspects and 13 cases involved international components. As presented in Table 6 above, 38 drug cases were determined to be federal interest, 31 cases were joint investigations, and 19 were local.<sup>30</sup> Factors which were present and may likely have led to federal prosecution include felony convictions, especially crimes of violence or drugs; gang membership; drug robbery crew; and illegal immigrants.

## **2. Firearms**

The firearms subcategory was generally categorized for firearms charges only. However, 20 cases involved narcotics in the circumstances of the case. If drugs were the focus of the investigation, the case was placed in the drug subcategory. If the case was a firearms investigation or if drugs were incidentally found, then the case remained in this subcategory. Only six cases included multiple charges and all firearms cases were confirmed to be felony offenses. There was more than one firearm involved in 18 cases.

My data shows federal firearm charges focus on gang members, stolen guns, gun sales, and defendants with drug history, violent history, federal convictions, and murder or manslaughter convictions. There were 43 firearms offenses charged in 2010, which represent about 20 percent of concurrent case numbers. This is significant because there is a higher percentage of local cases within the firearms subcategory than any other subcategory, and yet these cases represent only about four percent of all criminal cases. It is critical to know how

<sup>30</sup> There were three concurrent cases that were not classified because there was not enough information.

many of these types of cases exist in order to evaluate the criticism of federalization and its effects. These cases are ultimately the focus of critics. Not only are these cases the subject of overlapping criminal jurisdiction, many of them are local cases prosecuted in federal court. There were 20 cases that were originally charged in local courts. Separately, at least 15 cases appear to have involved a local arrest. There was no indication of local convictions for the same conduct: there was no double jeopardy related to convictions.<sup>31</sup> Only one case has two defendants; all other cases have one defendant. As shown in Table 6, there were five federal cases, six joint investigations, and 30 local cases.<sup>32</sup> There were 31 cases from King, Snohomish, or Pierce counties suggesting cases are drawn from major population centers or proximity to the federal courthouses.

There were 34 complaints that were reviewed in this subcategory. Over half of the complaints were completed by Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) special agents and six were signed by ATF task force officers. Other agencies who submitted complaints included FBI, Immigration and Customs Enforcement (ICE), Social Security Administration, and U.S. Marshals Service. One complaint was signed by a local detective without any task force or federal law enforcement association.

<sup>31</sup> Although a person may be convicted of the same conduct by the separate federal and state sovereigns, it is still commonly referred to as double jeopardy. Klein and Grobey (2012, 41-42) address this in detail, and note that the Department of Justice's Petite Policy from 1959 is likely to prevent dual prosecutions. The Petite Policy is specifically outlined in the U.S. Attorney's Manual (9-2.031).

<sup>32</sup> There were two firearms cases that could not be classified.

### **3. Financial Crimes**

Financial crimes are prosecuted by the U.S. attorney's office "to protect the interests of consumers and taxpayers" (Durkan 2013, 5). The number of financial crimes is about the same as firearms offenses, but these types of cases are not regularly mentioned in criticism of federalization of state criminal statutes. This may be because most cases are charged as wire fraud, bank fraud, or mail fraud. Factors which may lead a financial crime to be charged in federal court include multiple victims, multiple locations, interstate corporations, high dollar loss, or complex schemes. One case had more than 1,000 victims and a total loss of over one billion dollars. Multiple cases had losses over one million dollars. There were 13 wire fraud cases, 11 bank fraud cases, and five mail fraud cases. There were 22 federal investigations and nine that were not classified. Additionally, there were 10 joint investigations and only three local cases.

Mail or wire is the method by which most of the crimes are committed. The underlying criminal conduct is often a concurrent offense. Corresponding Washington crimes would be forgery, theft, and identity theft. Forgery and theft are relatively simple definitions under state law. Forgery is a likely statute because it involves the alteration of written documents: "falsely makes, completes, or alters a written instrument or... He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged."<sup>33</sup> Theft is broadly defined by Washington law:

To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or ... (b) By color or aid of deception to obtain

<sup>33</sup> RCW 9A.60.020 – Forgery, subsection 1 (a) and (b)

control over the property or services of another, or the value thereof, with intent to deprive him or her of such property or services.<sup>34</sup>

Washington courts likely have jurisdiction because state law includes “A person who commits in the state any crime, in whole or in part,” and, “A person who commits an act without the state which affects persons or property within the state, which, if committed within the state, would be a crime.”<sup>35</sup> It seems numerous local financial cases inevitably involve the mail, wire transfers, or financial institutions. As a result, nearly every local financial case appears eligible to be charged in federal court, which is similar to drugs and firearms cases.

The financial crimes subcategory includes six bank embezzlement cases, which is defined as theft by a bank employee.<sup>36</sup> The amount required to become a felony case is greater than \$1,000, which is higher than the state threshold of \$750 for a felony theft charge.<sup>37</sup> The victim banks were insured by the Federal Deposit Insurance Corporation (FDIC), which causes the federal government to be a secondary victim. There is no indication that local charges were filed in these cases. In one bank embezzlement case, the defendant’s attorney requested the court to consider that if the conduct was charged in local court the sentence would likely be deferred and there would be no permanent record. The defense also asserted that the crime would be in local court except that the bank is federally

<sup>34</sup> RCW 9A.56.020 – Theft – definition, subsection 1 (a) and (b)

<sup>35</sup> RCW 9A.04.030 – State criminal jurisdiction, subsections 1 and 5

<sup>36</sup> 18 USC § 656 – Theft, embezzlement, or misapplication by bank officer or employee

<sup>37</sup> RCW 9A.56.040 – Theft in the second degree

insured. This was confusing because banks that are robbed are federally insured but bank robbery charges are not precluded from being charged in local courts.<sup>38</sup>

#### **4. Sex Offenses**

There were 16 concurrent cases that were charged in federal court as sex crimes. Eight of the cases were federal, five were joint investigations, and three were local. Eleven of the cases involved child pornography. One defendant had convictions for child molestation and a federal conviction for possession of child pornography. This defendant also had five counts of possession of child pornography pending in local court, which were dismissed five days after he was indicted by the federal grand jury. A previous federal conviction appears to be a factor for federal prosecution in sex offense cases. Some child pornography cases involve federal resources in multiple states. The U.S. Postal Inspection Service, ICE, and the FBI all investigate child pornography cases, and the Internet Crimes Against Children task force also has a significant role in building cases against suspects.

There were three cases for registered sex offenders who failed to register. All three complaints were from the U.S. Marshals Service and each case involved interstate aspects. Two of the cases were previously filed in local courts. Separately, two cases were classified as joint investigations and the third case was classified as a local case.<sup>39</sup> Two cases occurred in King County and the third occurred in Lewis and Cowlitz Counties. The federal law for failure to register overlaps with the state law, which requires registered sex offenders to

<sup>38</sup> This case discussion is presented to suggest that bank embezzlement cases may be better categorized as primary offenses.

<sup>39</sup> A case charged in local court does not guarantee that it will be classified as a local case; a local charge is just one factor that is considered.

update their address with the sheriff's office when they move into or out of a county.<sup>40</sup> The federal law requires that the defendant be required to register and travelled in interstate or foreign commerce. The maximum penalty under federal law is up to 10 years imprisonment. The maximum penalty under state law is five years, or ten years if there are at least two convictions for failing to register.

The remaining two sex offense cases were sex trafficking cases which also overlap state law.<sup>41</sup> Both of these cases were classified as joint investigations due to investigation by the FBI and local law enforcement in one case, and investigation by a federal task force officer in the other case. Both cases were originally charged in local court but charges were dismissed after federal court documents were filed.

## **5. Robberies**

The FBI reported there were 143 bank robberies in the state of Washington in 2010 (FBI 2010). But only five bank robberies were charged in the Western District of Washington in 2010.<sup>42</sup> Four bank robberies were joint investigations and the fifth was not classified. There were also two pharmacy robberies charged, both of which were determined to be local cases. The federal charges for these cases are specific to the type of location (type of business) involved.<sup>43</sup> Bank robberies and pharmacy robberies are both concurrent crimes because they

<sup>40</sup> 18 USC § 2250 (a) – Failure to Register, and RCW 9A.44.132 – Failure to register as sex offender or kidnapping offender

<sup>41</sup> 18 USC § 1591 – Sex trafficking of children, RCW 9.68A – Sexual Exploitation of Children

<sup>42</sup> There is not necessarily a correlation between the incidents of bank robbery and the filing of charges, but the numbers are presented to give the reader perspective.

<sup>43</sup> 18 USC § 2113 – Bank Robbery and incidental crimes,

18 USC § 2118 – Robberies and burglaries involving controlled substances

can be charged in local court or federal court. The state robbery charge is generic and only requires that a person be robbed by force or the threat of force.<sup>44</sup>

**Table 7 Robberies Charged in Federal Court in 2010**

Number	Type	Location	Significant Factors
1	Bank	Everett	Robbery at gunpoint
2	Bank	Federal Way	6 robberies
3	Bank	Seattle	13 robberies total
4	Bank	Tacoma	3 federal convictions; Federal probation
5	Bank	Vancouver	Gunpoint, shot fired
6	Pharmacy	Seattle	14 felony convictions
7	Pharmacy	Bothell	Multiple robberies

Robbery cases appear to be exceptional in order to be charged in federal court, as described in Table 7. One bank robbery involved the suspect firing a shot into the floor, which triggers a federal sentencing enhancement. Another defendant had three previous federal convictions and was on federal probation at the time. One defendant had 14 felony convictions and the suspects entered the bank vault while brandishing firearms in another case.

## **6. Other Cases**

The last subcategory includes 14 cases that were grouped together as other crimes, including counterfeit documents or currency, hoax, operating a vessel under the influence of alcohol, and trafficking in counterfeit goods. One defendant was on federal probation and another defendant had an outstanding federal arrest warrant. One case involved a false explosive device left at a post office. Although these cases are concurrent and could be charged in local

<sup>44</sup> RCW 9A.56.190, Robbery – Definition

court, all of the cases except one are either federal or joint investigations. The combined total of sex offenses, robberies, and other cases is only 37 cases, and reinforces the argument that drug offenses, firearms crimes, and financial investigations are likely to make up the majority of concurrent cases in federal court.

The details of the subcategories are important because they paint a picture of the situation in federal court counter to what critics portray. The majority of criminal cases are exclusive jurisdiction or the federal government has a primary interest at stake. The remaining (concurrent) cases often involve federal interests, or interstate or international aspects. The minutiae also allow the reader to ask about the frequency of different types of cases and see the results in the same discussion. This method of case evaluation is from the ground up. Neither federal data nor the federalization literature itemizes cases individually according to the nature of jurisdiction. I believe it is accurate and necessary to categorize and classify a case based on the individual circumstances instead of declaring crimes to be concurrent based on the title of the statute.

#### **IV. Discussion**

The purpose of this thesis is not to comment on the bulk of federal cases which are found in the excluded, exclusive, or primary categories. Instead, the focus is to isolate and determine how many concurrent cases, specifically local cases, are filed in federal court. There is not criticism about crimes prosecuted in federal court when the U.S. government or one of its officers is the primary victim. The dispute is about cases involving drugs, guns, and other cases that are viewed as local matters.<sup>45</sup> These cases are likely chosen to have maximum effect on a case by case basis, or to send a message (Deputy Prosecuting Attorney 2013).

The focus of criticism is largely about concurrent cases. The underlying issue is whether federal law enforcement unnecessarily performs local police work or federal prosecutors charge local cases. But the overlap of federal and local law enforcement and prosecution is not a secret. Federal prosecutions of local crimes are regularly covered in the local media while police and prosecutors go to the prisons to warn inmates who are being released that they are at risk of future federal prosecution, especially for possession of a firearm (Carter and Mayo 2012). Further, the federal government has plenty of local cases to choose from. As of December 2012, The King County Prosecutor's Office screens all firearms cases in order to identify defendants or cases that would be appropriate for federal prosecution. The prosecutor's office can identify defendants and how much time they would serve in a local sentence compared to a federal sentence. The local prosecutor who screens cases can also identify factors in a case which may appeal to federal prosecutors such as drug convictions, violent history, or other circumstances. Local cases are relatively easy to charge

<sup>45</sup> The term "local" refers to everything local in nature including courts, prosecutors, cases, jails, and law enforcement. The term "state" refers to state statutes and prisons.

because the investigation is already complete (Assistant U.S. Attorney 2013). This is especially evident when the case has already been charged in local court because the only additional requirement for a federal firearm case is that the firearm travelled in interstate commerce, which applies to nearly all firearms. Drug cases and financial crimes regularly overlap state laws, as well. But prosecuting local cases still requires resources such as preparing motions and appearing in court. Federal adoption of local cases removes dangerous criminals from the community for longer periods of time than if the case remained in local court.

Federal programs provide funding to the cases filed by the U.S. attorney's office. Project Safe Neighborhoods is an example of a federal program which targets local crime. This is a nation-wide program which has provided nearly \$2 billion in funding (U.S. Bureau of Justice Assistance 2013). The program began in 2001 and has been found to reduce violent crime, especially gun-related violence (U.S. National Institute of Justice 2009). One key to its success is buy-in from leaders including local police, prosecutors, and politicians who likely celebrate the removal of criminals from their communities and potentially claim a resulting reduction in crime. Some federal advantages of the program include no release on bail, long sentences, and little good time earned in prison (McDonald 2012, 121).

#### **A. Overlap**

Congress has created numerous concurrent federal crimes and a large overlap with state criminal laws has resulted. It is easy for elected officials to add new crimes and harsher sentences (Stuntz 2006, 782). Since 1964, Congress and presidential administrations have

tried to better their predecessors with new laws or improved funding (Richman 2006, 382). Federal jurisdiction expanded to the point that federal officials could address nearly any crime by the 1970s, especially those involving guns and drugs (Russell-Einhorn, Ward, and Seeherman 2002, iii). Stuntz makes clear the duplication of federal and state law: “Federal criminal law and state criminal law mostly cover the same ground” (2001, 678). Smith describes federal criminal law as a “mess”, and writes that federalization is responsible: “Congress has passed so many crimes as to obliterate the distinction between federal and state criminal law” (2005, 880). The federal criminal code can be counted on to grow independent of crime rate trends (2005, 881). Overlapping federal laws do not have effect until they are acted on by federal law enforcement or federal prosecutors. The real change came when the federal government began to take action, “federal officials strategically reached into what had always been the province of state and local authorities” (Richman 2006, 379).

## **B. Federal Prosecutors**

The U.S. attorney is “one of the most powerful and least researched members of the federal courtroom workgroup” (Shermer and Johnson 2010, 395-396). Federal prosecutors hold significant power because of their position to decide what charges to file, if any, and the dialogue of plea negotiations. They also bargain from a position of advantage by compelling defendants to plead to local charges to avoid federal prosecution. Local prosecutors will use the threat of federal prosecution in their plea bargaining (Barkow 2011, 577). The practice is not new: State prosecutors were able to intimidate defendants by threatening to send them to

federal prosecution, specifically in 1988 and 1989 (Russell-Einhorn, Ward, and Seeherman 2002, v). McDonald describes the threat of a federal indictment in order to induce a guilty plea to a local charge as a problem (McDonald 2012, 127). The federal public defender for the Western District of Washington calls them threat letters (Carter and Mayo 2012). The federal threat letters are effective, though. Between 2004 and 2010, one King County deputy prosecutor was simultaneously designated as a federal prosecutor and sent numerous threat letters, which resulted in guilty pleas in local courts.<sup>46</sup> The threat letters had force, because the same prosecutor charged about 200 local cases in federal court in the same time frame. The local cases were likely filed in federal court to take advantage of the benefits of federal prosecution, such as longer sentences.

Miller and Eisenstein describe a local perspective of federal cherry-picking (2005, 259). The federal government can choose the cases it wants to prosecute (Barkow 2011, 522). Stuntz describes the advantage that federal prosecutors have in being able to select cases: “For the most part, federal officials get to pick the cases they want, and no one has a strong incentive to monitor what cases they pick or how those cases are handled” (2001, 678).<sup>47</sup> Federal prosecutors rely on local prosecutors to charge cases that they decline (Klein and Grobey 2012, 10-11). This movement has occurred throughout the last century and has increased significantly since 1964 (Richman 2006, 380-382).

<sup>46</sup> The federal government can name local deputy prosecuting attorneys as special assistant U.S. attorneys, and many assistant U.S. attorneys were previously deputy prosecutors (Miller and Eisenstein 2005, 261; and Assistant U.S. Attorney 2013). This allows local prosecutors to prosecute local cases from their own office, as well as cases from other counties, in federal court.

<sup>47</sup> However, Stuntz states the war on terror has changed these two considerations.

Federal prosecutors are the key to controlling federalization and “provide the best hope for controlling federalization” (Simons 2000, 899 and 963). By the nature of their position, prosecutors screen potential cases to determine which ones are most appropriate for federal court. It would not be in their interest to jeopardize their own cases, or civil cases involving the United States, by creating a logjam in the courts with concurrent cases. Federal prosecutors have been the solution to federalization so far. The problem is Congress continues to duplicate state laws and there is no incentive for legislators to change. The judiciary also complains but precedents are unlikely to change. Prosecutors are in a unique position to control the flow of concurrent cases. If federal prosecutors charged concurrent cases without consideration of the impact on the court’s operation, the potential for negative consequences would be enormous. Prosecutorial discretion is what affects the results of the federalization of crime (Taylor 2004, 207 footnote).

### **C. Criticism of Federalization and Responses**

There are different types of criticism regarding the transfer of criminal cases from local courts to federal courts including the types of defendants, types of cases, or the duplicate sets of laws in existence. Prosecutors should focus on violent offenders, not on people who demonstrated bad judgment (McDonald 2012, 127). McDonald argues that federal firearms cases in one program in Colorado included many people with no violent history or individuals who simply had bad judgment and should not have been prosecuted federally (2012, 122-123). McDonald also suggests that subjects may be prosecuted who are not even aware that they cannot possess a firearm. My research found different results: firearms

defendants had significant criminal history (described in Part III above). Stuntz argues that federal sentences should only apply to federal crimes that are exclusive (2006, 845). In response, Klein and Grobey conclude that federal resources are used to prosecute defendants who have violated federal interests and not who have broken obscure federal laws (2012, 33). Various safeguards exist to ensure prosecutors select appropriate defendants for federal prosecution (Klein and Grobey 2012, 80). Each U.S. attorney's office has different guidelines regarding the filing of concurrent cases (Klein and Grobey 2012, 49).

Miller and Eisenstein write that cooperative federal and state relations “open new avenues of discretion for local and federal prosecutors; limit the authority of other court actors, including state judges; and erode the distinctions between federal and local criminal jurisdiction” (2005, 239). Federal jurisdiction has been expanded through cooperation of prosecutors, at the expense of judges and defense attorneys (Miller and Eisenstein 2005, 243). Federalism concerns were voiced by the Supreme Court in 2000 regarding federal laws displacing state statutes and policies (Taylor 2004, 210). However, the role of state legislatures and local courts does not appear to be threatened. Klein and Grobey explain, “The argument... that the federal criminal law enforcement system is encroaching on state systems and endangering the balance between state and federal law enforcement is clearly mistaken” (2012, 36). They also explain that federalism allows for different priorities between state and federal governments (Klein and Grobey 2012, 44). It is acceptable for different sovereign governments to have varying criminal statutes and resulting sentences, and for law enforcement to select from among the choices.

Some criticism of federalization focuses on the displacement of state authority. When the federal government takes on a local case and a longer sentence is implemented, the federal government “substitutes its own judgment” in place of the state’s judgment (McDonald 2012, 125). The federal prosecution of local crimes avoids the law of the state and decreases state and local governments’ “political accountability.” Local prosecutors should not be able to use federal prosecution to obtain longer sentences for defendants. If state legislatures wanted defendants imprisoned for lengths of time similar to federal sentences then they could have done so with appropriate legislation. However, the complaint regarding usurped local authority does not seem to be a problem if the cooperation of local prosecutors is secured by federal prosecutors. Additionally, prosecutors appear in local courts every day on behalf of the state. Local prosecutors are elected by the public and are accountable to voters. There is no mention of local populations who are unhappy about local or concurrent cases being prosecuted in federal court. This takes away from the accountability argument if the citizens who hold local prosecutors and state legislators accountable are content with the elected officials’ decisions.

Miller and Eisenstein (2005, 261) explain there are enough violent cases for the federal government and local government to share without any complaints. Federal law enforcement is not interested in small cases, which would generally guard against unknowing federal defendants (Klein and Grobey 2012, 45). Generally, the subjects of federal investigations end up in federal court while local defendants are usually prosecuted in local court. It is a “rare event” when a local defendant is turned over to federal courts, but it happens when the state’s laws and punishments have been inadequate (Klein and Grobey

2012, 46). The rarity of the transfer is evident in a comparison between local and federal drug cases filed in 2010: there were 6,772 felony drug cases filed in local courts in western Washington and only 19 local drug cases were filed in federal court (Washington Courts 2011). The balance and collaboration between federal and local criminal justice systems seems to have reached a balance. There are actually few local complaints related to federal involvement or collaboration (Richman 2006, 405). Local prosecutors and police are usually content for local cases to be adopted with longer sentences in mind (Barkow 2011, 577).

#### **D. Advantages of Federal Involvement**

Concurrent cases are usually charged in federal court for one of two reasons: the case was investigated by federal law enforcement or local prosecutors want to take advantage of the features of federal involvement. There are many advantages to local actors if a local case is charged in federal court. Russell-Einhorn, Ward, and Seherman identified those who benefit from collaboration as “elected officials, community groups, ordinary citizens” (2002, iii-iv). They also list the advantages of a federal investigation: grand jury, limited immunity, electronic surveillance, testimony from co-conspirators, and witness protection features. Additionally, local authorities are able to expand their geographic reach as needed to address certain defendants. Additional advantages of federal prosecution include “favorable procedural and evidentiary rules” (Richman 2006, 404). Klein and Grobey note advantages related to procedures and evidence, as well as a “sky-high” conviction rate (2012, 37-38). Prosecutors interviewed for this thesis each described more generous evidence procedures in federal court (Deputy Prosecuting Attorney 2013, Assistant U.S. Attorney 2013). This is an

advantage because federal judges are not concerned with the state's restrictions on local law enforcement. Additionally, victims and witnesses do not have to submit to defense interviews in federal court cases (Assistant U.S. Attorney 2013). Taylor also lists advantages in federal court, including "high penalties, limited judicial discretion, and a minimal jurisdictional threshold" (2004, 210).<sup>48</sup> Federal prosecutors want concurrent cases in order to address the criminal elements in the community, "to enhance the safety and security of Western Washington and make it an even better place to live" (U.S. Attorney's Office 2013). The U.S. attorney's office can effectively address concurrent crimes with longer federal sentences.

Ultimately, the difference in sentencing may be the biggest advantage in a federal prosecutor's decision to pursue a local case. The U.S. Attorney's Manual advises of factors to be considered when a person could be prosecuted in more than one jurisdiction. The factors include the strength of federal and local interests in the case, the ability of the local prosecutor's office, and the comparative sentences: "The ultimate measure of the potential for effective prosecution in another [local] jurisdiction is the sentence... that is likely to be imposed if the person is convicted" (U.S. Department of Justice 2013a).<sup>49</sup> Sentencing is stricter in federal court than in state court (Smith 2005, 884). Federal courts have "more severe punishments – especially for firearm and drug offenses" (Shermer and Johnson 2010, 400). Barkow explains that sentencing is "central to federal prosecutions of local crime" (2011, 520). Local cases are referred to federal courts to take advantage of stricter

<sup>48</sup> Advantages listed may only benefit the government or the community for a limited time. These features do not address significant issues such as the inmate's reintegration into the community after release or the negative impact on the inmate's family during incarceration.

<sup>49</sup> U.S. Attorneys' Manual 9-27.240

sentencing, but McDonald argues the disparity between federal and state sentences should be considered as a matter of fairness to the defendant (2012, 107). The comparative sentences are clear in *United States v. Corey*, in which the defendant was convicted of being a felon in possession of a firearm. The federal sentence was a mandatory minimum of 15 years while the sentence under state law in Maine was between three and five years (Taylor 2004, 208). Further, the federal judge in *Corey* did not have authority to reduce the sentence. Many federal mandatory minimum sentences for crimes related to firearms were enacted in 1998 (Families Against Mandatory Minimums 2013, 5).<sup>50</sup> Table 8 displays federal mandatory minimum sentences which are likely attractive to local prosecutors if their intent is to incarcerate the defendant as long as possible.

**Table 8 Federal Mandatory Minimum Sentences**

Additional punishment in a crime of violence or drug-trafficking crime, for possession or use of a gun:	
i.	Not less than five years.
ii.	Not less than seven years if firearm was brandished.
iii.	Not less than 10 years if the firearm was fired.

Source: 18 USC § 924 (c)(1)(A) – Penalties

Miller and Eisenstein highlight a second example of the difference between federal and state sentences, and explain that almost all state felony charges can be prosecuted in federal court. A federal defendant in Washington was sentenced to five years for a local marijuana case, while the local sentence would have been 90 days (2005, 239-240). The Ninth Circuit Court of Appeals said there was no basis to review the prosecutors' decision related to which court

<sup>50</sup> Most federal mandatory minimum sentences for drug-related crimes were enacted in 1986 or 1988.

(federal or local) the case was charged in. Klein and Grobey write that the current Supreme Court stance “makes charging decisions essentially unreviewable” (2012, 38-39).

An additional advantage of federal sentences is that aliens actually serve their sentences for non-violent crimes (Deputy Prosecuting Attorney 2013). In Washington, removable aliens would normally be deported after their conviction for a non-violent offense and their sentence would be effectively suspended. They would be removed from the community, but potentially for a limited time. Another advantage of a federal prison sentence is that the inmate is completely removed from the community (Assistant U.S. Attorney 2013). There are no federal prisons in this state, so the inmate cannot hope to serve his sentence in a prison facility close to home. Prosecutors and law enforcement may believe that decreased communication between inmates and their friends, family, and associates can reduce criminal activity. Additionally, if a defendant is sentenced to federal prison, the cost of incarceration is shifted to the federal government, which may be appealing to local residents and political leaders. Richman explains the costs are “absorbed nationally, with the benefits felt locally” (2006, 377). According to the Washington Department of Corrections, it costs between \$67.57 and \$93.49 per day to house, feed, and care for an inmate, which would equal between \$24,663 and \$34,123 per year (Department of Corrections 2013a).<sup>51</sup> The state prison population recently averaged 17,930 inmates while the federal population averaged 200,901 (Department of Corrections 2013b; Federal Bureau of Prisons 2013).

There is also a local advantage in a federal prison sentence because the defendant is more likely to serve a higher percentage of his sentence. There is less good time in federal

<sup>51</sup> FY2012 figures

prison than in state prison. Federal inmates may earn up to 54 days of good time per year toward early release, while local inmates can reduce their sentence by up to one third (e.g. 122 days) for good behavior.<sup>52</sup> However, local defendants sentenced for a serious violent offense may not earn more than 15% of their sentence toward good time. This would equal about 54 days per year, the same as the federal rate for good behavior. The difference in available good time creates an advantage for federal sentencing in non-violent local cases (e.g. drugs and firearms).

Federal probation is another advantage because it is perceived as actually having force; probationers can get “hammered” if they violate their conditions (Deputy Prosecuting Attorney 2013). This is especially true for pretrial probation monitoring, compared to local probation, in the event a defendant is released or is able to post bail (Deputy Prosecuting Attorney 2013). According to federal law, there is a mandatory revocation of parole for violations involving controlled substances, refusal to comply with drug testing, or possession of a firearm.<sup>53</sup> Violations of probation conditions can also result in new charges. Probation terms are at least one year for felony convictions, and up to five years for misdemeanor convictions.<sup>54</sup>

Finally, it is advantageous for local leaders if a case is prosecuted federally. Local prosecutors and sheriffs are elected, and thus accountable to the voting public. Police chiefs are appointed and confirmed by mayors and city councils, who are also elected. If a local case is selected for federal prosecution, local criminal justice leaders can take credit for the

<sup>52</sup> 18 USC § 3624 – Release of Prisoner, RCW 9.92.151 – Early release for good behavior

<sup>53</sup> 18 USC § 3565 – Revocation of probation

<sup>54</sup> 18 USC § 3561 – Sentence of probation

original investigation, the decision to transfer the case, and the resulting time that the defendant is removed from the community.

#### **E. Other Considerations**

A local case may be adopted based on factors such as amount of loss, criminal history, federal interests involved, and interstate components (Klein and Grobey 2012, 39). These factors were regularly present in the concurrent cases I reviewed. Additional factors included federal probation, previous federal conviction(s), international aspects, violent criminal history, drug convictions, multiple locations within the state, and a high number of victims. Also, a local law enforcement officer's assignment to a federal task force may help a local case become adopted for prosecution. The cooperation between federal and local law enforcement officers within a task force parallels the cooperation between federal and local prosecutors.

Local cases are adopted as a result of cooperation between the U.S. attorney's office and local prosecutors' offices. Cooperation is critical and occurs regularly; U.S. attorneys do not work in isolation within their communities (Barkow 2011, 577 and 526). Local cases come to the attention of the U.S. attorney's office from federal agents and local prosecutors (Klein and Grobey 2012, 46). But there has to be a dialogue between federal and local prosecutors, and some prosecutors will not cooperate. The U.S. attorney's office will not swoop in and take a case if there is not cooperation (Assistant U.S. Attorney 2013). These factors are relevant because if there are poor working relationships between federal and local

prosecutors, local cases are less likely to be adopted which would decrease the number of concurrent cases filed in federal court.

With the exception of firearms cases, Chief Justice Rehnquist's concerns about federalism and federalization do not appear to be prevalent in cases in 2010. There were 215 criminal cases in 2010 that were concurrent jurisdiction: 78 cases were federal, 15 were unclassified, 64 were joint cases, and 58 were local cases. I believe the significance of the 15 unclassified cases is minimized to some extent considering the total set is 1,067 case numbers. Recent federalization does not appear to have an impact on the courts as the majority of concurrent jurisdiction charges have been in place for years or decades. This addresses a major part of the federalization criticism: continued duplication of state crimes threatens the judiciary's effectiveness and existence. My research determined that it does not appear to matter to federal prosecutors what the most recent federal criminal statutes are. This is consistent with Klein and Grobey's findings (2012). Federal prosecutors regularly see the same types of cases and continue to use the same charges, no matter how many new laws are enacted by Congress. Drug cases are one of the most common charges in federal court, and the relevant statutes are decades old (Klein and Grobey 2012, 7). There were 91 concurrent drug cases in federal court in 2010, and 84 of the cases were related to a statute enacted in 1970 (Klein and Grobey 2012, 106).<sup>55</sup> The federal statute for all firearms cases dates back to 1968.<sup>56</sup> Commonly used statutes and the corresponding years of enactment are listed in Table 9.

<sup>55</sup> 21 USC § 841 – Prohibited acts A [drugs]

<sup>56</sup> 18 USC § 922 – Unlawful acts [firearms]

**Table 9** Select Federal Statutes and Enactment Dates

Type of Crime	Statute	Year Enacted
Theft of U.S. funds	18 USC § 641	pre 1909
Mail Fraud	18 USC § 1341	pre 1909
Conspiracy to defraud U.S.	18 USC § 371	pre 1909
Counterfeit	18 USC § 472	pre 1909
False statements	18 USC § 1001	pre 1909
Bank Embezzlement	18 USC § 656	1913
False statement – passport	18 USC § 1542	1917
Escape	18 USC § 751	1930
Bank Robbery	18 USC § 2113 (a)	1934
Bank Larceny	18 USC § 2113 (b)	1934
Social Security Fraud	18 USC § 408	1935
Fraudulent Documents	18 USC § 1546	1948
Wire Fraud	18 USC § 1343	1952
Felon in Possession of Firearm	18 USC § 922	1968
Drugs	21 USC § 841	1970
Social Security Fraud	18 USC § 1383	1972
Child Porn	18 USC § 2252	1978
Fraudulent Documents	18 USC § 1028	1982
Bank Fraud	18 USC § 1344	1984
Fail to Register as Sex Offender	18 USC § 2250	2006

Source: Klein and Grobey 2012, 97-120

## **F. Firearms**

I focus on firearms briefly because this subcategory has the highest percentage of local cases within the concurrent category. U.S. attorneys around the country prosecute felons for possessing firearms despite the fact that many cases are completely local in nature; the cases do not have any connection to commerce on the part of the defendant (Newton 2001, 673). The nation-wide focus begins with the U.S. Department of Justice, where the enforcement mission includes “the enforcement of federal criminal statutes against the most dangerous offenders... and removal of violent criminals from our streets” (2013b). Federal prosecutors

use criminal statutes to address violent crime, even if the burden is low. Taylor (2004) describes how low the burden is in a firearms case in order for federal jurisdiction to apply. A “minimal nexus” is required, which was established by the U.S. Supreme Court in *Scarborough v. United States* in 1977.<sup>57</sup> The *Scarborough* standard was considered so low, one judge even called it “legal fiction” (Taylor 2004, 199; Newton 2001, 681). Prosecutors rely on the minimal requirement provided in *Scarborough*, which only requires that the gun has travelled in interstate commerce. Firearms experts estimate that the percentage of firearms transported in interstate commerce may be as high as 95% (Taylor 2004, 205; Newton 2001, 681). This means that almost any gun possessed by a felon is likely to have been moved in interstate commerce at some time. The actual percentage may vary from state to state, but may be as high as 100% in some states because not every state has a firearm manufacturer. The low nexus standard is an advantage to the prosecution, and there are limited challenges available to the defense (Taylor 2004, 204). Taylor argues that the threshold is “so easily met and so difficult to challenge that the statute unfairly reaches almost every firearm possession” (2004, 189). But Taylor explains that was the goal of Congress when they created the law. This law was meant to “address simple possession of firearms at the federal level” (2004, 191). Congress apparently intended for this law and its predecessor to reach every instance of a felon in possession of a firearm (2004, 192 footnote). The U.S. Supreme Court confirmed this by finding that Congress only intended to have a minimal nexus requirement (Taylor 2004, 193-194). The prosecutor does not have to

<sup>57</sup> 431 U.S. 563 (1977)

prove that the defendant moved the gun in interstate commerce, only that the gun itself was moved and the defendant possessed it.

There are mixed results regarding trends in federal firearms prosecutions in recent years. McDonald explains the number of federal defendants for felon in possession of a firearm doubled between 2000 and 2005 (2012, 106). However, McDonald fails to mention federal court data which clearly shows felon in possession of a firearm cases decreased every year from 5,282 in 2006 to 4,490 in 2010 (U.S. Courts 2010a, 64). The trend in the Western District of Washington recently increased while the nationwide trend decreased. Firearms cases increased 45% in the first three years under the direction of U.S. Attorney Jenny Durkan compared to the previous three years (Carter and Mayo 2012). This occurred despite a seven percent decrease in federal gun cases nationwide.<sup>58</sup> Recently, the U.S. attorney's office used federal firearms charges as a tool to address an increase in shootings in Seattle in 2012. The purpose was to obtain longer federal sentences for criminals deemed to be the "worst offenders" (Durkan 2013, 2).

### **G. Limitations and Future Research**

An examination of one year in a single district is limiting, but begins to offer explanations about how many concurrent cases are charged in federal court. My research confirms the types of cases likely to be charged in federal court, but adds details regarding the frequency and specific nature of each case. This review provides a glimpse into the actual situation resulting from federalization of state laws, specifically the number of concurrent cases in

<sup>58</sup> These aggregate numbers do not reflect the percentage of concurrent cases that were filed, which reinforces the need for this thesis and further research.

federal court. The U.S. attorney's office appears to prosecute concurrent crimes in an effort to address crime and improve the quality of life in a community. However, this occurs on a fairly limited basis. Concurrent cases, including local cases, only comprise about 20% of total criminal cases, and represent five percent of civil and criminal cases combined (U.S. Courts 2010b, 25). But these results are limited to one district in one year.

Future research should efficiently compare federal district courts and identify trends over time. Data collection could be more efficient by searching the PACER database for specific United States Codes and reviewing the resulting documents to make determinations of how often other U.S. attorneys' offices charge concurrent cases. An analysis of other district courts would identify how rates of concurrent cases compare in different areas. For example, there were 390 criminal cases commenced in Massachusetts in 2010 compared to over 1,000 cases in the Western District of Washington (U.S. Courts 2010c, 51 and 55).<sup>59</sup> It would be helpful to analyze a district which is not located on an international border and does not have military reservations to determine the impact of federalization (concurrent cases). It would be important to compare districts that share similar characteristics, such as population, with the Western District of Washington. Table 10 lists the four federal district courts that are closest in population size to the Western District of Washington. The number of new cases ranges from 278 in Minnesota to 1,059 in the Southern District of New York, but the actual comparison would focus on the number of concurrent cases in each district.

<sup>59</sup> The number of criminal cases commenced in the Western District of Washington in my categories differs slightly from federal statistics and I believe this is due to the methodology I used.

**Table 10 Federal District Courts by Population and New Cases**

<b>Rank<sup>60</sup></b>	<b>District Court</b>	<b>2010 Population</b>	<b>Criminal Cases Commenced</b>
21	Minnesota	5,303,925	278
22	New York – Southern	5,079,339	1,059
23	Washington – Western	5,047,486	1,048
24	Colorado	5,029,196	566
25	South Carolina	4,625,364	676

Sources: U.S. Courts (2010c, 51-56) and U.S. Census Bureau (2010)

An identification of concurrent prosecutions over time would also be a significant contribution to the federalization debate. Multiple questions begin to form when the scope of this paper is expanded: Do rates of concurrent prosecution vary between U.S. attorney offices? How do concurrent prosecution rates change with a new U.S. attorney in a respective district? How do the rates change over time in a given district or nation-wide? Is there a relationship between concurrent cases and the political party of the president who appointed the U.S. attorney? It would also be beneficial to obtain case-specific details such as trials and sentence lengths in concurrent cases. Comparisons and additional data collection would contribute a wealth of information to the federalization debate and could even change the discussion.

Future research should also examine what happens when concurrent cases are declined by the U.S. attorney's office. Are local courts burdened with criminal cases that have federal aspects such as interstate or international travel or commerce? Federal prosecutors can rely on local prosecutors to fill the gap for concurrent cases, especially joint investigations and local cases. Federal prosecutors are inevitably constrained by resources

<sup>60</sup> There are 94 federal district courts in the federal judiciary.

which results in local cases, even federal investigations, being declined in leaner times (Smith 2005, 884; Assistant U.S. Attorney 2013). In 2009, U.S. attorney's offices declined 34% of concurrent violent offenses and 37% of concurrent property offenses (Klein and Grobey 2012, 46-47). This question would examine the downward transfer of criminal cases: How many concurrent cases are in local courts that have federal interests?

## **V. Conclusion**

Federal cases appear to be special and scholars note the significance of federal involvement “because of the conspicuous cases it occasionally pursues and the attention the national media gives to the work of the storied ‘feds’” (Richman 2009, 2087). The question can be asked about each case: Why was this defendant or this case chosen by federal prosecutors? The answer may be obvious, especially in the case of exclusive jurisdiction or cases in which the federal government is primarily affected. Critics have argued for decades that concurrent cases are not special and should not appear in federal courts.<sup>61</sup> The primary question for this paper results from complaints about duplication: How many concurrent cases are charged in federal courts?

One major criticism of federalization is value-based and focuses on what should and should not be charged in federal court. The argument is that concurrent cases should not be charged unless there is an obvious federal interest. For the first time, concurrent jurisdiction cases have been accurately identified and separated from exclusive jurisdiction and primary federal interest cases in order to empirically show what the relationship is. This allowed me to identify federal interests in numerous concurrent cases.

The second criticism of federalization focuses on continued duplication of state criminal laws by Congress. I have also found the basis of this complaint to be lacking. Concurrent cases charged by federal prosecutors usually are based on statutes that have been in place for years, even decades. There does not appear to be a negative impact from recent federalization in the Western District of Washington in 2010. The number of available

<sup>61</sup> A regular exception provided by critics allows for federal prosecution if local prosecutors are not able or are not willing to charge concurrent cases in local courts.

criminal statutes does not affect the balance of power between states and the federal government, and is “largely irrelevant” compared to the number of prosecutions (Klein and Grobey 2012, 36). Federal prosecutions of concurrent crimes are unrelated to recent federalization because for the most part, federal prosecutors are “uninterested” in new criminal legislation (Klein and Grobey 2012, 26).

The final complaint that is addressed by this thesis focuses on the negative impact that concurrent cases have on the courts, especially civil cases. Beale complains that one-third of federal district courts spent more than half of their trial time on criminal cases. She also refers to federal judges who have not been able to try a civil case in more than a year (1996, 46 and 47). Federal court statistics, however, show that only one percent of civil cases went to trial in 2010. Civil cases filed in federal court increased from 245,575 in 2005 to 293,352 in 2010 while the types of crimes most likely to include concurrent cases (e.g. drugs and firearms) decreased during the same time frame (U.S. Courts 2010d). Finally, my research demonstrates that concurrent cases are regularly prosecuted when federal interests are present, and local cases are adopted for prosecution relatively infrequently. Based on the circumstances found in concurrent cases, and considering the actual number of cases filed, federalization and its effects do not appear to threaten the federal court system.

Attorney General Eric Holder described the relationship between various levels of government at the beginning of 2013, “No public safety challenge can be understood in isolation... none of us can make the progress we need, and secure the results our communities deserve, on our own. This is particularly true when it comes to gun violence.”<sup>62</sup>

<sup>62</sup> <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130118.html>

Cases pursued by the federal government remove criminals from the local (or federal) community through cooperation and collaboration on a selective basis. Numerous statements from Department of Justice programs and officials demonstrate a commitment to selectively prosecute criminals based on their impact on the community. The resulting criminal cases regularly include federal interests whether the conduct is exclusive or concurrent jurisdiction. After reviewing nearly 1,200 cases in 2010, I found the adoption of local cases by federal prosecutors is relatively infrequent while concurrent cases generally conform to principles and expectations outlined by critics of federalization. Despite criticism from scholars and judges over the past few decades, the effects of federalization do not threaten the operation of the court or the balance of power between the federal government and the states.

### **Appendix A: Interview Questions**

1. What costs are associated with federal adoption of a local case?
2. What are the federal advantages and disadvantages if a case is adopted?
3. What are the local advantages and disadvantages if a case is adopted?
4. What is the working relationship between the USAO and local prosecutors?
5. What types of cases are most likely to be adopted?
6. Is “gatekeeper” an accurate description for the position of assistant U.S. attorneys related to screening potential cases?
7. Is there a localization of federal crime? (Are cases from federal agencies prosecuted in local courts?)
8. What is the federal interest in these types of cases?
9. How would you describe federalism in the federal courts?
10. What effect has federalization, or over-federalization, had on the federal criminal justice system?
11. How much cooperation occurs between local and federal prosecutors?  
Are there any prosecutors who decline or refuse to cooperate?
12. How often are local or concurrent cases adopted for federal prosecution?
13. Has federal adoption of local cases changed (increased/decreased) in recent years (since 2009)?

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