Federal Crimes, State Courts, and Palmore

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Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 **Va. L. Rev.** 243 (2011).

In 1973, the Supreme Court in *Palmore* v. *United States* upheld Congress's creation of an "Article I" court in the District of Columbia—the D.C. Superior Court—against a claim that Congress lacked the power to invest non-Article III federal courts with the authority to entertain criminal prosecutions arising under federal law. One of the linchpins of Justice White's analysis for the 8-1 majority was his observation that, "Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III." As White explained, if it did not violate Article III for Congress to allow *state* judges to entertain federal criminal prosecutions, then it would be far harder to understand why, in at least some circumstances, non-Article III *federal* criminal adjudication—especially in a tribunal acting as a quasi-state court—should not also be permissible.

And yet, as Michael G. Collins and Jonathan Remy Nash persuasively demonstrate in *Prosecuting Federal Crimes in State Courts*, the historical record to which Justice White alluded in *Palmore* is "sketchy at best." Instead, Collins and Nash's article offers a compelling mix of historical, legal, and policy-oriented explanations for why the scattershot exceptions from the earliest years of the Republic may in fact prove the rule—that state courts generally do not (and *should* not) have the power to entertain criminal prosecutions arising under federal law. And whereas Collins and Nash's article comes in response to a series of recent proposals to expand the federal criminal jurisdiction of state courts, the true significance of their analysis may be the extent to which it deprives *Palmore* (and, as such, federal criminal adjudication in non-Article III federal territorial courts in general) of perhaps its strongest analytical underpinning.

Perhaps the strongest argument in favor of state court jurisdiction over federal criminal prosecutions is grounded in the Madisonian Compromise—the idea that the Constitution authorizes, but does not require, Congress to create lower courts. Without such lower courts, and with the Supreme Court's carefully circumscribed original jurisdiction, the logic goes that federal suits contemplated by Article III, *including* federal criminal prosecutions, would have to be brought in state courts.

In fact, though, as Collins and Nash explain, scholars who have made this claim have tended to assume a point that is hardly obvious (and that the Supreme Court has since rejected)—that state courts may hear any and all cases arising under Article III. To the contrary, Collins and Nash marshal substantial anecdotal and historical evidence for the proposition that at least some of the Founders did not believe that the Madisonian Compromise necessarily required state courts to hear federal crimes. Instead, "the historical evidence fails to show that the Compromise held such significance for members of the Founding generation, or that they reasoned (as modern scholars do) from the textual possibility of no lower federal courts to conclusions about state-court powers or duties respecting federal criminal cases (or, indeed, any other federal judicial business)." Given two distinct efforts to amend the Constitution in the 1790s to specifically provide *for* state court jurisdiction over federal criminal prosecutions, the (at best) equivocal nature of the Founding-era history seems difficult to dispute.

Prior commentators—including Frankfurter and Landis in their 1928 masterwork on *The Business of the Supreme Court* and Charles Warren in a 1925 *Harvard Law Review* article—have also looked to a handful of early state court decisions appearing to establish their power to entertain federal criminal prosecutions. Collins and Nash argue that these cases establish only that

At most—and only for a relatively brief period—state courts took jurisdiction in civil proceedings to recover monetary penalties or fines for violations of federal penal statutes. There is no similar record of genuinely criminal proceedings in the state courts for violations of federal law. Moreover, on the rare occasion when Congress actually permitted states to entertain federal criminal prosecutions, state courts concluded that they lacked jurisdiction.

Instead, Collins and Nash suggest that the stronger support for the power of state courts to entertain federal criminal prosecutions comes from developments subsequent to the Founding, including (1) the Supreme Court's recognition after the Civil War of the power to remove *state* criminal prosecutions—of federal officers or where the defendant had a federal civil rights defense—to *federal* court (which militates against the existence of a cross-jurisdictional prosecutorial bar); and (2) the post-World War II jurisprudence articulating the obligation of state courts to hear at least *some* claims arising under federal law (in *Testa* v. *Katt* and its progeny).

As to the first development, Collins and Nash emphasize that the removal cases "were motivated by powerful constitutional concerns—for supremacy and equal protection, respectively—concerns that are missing in proposals for state courts to hear federal criminal prosecutions." That is to say, constitutional imperatives overrode the structural limits on interjurisdictional prosecutions that otherwise remained—and therefore moved only in one direction.

With regard to the second development, Collins and Nash rightly point out that the Supreme Court has carefully ducked this question time and again, holding only that states may not *discriminate* against federal claims over which they would otherwise have jurisdiction unless they have a "valid excuse," and not that state must open their doors to such suits in the first place. At the very least, Collins and Nash conclude, state courts should not be able to entertain federal criminal prosecutions unless and until the legislature specifically chooses to confer such authority.

And at that point, a separate set of concerns would come into play—including "Article II problems respecting the exercise of federal criminal prosecutorial authority by persons not appointed as federal officers, as well as the delegation of prosecutorial power outside the executive branch"; "anti-commandeering problems were Congress to mandate state officials' prosecution of federal crimes" (as in *Printz*); questions of how the Fifth Amendment's right to grand jury indictment (which hasn't been incorporated) would apply; whether governors—instead of Presidents—might be able to pardon individuals convicted in state court for federal crimes; and whether the doctrine of "separate sovereigns" would or would not bar states and the federal government from separately prosecuting individual defendants for the same federal crime. Ultimately, Collins and Nash do not suggest that any of these arguments categorically compel the conclusion that the Constitution forbids federal criminal prosecutions in state courts. Instead, their admirably modest thesis is simply that there are enough structural, legal, and practical obstacles to federal criminal prosecutions in state courts to believe that "it is a 'particularly safe and salutary rule' that the federal government should be left to enforce its own criminal laws in its own courts."

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Although Collins and Nash frame their analysis entirely as a response to a series of proposed policy reforms (such as the partial repeal of the current statute giving federal courts exclusive jurisdiction over general federal crimes), its impact may well be far more significant. After all, if it has not been the case that state courts generally may entertain federal criminal prosecutions, then the argument for allowing non-Article III *federal* courts to hear such suits must rest on other grounds. *Palmore* itself offered one—Congress's unique and exclusive regulatory power vis-à-vis the District of Columbia, which can be analogized to Congress's unique and exclusive regulatory power over the insular territories, which is the ostensible source of Congress's power to create similar non-Article III "district" courts in Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. But it is not clear why these authorities, by themselves, compel the conclusion that non-Article III adjudication is permissible. If anything, these clauses merely ensure that even *local* disputes in federal territories fall within Article III's grant of "arising under" jurisdiction, and so may be resolved by Article III courts (such as the unitary D.C. court system prior to 1970). The other example relied upon by Justice White in *Palmore*—the power of non-Article III courts-martial to entertain criminal prosecutions—is also unhelpful, since the Supreme Court has traced the constitutionality of a separate military justice system at least in part to the express

textual exception for “cases arising in the land or naval forces” in the Fifth Amendment’s Grand Jury Indictment Clause.

In short, Collins and Nash’s article does more than what the authors claim—*i.e.*, provide a counterpoint to an ongoing set of proposed policy reforms. It also suggests that the entire foundation of the Court’s jurisprudence concerning non-Article III criminal adjudication in civilian territorial courts may be as “sketchy” as the historical precedents and structural arguments on which the *Palmore* Court relied.

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