

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
Plaintiff,

vs.

DEFENDANT ,
Defendant.

CRIMINAL NO. 00-000

MOTION TO DISMISS FOR LACK OF JURISDICTION

HON. CARMEN C. CEREZO
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF PUERTO RICO

COMES NOW, the defendant Defendant, represented by the Federal Public Defender, and respectfully STATES and PRAYS:

I. FACTUAL BACKGROUND

Mr. Defendant stands charged of various offences, the most significant of them brought before this Court under the Hobbs Act.¹ Counts one and two of the Indictment refer to the death of Mr. during a robbery at his home, in Ponce, Puerto Rico, in which approximately \$500.00 were stolen and which allegedly were the proceeds from a gasoline station in Peñuelas, Puerto Rico.

¹Section 1951(a), 18 U.S.C., provides in its pertinent part:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any memorandum or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

The “jurisdictional hook” to prosecute this events in the Federal forum is an allegation that the robbery of that money affected the interstate commerce and thus violated the Hobbs Act, 18 U.S.C. 1951.

If the money was indeed stolen is uncertain from the evidence produced in discovery so far by the United States. On the police report of the officer responding to the emergency, dated July 9, 1997, it is stated that no property was stolen. Cooperating co-defendant , has stated that no money was stolen from the house of Mr. . On the other hand, two years after the facts, on October 14, 1999, and after being interviewed by the FBI, the son of the victim alleged that some money (approximately \$500) had “disappeared”. Notwithstanding this discrepancy, which ultimately is an issue for the Jury, this Motion approaches the subject assuming that the \$500.00 were indeed stolen.

As will be discussed below, defendant contends that this Court lacks jurisdiction over Counts One and Two of the Indictment, since the Hobbs Act was not violated. The central issue will be if under United States v. Lopez,² and its progeny, Section 1951(a) applies to robbery directed against private individual in their homes.

II. INTRODUCTION: HOBBS AND LÓPEZ

² 514 U.S. 549 (1995)

In 1947, the Hobbs Act amended the Anti-Racketeering Act of 1934.³ The amendment sought to broaden, under the Commerce Clause, the federal government's capacity to prosecute the interstate activities of gangsters. With the Act Congress also wanted to ensure that the traffic in interstate highways during labor strikes remained unimpeded. It justified this intervention in state affairs based on the fact that the type of criminal activity targeted crossed state lines. Also, according to the legislative history, local and state authorities appeared incompetent in dealing with such crimes, and thus protecting the integrity of a national market.⁴

In 1995, the Supreme Court decided United States v. López⁵, in which the Gun Free School Zones Act was found constitutionally lacking, since it criminalized conduct beyond the permissible under the Commerce Clause of the Constitution. The case aimed to remind Congress that American federal authority rests on enumerated powers. The judiciary must intervene to annul federal legislation under the commerce power that alters significantly the balance between federal and state responsibilities. According to López, where a statute "define[s] as a federal crime conduct readily denounced as criminal by the States"⁶, fundamental principles of federalism require that "unless

³ Ch. 569, 48 Stat. 979; current version at 18 U.S.C. § 1951 (Supp. 2000).

⁴ 91 Cong. Rec. 11843. *See also* Evans v. U.S., 504 U.S. 255, 261 (1992).

⁵ Laurent, Reconstituting United States v. López: Another Look at Federal Criminal Law, 31 **Colum. J.L. & Soc. Probs.** 61, 75 (1997)("The language of Lopez...may have restricted significantly the Federal Commerce Power, a fact which will fundamentally alter the balance of criminal authority between the states and the federal government. Its logic, if extended, may in time prevent the federal government from policing activities that have only minimal effects on interstate commerce.")

⁶ United States v. Bass, 404 U.S. 336, 349 (1971). *See* Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 **Hastings L.J.** 1135, 1138-1139 (1995)("The

(continued...)

Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance” by federalizing local crimes.⁷ Thus, under López rationale, as developed by its progeny, the Hobbs Act is a questionable exercise of congressional authority as a proper federal intervention in state matters.

The reasoning became known as López’s “first principles of federalism”. It argues that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." Clearly the founding fathers created a “Federal Government of enumerated powers.”⁸ This "enumeration" necessarily "presupposes something not enumerated,"⁹ namely, the rights of the people. If federal prosecutors could use a sweeping federal criminal statute to prosecute crimes within the local jurisdiction of the states,¹⁰ the “first principles” of federalism enunciated in López and its progeny would become meaningless. Since robbery stands as one of the oldest

⁶(...continued)

Constitution did not directly confer power to exercise general criminal jurisdiction,...Congress’s reluctance to enact expansive criminal laws may have been partly attributable to a recognition that the Founding Fathers never envisioned a national police power. ...The federal government’s assumption of a limited role in maintaining everyday law and order left primary jurisdiction over criminal matters with the states. That seemed natural enough because crime was a matter of principally local interest and impact. Murders, **robberies**, rapes, and burglaries **did not implicate any special federal interest unless they were committed within a federal enclave**. Moreover, the criminal law was an expression of local mores and concerns.”) (emphasis supplied; footnotes omitted).

⁷ Lopez, 514 U.S. at 562 (quoting Bass, 404 U.S. at 349).

⁸ López, 514 U.S. at 552.

⁹ López, 514 U.S. at 553 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824)).

¹⁰ See e.g. Abbate v. United States, 359 U.S. 187, 195 (1959) (“[T]he principal responsibility for defining and prosecuting crimes” resides with the states.”)

common-law crimes, the prosecution of robbery should remain a state matter, outside the scope of the Hobbs Act.

III. THE HOBBS ACT

A. Legislative History

Section 1951(a), known as the “Hobbs Act”, became law in 1947. It supplanted the Anti-Racketeering Act of 1934,¹¹ which Congress passed to curb “rackets”, that is, exacting businesses money for protection; the very “activities of predatory criminal gangs of the Kelly and Dillinger types.”¹² The Act appeared specifically in response to the case holding in United States v. Local 807, International Brotherhood of Teamsters¹³, in which the Supreme Court reversed the convictions of teamsters locals accused of “racketeering”¹⁴. The “racket” of these union members supposedly consisted of preventing trucks from entering the City of New York, and forcing nonunion drivers to

¹¹ Ch. 569, 48 Stat. 979; current version at 18 U.S.C. § 1951 (2000).

¹² Comments by Senator Copeland cited in United States v. Local 807, 315 U.S. 521, 528-530 (1942). In 1933, John Dillinger committed numerous inter-state armed robberies throughout Indiana, Ohio and Wisconsin. George "Machine Gun" Kelly's criminal activities covered Mississippi, Texas, New Mexico and Oklahoma. *See Note, The Hobbs Act and RICO: A Remedy for Greenmail?*, 66 **Tex. L. Rev.** 647, 659 (1988).

¹³ 315 U.S. 521 (1942).

¹⁴ Congress enacted the Anti-Racketeering Act to punish the use of force or fear as means to acquire property. Anti-Racketeering Act § 2(b). Yet it also prescribed broad exemptions for labor, preserving the right to strike and picket. Moreover, the Act excluded “the payment of wages by a bona-fide employer to a bona-fide employee” from its provisions. *Id.* §§ 2(a), 3(b). It directed the courts not to apply the Act “in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof.” *Id.* § 6. Despite this exemption, prosecutors used the Anti-Racketeering Act in the 1930's and 1940's to prosecute labor union officials accused of accepting payments for promises of labor peace. *See Federal Legislation, Labor Law--A New Federal Antiracketeering Law*, 35 **Geo. L.J.** 362, 374 (1947).

pay the “wages” a union driver would have earned had the union allowed him to complete the delivery.¹⁵

In 1946, congressional debate over the Hobbs Act centered on this “labor exemption” of the Anti-Racketeering Act. Some members of Congress questioned whether the elimination of the exemption would unduly interfere with organized labor’s rights, such as the right to strike and picket. Others interpreted the Supreme Court holding as creating a loophole in the law, thus in effect legalizing the use of violence to solve labor-management disputes.¹⁶

The Hobbs Act appeared to close-off the loophole, thus making “racketeering” a federal crime even if committed in the name of labor rights.¹⁷ Congress further sought to ensure that the highways in interstate commerce remained free from interference during labor strikes.¹⁸ But most importantly, Congress justified federal intervention because state laws remained inadequate to attend this issue. As described in Local 807, this type of racketeering crossed state lines, and involved politically influential local groups, apparently immune from state prosecution.¹⁹ To correct these perceived insufficiencies in both federal and state practice, the Hobbs Act amended the language of section 3(a) in the Anti-Racketeering Act. That section had defined “fear” for extortion purposes as acts done “in

¹⁵ Local 807, 315 U.S. at 526.

¹⁶ *See, e.g.*, 91 Cong. Rec. 11900 (1945) (statement of Rep. Hancock) (“In effect it [Local 807] legalizes in certain labor disputes the use of robbery and extortion.”).

¹⁷91 Cong. Rec. 11843, 11844, 11911.

¹⁸ 91 Cong. Rec. 11843. *See also* Evans, 504 U.S. at 261.

¹⁹ 91 Cong. Rec. 11843.

violation of the criminal laws of the United States.”²⁰ The new language sought to provide greater federal latitude, not only to prosecute gangsterism and “rackets”, but to eradicate a broader array of corrupt practices at state level.²¹ First, in addition to extortion, the new version expanded its coverage to include “robbery”. Second, it deleted § 4 of the Anti-Racketeering Act, to avoid the requirement that every prosecution must initiate solely “upon the express direction of the Attorney General.”

Congressman Sam Hobbs of Alabama, the major sponsor of the bill, expressed: “[‘extortion’ and ‘robbery’] have been construed a thousand times by the courts. Everybody knows what they mean.”²² Added another Congressman: “[the language of the Anti- Racketeering Act of 1934] is too general, and we [think] it better to make this bill [Hobbs Act] explicit”.²³ Thus, the intent of Congress in passing the Anti-Racketeering Act of 1934 remained in place when the new statutory enactment of the Hobbs Act amendment became law in 1947.²⁴

Both the history of the Anti-Racketeering Act and the Hobbs Act, interpreted together, show that Congress sought to enable the government to prosecute that species of robbery and violence

²⁰ Anti-Racketeering Act, ch. 569, § 3(a), 48 Stat. 979, 980 (1934) (current version at 18 U.S.C. § 1951).

²¹ See Curato et al, Note, Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption, 58 **Notre Dame L. Rev.** 1027, 1049-50 (1983); Henderson, The Expanding Role of Federal Prosecutors in Combating State and Local Political Corruption, 8 **Cumb. L. Rev.** 385, 390-93 (1977); Note, Misapplication of the Hobbs Act to Bribery, 85 **Colum. L. Rev.** 1340, 1341-46 (1985).

²² 91 Cong. Rec. 11,912 (1945) (comments of S. Rep. Hobbs).

²³ 91 Cong. Rec. 11,904 (1945) (remarks of Rep. Hancock) (quoted in Culbert, 435 U.S. at 378); see also *id.* at 11,912 (remarks of Rep. Hobbs)

²⁴ 91 Cong. Rec. 11,911. See also United States v. Green, 350 U.S. 415, 418-20 (1956).

which apparently local law enforcement remained unable to pursue with diligence due to its multi-state nature, and the ability of local gangsters to elude prosecution by state officials.

B. The Text of Section 1951(a)

The text of Section 1951(a) purports to reach only robbery that “in any way or degree obstructs, delays, or affects [interstate] commerce or the movement of any article or commodity in [interstate] commerce.”²⁵ Clearly, the nexus with interstate commerce becomes a separate element of the crime, meaning that proof of such nexus must always exist in every case.²⁶

To correctly interpret the jurisdictional phrase in Section 1951(a) courts should follow the “ordinary and natural” meaning of the terms employed in the statute.²⁷ Given that the Court has upheld the constitutionality of the Hobbs Act under the Commerce Clause, saying that the statute “is directed at the protection of interstate commerce,”²⁸ an interpretation of the text of Section 1951(a) must accordingly adopt a two-prong approach: first, decide whether a particular robbery comes directed toward a commercial establishment or a private individual, and second, how this criminal act actually affected interstate commerce.

²⁵ 18 U.S.C. §1951(a).

²⁶ *See, e.g., Stirone v. United States*, 361 U.S. 212, 218 (1960).

²⁷ *Bailey*, 516 U.S. at 145; *United States v. Sun-Diamond Growers of California*, 526 US 398, 119 S. Ct. 1402 (1999).

²⁸ *United States v. Green*, 350 U.S. 415, 420 (1956).

Pre-Lopez cases held that robberies of commercial establishments needed only proof of a “de minimis” effect on interstate commerce to satisfy the jurisdictional element of the Hobbs Act.²⁹ The question after López becomes whether the Act remains constitutionally valid in non-commercial settings with only a “de minimis” requirement. Although the trend appears changing,³⁰ most circuit courts still assume that, in the context of robbery of commercial establishments, the “de minimis” effect suffices under López to make the Hobbs Act a permissible exercise of congressional power to regulate commerce among the states.³¹ Such test appears phrased as follows:

[I]n Hobbs Act prosecutions based on local activities that affect interstate commerce, the government need not prove that the effect of an individual defendant’s conduct was substantial. It suffices to show a slight effect in each case, provided that the defendant’s conduct is of a general type which, viewed in the aggregate, affects interstate commerce substantially.³²

²⁹ See e.g. United States v. Box, 50 F.3d 345, 352 (5th Cir.) (internal citation omitted) (“slight” effect), cert. denied, 516 U.S. 918, 116 S.Ct. 309, 133 L.Ed.2d 213 (1995); United States v. Collins, 40 F.3d 95, 99 (5th Cir.1994) (“de minimis” effect), cert. denied, 514 U.S. 1121, 115 S.Ct. 1986, 131 L.Ed.2d 873 (1995).

³⁰ See United States v. Collins, 40 F.3d 95 (5th Cir.1994), and United States v. Wang, 2000 WL 1060375 (6th Cir. (Tenn.)).

³¹ See United States v. Harrington, 108 F.3d 1460 (D.C. Cir.1997); United States v. Atcheson, 94 F.3d 1237 (9th Cir.1996), cert. denied, 519 U.S. 1156, 117 S.Ct. 1096, 137 L.Ed.2d 229 (1997); United States v. Farmer, 73 F.3d 836, 843 (8th Cir.), cert. denied, 518 U.S. 1028, 116 S.Ct. 2570, 135 L.Ed.2d 1086 (1996); United States v. Stillo, 57 F.3d 553, 558 n. 2 (7th Cir.), cert. denied, 516 U.S. 945, 116 S.Ct. 383, 133 L.Ed.2d 306 (1995); United States v. Bolton, 68 F.3d 396 (10th Cir.1995), cert. denied, 516 U.S. 1137, 116 S.Ct. 966, 133 L.Ed.2d 887 (1996); United States v. Robinson, 119 F.3d 1205 (5th Cir.1997), cert. denied, 522 U.S. 1139, 118 S.Ct. 1104 (1998). See also United States v. Jarabek, 726 F.2d 889 (1st Cir. 1984); United States v. Rivera-Medina, 845 F.2d 12 (1st Cir. 1988).

³² Robinson, 119 F.3d at 1212.

The circuit court cases that so held, nevertheless, dealt only with robbery directed at commercial establishments, not private individuals.³³ For noncommercial robbery, courts have required a more stringent test and have turned to the “depletion of assets theory”, discussed in detail below, which holds that the government has to demonstrate that a robbery “depleted the assets” of an individual or an entity customarily engaged in interstate commerce. The robbery has to have impaired or delayed the ability of the individual or entity to participate in interstate commerce.³⁴ Otherwise, the noncommercial robbery of an individual stands too remote from interstate commerce to warrant federal jurisdiction under Hobbs.

Even in cases that still use a “de minimis” test to validate Hobbs Act prosecutions in commercial contexts, courts have recognized that the terms of Section 1951(a) impose at least some limits to Congress’s power under the Commerce Clause.³⁵ Following the ordinary and natural meaning of these terms, the jurisdictional language of the Hobbs Act encompasses only criminal acts that directly or “concretely” affect interstate commercial enterprises.³⁶ Moreover, Section 1951(a) uses the phrase, “affect[] [interstate] commerce,”³⁷ and Congress has used the same or similar

³³ See United States v. Collins, 40 F.3d 95 (5th Cir.1994), and United States v. Wang, 2000 WL 1060375 (6th Cir. (Tenn.)).

³⁴ See, e.g., United States v. Collins, 40 F.3d 99; United States v. Martinez, 28 F.3d 444, 445 (5th Cir.), *cert. denied*, 513 U.S. 910, 115 S.Ct. 281, 130 L.Ed.2d 197 (1994).

³⁵ E.g., United States v. Darby, 312 U.S. 100, 118 (1941).

³⁶ López, 514 U.S. at 559. See e.g. United States v. Harrington, 108 F.3d 1460 (D.C. Cir. 1997), discussed *infra*, text accompanying notes _____.

³⁷ The Hobbs Act also defines certain key terms:

(1) The term "robbery" means the unlawful taking or obtaining of personal property from
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jurisdictional in many other statutes to limit federal regulation of intrastate conduct, the usage in those other statutes should provide persuasive evidence of the context for construing the limiting terms of Section 1951(a).³⁸

When Congress has used the phrase applied to an activity that “affects interstate commerce” in other areas, it always has done so in reference to commercial or business-related activities. For instance, in Jones v. Unites States,³⁹ the Supreme Court interpreted the Arson prohibition of Section 844(i) of 18 U.S.C, to extend only to activities “which affect[] interstate or foreign commerce.”⁴⁰ As the Supreme Court in a post-López case recognized, “[t]he “affect[] commerce” test was developed

³⁷(...continued)

the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction. 18 U.S.C. § 1951 (1996). For discussions of the legislative history of the Hobbs Act, see Culbert, 435 U.S. at 374-78; Callanan v. United States, 364 U.S. 587, 590-93 (1961); United States v. Varlack, 225 F.2d 665, 671-72 (2d Cir. 1955); United States v. Kemble, 198 F.2d 889, 891-92 (3d Cir. 1952) cert. denied, 344 US 893, 73 S.Ct. 211, 97 L.Ed 690, 1952; see also United States v. Green, 358 U.S. 415, 418-20 & n.5 (1956).

³⁸ See, e.g., Lorillard v. Pons, 434 U.S. 575, 581 (1978); American Airlines v. North American Airlines, 351 U.S. 79, 82 (1956); Overstreet v. North Shore Corp., 318 U.S. 125, 131-132 (1943).

³⁹ 120 S.Ct. 1904 (2000).

⁴⁰ 18 U.S.C. s 1962(a)-(c).

...to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial interstate effects."⁴¹ These usages of the phrase "affect[] interstate commerce" provide compelling evidence that Section 1951(a) should reflect a similar understanding of these common statutory terms, to mean application to purposeful business or "commercial" activities.

Thus interpreted, the jurisdictional element in Section 1951(a) would serve to single out intrastate robberies with sufficient connections to interstate commerce, to become permissible objects of federal criminal intervention, and distinguish them from robberies that affect purely private, non-commercial interests. Yet this interpretation would require delimiting non-commercial robberies that "in any way or degree...affect[] [interstate] commerce" to those that "substantially affect" interstate commerce.⁴² To interpret Section 1951(a) as reaching individual persons in private residences or other non-commercial structures would have the practical effect of eliminating the "interstate commerce" element of the Hobbs Act, given the reality that today any person or property has at least some "de minimis" link to interstate commerce.

C. The Supreme Court Cases

In United States v. Green, Stirone v. United States, and United States v. Culbert,⁴³ the Supreme Court interpreted initially a broad sweep for the Hobbs Act.

⁴¹ United States v. Robertson, 514 U.S. 669, 671 (1995). Cert denied, 517 US 1162, 116 S.Ct. 1557, 134 L.Ed.2d 658, 1996.

⁴² See López, 514 U.S. at 559.

⁴³ 435 U.S. 371 (1978)

In Green,⁴⁴ the Court explained that the Act prohibited every type of violence, even when committed by workers in the context of labor disputes. The district court that saw the case in the first instance had concluded that employees merely appeared exercising their rights to pressure an employer, even infusing threats of violence.⁴⁵ On Appeal, the Supreme Court disagreed, and pointed out that the legislative history of the Hobbs Act made it very clear that “attempts to get personal property through threats of force or violence” appeared as the very type of labor conduct that “[t]he Hobbs Act was meant to stop...” The Court interpreted that since the Act appeared directed towards the “protection of interstate commerce against injury from extortion,...[all] racketeering affecting interstate commerce [including labor violence] was within federal legislative control.”⁴⁶

In Stirone the government had indicted a worker for allegedly making threats to disrupt the construction of a steel mill. In the government’s case, the sand used to mix the concrete to build the mill came from outside the State, and that factual element supposedly provided the basis for federal jurisdiction over the matter. The indictment charged that interstate commerce would get disrupted by interference with “sand” shipments into Pennsylvania. Stirone, 361 U.S. at 214-15. The Supreme Court agreed, and in a *dictum*,⁴⁷ interpreted the “[Hobbs] Act [to] speak[] in broad language,

⁴⁴ 350 U.S. 415 (1956).

⁴⁵ See United States v. Green, 135 F. Supp. 162, 163 (S.D. Ill. 1955).

⁴⁶ Green, 350 U.S. at 421.

⁴⁷ In Stirone the defendant stood convicted of unlawful interference with interstate commerce in violation of the Hobbs Act. The main issue asked the Court to determine whether the indictment charged defendant with the same offense of which eventually convicted. *Id.* at 213, 80 S.Ct. at 271. The indictment charged that the defendant had interfered, through extortion, with the interstate transport of “sand” into Pennsylvania. At trial, however, the government

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manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence. The Act outlaws interference “in any way or degree.”⁴⁸

This expansive trend was slowed in Stirone, which warned that however broad, the Hobbs Act established limits to federal jurisdiction in the very language of the statute. “[T]here are two essential elements of a Hobbs Act crime” said the Court, “interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government’s jurisdiction of this crime rests only on that interference.”⁴⁹

In Culbert, the Court reaffirmed Stirone as to the extension of the Act. By then, it had become clear that Hobbs covered more than mere “racketeering”. Citing Stirone, the Culbert Court stated:

[T]he statutory language sweeps within it all persons who have “in any way or degree...affect[ed] commerce...by robbery or extortion.” These words do not lend themselves to restrictive interpretation; as we have recognized, they “manifest...a purpose to use all the constitutional

⁴⁷(...continued)

introduced evidence of the interference with steel shipments. The steel included, as one ingredient, concrete made from sand. Thus, the government sought to establish federal jurisdiction. *Id.* at 214, 80 S.Ct. at 271-72. The Court noted that the extortion scheme could have caused the interstate shipment of sand to slacken or stop, and that “[i]t was to free commerce from such destructive burdens that the Hobbs Act was passed.” *Id.* But reversed the conviction, nevertheless. Since the indictment concerned “sand” not “steel”, the introduction of that other evidence could have caused the jury to convict the defendant of a crime not included in the original charge. Given this ground for reversal, the Court’s interpretation of the scope of the Hobbs Act became *dictum*.

⁴⁸ *Id.* at 215 (quoting 18 U.S.C. § 1951).

⁴⁹ 435 U.S. 371 (1978).

power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence,”

But Culbert also considered the “federal-state balance” in the application of the Hobbs Act.

The Court cited lax and ineffective state enforcement as the main reasons for federalizing local crimes. Said the Court:

With regard to the concern about disturbing the federal-state balance, moreover, there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law. The legislative debates are replete with statements that the conduct punishable under the Hobbs Act was already punishable under state robbery and extortion statutes. Those who opposed the Act argued that it was a grave interference with the rights of States. Congress apparently believed, however, that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and the Federal Government had an obligation to do so.

In conclusion, both the legislative history of the Hobbs Act, and the Supreme Court cases discussed above, make clear that Congress never intended to federalize “robbery” as such, regardless of the crime’s connection to interstate commerce.

Federal prosecutors agreed with this interpretation initially. Thus, the Hobbs Act came to attack “the typical racketeering activities affecting interstate commerce [such as] those in connection with price fixing and economic extortion directed by professional gangsters,”⁵⁰ as well as illegal labor

⁵⁰ Letter from the Attorney General to the House Committee on the Judiciary of May 18, 1934, quoted in Local 807, 315 U.S. at 529. See Senator Copeland commented that the Act was intended to “close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types.” Local 807, 315 U.S. at 528-30. Though the Copeland Committee did not define the term “racket,” they “found that the term...had “for some time been used loosely to designate every conceivable sort of practice or activity which was either questionable, unmoral, fraudulent, or even disliked, whether criminal or not.”“ Culbert, 435 U.S. 371, 375 (1978) (quoting S. Rep. No. 1189 (1937)).

practices.⁵¹ Only later, as concerns for federalism waned, federal prosecutors extended the reach of the Hobbs Act further than the Constitution allows. Thus, in United States v. López,⁵² the Supreme

⁵¹ See e.g., United States v. Provenzano, 334 F.2d 678 (3d Cir. 1964) (involving extortion by local Teamster official to prevent labor slowdowns and disruptions); United States v. Kennedy, 291 F.2d 457 (2d Cir. 1961) (involving conspiracy to obstruct interstate trucking shipments); United States v. Persico, 305 F.2d 534 (2d Cir. 1962) (finding conviction for hijacking a truckload of goods moving in interstate commerce and conspiring to do so); United States v. Floyd, 228 F.2d 913 (7th Cir. 1956) (involving threats of labor disruption leveled against a local company engaged in the construction of an interstate crude oil pipeline); United States v. Varlack, 225 F.2d 665 (7th Cir. 1955) (finding labor union representatives allegedly orchestrating strikes threatened additional unrest "unless we are taken care of" by interstate shipper); Callanan v. United States, 223 F.2d 171 (8th Cir. 1955) (involving extortion of \$28,000 from construction company to prevent labor slowdowns and disruptions during the construction of an interstate pipeline).

⁵² Chief Justice Rehnquist has repeatedly voiced concern about the increasing federalization of crimes. "The number of cases brought to the federal courts" says Rehnquist "is one of the most serious problems facing them today. Criminal cases filings in federal courts rose 15 percent in 1998 --- nearly tripling the 5.2 percent increase in 1997. Over the last decade, Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state laws." And the Chief Justice adds: "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 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." Hon. William H. Rehnquist, 1998 Year-End Report of the Federal Judiciary (Jan. 1, 1999), at 4-5. See also Hon. William H. Rehnquist 1993 Year-End Report on the Judiciary 4-5, reprinted in *The Third Branch* (Administrative Office of the U.S. Courts), Jan. 1994, at 1, 3; Hon. William H. Rehnquist, 1992 Year-End Report on the Judiciary 1, 3-4, reprinted in *The Third Branch* (Administrative Office of The U.S. Courts), Jan. 1993, at 1-3; Hon. William H. Rehnquist, 1991 Year-End Report on the Federal Judiciary 5, reprinted in *The Third Branch* (Administrative Office of the U.S. Courts), Jan. 1992, at 1, 3. See also Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 **Hastings L.J.** 1135, 1147-1148 (1995) ("The practical impact of the penchant to federalize crime is nowhere better illustrated than in the story of our federal prisons. Between [1930] and 1989, the number of federal prisons rose from 5 to 47, and the federal prison population grew from 13,000 to more than 53,000. Within the next five years alone, the number of federal correctional

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Court had to remind both Congress, and the Executive Branch, of the limitations to federal involvement with intrastate matters.

IV . THE COMMERCE CLAUSE BEFORE AND AFTER LOPEZ

A. A Brief History of it's Development and Reach

The Hobbs Act is an act of Congress, acting under the authority of the Commerce Clause. Congress has the constitutional authority "[t]o regulate [c]ommerce ... among the several States," and to enact such laws as it deems "necessary and proper" for the protection of a national commerce.⁵³ Indeed, the Commerce Clause has remained "one of the most prolific sources of national power."⁵⁴ It admittedly "grants Congress extensive power and ample discretion to determine its appropriate exercise."⁵⁵

⁵²(...continued)

facilities nearly doubled. But the demand for more prison space is endless. The Bureau is slated to open nine new prisons in 1995 and to begin construction or construction planning at three other sites to relieve overcrowding and accommodate additional anticipated increases in the prison population. The system will house on average more than 92,000 offenders in facilities it controls in 1995. In addition, an average of more than 10,500 sentenced federal offenders will be housed in state and local jails and other contract facilities.") (footnotes omitted).

⁵³ U.S. Const. art. I, § 8, cl. 3, 18; *see also* Katzenbach v. McClung, 379 U.S. 294, 301-02 (1964).

⁵⁴ H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 534-35 (1949). *See* Laurence H. Tribe, American Constitutional Law § 5-4 (2d ed.1988)

⁵⁵ Lopez, 514 U.S. at 568 (Kennedy, J., concurring) (citing Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 194, 196, 22 U.S. 1, 194, 196 (1824)).

During the nineteenth century congressional faculty over commerce remained very much circumscribed. In United States v. E.C. Knight Co.,⁵⁶ and much later, in Carter v. Carter Coal Co.,⁵⁷ the Court restricted congressional authority and excluded “mining,” “production,” and “manufacture” from the scope of the commerce clause. It placed these activities outside congressional reach by defining them as “non-commercial”. In, Hammer v. Dagenhart⁵⁸ the Supreme Court once again limited congressional control of intrastate operations of businesses. It held that the federal government had no power to prohibit the interstate transport of goods made by child labor. In 1935, A.L.A. Schechter Poultry Corp. v. United States⁵⁹ ruled that Congress could regulate commercial activities “directly”, but had to avoid interfering with such activities “indirectly”. In 1937, NLRB v. Jones & Laughlin Steel Corp.⁶⁰ upheld the National Labor Relations Act. The Court abandoned the categories of “direct” and “indirect” effects on commerce, and thus allowed congressional regulation of activities more removed from interstate commerce. In 1941, United States v. Darby⁶¹ explicitly overturned

⁵⁶ 156 U.S. 1 (1895).

⁵⁷ 298 U.S. 238 (1936).

⁵⁸ 247 U.S. 251 (1918). This case limits the holding of Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903), under which Congress could prohibit the transport of lottery tickets across state lines. Under Hammer, Congress could not make States comply with its wishes. For a modern version of “obligated” State compliance see South Dakota v. Dole, 483 U.S. 203 (1987) (making federal highway funds contingent on a State’s increasing the drinking age).

⁵⁹ 295 U.S. 495 (1935).

⁶⁰ 301 U.S. 1 (1937).

⁶¹ 312 U.S. 100 (1941).

Schechter Poultry, and upheld the Fair Labor Standards Act. Thus, a federally mandated wage and hour remuneration for employees became national law.

Then, in 1942, came Wickard v. Filburn⁶² which first formulated the “aggregation principle”. The Court reasoned that even when an activity, standing alone, could have little effect on commerce, it nevertheless remained within the scope of federal regulation when the “contribution, taken together with that of many other[] [activities]...is far from trivial.”⁶³ The application of the aggregation principle allowed federal courts to find a sufficient jurisdictional nexus under the Commerce Clause by adding-up the discreet effects on interstate commerce of particular intrastate commercial crimes. But in 1995, United States v. López questioned this “aggregation” practice to establish federal jurisdiction, particularly in non-commercial cases.⁶⁴ López emphasized that American federal authority rests on enumerated powers. Although definitely not counseling a return to a “horse-and-

⁶² Id. at 127-28.

⁶³ 514 U.S. 549 (1995). Laurent, Reconstituting United States v. López: Another Look at Federal Criminal Law, 31 **Colum. J.L. & Soc. Probs.** 61, 75 (1997)(“The language of Lopez...may have restricted significantly the Federal Commerce Power, a fact which will fundamentally alter the balance of criminal authority between the states and the federal government. Its logic, if extended, may in time prevent the federal government from policing activities that have only minimal effects on interstate commerce.”)

⁶⁴ 514 U.S. at 551-53. Laurent, Reconstituting United States v. López: Another Look at Federal Criminal Law, 31 **Colum. J.L. & Soc. Probs.** 61, 81 (1997)(“The overriding rationale for the [Lopez] decision seems to be the lack of any stopping point for the arguments put forward in favor of validating the Gun Free School Zones Act. These arguments...are methodologically troubling. Potentially every human activity is in some way necessary to the function of the national economy, and thus worthy of federal protection. These types of arguments undermine the very foundation of the federal system by requiring the Supreme Court to accept, at least tacitly, that the federal government is a government of unlimited powers.”)

buggy definition of interstate commerce,”⁶⁵ the case “vividly reminds us [that]...the judiciary must intercede to assure that Congress does not, by enacting unconstitutional legislation under the guise of the commerce power, dramatically alter the balance of federalism.”⁶⁶

B. López’s Three Categories of Commercial Activities

In 1990, Congress legislated the Gun-Free School Zones Act,⁶⁷ to make it a federal crime to possess a firearm in the vicinity of a school. Defendant Alfonso López, Jr., a high-school student in San Antonio, Texas, became charged with carrying a handgun and five bullets to school. The Supreme Court affirmed the Fifth Circuit Court reversal of the conviction,⁶⁸ and established what

⁶⁵ Kathleen F. Brickey, Crime Control and the Commerce Clause: Life after Lopez, 46 **Case W. L. Rev.** 801, 803 (1996) (quoting Franklin D. Roosevelt, press conference (May 31, 1935), in 4 The Public Papers and Addresses of Franklin D. Roosevelt, 200, 221 (Samuel I. Rosenman ed., 1938)). As Justice Kennedy, joined by Justice O’Connor, argued in his López concurrence: “The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of national power.” López, 514 U.S. at 568 (Kennedy, J., concurring).

⁶⁶ United States v. Robinson, 119 F.3d 1205, 1209 (5th Cir.1997). *But see* Tushnet, Living in a Constitutional Moment?: López and Constitutional Theory, 46 **Case W. Res. L. Rev.** 845, 869-870 (1996)(“I suggest that the present constitutional moment, if it is one, may involve the evaporation rather than devolution of public power. That is, power may not be flowing from Congress to state and local governments, but rather going into thin air--or, more precisely, to private institutions, both in the United States and elsewhere.”) (footnotes omitted)

⁶⁷ 18 U.S.C. § 922(q)(1)(A).

⁶⁸ United States v. López, 2 F.3d 1342 (5th Cir.1993), *aff’d*, 514 U.S. 549 (1995).

became known as “first principles” of federalism. The case reaffirmed⁶⁹ the “three broad categories of activity” that Congress could constitutionally regulate under the commerce power.⁷⁰

Firstly, Congress may legislate “to keep the channels of interstate commerce free from immoral and injurious uses....”⁷¹ Secondly, Congress can regulate “the instrumentalities of interstate commerce, or persons or things in interstate commerce.”⁷² Thirdly, Congress has the power “to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”⁷³

These formal categories become irrelevant, however, whenever Congress directly regulates a commercial⁷⁴ enterprise, or an entity engaged in interstate commerce.⁷⁵ But, the Supreme Court in López made clear that under no circumstances should a “relatively trivial” effect on interstate commerce provide the pretext for a “broad general regulation of state or private activities.”⁷⁶ In

⁶⁹ Pérez v. United States, 402 U.S. 146 (1971).

⁷⁰ 514 U.S. at 558.

⁷¹ *Id.* (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) (internal quotation marks and citation omitted)).

⁷² *Id.*

⁷³ *Id.* at 558-59

⁷⁴ Kennedy’s concurrence opined that López left intact Congress’ power to regulate activities of a commercial or economic nature. 514 U.S. at 574.

⁷⁵ See United States v. Robertson, 514 U.S. 669 (1995) (per curiam).

⁷⁶ López at 558-59.

López, the Gun-Free School Zones Act fell within the third category, as an activity that substantially affects interstate commerce; the statute nevertheless remained constitutionally lacking because:⁷⁷

a) The criminal acts in question had “nothing to do with ‘commerce’ or any sort of economic activity, however broadly one might define those terms.”⁷⁸ Since the possession of a gun near a school had no demonstrable effect on commerce, Congress had unconstitutionally concluded that the activity “viewed in the aggregate,” substantially affected interstate commerce, when in fact it did not.⁷⁹

b) The Gun-Free School Zones Act, had no express jurisdictional element which would have “ensure[d], through case-by-case inquiry that the [criminal activity] in question affect[ed] interstate commerce.”⁸⁰

c) Finally, the Gun-Free School Zones Act had no legislative history on point, illuminating Congress rationale on how gun possession in school zones “substantially affected” interstate commerce.⁸¹ Though usually not required, legislative history becomes important, according to the Court, when the “... substantial effect [upon interstate commerce is] not visible to the naked eye...”⁸²

C. The López Progeny

⁷⁷ *Id.* at 559-61.

⁷⁸ *Id.* at 561.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 563.

⁸² *Id.* at 563.

Most recently, United States v. Morrison⁸³ and Dewey Jones v. United States,⁸⁴ reaffirmed the López-initiated movement against federalization of intrastate criminal activities.

In Morrison, a former university student brought suit under the Violence Against Women Act (VAWA)⁸⁵ against her fellow students for allegedly raping her. The Supreme Court declared the VAWA unconstitutional for this purpose according to the Court, Congress lacked the authority under both the Commerce Clause and section 5 of the Fourteenth Amendment, to enact a federal civil remedy provision for VAWA. Morrison reaffirms the continued vitality of the “substantial effect” test enunciated in López, and all but rejects the “aggregation principle” outside the “commercial” sphere. Says Morrison, echoing López:

“In Lopez, we held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress’ authority under the Commerce Clause...Several significant considerations contributed to our decision. First, we observed that § 922(q) was “a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms.”...Reviewing our case law, we noted that “we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.”...[W]e stated that the pattern of analysis is clear[:]...”Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”⁸⁶ Furthermore, Morrison highlights the strictly “commercial” nature of the activities to which Congress’s power could conceivably extend. Says Morrison: “Lopez”’s review of Commerce Clause case law

⁸³ 120 S.Ct. 1740 (decided May 15, 2000).

⁸⁴ 120 S.Ct 1904 (May 22, 2000).

⁸⁵ 42 U.S.C. § 13981.

⁸⁶ Morrison, 120 S.Ct. at 1749 (footnotes omitted).

demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."⁸⁷

For similar reasons, Morrison severely questions the use of the "aggregation principle" to obtain federal jurisdiction over non-commercial cases.⁸⁸ This particular Morrison reasoning becomes acutely relevant in the case of robberies directed toward private individuals in their homes, since in these cases the link with interstate commerce always appears highly attenuated or non-existent.

In Jones v. United States,⁸⁹ the Court refused to extend the federal arson statute,⁹⁰ to cover the fire of a private residence used for everyday family living. The statute penalizes whoever "maliciously damag[es] or destro[ys], ... by means of fire or an explosive, any building ... used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Jones stood accused and convicted of tossing a Molotov cocktail into his cousin's home. The Supreme Court concludes that the phrase "used in" commerce excludes owner-occupied residences, with no commercial use. Thus, Jones' crime of setting fire to his cousin's home triggered no federal involvement under § 844(i) of 18 U.S.C.⁹¹

In Jones, federal prosecutors wanted the Court to accept the interpretation that the victim had "used" his residence to obtain a mortgage loan from a state lender. The lender in turn, "used" the

⁸⁷ *Id.* at 1750.

⁸⁸ *Id.*

⁸⁹ 120 S.Ct 1904 (May 22, 2000).

⁹⁰ 18 U.S.C. § 844(i).

⁹¹ Jones, 120 S.Ct. 1908-1912.

property as security for the loan. Furthermore, the homeowner had “used” the residence to obtain a casualty insurance policy on the property from a an insurer in another state. Thirdly, the homeowner “used” his residence to receive natural gas from sources outside the state. Thus, the government wanted the Court to conclude that, since the private residence into which Jones threw the Molotov cocktail engaged in these three “activit[ies] affecting commerce,” federal jurisdiction ensued.⁹² The Supreme Court disagreed, and concluded:

It surely is not the common perception that a private, owner-occupied residence is "used" in the "activity" of receiving natural gas, a mortgage, or an insurance policy...The Government does not allege that the Indiana residence involved in this case served as a home office or the locus of any commercial undertaking. The home's only "active employment," so far as the record reveals, was for the everyday living of Jones's cousin and his family...Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce.⁹³

As for López, the Court expressed:

Given the concerns brought to the fore in Lopez, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement."⁹⁴

⁹² Id. at 1910.

⁹³ Id. at 1910-13.

⁹⁴ Id. at 1912 (citing United States v. Bass, 404 U.S. 336, 350 (1971)).

Thus, Morrison and Jones demonstrate that the government's old arguments in favor of an expansive federal criminal jurisdiction under the Commerce Clause open to question today.

VI. THE AGGREGATION THEORY

Even if the text of Section 1951(a) mandated no *per se* exclusion of non-commercial robbery, courts would still need to consider the application of the Hobbs Act to the particular case before them. As a general rule, the application of the Hobbs Act to the robbery of a private individual at home violates the Commerce Clause. The only exception to the rule could become a non-commercial robbery where the violent taking of the individual's personal property would have to affect or interfere with interstate commerce by way of an adverse consequence on that individual's or the company's potential for conducting interstate business.

The connections between the robbery of a private person and interstate commerce appear insubstantial enough. Some proponents of federalization argue that federal law nevertheless proscribes these acts based on the "aggregation principle". Using this principle, robbery appears as the type of activity that so substantially affects interstate commerce in general, that an individualized, case by case inquiry, into each case's nexus with commerce becomes unnecessary. Indeed, by concluding that the federal government can regulate any robbery whatsoever, based on the "aggregate" financial impact of on commerce of all robberies, large and small, the jurisdictional element of Section 1951(a) becomes superfluous.

But López and its progeny, especially Morrison, *supra*, and Jones, *supra*, denounce this reasoning as flawed. The criminal act of robbery can never sustain the aggregation of its effect in order to justify becoming the object of a federal prohibition without a substantial jurisdictional nexus.

According to López, “the “de minimis” character of individual instances arising under [a statute enacted under the Commerce Clause] is of no consequence -- and so will permit federal regulation -- only “where a general regulatory statute bears a substantial relation to commerce.”⁹⁵

If a federal prohibition could extend to residential robbery simply because, taken together, all robberies present a significant aggregate effect on interstate commerce, then almost any intrastate conduct would fall under federal scrutiny by virtue of the inevitable interconnection of everything and everyone in a globalized economy. Such reasoning represents a violation of one of the most fundamental premises of American constitutional federalism, namely, that “[t]he interpenetrations of modern society have not wiped out state lines”.⁹⁶

Congress has plenary authority to regulate interstate commerce.⁹⁷ But when it comes to intrastate conduct the commerce power extends only to those activities “which so affect interstate commerce or the exertion of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”⁹⁸ The justification under the Commerce Clause for this federal power remains thus: “...that ‘in certain fact situations’ federal ‘regulation of purely local and intrastate commerce’

⁹⁵ López, 514 U.S. at 558 (quoting Wirtz, 392 U.S. at 197 n.27).

⁹⁶ Polish National Alliance v. NLRB, 322 U.S. 643, 650 (1944).

⁹⁷ See Gibbons, 22 U.S. (9 Wheat.) at 197.

⁹⁸ *Id.* at 555 (quoting Darby, 312 U.S. at 118, which cited M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

may be ‘necessary and proper’ to prevent injury to interstate commerce.”⁹⁹ As recognized by constitutional scholars,¹⁰⁰ the “substantial effect on commerce” test under the Necessary and Proper Clause¹⁰¹ suggests something more than a mere adding-up of costs.¹⁰² As López makes clear: the “activities that substantially affect interstate commerce.. [become]...activities having a substantial relation to interstate commerce.”¹⁰³

⁹⁹ Polish National Alliance, 322 U.S. at 652 (Black, J., concurring). *See* U.S. Const. art. I, s 8, cl. 18; Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 231-232 & n.11 (1948); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 584-585, 488 US 889, (1988) (1985) (O’Connor, J., dissenting); *see also* 1 L. Tribe, American Constitutional Law 812-814 & n.23 (3d ed. 2000).

¹⁰⁰ Barnett, Necessary and Proper, 44 UCLA L. Rev. 745 (1997); Gardbaum, Rethinking Constitutional Federalism, 74 Tex. L. Rev. 795 (1996).

¹⁰¹ Gardbaum, *supra* note 171, at 807-808 argues that the New Deal Court based its justification for the expansion of the federal power over commerce on the Necessary and Proper Clause, without directly enlarging the scope of the Commerce Clause itself. For example, he cites United States v. Darby, 312 U.S. 100, 118-119 (1941), and Justice O’Connor’s dissent in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 584-585 (1985), 488 US 889, 109 S.Ct. 221, 102 L.Ed.2d 212, 1988, which pointed out that “[t]he Court based the expansion [of the commerce power] on the authority of Congress, through the Necessary and Proper Clause, “to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.” It is through this reasoning that an intrastate activity “affecting” interstate commerce can be reached through the commerce power. . . . [A]nd the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce.”

¹⁰² *See* 1 L. Tribe, American Constitutional Law 819 (3d ed. 2000).

¹⁰³ López, 514 U.S. at 558-559. *But see* Oshidari, Protecting Federalism or Assaulting Separation of Powers? The Proposed Tenth Amendment Enforcement Act, 33 **Loy. L.A. L. Rev.** 775 (2000) (voicing the concern that congressional protection of the principles of federalism in reaction to Supreme Court cases and Presidential orders, would itself infringe on the proper sphere of judicial interpretation and executive enforcement); Shane, Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism, 45 **Vill. L. Rev.** 201 (2000) (presenting a careful and meticulous criticism of López and its progeny).

In some limited circumstances federal intervention with intrastate conduct may become necessary. The aggregate effect of a particular class of insignificant activities could have a substantial impact on interstate commerce. In this case, the “substantial effect” would define in terms of its qualitative closeness to interstate commerce, rather than a quantitative aggregation of effects. Such appears the case in United States v. Harrington,¹⁰⁴ where the court used the standard of a “direct” or “concrete” effect on commerce, or in or in Collins and Wang where the courts adopted a “substantial effect” instead of the usual “de minimis” standard.

But transparently insubstantial connections with commerce, such as the robbery of an individual at home, and the taking of his personal property, appears insufficient by itself to justify federal intervention no matter what the dollar value. As the Supreme Court recently explained in Morrison:

“[O]ur decision in Lopez rested in part on the fact that the link between [the criminal act regulated] and a substantial effect on interstate commerce was attenuated...The United States argued that the [criminal act] may lead to violent crime, and that violent crime “can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe.”...The Government also argued that the [the criminal act] poses a threat to the [local] educational process, which in turn threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus interstate commerce...We rejected these “costs of crime” and “national productivity” arguments because they would permit Congress to “regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate

¹⁰⁴ 108 F.3d 1460 (D.C. Cir. 1997).

commerce.”...We noted that, under this but-for reasoning: “Congress could regulate any activity that it found was related to the economic productivity of individual citizens...Under the[se] theories ..., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement...where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.””¹⁰⁵

Thus, un-circumscribed aggregation could become a way to unconstitutionally avoid the “substantial effects” limitation established in López and its progeny. Aggregation has to exist limited to “regulation[] of [intrastate] activities that arise out of or are connected with a commercial transaction.”¹⁰⁶ Congress may regulate individual instances of intrastate “economic activity that might, through repetition elsewhere, substantially affect...interstate commerce”.¹⁰⁷ But it may not rely on the aggregation principle to regulate non-commercial intrastate conduct that lacks a demonstrably substantial relation to interstate commerce.¹⁰⁸ That appears why it makes perfect sense to consider commercial, but not private, transactions “in the aggregate.”¹⁰⁹ For only commercial transactions operate within markets that either function or may become affected by adjacent intrastate factors, in interstate commerce.¹¹⁰

¹⁰⁵ 120 S.Ct at 1750 (emphasis added).

¹⁰⁶ López, 514 U.S. at 561; *see also* 1 L. Tribe, *supra* note 113, at 820-821.

¹⁰⁷ López, 514 U.S. at 567.

¹⁰⁸ *See Morrison*, 120 S.Ct. at 1750.

¹⁰⁹ López, 514 U.S. at 561.

¹¹⁰ López, at 566, recognized however, that “a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty”.

A general federal prohibition of robbery remains constitutionally suspect also because it impinges on an area of *traditional* state authority. A crude use of aggregate financial impact to justify the application of Section 1951(a) to all non-commercial, residential robberies, without a case-by-case analysis of their direct impact upon interstate commerce, would supply a rationale for transforming the Commerce Clause into the means for federal intervention in nearly all local crimes.¹¹¹

As the United States Supreme Court has repeatedly explained, “[u]nder [the American] federal system, the “States possess primary authority for defining and enforcing the criminal law.””¹¹² Although the states can legislate in any field, the “Constitution...withhold[s] from Congress a plenary

¹¹¹ See Baker, State Police Powers and the Federalization of Local Crime, 72 **Temp. L. Rev.** 673 (1999) . See also Clymer, Unequal Justice: The Federalization of Criminal Law, 70 **S. Cal. L. Rev.** 643 (1997). Three recent Symposia address the topic. Mengler, The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary From the Federalization of State Crime, 43 U. Kan. L. Rev. 503 (1995); Miner, Crime and Punishment in the Federal Courts, 43 Syracuse L. Rev. 681 (1992); Schwarzer & Wheeler, On the Federalization of the Administration of Civil and Criminal Justice, 23 Stetson L. Rev. 651 (1994); Chippendale, Note, More Harm Than Good: Assessing Federalization of Criminal Law, 79 Minn. L. Rev. 455 (1994); Hollon, Note, After the Federalization Binge: A Civil Liberties Hangover, 31 Harv. C.R.-C.L. L. Rev. 499 (1996). Baker, Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?, 16 Rutgers L.J. 495 (1985); Bradley, Racketeering and the Federalization of Crime, 22 Am. Crim. L. Rev. 213 (1984); Cushman, The National Police Power Under the Commerce Clause of the Constitution, 3 Minn. L. Rev. 289 (1919); Miner, Federal Courts, Federal Crimes, and Federalism, 10 Harv. J. L. & Pub. Pol’y 117 (1987); Stern, The Commerce Clause Revisited--The Federalization of Intrastate Crime, 15 Ariz. L. Rev. 271 (1973); Van Alstyne, Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court, 26 Am. Crim. L. Rev. 1740 (1989); Kenny, Comment, Federal Criminal Jurisdiction: A Case Against Making Federal Cases, 14 Seton Hall L. Rev. 574 (1984).

¹¹² López, 514 U.S. at 561 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993), and Engle v. Isaac, 456 U.S. 107, 128 (1982)).

police power.”¹¹³ From the earliest days of the American Republic, it became “clear[] that Congress cannot punish felonies generally.”¹¹⁴ The Commerce Clause empowers Congress to regulate interstate and foreign commerce, and that regulation may include criminal proscriptions and penalties. But, as López reminds us, the commerce power, although broad within its defined sphere, “is subject to outer limits.”¹¹⁵ Certain spheres of conduct do not constitute commercial activity and thus cannot become “regulated” directly and generally by Congress in an exercise of the commerce power. These areas include public education, child-rearing, marriage and divorce, and above all, violent crime.¹¹⁶

Except to the extent that it may appear bound to a commercial activity, robbery exists as a traditional crime falling within the heartland of traditional “criminal law enforcement,” an area in which “States historically have been sovereign.” The robbery of a private individual in his residence classifies as a felony in every state of the Union and in the Territories, and has been since before the foundation of the American Republic.¹¹⁷ No indication has surfaced that states appear unwilling or

¹¹³ *Id.* at 566.

¹¹⁴ Justice Marshall recognized that “congress cannot punish felonies generally” in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415-23 (1819) where Marshall argued that Memorandum I authorizes Congress to enact criminal laws only in a few areas (e.g., piracy and counterfeiting). That authority did include, in Marshall’s view, implied powers to penalize certain actions to effectuate its other Memorandum I powers. *Id.* at 416-17. For example, the robbery of a post office to vindicate its express authority to establish post offices and post roads. *Id.* at 417. And the protection of federal property. United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).

¹¹⁵ López, 514 U.S. at 557.

¹¹⁶ *See id.* at 564-565. *See also* Morrison, 120 S.Ct at 1750.

¹¹⁷ *See* Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 Hastings L.J. 1135, 1138 (1995); and Pueblo v. Batista Montañez, 1982 WL 210563 (P.R.), 113

unable to enforce their robbery laws.¹¹⁸ Applying the aggregation device to Section 1951(a) would thus result in a broad intrusion on a subject of traditional and thorough state regulation. That should weigh heavily against extending federal power over all or substantially all robbery as “necessary and proper” to protect interstate commerce. Even without preemption, the federalization of local crimes “displace[s] state policy choices” on what activities to prohibit, what substantive and procedural rights to grant criminal defendants, and what punishments to mete out.

That should not happen under the Constitution. The Commerce Clause must avoid becoming interpreted as a subtle grant of a plenary police power to the federal government. That provision speaks only of “commerce,” and only of such commerce involving more than one state or sovereign nation.¹¹⁹ To extract a general police power from that limited grant would flatly disregard the stated intentions of the Framers of the Constitution, who envisioned that “[t]he powers reserved to the

¹¹⁷(...continued)

D.P.R. 307 (1982), for a history of robbery and larceny at common law and in the continent. *See also* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32-33 (1812), (the Supreme Court resolved that federal jurisdiction excludes common-law crimes.) More recently, Carter v. United States, 120 S.Ct. 2159 (No. 99-5716; decided June 12, 2000) (“...[A] “cluster of ideas” from the common law should be imported into statutory text only when Congress employs a common-law *term*...[I]t is undisputed that “robbery” and “larceny” are terms with established meanings at common law.”[emphasis on the original])

¹¹⁸ Ashdown, Federalism, Federalization, and the Politics of Crime, 98 **W. Va. L. Rev.** 789 text accompanying note 65 (1996). (“[T]here appear to be two situations where congressional exercise of federal criminal jurisdiction is clearly warranted -- cases where the states, although capable, are unwilling to engage the machinery of their own domestic criminal law or when local law enforcement is incapable of handling a problem national in scope. Civil rights protection and political corruption might be examples of the former, while protection of national markets and organized crime represent activities in the latter category.”)

¹¹⁹ *See* Redish & Drizin, Constitutional Federalism and Judicial Review: The Role of Textual Analysis, 62 **N.Y.U.L. Rev.** 1, 41 (1987).

several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”¹²⁰

Reading the Commerce Clause to permit federal criminal regulation over any behavior with aggregate economic significance also would improperly eradicate any limitations on Congress’s enumerated powers addressing crime and intrastate violence.¹²¹ A view that the federal government can regulate most basic and traditional crimes fully contradicts the Constitution’s grant of congressional authority over crime in only four very discrete areas.¹²² That view also would render superfluous Article IV, Section 4, which sets out the limited role for Congress in regulating local crime within the States: “[t]he United States shall...protect each of [the States of this Union]...on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” By its plain terms, the Domestic Violence Clause requires a proper request from

¹²⁰ The Federalist No. 45, at 292-293 (J. Madison) (C. Rossiter ed. 1961).

¹²¹ See Railway Labor Executives’ Assn. v. Gibbons, 455 U.S. 457, 468-469 (1982).
Cert. Denied 455 US 999, 102 S.Ct. 1629 71 L.Ed.2d 865; 1982.

¹²² Memorandum IV, Section 4 clearly provides that "(t)he United States shall... protect each of (the states) against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Thus, the federal intervention remains limited in case of violence within a state, unless of course the state requests it. This Domestic Violence Clause covered not only political violence within the state (such as insurrections), but also common criminal violence against state citizens (such as murder, arson, and robbery). *See also* U.S. Const. art. I, s. 8, cl. 6 (power to punish counterfeiting of United States securities and coin); *id.* cl. 10 (power to "punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations"); *id.* cl. 17 (plenary power over seat of federal government and federal enclaves); *id.* art. III, s. 3 (power to punish treason); Bybee, Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause, 66 **Geo. Wash. L. Rev.** 1 (1997) (arguing that the Clause supplies an independent justification for reining in Congress’s attempts to federalize state violent crimes).

a State before the federal government may act against intrastate violence.¹²³ The existence of these powers should create a strong presumption against the derivation of additional powers to create federal crimes. Under these circumstances, a regulation of a crime like robbery surely cannot rest as a regulation of commerce without proof of substantial effect on commerce in every individual case.

C. The Jurisdictional Element and the “de minimis” standard.

The proposition that Congress has a broad national power to prohibit robbery as such, finds no support in the terms of the constitutional grant of authority “[t]o regulate Commerce...among the several States.”¹²⁴ In Section 1951(a) Congress intended to render the prohibition of robbery constitutional based on something else, namely, the jurisdictional element in the phrase “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce”. This jurisdictional requirement “ensure[s], through case-by-case inquiry,” that the particular instances of the criminal activity fall within the power to regulate commerce.¹²⁵ No part of the cited provision covers the robbery of an individual in his or her private place of residence.¹²⁶

¹²³ See W. Rawle, A View of the Constitution of the United States of America 299 (2d ed. 1829); 3 J. Story, Commentaries on the Constitution of the United States p 1819, at 684-685 (1833 ed.) (Fred. B. Rothman & Co. 1991); Bybee, Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause, 66 **Geo. Wash. L. Rev.** 1, 3-4 (1997).

¹²⁴ See R. Berger, Federalism: The Founder’s Design

¹²⁵ López at 561-562.

¹²⁶ See Nelson & Pushaw, Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues, 85 **Iowa L. Rev.** 1 (1999)(“In our view, the Commerce Clause does not authorize enactment of a general criminal code because most criminal behavior does not constitute “commerce”-- the voluntary sale or exchange of property or services. At its core is a consensual transaction.

(continued...)

The inclusion of a jurisdictional element in a federal statute may permit Congress to regulate activities that otherwise lack “a substantial relation to interstate commerce” because they do not in general “substantially affect interstate commerce.”¹²⁷ A statute that contains an “express jurisdictional element which...limit[s] its reach to a discrete set of” intrastate activities “that additionally have an explicit connection with or effect on interstate commerce” may become constitutionally applied to a particular instance of that “discrete set” of activities.¹²⁸ But a jurisdictional element does not permit regulation outside the three categories of activity identified in López.

Accordingly, application of a statute with a jurisdictional element to particular conduct requires stricter judicial scrutiny, and a stronger showing of an effect on interstate commerce, than application of a statute regulating an entire class of activities found by Congress to have a substantial effect on interstate commerce. In cases like this one, there appears no broad congressional finding -- express or implicit -- to which a court might defer.¹²⁹ The nexus with interstate commerce established by the satisfaction of the jurisdictional element in a particular case must stand or fall on its own.

The United States Supreme Court has never explicitly held that a jurisdictional element might be satisfied by intrastate conduct with only a “de minimis” effect on interstate commerce. In fact, the

¹²⁶(...continued)
Unilateral criminal acts, no matter how substantial their economic motivation, are not “commercial.””)

¹²⁷ *Id.* at 559.

¹²⁸ *Id.* at 562.

¹²⁹ See López, 514 U.S. at 562-563; Wirtz, 392 U.S. at 192-193; Darby, 312 U.S. at 120-121.

Court has stated quite the contrary: Congress may not “use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.”

Although the Supreme Court has changed its view of what types of effects are too attenuated,¹³⁰ It’s recognition and enforcement of limits on the causal chain have remained intact. In repeating Justice Cardozo’s warning, the Court recognized that “[t]here is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.” Some limit on the degree of causal attenuation appears necessary for courts to remain capable to make the distinction between the truly national and the truly local.¹³¹ In the case of robbery of private individuals in their homes, courts have used the “depletion of assets” theory to help them determine, on a case-by-case basis, whether the factual scenario fulfills the jurisdictional requirement of the Hobbs Act.

VII. THE DEPLETION OF ASSETS THEORY

The old expansive reading of the statute, that included attenuated nexus with interstate commerce as fulfillment of the jurisdictional requirement in non-commercial cases, has given way to the substantial effect test, a rejection of the aggregation principle, and the elaboration of the depletion of assets theory.

¹³⁰ López, 514 U.S. at 567 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)).

¹³¹ *Id.* at 566-568; *see also, e.g.*, Jones & Laughlin, 301 U.S. at 30.

During the first decade following the passage of the Hobbs Act, prosecutors used it to disarticulate large scale extortions and conspiracies that directly affected commerce.¹³² But in the late 1960's that changed when United States v. Malinsky expressed the sweeping proposition that the Hobbs Act also applied to activities of insubstantial consequence to commerce. Said Malinsky:

“The statute provides that effect “in any way or degree” is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial. The substantiality of the effect is not left to judicial determination. The only question is whether the prohibited activity is within the reach of Congress. Next, United States v. Provenzano, appeared as the first instance in which a court used the “depletion of assets” theory to support federal jurisdiction in a Hobbs Act prosecution.¹³³ Subsequently, United States v. Amabile, and United States v. Addonizio, adopted the “depletion of assets” theory but in a stronger language.”¹³⁴

¹³² See, e.g., United States v. Pranno, 385 F.2d 387, 390 (7th Cir. 1967) (extorting \$16,000 for the issuance of a building permit); United States v. Provenzano, 334 F.2d 678, 683 (3d Cir. 1964) (extorting \$17,000 over a period of seven years to avoid labor disruptions); United States v. Postma, 242 F.2d 488, 491-92 (3d Cir. 1957) (extorting \$10,000 to end a union strike); United States v. Dale, 223 F.2d 181, 182 (7th Cir. 1955) (involving attempted extortion of a total of \$1,037,500 on a construction project); Callanan v. United States, 223 F.2d 171, 173 (8th Cir. 1955) (extorting \$28,000 for labor peace during the construction of an interstate pipeline); United States v. Varlack, 225 F.2d 665, 667-69 (2d Cir. 1955) (involving approximately \$11,000 and an initial demand that the victims "give each of us \$2,500 and...a Chevrolet car, and that you place each of us on the payroll at \$50 a week").

¹³³ See United States v. Iñigo, 925 F.2d 641, 649 (3d Cir. 1991); United States v. Cerilli, 603 F.2d 415, 424 (3d Cir. 1979) cert. denied 444 US 1043, 100 S.Ct. 728, 62 L.Ed.2d 728, 1980; United States v. Addonizio, 451 F.2d 49, 60 (3d Cir. 1972); United States v. Auguello, 451 F.2d 1167, 1170 (2d Cir. 1971) cert. denied 405 US 1070, 92 S.Ct. 1518 31 L.Ed2d 802, 1972; United States v. Esperti, 406 F.2d 148, 150 (5th Cir. 1969) cert. denied 304 US 1000, 89 S.Ct. 1951, 1969. See also Expansion, supra note 14, at 314.

¹³⁴ See Addonizio, 451 F.2d at 76-77 (citing Stirone v. United States, 361 U.S. 212, 215 (1960); United States v. Tropicano, 418 F.2d 1069, 1076 (2d Cir. 1969), cert. denied 397 US 1021, 90 S.Ct. 1262, 25 L.Ed.2d 530; Amabile, 395 F.2d at 49; United States v. Varlack, 225

(continued...)

The focus under the new theory became the commercial entity's or the individual's impaired ability to participate in interstate commerce as he customarily would. Clearly, since Lopez, the Malinsky reasoning appears untenable. Courts can no longer disregard the "substantiality of the effect" on interstate commerce to predicate federal jurisdiction under the Commerce Clause in non-commercial cases. The Jones and Morrison opinions cited above, confirm this.

United States v. Collins and United States v. Wang articulate the "depletion theory" in the context of criminal acts directed against individuals. In Collins, the defendant appeared at the home of an employee of a national computer company, robbing him at gunpoint. Collins took cash, jewelry, clothes, and a Mercedes-Benz with its cellular telephone. The government accused and convicted Collins under the Hobbs Act for obstructing interstate commerce by robbing the victim at his home. Under the Hobbs Act, the Collins Court reasoned the following:

"Both direct and indirect effects on interstate commerce may violate section 1951(a) [of 18 U.S.C.]. The government's "depletion-of-assets" theory falls into the indirect category...Criminal acts directed toward an individual may violate section 1951(a) only if: (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some "commutative effect on interstate commerce."¹³⁵

¹³⁴(...continued)
F.2d 665, 672 (2d Cir. 1955); Hulahan, 214 F.2d at 445; Nick v. United States, 122 F.2d 660, 673 (8th Cir.) Cert. denied 314 US 687, 1941.

¹³⁵ 40 F.3d at 99-100 (citing United States v. Merolla, 523 F.2d 51 (2nd Cir.1975), and United States v. DeParias, 805 F.2d 1447 (11th Cir. 1986)). Cert. denied 482 US 916, 107 S.Ct. 3189, 96 L.Ed.2d 678 1987.

The evidence in Collins showed that the victim's only connection to interstate commerce remained his employment in an interstate commercial enterprise. Thus, concluded the court: "This linkage to his business is much too indirect to present a sufficient nexus with interstate commerce to justify federal jurisdiction."¹³⁶

As the Collins opinion suggests, the Supreme Court's "first principles" of federalism, first enunciated in López and reaffirmed in Jones and Morrison, limit the application of the "depletion of assets" theory to those cases where the court finds evidence that the individuals or entities customarily engaged in interstate commerce, and that their assets became depleted as a result of the crime.

In Wang the defendant stood convicted of robbing the owners of Chinese restaurant. The restaurant, in turn, purchased meat and seafood from out-of-state suppliers. The victims had closed the restaurant for the day, and headed home with part of the proceeds. Unbeknownst to them, defendant Wang had broken into their house earlier with an accomplice, and remain there waiting. When the victims arrived he assaulted and robbed them.

A federal grand jury returned a four-count indictment. Count I charged Wang with robbery affecting interstate commerce in violation of 18 U.S.C. § 1951. The district court found Wang guilty of the Hobbs Act violation. But it expressed discomfort about federal jurisdiction over the matter:

This Court finds that there is no effect on interstate commerce beyond an absolute de minimis effect of \$1,200. There is no proof that Dr. and Mrs. Tsai closed the restaurant, that they were unable to order any

¹³⁶ 40 F.3d at 100.

further goods from out of state. There is no evidence of an [e]ffect upon interstate commerce.¹³⁷

Wang challenged his conviction for robbery on appeal. He maintained that in light of López, insufficient evidence existed to support a finding that his robbery affected interstate commerce. The Wang court summarized the situation after López, stating the “de minimis” standard still survived for some situations:

“The jurisprudential landscape has not much changed in the wake of Lopez, the landmark case that struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), as an invalid exercise of Congress’s power under the Commerce Clause. See Lopez, 514 U.S. at 551, 115 S.Ct. 1624. Facial constitutional challenges to the Hobbs Act followed close on the heels of Lopez. In turning away the first of these in United States v. Valenzano, we remarked in dicta that “[i]f Lopez indicates that the Commerce Clause gives Congress less power than was previously thought to be the case, the proper remedy would be to give the statute a narrower interpretation, or to require a more substantial jurisdictional nexus, not to hold facially invalid an Act of Congress.” Valenzano, 123 F.3d 365, 368 (6th Cir.1997). Ultimately, however, “[w]e join[ed] our sister circuits and [held] that the de minimis standard for the interstate commerce effects of individual Hobbs Act violations survived Lopez.” United States v. Smith, 182 F.3d 452, 456 (6th Cir.1999).”¹³⁸

But the Wang Court distinguished under López commercial from non-commercial robberies directed against individuals. Said the court:

“...our precedents have involved robberies in which the victims were businesses engaged in interstate commerce. But where, as here, the criminal act is directed at a private citizen, the connection to interstate commerce is much more attenuated...We hold that the required

¹³⁷ Wang, 2000 WL 1060375, in text belonging to headnote 2.

¹³⁸ Wang, 2000 WL 1060375, in text belonging to headnote 3.

showing is of a different order than in cases in which the victim is a business entity.”²⁴⁰

Finally, the Wang Court specified under what circumstances federal jurisdiction ensued in cases of robbery of individuals:

“...when the Government seeks to satisfy the Act’s jurisdictional nexus by showing a connection between an individual victim and a business engaged in interstate commerce, that connection must be a substantial one--not one that is fortuitous or speculative. We have suggested that the Government might make such a showing by demonstrating that the defendant knew of or was motivated by the individual victim’s connection to interstate commerce. See *United States v. Mills*, 204 F.3d 669, 670 (6th Cir.2000) (holding that solicitation of bribes from individuals gave rise to federal jurisdiction under the Hobbs Act because the defendants "had actual knowledge that the bribe money would be obtained through loans made in interstate commerce"). Other avenues of proof will no doubt present themselves...”

Applying these principles to the facts of the case, the Wang Court reversed the Hobbs Act conviction for lack of a substantial connection of the robbery to interstate commerce:

“In the present case, application of these principles dictates reversal of Wang’s conviction with respect to Count I. Wang robbed private citizens in a private residence of approximately \$4,200, a mere \$1,200 of which belonged to a restaurant doing business in interstate commerce. The Government made no showing of a substantial connection between the robbery and the restaurant’s business, and the district court held that "[t]here is no evidence of an [e]ffect on interstate commerce." In the absence of such a showing, there is no realistic probability that the aggregate of such crimes would substantially affect interstate commerce...Due regard for th[e] admonition [in López and its progeny] requires that Wang’s case be heard in state court. We therefore reverse his Hobbs Act conviction.”¹³⁹

¹³⁹ Wang, 2000 WL 1060375, in text belonging to headnote 7.

A. Collins, Wang and the development of the Aggregation Principle

In Collins, the court recognized that the connections between interstate commerce and the supposedly regulated conduct in the case, namely the robbery of a private individual in his home, had no demonstrable “substantial effect” on interstate commerce. The connections between the victim and interstate commerce appeared remote, and insignificant in quality, and the actual effects of that specific robbery, still less significant. Thus, the court concluded:

We are persuaded that if the robbery of an individual were found to affect interstate commerce merely because of the real or perceived disruption of the individual’s business by interfering with his work, the reach of section 1951(a) would be ubiquitous, and any robbery, in our closely-interwoven economy, arguably would affect interstate commerce.

If such trivial connections to interstate commerce had legally sufficed to support the exercise of federal power under the Commerce Clause, Congress could then become empowered to regulate any crime that resulted in a loss of currency potentially in interstate commerce. Because any kind of theft inevitably affects commerce this way, Congress would have plenary power to regulate all robberies.¹⁴⁰ That result appears to contradict López’s recognition that the commerce power does have enforceable limits.

¹⁴⁰ However, several courts still upheld application of the Hobbs Act to theft or extortion from small businesses on the grounds that stolen money otherwise might have been spent in interstate commerce. See, e.g., United States v. Zeigler, 19 F.3d 486, 491-493 (10th Cir.), cert. denied, 513 U.S. 1003 (1994); United States v. Boston, 718 F.2d 1511, 1516-1517 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984); United States v. Elders, 569 F.2d 1020, 1025 (7th Cir. 1978).

Where the regulated activity appears as far removed from common conceptions of “commerce” and “commercial” as does the robbery of a mere private person in his residence, the effect of the aggregation diminishes. As the court reasoned in Collins:

“Given the fact that “[t]he Hobbs Act definition of commerce is coextensive with the constitutional definition,” and that the congressional commerce power extends only to conduct which “exerts a substantial economic effect on interstate commerce,” it is manifest that Congress may not regulate conduct that, standing alone, does not directly affect interstate commerce or have a direct effect on a business engaged in interstate commerce.¹⁴¹

Wang also rejected the aggregation principle, which it called a “butterfly effect”, in cases of robbery of private individuals:

“...The Hobbs Act’s de minimis standard survives *Lopez* by virtue of the aggregation principle. But the *Lopez* Court declined to apply the aggregation principle in conjunction with long chains of causal inference that would have been necessary to arrive at a substantial effect on interstate commerce...“There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.... Activities local in their immediacy do not become interstate and national because of distant repercussions.”). Just this sort of “butterfly effect” theory of causation would be required to find liability in the great majority of Hobbs Act cases in which the victim is a private citizen...See James Gleick, *Chaos: Making a New Science* 8 (1987) (discussing the parable of the flapping of a butterfly’s wings that creates a minor air current in China, that adds to the accumulative effect in global wind systems, that ends with a hurricane in the Caribbean). Per *Lopez*, a small sum stolen from a private individual does not, through aggregation, affect interstate commerce merely because the individual happens to be an

¹⁴¹ Collins, 95 F.3d at 100-101 (citing United States v. Hanigan, 681 F.2d 1127, 1130 (9th Cir. 1982), *cert. denied*, 459 U.S. 1203, 103 S.Ct. 1189, 75 L.Ed.2d 435 (1983); United States v. Lopez, 2 F.3d 1342, 1361 (5th Cir.1993), *cert. granted*, --- U.S. ----, 114 S.Ct. 1536, 128 L.Ed.2d 189 (1994), (citing Wickard v. Filburn, 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942)))

employee of a national company, or happens to be on his way to a store, or happens to be carrying proceeds from a restaurant.”¹⁴²

Thus, speculative and attenuated connections between a particular conduct and interstate commerce cannot support an exercise of federal power where, as in the case of the robbery of a private person at home, the entire class of activities cannot become federally regulated because of an inherent, evident lack of connection with commerce. In Collins and Wang the robbery of a private individual in his home did not, and could not shut down or alter any business. Thus, no substantial effect existed to satisfy the jurisdictional requirement in Hobbs.

VIII. CONCLUSION

The present Memorandum argues and concludes that under United States v. Lopez, and its progeny, the Hobbs Act is inapplicable to the facts in this case. Given the above, it is respectfully requested that Counts One and Two of the Indictment be dismissed with prejudice for lack of jurisdiction.

In San Juan, Puerto Rico, this 6th day of March, 2001

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¹⁴² Wang, 2000 WL 1060375, in text belonging to headnote 4.

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I HEREBY CERTIFY: That a copy of the foregoing Motion was served on counsel for the government, U.S. Attorney Guillermo Gil (Attn: Assistant U.S. Attorney Sonia Torres) by delivering it to his office at the Federal Building, Carlos Chardón Avenue, San Juan, Puerto Rico.

Assistant Federal Public Defender