

Sexual Orientation and the Law Blog

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Do anti-hate crime laws expand double jeopardy?

The Cato Institute's [David Rittgers explains](#) an objection to the new federal hate crimes law passed by Congress (hat tip to the [Volokh Conspiracy](#)):

States and the federal government are considered separate sovereigns. If someone has broken both state and federal laws, he can have a day in court in both systems. . . . A trial by a state does not rule out federal prosecution for the same crime, and this does threaten to thwart the Fifth Amendment's demand that no person suffer double jeopardy. In practice, however, this hasn't happened too often; until now, limited federal jurisdiction meant that Uncle Sam usually didn't have the ability to try or retry a state defendant.

That's what makes the new hate-crime law so remarkable. Its defining feature is not that it allows federal prosecution of crimes motivated by the race, gender, sexual orientation, or disability of the victim. What's significant is that it greatly expands the federal government's jurisdiction to prosecute cases that properly belong in a state court.

In legal terms, this law achieves its aims through federal authority over interstate commerce. If someone assaults you by throwing a cell phone at you, what Congress has done is enabled the prosecution of the thrower as a function of the fact that the cell phone was made in Japan, and therefore must have crossed state lines. To non-lawyers, that surely sounds absurd — which is precisely why this law's drastic overreach is so stark. This is a sea change in the power of the government to reach into a state and define violence between two people as a federal matter, one traditionally handled by state laws and state prosecutors.

An equally striking feature of the law is that the federal power to prosecute is not dissipated even if the defendant is found guilty by the state. It explicitly says, in fact, that federal charges should be pursued if the state verdict "left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence."