

President Clinton's remarkable reaction to the decision—which was to instruct the attorney general to recommend ways to evade it because keeping guns out of schools is “what the American people want” and “the right thing to do”—encapsulates the jurisprudence of expediency that has guided federalism doctrine beginning with the Supreme Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1.

Since that early New Deal case, the idea of federalism—the division of power

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lays the foundation for the recognition of further limits on congressional power. “We start with first principles,” says the chief justice, “the Constitution creates a Federal Government of enumerated powers.” Mr. Rehnquist carefully avoids suggesting that any of the court's commerce clause decisions in the last half century are inconsistent with this principle or with the ruling in *Lopez*, but every student of constitutional law will know otherwise.

If there has been a sure thing in constitutional law, a gift question on the exam, it is that Congress has been able to do whatever it likes in the name of commerce regulation.

...not considered radical in the nation that was the first to put that idea into practice.

### Wrong Focus

To the president and to many commentators in the media, the *Lopez* decision is about guns. To these people, the court's holding that the federal government may not regulate guns in schoolyards is all the more shocking in the wake of the Oklahoma City bombing.

To others, including the four dissenters, the case presents a “practical” problem of assuring that Congress has the power it needs to regulate anything and everything, no matter how tenuous

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## CIVIL LIBERTIES *By Harvey A. Silverglate*

# Is It Paranoia or Fear?

**W**E SHOULD hesitate before dismissing the message sent by the Oklahoma City terrorists and their supporters on the ground they are paranoid. At the core of most paranoid delusions is a piece of reality.

Not many Americans cheered that act of wanton slaughter. But anger at the excesses of the federal government has become widespread amid different segments of the population for different reasons. Those excesses were dramatically exemplified by the deadly encounters between agents of both the Federal Bureau of Investigation and Bureau of Alcohol, Tobacco and Firearms, and the Randall Weaver family at Ruby Ridge, Idaho, in 1992, and between the same agencies and the Branch Davidians at

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Waco, Texas, in 1993. Anger over Ruby Ridge and Waco is not confined to the “militias” that have sprung up in many states. Nor is it directed only at the occasional high-profile standoff, but also encompasses many seemingly routine governmental acts perceived as threatening to civil liberty.

To ignore the anger because it is shared by violent extremists would be an error of historic proportions. It is precisely at potential turning points in our constitutional democracy that perspective is required. Congressional legislation and Department of Justice/FBI guidelines that will expand federal investigative and prosecutorial power, at the expense of liberty, loom ahead of us.

Well before Oklahoma City, Congress had adopted the administration's Digital Telephony Initiative, requiring manufacturers and common carriers to shape digital telecommunications systems to

[SEE 'OKLAHOMA' PAGE A23]

# Women in Imminent Danger From

*By Michael G. Dowd* SPECIAL TO THE NATIONAL LAW JOURNAL

**T**HE “ABUSE EXCUSE” has become a catchy phrase describing a decline in moral values marked by circumstances in which otherwise guilty people use past victimization to seek absolution for their crimes.

The Menendez brothers, Lorena Bobbitt, abused women who slay their abusers and then hide behind the murky “battered woman's defense,” kids who kill because they saw too much violence on television, adults who lash out because of childhood injustices and women whose actions may be the product of factors such as PMS and postpartum depression all leap to mind as examples of

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# Anger at Government Is Not Limited to the Fringe

['OKLAHOMA' FROM PAGE A21]

facilitate wiretapping. The CIA and FBI are currently lobbying Congress to adopt "Clipper Chip," a computer encryption standard that would enable the government to decipher any coded message. Civil libertarians, industry leaders and scientists all have expressed concern about this effort.

The administration has been pushing its Omnibus Counterterrorism Act to do away with due process protections in deportation proceedings. There has been steady erosion of search and seizure protections over two decades, and changes in the Federal Rules of Evidence and the Sentencing Guidelines make unfair trials and sentences commonplace.

The administration seeks looser restrictions on the FBI's ability to monitor radical groups—a relaxation of the guidelines established in 1976 under Attorney General Edward Levi pursuant to a national consensus to protect domestic political or religious groups. Modified by the Reagan administration, these guidelines allow the bureau to begin an investigation "when facts or circumstances reasonably indicate" that the criminal use of force is planned to achieve political objectives.

This standard was meant to balance public safety and civil liberties in light of the history of the FBI's Cointelpro surveillance and "dirty tricks" programs of the '60s and '70s. (Anyone who deems the bureau incapable today of chicanery need look no further than the FBI's use of its informant in ensnaring Malcolm X's daughter, Qubilah Shabazz, in a seemingly fabricated plot.)

tion becomes criminal, and the statute makes an executive criminally responsible for violations by lower-echelon employees even where the executive was unaware of the violation.

Strict criminal liability has not, however, taken root everywhere. Attorney General Janet Reno, who admitted she personally approved the assault at Waco that led to the conflagration that killed over 80 people, neither resigned nor was prosecuted. FBI Agent Larry Potts, who as head of the FBI's Criminal Division had responsibility for the operation at Ruby Ridge, was later slated for promotion by FBI Director Louis Freeh, and was approved by Attorney General Janet Reno.

Wholly aside from the question of whether the government's *tactics* were lawful, nobody has suggested any legiti-

**To ignore the anger because it is shared by violent extremists would be an error of truly historic proportions.**

mate federal governmental interest that brought its agencies to Waco and Ruby Ridge in the first place.

Citizens prosecuted under the federal Racketeer Influenced and Corrupt Organizations Act know how easy it is for an innocent citizen to be swept up in massive indictments tried under loose rules in show trials lasting months and resulting in lengthy sentences. Victims of federal

forfeiture laws recognize that the Fifth Amendment's property protections are no match for government's confiscatory power; the Justice Department freezes assets and then forces victims to litigate without funds for counsel.

The feds have virtually supplanted state law enforcement of political corruption and have redefined acceptable state practices. Physicians have become

casualties of the "war on drugs," threatened with prosecution and loss of license by Drug Enforcement Agency bureaucrats who define "good-faith" narcotic treatment for intractable pain. The Internal Revenue Service long has had enormous power to enforce a tax code that even experts don't comprehend. (IRS overreaching caused the Supreme Court in *Cheek v. U.S.*, 111 S. Ct. 104 (1994), to rule that taxpayers are not guilty of criminal fraud if they believe they are acting lawfully.)

Victims of federal abuse have tended to see the problem narrowly, each concerned with his own niche. The newly elected Congress has been obsessed with trimming the sails of the regulatory state but has turned a blind eye to (and even has exacerbated) the excesses of prosecutorial power. To trim one without the other would elevate property interests while denigrating personal liberty, missing an historic opportunity to restore liberty to civil society across the board. ☐

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## Budding National Consensus

In the heat of national outrage, Congress debates whether the appropriate reaction to Oklahoma City is an increase in federal power. We risk arriving at the wrong answer. While the bombers appear paranoid about federal power, one perceives, nonetheless, a budding national consensus that indeed it should be curbed, not expanded. The last election suggested massive unhappiness with regulatory and tax excesses. Congress should, by now, have recognized that there is a long string of federal abuses that starts with the regulators and runs seamlessly across the spectrum of federal interests, including law enforcement.

Regulatory excesses have been the concern of businesses dealing with the alphabet soup of agencies involved with every aspect of our lives. Most of these agencies perform some necessary functions, but excesses abound. Of late, even the average citizen has complained; fear of regulatory overreaching is spreading to Main Street.

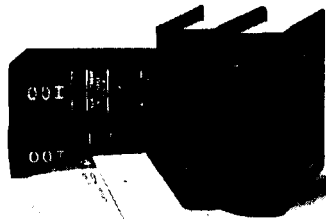
But now it is the law enforcement side of federal power that is attracting increasing concern throughout the community. "Ordinary" criminal defendants long have felt the largely unrestrained power of federal prosecutors, but, then, drug dealers, bank robbers and assorted villains never have attracted public sympathy. Nor has there been much sympathy among the general populace for the militias, which have cited the excesses of the FBI, ATF and other law enforcement units.

In recent times, however, this wariness has become increasingly common among more "respectable" citizens. As white-collar criminal defense practitioners can attest, a growing number of business people resent not only regulatory excesses, but also prosecutorial overreaching. Those prosecuted during the S&L and stock trading scandals of the '80s were aghast at how easy it was to criminalize ordinary business transactions. Investors have been ensnared by the Securities and Exchange Commission's refusal to define "insider trading" and its reliance on the in terrorem impact of selective prosecution.

Drug industry executives express dismay at how simple it is to run afoul of the food and drug laws; even a benign devia-

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