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Carrie Bowden's superb student Note[1] on dual sovereignty and federal court review of suppression issues epitomizes the best of what student law review work can bring to those of us in the non-academic legal community. In the first place, it gives a balanced and accurate view of the background and context of an important area of law. I often rely on student work of this nature for a better understanding of complex legal issues presented in the cases that come before me. Even more important, however, the Note proposes a novel solution for a troubling dilemma. Whether one accepts the proposed solution or not, one cannot help but be influenced by this fresh look at an issue that is often resolved by simple rote recitation of old precedent.

I know from my experience on the bench that the problem illuminated by the Note has intense practical application. In a recent case tried before me,[2] I was faced with a successive federal prosecution of a twelve-year-old triple homicide, initiated after state authorities had failed to obtain a conviction of the defendant at a trial in state court in 1992. State authorities charged the defendant with the murders, but prior to trial, the state judge suppressed the evidence from the defendant's automobile on the ground that the local police had unconstitutionally carried out the search, and the suppression was upheld on an appeal by the prosecutor.[3] Perhaps because there was no other physical evidence linking the defendant to the crime, the state jury acquitted him. The defendant testified in his own behalf and claimed that he had not been at the crime scene. Because of the earlier suppression, the state jury never knew of the evidence relating to the defendant's car.

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1. Carrie M. Bowden, Note, *The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996*, 60 WASH. & LEE L. REV. 185 (2003).

2. *See* United States v. Ealy, 163 F. Supp. 2d 633, 634 (W.D. Va. 2001) (describing results of the case in state court that led to federal prosecution).

3. *See* Commonwealth v. Ealy, 407 S.E.2d 681, 690 (Va. Ct. App. 1991) (affirming the lower court's decision to suppress evidence).

After additional investigation, the federal government reopened the case and indicted the defendant for committing the murders in furtherance of a continuing criminal enterprise—a federal offense.[4] The defendant's counsel again filed a motion to suppress.[5] I heard evidence similar to that previously presented to the state judge and reached a different conclusion as to the legality of the search and thus denied the motion to suppress.[6] Different views of the facts largely formed the basis for the conflicting decisions. The state judge had disbelieved the police officers who testified as to their method of entering the garage where they found the car,[7] while I found their testimony credible.[8] This time, with the evidence of the car not suppressed, a federal jury convicted the defendant of the murders.[9]

The American system of dual sovereignty has been a mystery, even to lawyers, since it was first introduced in our Constitution. James Madison, widely considered the father of the Constitution, if there is one, felt that his most important suggestion, and one that eventually failed, was to give Congress the express and unlimited power to invalidate any state law.[10] Although the Supremacy Clause [11] does give federal law preeminence within its jurisdic-

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4. 21 U.S.C. § 848(e) (2000). This statute reads:

> Any person engaging in or working in furtherance of a continuing criminal enterprise . . . who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results . . . shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

Id.; *see* United States v. Ealy, 2001 WL 855894, at *2 (W.D. Va. July 30, 2001) (denying motion to dismiss based on double jeopardy).

5. The procedures for obtaining the suppression of constitutionally inadmissible evidence prior to a criminal trial are similar under federal and Virginia law. *Compare* FED. R. CRIM. P. 12(b)(3) (stating that motions to suppress evidence must be raised by written or oral motion prior to trial) *with* VA. CODE ANN. § 19.2-266.2 (Michie 2000) (noting that motions to suppress "shall be raised by motion or objection, in writing, before trial").

6. *See* United States v. Ealy, 163 F. Supp. 2d 633, 637-38 (W.D.Va. 2001) (finding that defendant had no legitimate expectation of privacy in garage).

7. *See* Commonwealth v. Ealy, 407 S.E.2d 681, 685 (Va. Ct. App. 1991) (noting the trial court judge's disbelief of the officers' testimony).

8. *See Ealy*, 163 F. Supp. 2d at 635 ("I find that the officers are telling the truth about the search.").

9. *See* Jen McCaffery & Laurence Hammack, *Man Convicted in 1989 Killings*, ROANOKE TIMES & WORLD NEWS, Jun. 7, 2002, at B1 (reporting on federal jury's finding of guilt).

10. GARRY WILLS, JAMES MADISON 27–29 (2002).

11. U.S. CONST. art. VI, cl. 2. The Supremacy Clause reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

tion, judges have struggled ever since the adoption of the Constitution with the relationship between the courts of our dual sovereigns. The balance in this relationship has tilted one way or the other, largely depending upon the dominant judicial or political ideology of the time.[12]

It is entirely logical, as suggested in the Note, that federal deference to state court decisions in habeas corpus imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[13] ought to be balanced by such deference to other types of state court criminal determinations. The difficulty, as I see it, is that congressional mandate imposed the deference in habeas corpus. As a federal judge, I would have preferred that Congress not limit my ability to find the facts anew when a state prisoner asserts a constitutional claim. I see it as an appropriate part of my job to decide on my own whether continued imprisonment violates a state prisoner's federal constitutional rights. I have the highest respect for the state judiciary, particularly in Virginia, but the fact remains that the United States Constitution affords the federal judiciary an independence not typically present in most state judicial systems.

Nevertheless, I understand the practical and political motivations of Congress in requiring the deference imposed by AEDPA, including the fact that the flood of habeas corpus petitions from state prisoners was seen to have overwhelmed the ability of the federal judiciary to resolve such cases in a timely fashion. I might add that today, even after several years of the effects of Congress's restrictions on habeas corpus for state prisoners, my court—one of the smaller of the ninety-four federal district courts in our country—still employs three full-time staff attorneys to assist in the handling of habeas corpus cases, in addition to each judge's two regular law clerks.

On the other hand, Justice Department policy limits the circumstances under which federal authorities may bring successive prosecutions[14] and thus the occasions in which a federal court reviews de novo an issue previously resolved by a state court are relatively few in number. For this reason, per-

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> Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

12. *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 7–8 (2002) (commenting on the fluctuating role of the Supreme Court in the inherent tension between the states and the federal government under the Constitution).

13. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1218–19 (codified at 28 U.S.C. § 2254 (d) (2000)).

14. This is known as the so-called Petite Policy, discussed in Bowden, *supra* note 2, at 193.

haps, it is apparent that Congress has not been motivated to make any change in the existing law that permits such de novo review.

Of course, it is possible that the federal courts might apply the deferential habeas approach to other criminal determinations without legislative action, as suggested by the Note. The so-called Rooker-Feldman rule, for example, which prohibits the lower federal courts from reviewing state court decisions in civil cases,[15] is a judicially developed doctrine not found in statute. Carrie Bowden's Note may convince the federal courts to balance the scales of sovereignty in the manner she suggests. Regardless of the ultimate outcome, however, her splendid work will enrich the debate.

15. *See* United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995) (defining the Rooker-Feldman rule as "a combination of the abstention and res judicata doctrines, [that] stands for the proposition that a federal district court may not hear an appeal of a case already litigated in state court"); *see also* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983) (acknowledging that a United States district court has no authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings); Rooker v. Fid. Trust Co., 263 U.S. 413, 415–16 (1923) (finding that when the state court has both subject matter jurisdiction and jurisdiction over the parties, only the Supreme Court can entertain a proceeding to reverse or modify the judgment).