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Monuments and Memorials: Federal Criminal Law Protections

On June 26, 2020, President Trump issued an “Executive Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence” (June 26 Order). Among other things, the June 26 Order directed the U.S. Department of Justice (DOJ) to prioritize prosecutions under existing federal statutes protecting monuments, memorials, and statues. On July 3, 2020, President Trump issued an “Executive Order on Building and Rebuilding Monuments to American Heroes” (July 3 Order). The July 3 Order decried vandalizing or destroying national monuments and created an Interagency Task Force for Building and Rebuilding Monuments to American Heroes (Task Force). The July 3 Order also assigned the Task Force to “establish a statutory park named the National Garden of American Heroes (National Garden).”

This In Focus analyzes two federal criminal statutes that may protect monuments and memorials from removal or intentional damage, potentially including future monuments in the National Garden.

Congressional Power to Enact Federal Criminal Laws

Criminal law enforcement is an area where “States historically have been sovereign.” *United States v. Lopez*, 514 U.S. 549, 564 (1995). When Congress wishes to criminalize individual conduct, it may do so only as an exercise of its constitutionally granted authority. Although Congress’s legislative powers are broad, they are not unlimited. Courts have declined to uphold federal criminal statutes that do not require a sufficient jurisdictional nexus—that is, an element of the offense bringing it within the scope of Congress’s constitutional powers. *Id.*

The U.S. Constitution grants Congress several different powers that it may use to enact legislation. For example, Article I, Section 8 of the Constitution expressly authorizes Congress to legislate regarding counterfeiting, piracy, crimes on the high seas, offenses against the law of nations, and treason. The Commerce Clause is another significant source of legislative authority that undergirds many federal criminal statutes. Under its Commerce Clause powers, Congress may regulate three categories of activity: (1) “use of the channels of interstate commerce,” such as highways; (2) “instrumentalities,” such as vehicles used to carry out commerce, “or persons or things in interstate commerce”; and (3) activities that “substantially affect” interstate commerce, at least in the aggregate. *See Lopez*, 514 U.S. at 558–59. Congress also has authority under the Postal Power (Article I, Section 8, Clause 7) to regulate the use of the postal system. Additionally, Article IV, Section 3, Clause 2—the Property Clause—gives Congress the power to “make all needful Rules and Regulations respecting . . . Property belonging to the United States.” The Supreme

Court has explained that Congress’s Property Clause “power over the public land” is “without limitations.” *United States v. San Francisco*, 310 U.S. 16, 29 (1940).

When Congress creates federal criminal law by exercising one or more of its constitutional powers, those laws are generally enforced by the DOJ, which can prosecute violations of those laws in court, consistent with due process and other rights of the accused. The DOJ does not need specific authorization from the President or from any other entity to prosecute violations of federal criminal law. However, as the head of the Executive Branch, the President may set certain enforcement priorities and shape Departmental policy on the handling of such prosecutions.

Veterans Memorials

In certain circumstances, the Veterans’ Memorial Preservation and Recognition Act (VMPPRA) criminalizes the willful injury or destruction (or attempted willful injury or destruction) of “any structure, plaque, statue, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States.” 18 U.S.C. § 1369(a). A person convicted of violating this provision may be imprisoned up to 10 years, making the crime a felony. However, the applicability of this statute is limited in several important respects, as discussed below.

Limited Jurisdictional Circumstances. Section 1369(b) expressly limits the above-described crime’s applicability to two circumstances. *First*, § 1369(b)(1) covers instances when the offense involved interstate or foreign commerce or the mail. Specifically, the statute applies when the person committing the offense does so by (a) traveling, or causing someone else to travel, in interstate or foreign commerce; (b) using an “instrumentality” of interstate or foreign commerce, such as a car or truck; or (c) using the mail. Both (a) and (b) tie the conduct to Congress’s Commerce Clause power; (c) falls within Congress’s Postal Power. *Second*, § 1369(b)(2) makes the statute applicable when the monument in question “is located on property owned by, or under the jurisdiction of, the Federal Government.” This invokes Congress’s power under the Property Clause.

These circumstances are elements of the overall offense and must be proven in court. If a person willfully injures or destroys a monument commemorating service in the United States Armed Forces, but (a) does so without traveling in or utilizing any instrumentality of interstate commerce and without using the mail, and (b) the monument is not located on federal property, that person would not have violated the VMPPRA.

Willfulness. The use of the word “willful” indicates that the injury or destruction must be intentional. This would generally exclude accidental or negligent actions. For example, if a person lost control of a car due to slippery road conditions and hit a covered monument, they likely could not be prosecuted under the VMPRA, even if they caused significant damage.

Injury or Destruction. At least one court has suggested that mere removal and relocation would not constitute “injury or destruction” within the meaning of the statute. *See* Monumental Task Comm., Inc. v. Foxx (MTC), 259 F. Supp. 3d 494, 504 (E.D. La. 2017) (considering private challenges to local government’s planned removal of Confederate-era public monuments). Thus, if a monument is removed from its site of public display but remains fully intact, the removal may not violate the VMPRA. Similarly, covering a statue with fabric or projecting lights onto its surface may not be considered “injury or destruction” if no damage results. However, a monument arguably suffers injury when its intended context or message is changed, especially if that change is unauthorized.

On Public Property. This clause forecloses the applicability of the VMPRA to monuments located on *private* property.

Commemorating Service in the U.S. Armed Forces. This statutory language excludes monuments that do not honor the subject’s service in the U.S. Armed Forces. The decisive factor is not whether the subject ever served in the U.S. Armed Forces, but whether the monument specifically is memorializing that service. Thus, a statue honoring a person solely for contributions in another field—such as science or diplomacy—is not a covered monument even if that person also served in the U.S. military.

This clause of the VMPRA would seemingly exclude statues and memorials honoring Confederate soldiers, even if the subjects also served in the U.S. Armed Forces prior to the Civil War. Likewise, the VMPRA would not cover some of the proposed figures in the National Garden who did not serve in the military, such as Dolley Madison and Antonin Scalia. Some figures who served in the military, such as Ronald Reagan or Jackie Robinson, would be covered only to the extent the statues memorialize their service, rather than solely honoring nonmilitary accomplishments. Some indications that a memorial commemorates a subject’s military service may include the display of military uniforms or insignia or inclusion of military titles and accomplishments in an inscription.

Criminal Penalties Enforceable Only by the Federal Government. As noted above, the DOJ is responsible for enforcing federal criminal laws. Private citizens cannot use the VMPRA to challenge or prevent destruction of monuments (i.e., the VMPRA contains no private right of action). As one court explained when denying civil discovery on a VMPRA claim, “[d]ecisions whether to prosecute or file criminal charges are generally within the prosecutor’s decision. Private citizens have no standing to institute a federal criminal prosecution and no power to enforce a criminal statute.” *MTC*, 259 F. Supp. 3d at 504 (internal quotation marks omitted; alteration in original).

Federally Owned Property

Section 1361 of the *U.S. Code*, Title 18, provides criminal penalties against anyone who “willfully injures or commits any depredation against any property of the United States” or its agencies, or who “attempts to commit” such an offense. The statute also covers property being produced for the United States. If the offender causes damage exceeding \$1,000, the crime is a felony punishable by fines and up to 10 years in prison. If not, it is a misdemeanor punishable by fines and up to a year in prison.

This straightforward exercise of Congress’s Property Power is not as limited as the VMPRA. As an example, an attack on a federally owned monument that causes no damage is unlikely to be a violation of the VMPRA, but could still constitute a “depredation” against federal property and result in misdemeanor charges. This statute is also broadly applicable to buildings and other types of federal property, not just monuments. It could also apply to Confederate monuments, so long as they are federal property. However, as with the VMPRA, this statute is enforceable only by the DOJ, and not by private parties.

To the extent that the National Garden is established on federally owned property, and the statuary therein belongs to the federal government, this statute would appear to provide criminal penalties for any attempted damage to any of the statues, regardless of which person or persons they depict or in what context.

Options for Congress

Congress may pass additional measures to protect monuments, or it could further restrict the measures already in place. Congress could expand the applicability of the VMPRA (or enact separate legislation) to cover a broader set of monuments—for instance, all monuments honoring American citizens, or all statues in the National Garden.

In the opposite vein, Congress could add language to the VMPRA to expressly exempt injury or destruction carried out with the permission of the owner or relevant authority. This would avoid the possibility of the VMPRA being used to prosecute agents of state or local entities that choose to remove or destroy monuments within their control. Congress could also clarify whether or not it intends removal of monuments to constitute injury or destruction under the VMPRA, even if the monuments are not physically harmed.

Similarly, Congress may strengthen or weaken the federally owned property statute’s applicability or penalties. Outside the criminal law context, Congress could also examine the Task Force’s proposed funding sources for the National Garden, and legislate to support or stymie such funding. Regardless of Congress’s policy choices, any legislation may only prohibit activities within the realm of Congress’s constitutional authority.

Mainon A. Schwartz, Legislative Attorney

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