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Legal Sidebar

Congressional Authority to Enact Criminal Law: Female Genital Mutilation (FGM)

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18 U.S.C. § 116 proscribes female genital mutilation (FGM), a practice rooted in traditional or religious beliefs in certain parts of Africa, Asia, and the Middle East. Among other things, the federal statute (FGM statute) makes it a crime to knowingly circumcise, excise, or infibulate the labia majora, labia minora, or clitoris of a minor unless a medical exception applies. Though the FGM statute was enacted in the 1990s, it went essentially unused for over twenty years. Then, in April 2017, federal prosecutors brought charges under the statute in the Eastern District of Michigan against two physicians, medical support personnel, and several mothers who allegedly brought their daughters to the physicians for FGM procedures. In November 2018, however, the district court dismissed all of the FGM charges in that case—*United States v. Nagarwala*—on the ground that Congress lacked constitutional authority to enact a central piece of the FGM statute. The district court's decision and subsequent developments in the case have spurred significant commentary regarding Congress's legal options to restrict FGM and, more broadly, the limits of Congress's authority to enact criminal law. This Legal Sidebar accordingly provides a brief overview of Congress's power to enact federal criminal law, explores the district court's decision in *Nagarwala* and the current status of the case, and addresses possible amendments to the FGM statute that might pass constitutional muster.

Congressional Authority to Enact Criminal Law

Broadly, it is the states, and not the federal government, that "possess primary authority for defining and enforcing the criminal law." The reason for this is that states have "plenary police powers," while the Constitution establishes a federal government of only limited, enumerated powers. As such, any law enacted by Congress must be based on one or more of the explicit powers contained in that document. And the Constitution gives Congress explicit authority to enact criminal law in only certain narrow areas, related to things like counterfeiting and "Piracies and Felonies committed on the high Seas."

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Congress accordingly "cannot punish felonies generally." That said, the Constitution vests Congress with broader legislative powers under the Spending, Commerce, and Territorial Clauses (among others), as well as under the enforcement sections of the Civil War Amendments. Together with its authority to pass "all Laws which shall be necessary and proper for carrying into Execution" constitutionally enumerated powers, Congress can and does use specified powers to enact criminal prohibitions at the federal level. The constitutional authority for Congress to regulate interstate commerce, in particular, has been broadly construed and thus has become the primary source of power to enact federal criminal laws.

Even where Congress purports to act pursuant to an enumerated power, however, its authority is not unlimited. With respect to the Commerce Clause, the Court has recognized that, when Congress is not regulating the channels of interstate commerce or items in commerce, a rational basis must exist for concluding that the activity being regulated, in the aggregate, "substantially affect[s] interstate commerce." And to be "necessary and proper" to an enumerated power, legislation must be "rationally related to the implementation" of that power and "not [otherwise] prohibited" by the Constitution. Undergirding these limitations is the structural principle of federalism, i.e., that the Constitution embraces a "dual system of government" whereby Congress may not "obliterate the distinction between what is national and what is local." Thus, in the criminal law context, the Supreme Court has, for example, struck down a flat federal prohibition on the possession of firearms near schools, reasoning that reading the Commerce Clause to authorize regulation of such non-economic, intrastate activity would effect an impermissible "change in the sensitive relation between federal and state criminal jurisdiction" by "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States." More recently, in *Bond v. United States*, the Court interpreted a federal criminal law related to a chemical weapons treaty to avoid a broader constitutional question of whether the law was "necessary and proper" to the Constitution's treaty-making power, noting that reading the law to encompass the charged conduct in the case (attempted assault with commonly available chemicals) "would mark a . . . serious reallocation of criminal law enforcement authority between the Federal Government and the States."

The District Court Ruling in *Nagarwala*

The limits of Congress's power under the Commerce Clause and Necessary and Proper Clause were directly at issue in *Nagarwala*. The defendants in the case were charged with, among other things, conspiring to commit and committing (or aiding the commission of) FGM in violation of 18 U.S.C. § 116(a). The defendants moved to dismiss all of the FGM-related charges on the ground that Section 116(a) exceeded Congress's constitutional authority. In response, the government pointed to two constitutional bases for Congress to criminalize FGM: first, the government argued that the FGM statute was necessary and proper to effectuate an international treaty in accordance with Article II, Section 2, Clause 2 of the Constitution; and second, the government asserted that Congress was empowered to criminalize FGM by the Commerce Clause. With respect to the treaty power and Necessary and Proper Clause argument, the government relied on Supreme Court precedent reflecting that Congress may pass laws to effectuate treaties so long as the two are rationally related. Based on this precedent, the government contended that Section 116(a) is rationally related to provisions in the International Covenant on Civil and Political Rights that obligate signatories to ensure certain rights and "protection" for minors on a nondiscriminatory basis. With respect to the Commerce Clause, the government argued that Congress had a rational basis to conclude that the practice of FGM is a commercial activity—essentially a form of health care—for which there is a market and which therefore has a substantial effect on interstate commerce in the aggregate.

In a November 2018 decision, the district court sided with the defendants and dismissed the FGM charges after concluding that Section 116(a) unconstitutionally exceeded Congress's power to legislate. Regarding the government's treaty power argument, the court found no rational relationship between the general

nondiscrimination provisions of the relevant treaty and Section 116(a)—according to the court, "[t]he latter does not effectuate the purposes of the former in any way." Furthermore, the court held that even assuming a rational relationship, principles of federalism inherent in the structure of the Constitution prevented Congress from criminalizing FGM. On this point, the court relied on *Bond*, in which the Supreme Court commented on the relationship between Congress's authority to legislate with respect to treaties and federalism concerns by suggesting that congressional implementation of a treaty should "observ[e] the Constitution's division of responsibility between sovereigns and leav[e] the prosecution of purely local crimes to the States." In the *Nagarwala* court's view, *Bond* supported the conclusion that "FGM is local criminal activity which, in keeping with longstanding tradition and our federal system of government, is for the states to regulate, not Congress."

As for the government's Commerce Clause argument, the district court looked to Supreme Court and Sixth Circuit precedent establishing four factors to be considered in assessing the constitutionality of congressional action regulating activities that purportedly have a substantial effect on interstate commerce in the aggregate: (1) the economic nature of the activity; (2) a jurisdictional element limiting the reach of the law to a discrete set of activities that has an explicit connection with, or effect on, interstate commerce; (3) express congressional findings regarding the regulated activity's effects on interstate commerce; and (4) the link between the regulated activity and interstate commerce. Assessing these factors, the court determined that all four pointed towards Section 116(a) exceeding Congress's Commerce Clause authority. Regarding factors one and four, the court rejected the proposition that FGM is "economic or commercial activity" for which there is a "market" in interstate commerce, stating that it found no indication of FGM being provided as a service for money and viewed the practice as simply "a criminal act that 'has nothing to do with commerce or any sort of economic enterprise.'" Regarding factors three and four, the court noted that the FGM statute is accompanied only by generalized, "pro forma" congressional findings and does not "require any proof that the victims or the provider traveled in, or had any effect on, interstate commerce." Accordingly, the court concluded that Congress lacked constitutional authority under the Commerce Clause to pass Section 116(a) because, in the court's view, the statute is essentially an attempt to regulate "noneconomic, violent criminal conduct" without a rational basis to conclude the practice "has any effect, to say nothing of a substantial effect, on interstate commerce."

Having rejected both of the government's asserted bases for congressional authority to enact Section 116(a), the court in *Nagarwala* held the statute unconstitutional and granted the defendants' motion to dismiss all of the FGM-related counts against them.

Subsequent Developments

Following the district court's decision in *Nagarwala*, the government filed a notice of appeal to the Sixth Circuit. However, on April 10, 2019, the Department of Justice sent a letter to Congress notifying it that the Department did not intend to pursue the appeal. In the Department's view, it lacked a "reasonable defense of the provision, as currently worded." In other words, upon review, the Department concluded it agreed with the district court that Congress exceeded its constitutional authority when it enacted Section 116(a). That said, the Department's letter recognized "the importance of a federal prohibition on FGM committed on minors" and "urge[d]" Congress to "amend Section 116(a) to address the constitutional issue that formed the basis of the district court's opinion." Indeed, the letter included a legislative proposal for Congress's consideration that would include explicit (albeit brief) findings and establish in Section 116(a) textual links between FGM-related conduct and interstate commerce.

In light of the Department of Justice's decision not to defend the constitutionality of the FGM statute on appeal in *Nagarwala*, the House of Representatives filed a motion to intervene in the appeal on April 30, 2019. The motion argues that the House should be permitted to advocate for the constitutionality of its

enactments when the executive branch declines to do so, citing past examples where courts have permitted Congress to intervene (primarily in civil proceedings).

The Department and individual defendants have opposed intervention, however, on two primary bases. First, Article III of the Constitution limits the judicial power to "Cases" and "Controversies," which the Supreme Court has interpreted as requiring, among other things, that the parties be actually adverse and that the party asserting jurisdiction have suffered an injury fairly traceable to the counter-party's conduct that is likely to be redressed by the relief requested. Based on these principles, the Department and defendants argue that their agreement that the statute is unconstitutional and cannot be enforced against the defendants, coupled with the lack of a separate and sufficient injury to the House, means there is no "case or controversy" for the appellate court to address. Second, the Department asserts that because it has determined not to pursue criminal prosecution of the defendants under the FGM statute, permitting the House to stand in the Department's place for purposes of the appeal would usurp the executive branch's exclusive constitutional authority to enforce the law and exercise discretion as to who should be prosecuted. Underscoring its arguments, the Department has concurrently filed a voluntary motion to dismiss the appeal. For its part, the House has argued that (1) it has suffered a concrete injury to its power to legislate as an institution, and (2) it does not seek to engage in an executive function, but merely intends to advocate for the constitutionality of a law it passed so that the Department of Justice can decide whether or not to pursue charges. As of the date of this Sidebar, the appellate court has not ruled on the motions.

Implications and Options for Congress

It is not clear whether the appellate court will permit the House of Representatives to intervene in the *Nagarwala* appeal. As the Department of Justice points out, no rule of procedure expressly authorizes intervention by Congress in a criminal appeal, and the precedent for permitting even private parties to intervene in criminal prosecutions—which would not raise the same potential separation-of-powers concerns as congressional intervention in *Nagarwala*—is limited. That said, a federal statute, 28 U.S.C. § 530D(b)(2), does appear to contemplate the prospect of one or both houses of Congress intervening when the executive branch declines to defend an act of Congress, and the Supreme Court has remarked, albeit in dicta and under different circumstances, that "Congress is the proper party to defend the validity of a statute when an agency of government . . . agrees . . . that the statute is inapplicable or unconstitutional." The appellate court in *Nagarwala* may also need to address the applicability of the Supreme Court's June 2019 ruling that one house of a state legislature lacked standing to appeal a lower court decision deeming a state law to be unconstitutional. In that case, the Supreme Court rejected the proposition that "one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment."

In any event, assuming the Sixth Circuit denies the House's request to intervene or upholds the district court's decision on the merits, Section 116(a) could be effectively unenforceable in the short term. Though the district court's decision in *Nagarwala* is not binding on other courts, given the Department of Justice's position, as expressed in its letter to Congress, that there is a constitutional problem with the statute, it would appear the federal government will not continue to utilize Section 116(a) in future FGM prosecutions. Congress could amend the statute, however, to seek to remedy the ostensible constitutional defect identified in *Nagarwala*, and perhaps the most straightforward way to do this would be by tying the prohibited conduct more directly to Congress's Commerce Clause authority. Indeed, a separate portion of the FGM statute, which the *Nagarwala* decision appears to have left undisturbed, expressly prohibits knowingly transporting a person "in foreign commerce" to engage in FGM.

In this vein, as noted above, the Department of Justice has submitted a legislative proposal to Congress to amend the FGM statute in order to "ensure that, in every prosecution under the statute, there is a nexus to interstate commerce." The proposal would establish that FGM is a federal crime only when, among other

things, certain actions (such as an offer to perform FGM) are taken "in or affecting interstate or foreign commerce" or where the FGM "otherwise occurs in or affects" commerce. Similarly, a bill introduced in the 116th Congress would criminalize interstate travel in connection with FGM, though the bill would also retain the general prohibition on FGM struck down by the *Nagarwala* court.

Although a jurisdictional interstate commerce hook is only one of the considerations the Supreme Court has identified in assessing Congress's authority to enact legislation under the Commerce Clause, including one in the FGM statute "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce" and thereby obviate the constitutional issue raised in *Nagarwala*, particularly if coupled with express findings regarding FGM's effects on interstate commerce. Such was the approach Congress took in the wake of the Supreme Court striking down the aforementioned criminal prohibition on possessing firearms in school zones, with the new legislation expressly requiring a connection to interstate or foreign commerce. And courts subsequently recognized that this added textual requirement "resolve[d] the shortcomings" identified by the Supreme Court. Thus, although a jurisdictional hook could make certain prosecutions somewhat more difficult as a factual matter, Congress may wish to consider a similar course with respect to the FGM statute should the *Nagarwala* decision stand.

Amending the FGM statute in a way that seeks to ensure the provision is rooted in Congress's constitutional authority would not insulate the statute from constitutional challenge on other grounds, however. In particular, some commentators have questioned whether criminalization of FGM runs afoul of the Constitution's provisions for religious freedom and equal protection under the law given that comparably serious genital procedures for males (i.e., circumcision) remain legal. Thus far, given the dearth of FGM prosecutions, it does not appear that a challenge to the statute pursuant to these constitutional provisions has been substantively addressed by a federal court in a reported decision.