

RACKETEERING AND THE FEDERALIZATION OF CRIME

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The federal anti-racketeering effort has grown steadily since its inception in response to the lottery schemes of the late nineteenth century. Yet, as this article demonstrates, it has done so in the absence of a clear understanding of just what the problem is, and how the ever-expanding body of legislation is going to deal with it. While not wholly critical of the efforts of the Department of Justice and the Congress to "stamp out" racketeering, Professor Bradley raises substantial questions about the government's assessments of the scope of the problem and the effectiveness of the methods employed in fighting it.

"It appears that when the Congress does not seem to have anything else to do, we must meet here and make some more crimes."

—Statement of Congressman Young
concerning the 1934 anti-racketeering legislation

This is not an article about organized crime. For the purposes of this article it is assumed, as President Reagan, reflecting the view of virtually every government official who has ever addressed himself to the issue, recently stated: "[O]rganized criminal activity is a continuing threat to the domestic security of our nation. Illegal drug trafficking, gambling, extortion, pornography, fraud, and other crimes committed by highly-organized, well-financed criminal organizations take a tremendous toll on the criminal justice system and its resources."¹

To agree that a national problem of organized crime exists, however, is not necessarily to agree that the government's declarations as to its scope are accurate or that the methods used in fighting it are appropriate or effective.

This article is about those methods. It traces the history of federal anti-racketeering legislation back to the late nineteenth century when Congress acted under the

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1. Letter from President Reagan to Senator Thurmond (January 26, 1983), *reprinted in Organized Crime in America, Hearings Before the Comm. on the Judiciary, United States Senate, 98th Cong., 1st Sess. 3 (1983)* [hereinafter cited as *Organized Crime in America*].

commerce power to ban the interstate lottery business. This article follows the development of federal power through Prohibition, the Kefauver hearings and the Kennedy Administration up to present Justice Department proposals to limit the scope of the insanity defense and the exclusionary rule for the professed purpose of fighting organized crime. The article shows how the Justice Department and a compliant Congress have progressively increased the federal power to combat organized crime despite persistent doubts as to just what constitutes organized crime, what methods would be most effective in attacking it, and how useful the methods chosen actually have been. It is a chronicle of hope and frustration, transitory success, and ultimate failure. After a century of federal efforts to eliminate organized crime, the only certain result is that the federal bureaucracy dedicated to the elimination of the problem has grown exponentially.² As for organized crime itself, no one definitively knows what it is or how extensive its operations may be; consequently, attempting to assess its growth or diminution is pure speculation.³

This article discusses how the commerce clause has been eroded into meaninglessness by the expansion of federal laws directed at organized crime. Indeed, these statutes have at times been in the vanguard of the historical trend toward federalism, which has been accomplished largely through the commerce clause.⁴ The author does not purport either to decry or support that process; rather, these illustrations attempt to demonstrate the power of the organized crime issue as a political weapon, before which concerns about states rights, so tenacious in other contexts, have melted quietly away.

The growth of federal power in the area of organized crime may be regarded as a paradigm for the growth of federal governmental power in other areas. First, an evil is identified, i.e., crime, poverty, the Russian military, then an establishment is created to deal with and attempt to eliminate the problem. The vitality of that

2. Compare 78 CONG. REC. 451 (1934) (estimate that organized crime netted \$13 billion per year) with Miller, *A Federal Viewpoint on Combatting Organized Crime*, 347 ANNALS 93, 94 (1963) (1961 estimate that organized crime netted \$22 billion per year).

By 1967, some authorities estimated that organized crime received as much as \$50 billion in gross revenue from gambling alone. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME IN AMERICA 3 (1967) [hereinafter cited as PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE]. In 1983, Senator Thurmond declared that "\$80 billion in drugs [alone] is being trafficked in this country each year. . . . Organized crime drug sales volume ranks ahead of every major American corporation except Exxon and drug profits exceed those of every company in the entire United States." *Organized Crime in America*, *supra* note 1, at 1. In the author's opinion, none of these estimates is supported by any data, and, due to the inherently secretive nature of organized criminal activity, must be considered nothing more than wild guesses. See *infra* note 227. Still, guesses such as these have been the foundation for the ever-increasing federal bureaucracy which has grown to deal with the organized crime problem.

3. The FBI has grown from 239 employees in 1925, to 10,291 in 1950, and to 19,738 in 1980. See Federal Budget Hearings for FYs 1927, 1952 and 1982 respectively. According to President Johnson, 26 different federal law enforcement agencies participated in the anti-organized crime effort in 1965. MESSAGE OF THE PRESIDENT, *quoted in* H.R. Doc. No. 103, 89th Cong., 1st Sess. 4 (1965). In 1983, the Attorney General sought \$130 million for an additional 1600 agents and prosecutors to be devoted solely to the interdiction of the narcotics traffic. *Organized Crime in America*, *supra* note 1, at 34.

4. See Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 381 (1919) (discussion of impact of *Champion v. Ames*, 188 U.S. 321 (1903), on development of national police power) [hereinafter cited as Cushman].

establishment, however, depends upon the continued existence, and even growth, of the problem. Soon, whatever the actual scope of the problem, the establishment will tend to portray it as growing. Because the establishment also controls the statistical data as to the scope of the problem, a legislative body will have difficulty resisting requests for greater resources. Thus, a fundamental bureaucratic principle emerges: *failure is success*. That is, an ever-growing threat of crime, poverty or Russian militarism, or at least the perception of such a threat, is the lifeblood of the establishment's set-up to combat these problems.

The threat of organized crime as a basis for the growth of federal power has been a particularly enduring phenomenon. On and off for a century, this "alien conspiracy" has provided grist for the mill of ambitious congressmen and scandal-hungry journalists as well as the executive branch. While the bureaucracy developed to fight organized crime has indeed grown, it has not done so primarily of its own initiative. Rather, it has grown at the instigation of political figures and with the enthusiastic support of both the press and the courts. In terms of both longevity and unanimity of response, organized crime is unique as a governmental issue. The almost blind acceptance of federal initiatives in the face of this *threat* raises serious questions about how future threats will be dealt with.

I. THE EARLY LEGISLATION

While organized criminal activity in America is undoubtedly as old as America itself,⁵ the notion that the federal government ought to do anything about it is relatively recent. What might be considered the first federal organized crime legislation dealt with something which originally was not only legal but also a vital source of public revenue in eighteenth and early nineteenth century America—the lottery. Lotteries enjoyed widespread popularity throughout the first century of the country's existence and were used frequently by states and universities to finance worthwhile projects.⁶ The Continental Congress even held a lottery to raise \$1,005,000 to finance the Revolutionary War.⁷

Inevitably, mismanagement and cupidity on the part of the organizers, and public concern that the working man's hard-earned wages were being frittered away, led to increasing public opposition to lotteries.⁸ The Civil War delayed their abolition,⁹ but by 1878 lotteries were illegal in most states.¹⁰ Nevertheless, the Louisiana

5. See Tyler, *An Interdisciplinary Attack on Organized Crime*, 347 ANNALS 104, 107 (1963) (early settlers were plagued by pirates who sailed up navigable rivers of eastern seaboard and plundered plantations and villages).

6. J. EZELL, *FORTUNE'S MERRY WHEEL, THE LOTTERY IN AMERICA* 64, 71 (1960) (discussion of 1778 Massachusetts lottery worth \$750,000 to reward enlistments in Continental Army; 1788 lottery worth 550 pounds for benefit of Harvard College) [hereinafter cited as EZELL].

7. *Id.* at 62-64. The lottery was only a partial success. *Id.* at 65-78. In 1792, Congress authorized a lottery for improvement of Washington, D.C. in which the first prize was a hotel worth \$50,000. *Id.* at 102.

8. *Id.* at 107 (default on \$100,000 grand prize in another District of Columbia lottery held in 1820s). *Id.* at 205 (major factors leading to decline of lotteries were social effects and fraud).

9. *Id.* at 230-32 (states used lotteries to finance participation in Civil War).

10. *Id.* at 249; *Stone v. Mississippi*, 101 U.S. 814 (1879) (Mississippi's ban on lotteries upheld against claim of breach of contract as exercise of states' police power).

lottery, operated by a syndicate of New York gamblers and kept alive by liberal bribes to Louisiana legislators, continued to flourish, flouting the laws of the other states by selling chances through the mails.¹¹ While ninety-three percent of the lottery's business came from outside of Louisiana, the drawings were held in New Orleans under the auspices of the revered Civil War Generals Beauregard and Early, to insure "fairness."¹² Nevertheless, with great frequency, unsold tickets retained by the company came up winners, rather than those held by customers.¹³ Not surprisingly, the company prospered, with gross receipts rising to at least \$28 million and profits ranging from \$8 million to as much as \$13 million annually.¹⁴

In 1876, Congress denied the use of the mails to "any letters or circulars concerning lotteries. . . ."¹⁵ and on March 3, 1877, Attorney General Taft authorized the Post Office to exclude letters or circulars pertaining to legal as well as illegal lotteries.¹⁶ However, in 1878, after a visit to newly elected President Hayes by Charles Howard, one of the organizers of the lottery,¹⁷ the Justice Department, under Attorney General Devens, reversed itself and informed the Post Office that it had no power under the law to seize lottery materials.¹⁸

11. J. EZELL *supra* note 6, at 247-49. In 1864, the Louisiana legislature authorized the granting of licenses to carry on lotteries and in 1868, the Louisiana Lottery Company was given a monopoly to operate in the state in exchange for an annual fee of \$40,000 (plus bribes). Alwes, *The History of the Louisiana Lottery Company*, 27 LA. HIST. Q. 964, 973-74 (1944) [hereinafter cited as Alwes].

12. J. EZELL, *supra* note 6, at 247-49.

13. *Id.* Only 52% of the amount paid in was returned in prizes, compared with 85% in other contemporary lotteries. Alwes, *supra* note 11, at 986.

14. J. EZELL, *supra* note 6 at 249. The \$8 million figure was offered in Congress by Representative Evans of Tennessee, 21 CONG. REC. 8706-13 (1889-90), but is misleading in that it assumed that all prizes were awarded. Actually, as noted above, many were not and the company's true profits were greater. J. EZELL, *supra* note 6, at 254. Probably more accurate is the estimate of a \$13 million (47%) profit. 12 FORUM 555 (1982).

15. Act of July 12, 1876, ch. 186, § 1, 19 Stat. 90 (1876). The earlier Act of June 8, 1872, ch. 335, § 149, 17 Stat. 297 (1872), had forbidden the use of the mails to "illegal" lotteries, but because the Louisiana Lottery was not illegal under Louisiana law, the Act had no effect on the lottery. The 1876 statute remedied that defect. The Supreme Court upheld the statute, under the post office power, in *Ex parte Jackson*, 96 U.S. 727, 732 (1877). Senator West of Louisiana predicted, prophetically, that if the Act were passed, "there will be no end whatsoever to the jurisdiction of Congress over the morals of the people in their state enactments." 4 CONG. REC. 4262 (1876). See also Act of July 27, 1868, ch. 246, § 10, 15 Stat. 194 (1868).

In 1872, Congress also enacted the first mail fraud statute, which forbade use of the mails for the purpose of effectuating "any scheme or artifice to defraud. . . ." Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (1872) (codified as amended at 18 U.S.C. § 134 (1982)). While this statute was not intended specifically to be a racketeering statute, it has come to be a major vehicle for the prosecution of white collar and, to a lesser extent, organized crime. See Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980). This statute is another important example of the federalization of crime. *Id.* at 772-73.

16. 15 Op. Att'y Gen. 203 (1877). These seizures by the Post Office were upheld in federal court in *Commerford v. Thompson*, 1 F. 417 (D. Ky. 1880) in which the court refused to enjoin the Postmasters of Louisville, Kentucky from detaining mail addressed to the organizers of the Louisville lottery.

17. Alwes, *supra* note 11, at 992.

18. 16 Op. Att'y Gen. 5 (1878). The Attorney General claimed that the only remedy provided in the statute was a fine or imprisonment of the offender. *Id.* at 6.

Enforcement of the anti-lottery law having been effectively abandoned, the lotteries used the mails for the next twelve years with impunity. Finally, after receiving complaints that the large volume of lottery mail was demoralizing the Post Office, and facing a strong national anti-lottery movement, President Harrison sent a special message to Congress in 1890 asking for "severe and effective legislation . . . to purge the mails of all [material] relating to the business."¹⁹ A new law specifically forbidding the Post Office to carry mail pertaining to lotteries, including delivery of mail to an agent of a lottery, was enacted on September 19, 1890.²⁰ This was followed by the Louisiana legislature, under severe pressure from anti-lottery forces,²¹ finally voting to prohibit the lottery on December 31, 1893,²² despite the fact that the lottery had offered to pay the state one and a quarter million dollars annually if it could continue to operate.²³ Undaunted, the company moved the lottery to Honduras, used an express company instead of the mails, and established clerical offices in Port Tampa City, Florida, under a loophole in the Florida anti-lottery law that permitted legitimate business connected with a lottery, though not a lottery itself, to be conducted in the state.²⁴

Amid another storm of public protest,²⁵ Congress returned to the fray, motivated by the view expressed by Senator Maxey some years earlier, "I regard this lottery as one of the greatest curses that ever was inflicted upon the American people. It fosters and encourages gambling and vice; it is ruining many of the poorer

This is a strained reading of the statute in view of the fact that none of the prohibitions in the same title (such as the prohibition against mailing obscene books) specifically called for seizure, yet the concluding section of the title provides that "[all] letters etc. which may be *seized* for violation of law shall be returned to the owner or reader of the same, or otherwise disposed of as the Postmaster General may direct" (emphasis added). Rev. Stat. § 3895 (1873).

19. IX MESSAGES AND PAPERS OF THE PRESIDENTS OF THE UNITED STATES 80-81 (J. Richardson ed. 1921).

20. Act of Sept. 19, 1890, ch. 908, § 3894, 26 Stat. 465 (1890). Two agents of the Louisiana Lottery, Dupre and Rapiere were arrested under the statute and petitioned directly to the Supreme Court for habeas corpus. *In re Rapiere*, 143 U.S. 110, 112 (1892). In a unanimous opinion, the Court denied the writs and upheld the power of Congress, under its authority to regulate the postal system, to exclude lottery matter from the mail. *Id.* at 133-34.

21. Typical of the public sentiment was the following article from the NORTH AMERICAN REVIEW:

The demoralization flowing from these schemes has entered the marts of trade, honeycombed commercial institutions, and undermined the stability of banking corporations. Our young men are rendered dishonest and ruined by thousands each year. Many a beautiful home has been wrecked by the downfall of a once honored father and husband. A blight has fallen upon public interests. Disorder and crime run rampant, while the ceaseless miasma arising from these putrid streams poisons the atmosphere which surrounds the rising generation.

154 N. AM. REV. 217 (Feb. 1892).

22. See J. EZELL, *supra* note 6, at 265-67.

23. *Id.* at 256.

24. 26 CONG. REC. 2356-57 (1894). This loophole was created by the Florida Legislature after a strict anti-lottery prohibition was added to the Florida constitution. See 49 OUTLOOK 259-60 (1894).

25. During the Second Session of the 53rd Congress (1893), 156 abolition petitions were presented to Congress. See J. EZELL, *supra* note 6, at 268. The OUTLOOK reported mass meetings in New York and demanded from Congress "an enactment prohibiting under the heaviest penalties the bringing of lottery matters without our territory." 48 OUTLOOK 883 (1893).

portion of the community.”²⁶

On February 15, 1894, Senator Hoar introduced a bill which made it a crime to “cause to be brought into the United States from abroad for the purpose of [mailing] or [to be] carried from one State to another in the United States any paper, certification or instrument” having anything to do with a lottery.²⁷ This bill was specifically aimed at the Louisiana lottery.²⁸ After considerable delay engendered by several Congressmen,²⁹ both Houses finally passed the bill on March 2, 1895.³⁰

In 1899, C. F. Champion was arrested in Chicago for conspiracy to deposit a batch of lottery tickets of the Pan American Lottery Company of Ascuncion, Paraguay,³¹ with Wells Fargo in Dallas, Texas, for shipment to Fresno, California.³² The *Lottery Case*³³ arose from Champion’s appeal from the dismissal of his writ of *habeas corpus* by the Circuit Court of the Northern District of Illinois.³⁴

The most striking feature of the Supreme Court’s 5–4 decision is that the majority opinion is laced with the same moralistic view of lotteries which had influenced Congress. The Court refers to the “widespread pestilence of lotteries” which “preys upon the hard earnings of the poor [and] plunders the ignorant and simple.”³⁵ It concludes that “we should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end,” Congress.³⁶

It is this moral foundation that makes the legislation, and the opinion approving it, so important. Congress was not regulating commerce for the purpose of protecting commercial transactions but for the purpose of protecting the public morals. No previous case had recognized such a power under the Commerce Clause. Congress was thought to have broad powers over peculiarly federal matters such as the Post Office,³⁷ and to have the ability to protect interstate commercial transactions from interference by the states.³⁸ The Court had explicitly noted in *Ex parte Jackson*, however, that “Congress [does not possess] the power to prevent the

26. See 4 CONG. REC. 4262–63 (1876).

27. 26 CONG. REC. 4312–14, 4986, 7941, 8129 (1894); 27 CONG. REC. 3012, 3039, 3100, 3144 (1895).

28. “The Louisiana lottery is an American institution to-day, a Florida institution, . . . that is, they go out to sea, or to Cuba or, to one of the West Indies islands, and actually do their drawing. . . but the control, the management, the information, the attraction all come from American soil.” 26 CONG. REC. 4314 (1894) (remarks of Senator Hoar).

29. The Congressmen were ostensibly concerned that the bill would prevent churches from raising money through bingo games and similar activities. *Id.* at 4313 (remarks of Senator Gorman). Because churches formed the strongest anti-lottery lobby, see J. EZELL, *supra* note 6, at 269, the motives of these Congressmen must be suspect. 26 CONG. REC. at 4313.

30. Act of March 2, 1895, ch. 191, § 85, 28 Stat. 963 (1895) (codified as amended at 18 U.S.C. § 1301 (1948)). The Supreme Court in *Champion v. Ames*, 188 U.S. 321, 355 (1903), erroneously refers to this as the Act of May 2, 1895.

31. Pan American was independent from, but obviously inspired by the success of the Louisiana lottery’s Honduras operation.

32. *Champion v. Ames*, 188 U.S. at 322.

33. The *Lottery Case* is properly known as *Champion v. Ames*, 188 U.S. 321.

34. *Id.* at 324.

35. *Id.* at 356 (quoting *Phalen v. Virginia*, 8 How. 163, 168 (1850)).

36. *Champion v. Ames*, 188 U.S. at 357–58.

37. *In re Rapier*, 143 U.S. at 110; see also *Champion v. Ames*, 188 U.S. at 357 (Fuller, C. J., dissenting).

38. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

transportation in other ways, as merchandise, of matter which it excludes from the mails."³⁹ Thus, *Champion v. Ames*⁴⁰ created a new federal police power which was to be the basis for future legislation aimed at organized criminal activity, as well as for federal regulation of impure foods⁴¹ employees' wages and hours⁴² and many other matters. As broad as *Champion* was, however, it did emphasize that the statute involved was limited to actual interstate shipment of lottery materials⁴³ and that "Congress only supplemented the action of those states" which had already declared lotteries illegal.⁴⁴

The fundamental assumption upon which the legislation and the Supreme Court decision were based—that Congress was "the only power competent"⁴⁵ to deal with the problem—was certainly erroneous. Matters such as unfair competition among the states and interference with the shipment of goods from state to state require congressional intervention because each state, acting in its own narrow interest, may stifle the trade of the nation.⁴⁶ That consideration was not present in *Champion*. Had Texas wished to prohibit the shipment of lottery materials by Texas express companies, it could have done so, as California could have prohibited their receipt by California companies. Florida similarly could have thrown the rascals out of Port Tampa City in short order. It was not the *inability* of the states to act but their *unwillingness*, for whatever reasons, which led to the federal action to eradicate what was perceived by the federal authorities as a moral wrong, not as a threat to commerce. This is a theme which will be constantly repeated in the legislation discussed in this article.

Another aspect of the lottery incident deserves mention: lotteries were eradicated because they had acquired a bad name and lost the support of a majority of the public. However, as the government was frequently to remind the Congress and the people throughout the twentieth century,⁴⁷ the "plundering of the ignorant and simple" through gambling was hardly eliminated. People who wanted to gamble away their hard earned wages still found many outlets—from the local numbers games and bookie joints to legal and illegal casinos. The necessarily highly publicized and interstate nature of the Louisiana Lottery made it easy to stamp out, but there is

39. *Ex parte Jackson*, 96 U.S. at 735 (dictum); see also *Henderson v. Mayor*, 92 U.S. 259, 268 (1875); *Minnesota v. Barber*, 136 U.S. 313, 320 (1889).

40. 188 U.S. 321 (1903).

41. *Hippolite Egg Co. v. United States*, 220 U.S. 45 (1911).

42. *United States v. Darby*, 312 U.S. 100 (1941). For a discussion of the early decisions in this area, see Cushman, *supra* note 4, at 381-412 (approving extension of commerce power).

43. *Champion v. Ames*, 188 U.S. at 357 ("Congress... does not assume to interfere with traffic or commerce within the limits of any State..."). But see *United States v. Perez*, 402 U.S. 146 (1971) (discussed *infra* note 268).

44. *Champion v. Ames*, 188 U.S. at 321.

45. *Id.* at 357-58.

46. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (New York grant of monopoly to steamship company increased price of interstate shipments and unconstitutionally burdened interstate commerce).

47. In 1967 the President's Task Force on Organized Crime estimated that the gross revenues of organized crime from gambling raised from \$7 to \$50 billion annually. Added to this is about \$5 billion annually in legal contract betting, the take of the Nevada casinos and private wagers. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *supra* note 2, at 3. These profits make the \$8 million profits of the Louisiana Lottery seem paltry indeed. See *supra* note 14 and accompanying text.

no evidence that the problem of gambling was reduced one iota.⁴⁸

No sooner had the scourge of lotteries been supposedly eradicated by federal legislation than another evil sprang up to fill the seemingly insatiable appetite of the American working class for vice and the equally insatiable desire of the American middle class to stamp it out. This was the so-called white slave trade which was described by the United States Immigration Commission in its report to Congress in 1909 as follows:

This importation of women for immoral purposes has brought into the country evils even worse than those of prostitution. In many instances the professionals who come here have been practically driven from their lives of shame in Europe on account of their loathsome diseases. . . . This traffic has intensified all the evils of prostitution which, through the infection of innocent wives and children by dissipated husbands and through the mental anguish and moral indignation aroused by marital unfaithfulness, has done more to ruin homes than any other single cause.⁴⁹

It was a significant problem around the turn of the century that young women, from rural America and from foreign countries, came to the large American cities, either on their own or through inducements offered by procurers, and, for want of any alternative means of livelihood, turned to a life of prostitution. However, they were normally *slaves* only in the sense that, as the Immigration Commission reported with regard to aliens, ignorance of the language and customs of the country and/or lack of friends “[made] it practically impossible for them to escape.”⁵⁰ Moreover, many of the women were simply prostitutes who came to America, along with many other refugees, to make a better living for themselves.⁵¹ There was no question but that these houses of prostitution existed only at the sufferance of the local police.⁵²

As in the *Lottery Case*, there was a powerful public reaction to the white slave trade based upon a combination of xenophobic fear of undesirable aliens,⁵³ a Vic-

48. “Law enforcement officials agree almost unanimously that gambling is the greatest source of revenue of organized crime.” PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *supra* note 2, at 2.

49. F. CORDASCO, *THE WHITE SLAVE TRADE AND THE IMMIGRANTS* 47, 58 (1981) (quoting S. DOC. NO. 196, 61st Cong., 2d Sess. (1909)) [hereinafter cited as F. CORDASCO].

50. F. CORDASCO, *supra* note 49, at 72–73. There were undoubtedly many instances where individual women were brutalized, as is still true of prostitutes; nevertheless, the principal means of both obtaining and maintaining these women clearly was inducement, not coercion.

51. The Immigration Commission found that “[i]n a large majority of cases, probably the women imported . . . have already been leading an immoral life and are brought to this country to continue the life begun abroad. In many instances they believe that they can greatly improve their conditions, even though they recognize the power of the procurer.” *Id.* at 54 (many made ten times wages earned in Europe).

52. *Id.* at 75, 79.

53. The Commissioner General of Immigration reported that “the purpose of the United States immigration laws is to prevent the introduction into the United States not only of innocent girls who have been seduced into a life of prostitution, but of all girls and women of sexually immoral class.” F. CORDASCO, *supra* note 49, at 26 (quoting 1909 COMMISSIONER OF IMMIGRATION, ANN. REP. 116–117).

torian revulsion against the immoral practice of prostitution,⁵⁴ and, to a lesser extent, a genuine concern for the welfare of the women.⁵⁵ Congress, believing along with the rest of the country that there was "an *organized system or syndicate* having for its purpose the importation of women from foreign countries to Chicago and other cities in the United States for immoral purposes,"⁵⁶ began legislating against the problem. In 1875, acting under its power to regulate immigration,⁵⁷ Congress enacted a statute which forbade the "importation into the United States of women for the purpose of prostitution."⁵⁸ In 1907, Congress went even further, providing that anyone who kept any alien woman "for the purpose of prostitution or any other immoral purpose. . . within three years after she shall have entered the United States" was subject to penalties; moreover, any alien woman who practiced prostitution within three years was subject to deportation.⁵⁹

Joseph Keller was convicted of violating this statute for keeping a Hungarian woman for the purpose of prostitution within three years of her arrival in the United States and was sentenced to eighteen months imprisonment. The Supreme Court reversed his conviction.⁶⁰ While acknowledging the power of Congress to control the "coming in or removal of aliens," the Court held that an immigration measure which attempted to control aliens' behavior for three years after their arrival was an exercise of the police power which was reserved to the states.⁶¹

54. See *infra* note 64 and accompanying text.

55. *E.g.*, The Women's Christian Temperance Union expanded their concerns to include lobbying for the welfare of these unfortunate women. F. CORDASCO, *supra* note 49, at 3.

56. H.R. REP. NO. 47, 61st Cong., 2d Sess. 12 (1901) (emphasis added). The belief that a vast international organization controlled the white slave trade was widely held. According to the House Report,

[t]his belief ran parallel in time to the popular acceptance of the existence of a vast Black Hand Criminal organization among Italians. Both added to the growing hostility to the so-called "new" immigration, especially the Jews and the Italians. Together, in their day, they provided what Thomas Beer called "the demonic shape essential to American journalism."

F. CORDASCO, *supra* note 49, at 25.

57. See U.S. CONST. art. I, § 9, cl. 1 (limiting Congress' power to restrict immigration prior to year 1808); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 289 (1904).

58. Act of March 3, 1875, ch. 141, § 3, 18 Stat. 477 (1875). This was superseded by the Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213 (1903), which was to the same effect.

59. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 89 (1907).

60. *Keller v. United States*, 213 U.S. 138 (1909).

61. *Id.* at 144.

While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether to punish therefore is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power [and consequently is reserved to the State].

Id. Justice Holmes, joined by Justices Harlan and Moody, dissented, arguing that "Congress may require, as a condition to the right to remain in this country, good behavior for a certain time, in matters deemed by it important to the public welfare and of a kind that indicates a preexisting habit that would have excluded the party had it been known." *Id.* at 150.

In an earlier case, *United States v. Bitty*, 208 U.S. 393 (1908), the Court had upheld

Having been thwarted by a lack of adequate power under traditional constitutional provisions, as in the *Lottery Case*, Congress was forced again to turn to the commerce clause. Congressman Mann of Illinois introduced a bill "to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls."⁶² The House Report accompanying the bill averred that "legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers."⁶³ In all of the previous discussions of the "white slave trade" in Congress, the "villainous interstate traffic" had not been mentioned—the problem was seen as being primarily one of undesirable aliens entering the country (which Congress had the authority, if not the ability, to prevent) combined with country girls coming to the cities. The fact that no mention is made of why some of those country girls might have traveled interstate added to the problem. Indeed, it is obvious that the problem could have been quickly eradicated by effective enforcement of existing state and local laws against prostitution. The House Report rather clearly indicates that the interstate travel aspect of the bill was added simply to fit it within the new federal jurisdiction established by *Champion v. Ames* and to overcome the jurisdictional barriers raised by *Keller*,⁶⁴ rather than because interstate travel was essential to the offense, made the problem worse, or made enforcement more difficult. The real motivation for the legislation was simply that Congress considered it good politics to take a stand against immorality. Reflecting the public sentiment, Congressman Gillespie of Texas declared that he was going to vote for the legislation despite his doubts about its constitutionality because "the meanest blackest crime that ever was instilled into the human heart by the devil himself is the crime of trafficking in the virtue and chastity of women."⁶⁵

the 1907 Act as applied to an individual, arrested at the time of importation, who brought in a woman to be his private mistress on the ground that it fell within the statutory language which prohibited importing a woman for "prostitution, or for any other immoral purpose." *Id.* at 398 (emphasis by the Court). No challenge was made to the power of Congress in this case. It was simply a matter of statutory interpretation.

62. H.R. 12315, 61st Cong., 2d Sess. (1910). The bill was enacted June 25, 1910, ch. 395, 36 Stat. 825-827 (codified as amended at 18 U.S.C. §§ 2421-2424). This was one of twelve bills on the subject introduced in this session of Congress. Another bill, H.R. 15816 (the only other bill which was enacted) was introduced by Congressmen Howell and Bennet. The purpose of this latter bill was to amend the Immigration Act to circumvent the *Keller* decision by removing the three year limit and simply providing that anyone who imported an alien for the purpose of prostitution or other immoral purposes or who kept an alien for that purpose "in pursuance of such illegal importation" was guilty of felony. Act of March 26, 1910, ch. 128, § 2, 36 Stat. 263 (codified as amended at 8 U.S.C. § 1328). No one has been prosecuted under this provision for 70 years. See 8 U.S.C.A. § 1328 note.

63. H.R. REP. No. 47, *supra* note 56, at 9-10. The report went on to conclude that "the evil is one which cannot be met comprehensively and effectively otherwise than by the enactment of *federal laws*." *Id.* at 10 (emphasis added). But no statement appears as to why interstate transportation aggravated what would seem to be an essentially local problem.

64. *Id.* at 4, 6-8.

65. 45 CONG. REC. 546 (1910) (Congressman Gillespie referring to related statute concerning

Thus, the Mann Act differed from the lottery legislation in two significant ways. First, as the House report frankly admitted, it was not designed to supplement state laws which, due to jurisdictional limitations, were being thwarted by enterprising malefactors.⁶⁶ Interstate travel was not an essential or even important part of the prostitution business, whereas interstate shipments were crucial to the success of the offshore lotteries.⁶⁷ Second, the Act was much more a regulation of private activity—personal travel—than was the conduct forbidden in the lottery cases—depositing lottery material in the mails or carrying it state to state. Given the manner in which the lotteries were run, it was reasonable to suppose that closing the avenues of interstate commerce would have the effect of eliminating the activity because the Post Office and the express companies could be expected to comply with the statute. No one supposed that forbidding interstate travel to prostitutes would have the effect of eliminating such travel, much less of eliminating prostitution. Thus, as was to become the pattern in later years, the Act provided federal jurisdiction to demonstrate that Congress was *doing something* about the problem, even though the problem was not in fact amenable to solution at the federal level.

Despite these extensions of federal jurisdiction embodied in the Act, the Supreme Court had no difficulty in unanimously upholding the conviction of one who had “knowingly persuade[d], induce[d] and entice[d]” a woman to travel from Beaumont, Texas, for the purpose of prostitution.⁶⁸ The Court relied on *Hippolite Egg Co. v. United States*⁶⁹ in holding, in effect, that just as Congress may bar adulterated foods from interstate commerce, so may it bar adulterated women.⁷⁰

While the analogy is facile, it is not completely satisfying if the states’ police power is thought to have any independent constitutional basis, as the early cases had indicated.⁷¹ If the state police power may only be augmented by the federal government where, due to limits on state jurisdiction, it is ineffective (as *Champion* had held) then there is no basis for exercising it in the case of prostitution. Unlike regulation of food and drugs, where separate rules by each state would lead to gross

immigration, H.R. 15816). Another Congressman, Sims, found it inappropriate to “haggle and higgler over a constitutional provision” in light of these “horrible facts.” *Id.* at 811.

66. *Id.*

67. Of course, as previously argued, the lottery business could also have been stamped out by the states but there, at least, the use of interstate commerce facilities was the *sine qua non* of the offense.

68. *Hoke v. United States*, 227 U.S. 308, 317 (1913). The defendant operated a house of prostitution in Beaumont. *Id.* The alleged victim was a New Orleans prostitute. *Id.* at 325.

69. 220 U.S. 45 (1911).

70. *Hoke v. United States*, 227 U.S. at 322–23. After drawing this analogy, the Court acknowledged that “women are not articles of merchandise” but “this does not affect the analogy. . . .” *Id.* at 323. As for the argument that this statute impinged on individual freedom of travel, the Court acknowledged that “men and women have rights” but held that “their rights cannot sanction their wrongs.” *Id.*

71. *Gibbons v. Ogden*, 22 U.S. 1, 203–04 (1824) (discussing theory that morality, life, pauperism, crime are not things to be regulated by United States, but are things to be prohibited by “the States”). See also *New York v. Miln*, 36 U.S. 102, 133 (1837) (New York reporting requirements for arriving vessels valid exercise of police power); *Patterson v. Kentucky*, 97 U.S. 501, 505 (1878) (Kentucky standards for inspection and regulation of illuminating oil within purview of state police power). These cases were cited during the Congressional debate over the white slave legislation as clearly indicating that the Act was an overextension of federal power. 45 CONG. REC. 520–21 (1910).

inefficiency and confusion and have the effect of stifling interstate commerce, prostitution is clearly amenable to state regulation. Moreover, because states have little incentive to regulate goods which will be sold out of state, the need for federal action in that area is more apparent than in *Hoke*. Thus, *Hoke* represented a further extension of federal power into an area where federal action was not necessary to effective enforcement, but was simply desired because the states were not doing the job. Finally, unlike the Lottery Act which was little used after its enactment, the Mann Act has enjoyed a vigorous life, allowing ever-vigilant federal officials to prosecute a Mormon for having two wives,⁷² a man for having a mistress,⁷³ and a man *and* a woman (she for conspiracy) who were "living in sin,"⁷⁴ all because these people made the cardinal mistake of crossing a state line.

Another act of the pre-prohibition period which was significant in the development of federal jurisdiction was the National Motor Vehicle Theft Act, popularly known as the Dyer Act.⁷⁵ This Act prohibited the transportation in interstate or foreign commerce of a motor vehicle by anyone who knew the same to be stolen.⁷⁶ The Report of the House Judiciary Committee summarized the problem:

There has been and is now a widespread demand for such a law. State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one state to another and oftentimes have associates in this crime who receive and sell the stolen machines.⁷⁷

While the principal difficulties presented by interstate transportation of a motor vehicle would seem to be detection and apprehension, the Dyer Act was not aimed at solving those problems.⁷⁸ No one supposed that the miniscule and disorganized Federal Division of Investigation of 1919 (now known as the FBI) would be able to play any substantial role in catching car thieves.⁷⁹ Rather, the Act was for the "purpose of giving some jurisdictional authority to bring witnesses from one state to another. You can not do that under existing law."⁸⁰ If this was the end sought, a more obvious means to it would have been simply to promote an interstate compact on witnesses; the states would agree with one another to render up witnesses just as they did with defendants under extradition laws.⁸¹

Instead, Congress returned to the Commerce Clause, not to protect commerce

72. *Cleveland v. United States*, 329 U.S. 14 (1946).

73. *Caminetti v. United States*, 242 U.S. 470 (1917).

74. *Corbett v. United States*, 299 F. 27 (10th Cir. 1924).

75. Act of October 29, 1919, ch. 89, 41 Stat. 324 (1919) (codified as amended at 18 U.S.C. § 2312 (1979)).

76. *Id.*

77. H.R. REP. NO. 312, 66th Cong., 1st Sess. 1 (1919). The report further found that theft insurance rates had doubled in recent years for inexpensive cars, which were the principal targets of these theft rings. *Id.* at 4.

78. 58 CONG. REC. 5474 (1919).

79. *Id.*

80. *Id.*

81. This was later advocated by the Justice Department as a solution to the problem of both errant suspects and witnesses. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME 167 (1934).

but, as in the Mann Act, simply to use the interstate aspect of crime as the basis for federal jurisdiction. Unlike the Mann Act, however, the interstate transportation of stolen vehicles really was a vital part of the problem because it made apprehension of the criminals and recovery of the vehicles much more difficult (though, as noted, the Dyer Act did nothing to alleviate these problems). Nevertheless, the Supreme Court had no difficulty in unanimously upholding the statute, based on its earlier decisions:

Elaborately organized conspiracies for the theft of automobiles . . . have roused Congress . . . [Q]uick passage of the machines into another State helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates . . . [disposal] of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation. . . .⁸²

While the Dyer Act did not break any new ground in the development of the jurisdictional authority of the federal government, it proved to be vital in the exercise of that authority. Despite the fact that detection and recovery of stolen vehicles remained overwhelmingly the province of state and local police, *prosecution* of those offenses was virtually completely taken over by the federal government, with Dyer Act cases making up nearly half of the FBI closed cases for many years.⁸³

II. PROHIBITION AND REACTION

The wave of moralism that led Congress to outlaw prostitution in 1909 gained momentum in the second decade of the century. The statutes spawned by this attempt to legislate morality were not aimed at organized crime, however, but rather at the disorganized use of narcotic drugs and liquor by the general population.

Narcotics had become, by the early twentieth century, a significant problem in America. Many people had become unwittingly addicted to opiates due to the over-prescription of morphine or to the extensive use of patent medicines containing opium.⁸⁴ Early state legislation was aimed principally at banning opium dens and opium smoking—a vice peculiar to the newly arrived Chinese immigrants.⁸⁵ Finally, in response to pressure from the medical profession as well as some public concern, Congress first banned the importation of opium⁸⁶ and then, in 1914, passed the

82. *Brooks v. United States*, 267 U.S. 432, 438–39 (1925).

83. For example, the FBI Annual Report for 1937–38 reported 5420 convictions. Of these reported convictions, 2093 were for vehicle theft, and 569 for thefts from interstate shipments (the latter representing a 1934 addition to the Dyer Act). Also, 576 convictions were for Mann Act violations. See M. LOWENTHAL, *FEDERAL BUREAU OF INVESTIGATION* 401–03 (1950) (discussing how state authorities apprehend car thieves and turn them over to FBI to save expense of prosecution).

84. Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 981–84 (1970) [hereinafter cited as Bonnie & Whitebread]. See generally H. KANE, *OPIUM-SMOKING IN AMERICA AND CHINA* (1882); S. ADAMS, *THE GREAT AMERICAN FRAUD* (1913); C. TERRY & M. PELLENS, *THE OPIUM PROBLEM* (1928).

85. Bonnie & Whitebread, *supra* note 84, at 984–86.

86. Act to Prohibit Importation and Use of Opium, ch. 100, 35 Stat. 614 (1909) (codified as amended

Harrison Act.⁸⁷ The latter statute was a tax measure which, by limiting the availability of the proper tax forms to legitimate handlers of specified narcotics, sought to eliminate the trade by people not licensed as physicians or druggists. However desirable this goal, and however successful the Act might have been in attaining the goal, it nevertheless followed by definition that by criminalizing narcotics distribution and use, narcotics distributors and users became criminals. Only if the Act had totally eliminated narcotics use, which it did not, would this truism not have created difficulty. As it was, the demand for narcotics continued and the supplying of that demand created a fertile field for organized criminal endeavor.⁸⁸ The problem was not immediate, nor did it affect as broad a segment of the population as the other congressional enactment of this period.

This enactment was the National Prohibition (Volstead) Act.⁸⁹ Overnight the legitimate brewing and distilling industry was declared illegal while demand, piqued because alcohol had become a forbidden fruit, greatly increased. This demand was now, of necessity, met by criminals—either the former legitimate brewers operating illegally or bands of gangsters and thugs. The latter, a more ruthless group, gradually pushed the former out.⁹⁰ They also had the organization to smuggle in the roughly five to ten million gallons of foreign liquor that came into the United States annually during prohibition.⁹¹

While America had organized crime before prohibition, it was more diverse, loosely structured, and primarily involved with prostitution, gambling and political corruption on a local level. These activities did not require large organizations. In contrast, prohibition created a need for large-scale distribution networks comprising smugglers, distillers, bottlers, warehouses and trucks as well as numerous retailing outlets (speakeasies). Obviously this required far more organization than did operating a house of prostitution or a bookie joint, and organized crime, as we know it today, was born—the unwanted child of an unfortunate act of Congress. Moreover, prohibition also gave a big boost to organized gambling and prostitution: as long as one was paying protection to the police for a speakeasy, it made sense to consolidate and provide prostitution and gambling in the same establishment, or at least in an establishment under the control of the same organization.⁹² As the

at 21 U.S.C. § 173 (1964)).

87. Ch. 56, 84 Stat. 785 (repealed 1970).

88. Bonnie & Whitebread, *supra* note 84, at 1080.

89. National Prohibition Act, ch. 83, 41 Stat. 305 (1919). The Act was designed to effectuate the 18th amendment, which was to take force on January 29, 1920. It provided for the manufacture of industrial alcohol by permits, banned the use of beverage alcohol, and charged the Commissioner of Internal Revenue with enforcement of the Act. In 1920, the Supreme Court upheld the constitutionality of both the 18th amendment and the National Prohibition Act without opinion. *National Prohibition Cases*, 253 U.S. 350 (1920).

90. Anheuser-Busch Corporation complained: "Those who are obeying the law are being ground to pieces by its very operation, while those who are violating the law are reaping unheard-of rewards. Every rule of justice has been reversed." A. SINCLAIR, *ERA OF EXCESS: A SOCIAL HISTORY OF THE PROHIBITION MOVEMENT* 205 (1962)(quoting ANHEUSER-BUSCH CORPORATION, *THE PENALTY OF LAW OBEDIENCE*).

91. A. SINCLAIR, *supra* note 90, at 198.

92. "The speakeasy and the hoodlum-guarded roadhouse casino soon prospered together, both pro-

gangsters gained strength, entire towns, such as Cicero, Illinois, where all forms of illicit recreation were heavily patronized, were taken over.⁹³

As local police forces were rendered ineffective by widespread public flouting of the laws and millions in bribes paid by gangsters, Washington was quiescent. The Prohibition Bureau of the Treasury Department, which had been given enforcement authority by the Volstead Act, was staffed by political hacks, most of whom were either corrupt or incompetent.⁹⁴ At the Justice Department, matters were no better. The Attorney General was President Harding's crony, the corrupt Harry M. Daugherty of Teapot Dome fame, and the Division of Investigation was in disarray.⁹⁵ Not until the death of Harding in August of 1923 and Coolidge's replacement of Daugherty with Harlan F. Stone as Attorney General did the government by blackmail of the Department of Justice come to an end.⁹⁶

By 1931 the Director of Enforcement was able to report to Congress that "corruption is on the wane"⁹⁷ and that "Federal courts. . . have been reasonably effective in the prosecution of prohibition cases."⁹⁸ While other testimony before the

ted by the same 'muscle' and immunized from official harassment by the same 'arrangements.' " R. KING, *GAMBLING AND ORGANIZED CRIME* 24 (1969).

93. H. ABADINSKY, *ORGANIZED CRIME* 80-81 (1969) (describes how Capone mob took over Cicero in 1924). Another town, Forest View, Illinois, was similarly taken over by the Torrio (Capone's predecessor) organization. *Id.* at 81.

94. W. MOORE, *THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME 1950-52* 12 (1974) [hereinafter cited as W. MOORE].

The rapid turnover in the prohibition service, and the notoriety of some of its agents, gave it a bad name. One disgruntled prohibition administrator called the Bureau a "training school for bootleggers," because of the frequency with which agents left the service to sell their expert knowledge to their old enemies.

A. SINCLAIR, *supra* note 90, at 184 (quoting I. REEVES, *OL' RUM RIVER* 33 (1931)).

The reasons for the low quality of agents were low pay, no training, and appointment by the spoils system. A. SINCLAIR, *supra* note 90, at 184. Also, the Bureau, with only 1,500 to 2,300 agents nationwide, was greatly understaffed. *Id.* See also, *ENFORCEMENT OF THE PROHIBITION LAWS: OFFICIAL RECORDS OF THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT*, S. DOC. NO. 307, 71st Cong., 3d Sess. 30, 209-10 (1930) (detailing changes in Bureau of Prohibition personnel policies on agency selection, training and compensation between 1920 and 1930) [hereinafter cited as WICKERSHAM RECORDS].

95. A. SINCLAIR, *supra* note 90, at 185.

The Volstead Act was used by the Ohio Gang [Harding's cronies] as a protection racket. A file from the Department of Justice listed convicted bootleggers, who could be sold pardons. Special agent Gaston B. Means testified that he collected some \$7,000,000 from bootleggers in a goldfish bowl to square the Department of Justice.

Id.

96. *Id.* at 263-64. Stone, in turn, appointed J. Edgar Hoover as director of the Division of Investigation in May of 1924. O. DEMARIS, *THE DIRECTOR: AN ORAL BIOGRAPHY OF J. EDGAR HOOVER* 54 (1975). Enforcement of prohibition was transferred to the Justice Department in 1929. A. SINCLAIR, *supra* note 90, at 191.

97. 1 WICKERSHAM RECORDS, *supra* note 94, at 30 (citing A. W. WOODCOCK, *Report on Enforcement*).

98. *Id.* at 18.

Wickersham Commission indicated that this assessment was rather optimistic, enforcement efforts clearly were becoming more effective.⁹⁹ This combination of more and more arrests but continued widespread use of illicit liquor¹⁰⁰ led to a general belief that the great experiment had failed,¹⁰¹ and on December 5, 1933, the twenty-first amendment, repealing prohibition, was ratified.¹⁰²

During the later years of prohibition, crime seemed to run rampant. Cities such as Chicago and Detroit were in the grip of gangsters, and murders of police and federal agents, as well as gang figures, were commonplace.¹⁰³ Even worse, with the onset of the Depression and the imminent demise of prohibition, falling liquor profits forced the gangleaders to find other outlets for the energies of their violent henchmen. Thus, the mobsters began to move into other previously untapped areas such as extortion from legitimate business and labor racketeering.¹⁰⁴ At the same time,

99. A United States Treasury Report found:

In 1921 a total of 95,933 illicit distilleries, stills, still worms, and fermenters were seized; this total rose to 172,537 by 1925 and 282,122 by 1930. . . . The number of convictions for liquor offenses in federal courts, which had averaged about 35,000 a year after 1922, showed a startling jump under the Hoover administration to a maximum of 61,383 in 1932.

A. SINCLAIR, *supra* note 90, at 190 (quoting U.S. TREAS. DEP'T, *Statistics Concerning Intoxicating Liquors* 95-97 (1933)).

100. The Moderation League reported to the Wickersham Commission that, as of 1931, "drunkenness generally has already increased to the preprohibition level." 5 WICKERSHAM RECORDS, *supra* note 94, at 635. Many others testified that drinking was far worse than before prohibition. See generally WICKERSHAM RECORDS, *supra* note 94, at Vol. 3.

101. Even President Hoover recognized "the futility of the whole business." A. SINCLAIR, *supra* note 90, at 190 (quoting 2 MEMOIRS OF HERBERT HOOVER 276). In his inaugural address in 1929, President Hoover attributed to the ordinary citizen responsibility for "a dangerous expansion in the criminal elements" due to widespread "disregard and disobedience" of the 18th amendment. GOV'T PRINTING OFFICE, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 226-27 (1969).

102. U.S. CONST. amend. XXI.

103. H. ABADINSKY, *supra* note 93, at 72, 84. The pinnacle of gangland terrorism was the Saint Valentine's Day massacre in Chicago on February 14, 1929 when seven members of "Bugs" Moran's gang, Al Capone's rival, were shot down in Chicago by gunmen dressed as Chicago police officers. *Id.* at 84-85.

The WICKERSHAM RECORDS showed that 286 civilians and officers died under Volstead Act enforcement. 5 WICKERSHAM RECORDS, *supra* note 94, at 491. Numerous racketeers were shot down in the streets of Chicago, New York and other cities. Among the more prominent were Dion O'Banion (1924) (another rival of Al Capone), Arnold Rothstein (1928), Guiseppi Masseria (1931) and Salvatore Maranzano (1931). Masseria and Maranzano contended for the title of boss of bosses in New York, which Maranzano claimed after Masseria's death. Five months later, Maranzano was murdered by a group of younger mobsters led by "Lucky" Luciano because of Maranzano's unwillingness to cooperate with other ethnic groups. H. ABADINSKY, *supra* note 93, at 51-52. Later, highly publicized victims of mob slayings were "Dutch" Schultz, Vincent "Mad Dog" Coll, "Legs" Diamond, and "Bugsy" Siegel. W. MOORE, *supra* note 94, at 22; H. ABADINSKY, *supra* note 93, at 98-99, 108-110. Unquestionably, the mob itself has been far more effective at eliminating its top leaders than has the federal government.

Around the same time, the country was further shocked by the ravages of bank robbers such as "Machine Gun" Kelly and John Dillinger. Dillinger went on a bank robbing spree in the Midwest in the summer and fall of 1933, killing 16 people, robbing numerous banks and escaping from prison twice. Dillinger was finally shot down by police and FBI agents as he left a Chicago movie theater on July 22, 1934. 21 DICTIONARY OF AMERICAN BIOGRAPHY 248 (Supp. 1, 1944).

104. See H. ABADINSKY, *supra* note 93, at 84, describing how, beginning in 1924, the Capone mob

a wave of kidnapping and bank robberies terrorized the country.¹⁰⁵

Obviously, there was political capital to be made from attacking crime, as certain congressmen came to realize. The first volley fired from Washington was the Federal Kidnapping Act¹⁰⁶ which, while passed in the furor surrounding the kidnapping of the Lindbergh baby,¹⁰⁷ had actually been introduced prior to that crime as a measure aimed at the depredations of organized crime.¹⁰⁸ The bill made interstate transportation of a kidnapped victim a federal offense, subject to life imprisonment. At the hearings on the bill it was disclosed that 279 kidnappings had been reported to the committee from police officials in 500 cities and that, out of an estimated 2000 who were involved, only 69 persons had been convicted.¹⁰⁹

President Hoover's Attorney General Mitchell objected to the bill on the grounds that it would represent an undue burden on his Department's already tight budget and that "the enactment of such legislation had a bad effect on State authorities, as State authorities are inclined immediately to shift the burden onto the Federal authority where the Federal government assumes jurisdiction."¹¹⁰ Congressman Sumners, Chairman of the House Judiciary Committee opposed the bill as an un-

began to move into "racketeering on a grand scale. It took over many of the rackets then prevalent in Chicago — extortion from Jewish butchers, fish stores, construction industry, garage owners, bakeries, laundries, beauty parlors, dry cleaners, theaters, sports arenas, even bootblacks." *See generally* H. SEIDMAN, *LABOR CZARS: A HISTORY OF LABOR RACKETEERING* (1938); J. MCPHAUL, *JOHNNY TORRIO: FIRST OF THE GANG LORDS* (1970); and J. KOBLER, *CAPONE* (1971) [hereinafter cited as J. KOBLER].

105. Brabner-Smith, *Firearm Regulation*, 1 *LAW & CONTEMP. PROBS.* 400 (1934).

Kidnaping [sic], racketeering and gangsterism, which reached a climax of publicity in the last twelve months with such front page cases as the Urschel kidnaping, the income tax evasion trial of the New Jersey racketeer and beer baron, "Waxey" Gordon, and the final victory of law enforcement agents over the Touhy and Dillinger gangs, have greatly stimulated the interest of the American public in criminal law and law enforcement.

Id. *See also* Finley, *The Lindbergh Law*, 28 *GEO. L.J.* 908, 909 (1940) (kidnapping racket reached its peak in 1932).

106. Federal Kidnapping Act, ch. 271, 47 Stat. 326 (1932) (codified as amended at 18 U.S.C. § 1201 (1979)). *See infra* note 123 for the 1934 amendments. *See infra* notes 141-148 and accompanying text.

107. In December, 1931, S. 1525, 75 *CONG. REC.* 275 (1931), was introduced in the Senate and H.R. 5657, 75 *CONG. REC.* 491 (1931), in the House. These bills were introduced by Senator Patterson and Congressman Cochran, both of Missouri, due to the fact that St. Louis had become a "favored locale" for kidnappers who "menac[ed] the lives and well-being of prominent and wealthy citizens and their families." Finley, *supra* note 105, at 909-10. The Lindbergh baby was kidnapped on March 2, 1932. *Id.* at 910.

108. "[A]t the outset gangsters were victims of gangsters in this kidnaping [sic] racket. They then turned to the gambler, the bookmaker, and have taken millions from that class. Then, after that field was destroyed, they turned to the business man." 75 *CONG. REC.* 13,284 (1932) (remarks of Representative Cochran, sponsor of House bill). *See also* Fisher & McGuire, *Kidnapping and the So-called Lindbergh Law*, 12 *N.Y.U. L.Q.* 646 (1935) (strongly supporting both constitutionality and operation of law) [hereinafter cited as Fisher & McGuire].

109. *Hearings on H.R. 5657 Before the Comm. on the Judiciary*, 72nd Cong., 1st Sess. 5 (1932).

110. 75 *CONG. REC.* 13,291 (1932) (remarks of Representative Sumners, quoting Attorney General's letter). "[T]his law has had a most salutary effect in the breaking up of this nefarious traffic. . . . Since its passage 29 cases of kidnaping have fallen within the investigative action of the Government, resulting in the conviction of 69 persons." Fisher & McGuire, *supra* note 108, at 662.

necessary intrusion on the police authority of the states.¹¹¹ The Committee instead proposed that Congress empower state and local governments to deputize police officers so that they would be able to pursue kidnappers across state lines.¹¹² However, the proponents of the bill cited the possible delays that this measure would engender and asserted that state expenditures would be used for running down violators of a federal statute. They held out the Dyer Act as a precedent that clearly established federal jurisdiction.¹¹³ The bill was enacted on June 22, 1932.¹¹⁴

By now, the people who had merrily supported gangsterism and flouted the law throughout the days of prohibition were shocked to find that "there has been a break-down in the administration of criminal law."¹¹⁵ Pursuant to a Senate resolution that racketeers were "exploit[ing], deceiv[ing] and terrorizing our citizens,"¹¹⁶ Senator Copeland of New York led a subcommittee of the Commerce Committee around the country in the summer and fall of 1933 to hold hearings on the subject.¹¹⁷ The witnesses included federal and state judges and prosecutors and one representative of the Department of Justice, Assistant Attorney General Keenan, Chief of the Criminal Division.¹¹⁸

The overwhelming sentiment of the witnesses, state and federal officials alike, was that crime should be dealt with by state, not federal authorities.¹¹⁹ The

111. 75 CONG. REC. 13,291-92.

112. H.R. REP. No. 1493, 72nd Cong., 1st Sess. (1932). However, even Congressman Sumners did not really deny federal *power*, merely the advisability of this particular expansion of it.

We have now come face to face with a situation where crime is organized and criminals go quickly back and forth across State lines. That is a thing that you and I must meet upon the responsibility of our best judgment. . . . There are all sorts of State officers everywhere in the States. Why. . . duplicate them with a lot of new Federal marshals.

75 CONG. REC. 13,291-92 (1932). Sumners predicted that the states would "waste away and shrivel up through non-exercise of [their] powers." *Id.* at 13,292.

113. 75 CONG. REC. at 13,288, 13,292.

If we can pass a law giving the Federal Government jurisdiction where a man steals an automobile, without requiring [the appointment of] a police officer to go to an adjoining State, I see no reason why we can not pass a law giving the Government jurisdiction when some individual steals a person and takes him across a State line. . . .

Id. at 13,295 (remarks of Representative Cochran).

114. *See supra* note 106 (citing Federal Kidnapping Act).

115. 78 CONG. REC. 448 (1934).

116. S. RES. 74, 73d Cong., 1st Sess., 78 CONG. REC. 2966 (1933).

117. *Investigation of So-Called Rackets: Hearings Before a Subcomm. of the Comm. on Commerce, United States Senate, 73d Cong., 2d Sess. 2 (1933)* [hereinafter cited as *Investigation*]. Hearings were held in various parts of the country, notably in New York, Detroit and Chicago. 78 CONG. REC. 448 (1934).

118. 78 CONG. REC. 448 (1934).

119. *E.g.*, George Z. Medalie, United States Attorney for the Southern District of New York, testified: "whenever the Federal Government acts, the local authorities practically abdicate their power. . . . [T]he more power you take away from localities, the less able will be the localities to function." *Investigation, supra* note 117 at 83-84. Howard W. Ameli, United States Attorney for the Eastern District of New York, testified that "any attempt to give to Federal courts jurisdiction over [racketeering] crimes will be

leading exception to this viewpoint was Keenan who, while paying lip service to the notion that law enforcement is "the task of each single local community,"¹²⁰ went on to declare that the ability of criminals to communicate and travel rapidly from state to state necessitated greater involvement by federal authorities.¹²¹

Because deferring to the states meant that Congress would have nothing to show for the hearing, it is hardly surprising that the Justice Department's advice was accepted. Senator Copeland returned to Washington and on January 11, 1934, introduced thirteen bills designed to advance the federal anti-racketeering effort. The Senator gave credit for the "hearty support and cooperation of the Department of Justice" which had, in fact, drafted the bills.¹²² He placed the cost of crime at \$12,933,000,000 per year¹²³ and pointed out that "in this day of hard surfaced roads [and] high powered automobiles. . . there are few crimes of organized groups which are not interstate in nature."¹²⁴ However, he expressed the sentiment of the committee that the enactment of these measures would "go far toward the control of crime in this country."¹²⁵

The major measures which were enacted expanded the coverage of the Lindbergh Law,¹²⁶ forbade interference with interstate commerce by threats, force or violence,¹²⁷ extended the Dyer Act to cover interstate transportation of all stolen property worth more than \$5000,¹²⁸ forbade interstate flight to avoid prosecution or testimony,¹²⁹ and regulated the sales and shipment of firearms.¹³⁰ Later bills in the

an attempt to assume powers not contemplated by the Constitution. . . ." *Id.* at 94.

However, it was generally agreed that an "American Scotland Yard," which could offer greater investigative assistance to the states, would be desirable. *E.g.*, 78 CONG. REC. 456 (1934) (remarks of Senator Copeland). In 1934, the Division of Investigation of the Department of Justice (the FBI) had only 350 agents. *Investigation, supra* note 117, at 84.

120. *Investigation, supra* note 117, at 5.

121. *Id.* at 5-6.

122. 78 CONG. REC. 451-52 (1934). A later remark by Senator Ashurst, Chairman of the Judiciary Committee, makes clear that all of these bills, as well as five more introduced by Ashurst on February 21, 1934, were drafted by the Justice Department. *Id.* at 2946-47.

123. *Id.* at 451.

124. *Id.*

125. *Id.*

126. S. 2252, 73d Cong., 2d Sess. (1934). The new Act of May 18, 1934, ch. 301, 48 Stat. 781 (1934), made three changes in the Lindbergh Law. First, it made the death penalty applicable to kidnapping cases. Second, it made the statute applicable to kidnapping other than for ransom or reward. Third, it established a presumption of interstate travel if the victim was not released within seven days. *Id.* Now the presumption attaches after 24 hours. 18 U.S.C. § 1201 (1979).

127. Act of June 18, 1934, ch. 569, 48 Stat. 979 (1934) (originally proposed as S. 2248, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 1951 (1976).

128. Act of May 22, 1948, ch. 333, 48 Stat. 794 (originally proposed as S. 2845, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 2314 (1976). The primary purpose of this bill was to bring bank robbery within federal jurisdiction. 78 CONG. REC. at 452 (remarks of Senator Vandenberg). As it turned out, another bill was later introduced specifically making robbery of any bank "organized or operating under the laws of the United States" a federal offense. *See infra* note 131 and accompanying text.

129. Act of May 18, 1934, ch. 302, 48 Stat. 782 (1934) (originally proposed as S. 2253, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 1073 (1976).

130. Act of June 26, 1934, ch. 757, 48 Stat. 1236 (1934) (originally proposed as H.R. 9741, 73d Cong., 2d Sess. (1934)), *as amended*, 26 U.S.C. § 5841 (1976).

same session added bank robbery¹³¹ and assault on a federal officer to the list of federal crimes.¹³²

While there were a few grumblings of dissent,¹³³ in general, these bills were passed in a flurry of patriotic fervor such as that displayed by Congressman Oliver:

At the request of the Attorney General. . . we have marked an historic hour. . . . [T]he states will feel the full power of the encroachment and help of the United States just as. . . France and England felt the help of the United States when we went to their rescue in the war (applause). . . . [C]rime is organized until it has become as widespread as the jurisdiction of the government. It has trampled down the states; it has flouted their laws; it has rendered them helpless. Now the government of the United States. . . has come to say: "We will all stand together; we will give them all the barrels in the governmental shotgun (applause). . . . There is. . . little hope of success for any man who casts a slur upon those who stand against crime and for liberty."¹³⁴

Thus, as part of the belief of the time that the solution to the nation's problems could come from Washington, a "new deal" in criminal law enforcement began.

The most striking feature of these bills was simply their volume; "the 73rd Congress added more to the provisions of the federal criminal code than all previous congresses."¹³⁵ However, two of the bills contained features which also significantly

131. Act of May 18, 1934, ch. 304, 48 Stat. 783 (1934) (originally proposed as S. 2841, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 2113 (1976).

132. Act of May 18, 1934, ch. 299, 48 Stat. 780 (1934) (originally proposed as S. 2080, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 2113 (1976). Other enactments included: an act forbidding extortion by means of telephone, Act of May 18, 1934, ch. 300, 48 Stat. 781 (1934) (originally proposed as S. 2249, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 875 (1976) and an act appropriating money for rewards to facilitate the apprehension of public enemies, Act of June 6, 1934, ch. 408, 48 Stat. 910-911 (1934) (originally proposed as H.R. 9370, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 3059 (1976).

In addition to these measures, several adjustments to the law of criminal procedure were proposed, including an alibi notice rule, S. 2255, 73d Cong., 2d Sess. (1934); S. 2842, 73d Cong., 2d Sess. (1934), making spouses competent witnesses and allowing the prosecution to comment on defendant's failure to testify, and a bill to abolish habeas corpus appeals in cases involving the validity of a "warrant of removal," S. 2254, 73d Cong., 2d Sess. (1934). These bills did not pass. 78 CONG. REC. INDEX (1934).

Another bill which failed was S. 2257, 73d Cong., 2d Sess. (1934), a bill to consolidate federal investigative agencies, such as the Secret Service and the FBI. This bill died in Committee with no public explanation for its demise. 78 CONG. REC. INDEX (1934).

133. For example, with regard to the fugitive felon bill, Senator King remarked:

I shall vote against this bill. . . because I believe it will be abused in its administration. I doubt its constitutionality; and I have not any doubt on earth that in the hysteria now existing, . . . persons . . . will be arrested and prosecuted under federal law, which the facts and circumstances will not warrant.

78 CONG. REC. 5371 (1934). Similarly, regarding the volume of legislation, Congressman Young remarked: "[I]t appears that when the Congress does not seem to have anything else to do, we must meet here and make some more crimes." *Id.* at 8138.

134. *Id.* at 8140.

135. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME, *supra* note 81 at 332 (remarks of Assistant Attorney General Keenan). This increase in the number of federal laws promptly led to a pro-

broadened the legal basis for federal jurisdiction. All of the earlier legislation and most of the 1934 acts required an actual participation in commerce— either interstate travel or use of a facility of interstate commerce. The Anti-Racketeering Act, however, made it a felony to obtain the “payment of money, etc.” by the use of, or threat to use “force, violence or coercion” when such conduct is “in connection with or in relation to any act in any way or degree *affecting*” interstate or foreign commerce.¹³⁶

As a contemporary commentator argued:

The Act has the commerce clause for its constitutional basis, yet, . . . the activities of racketeers are primarily local. Therein lies an explanation for the breadth of the clause which seeks to bring within the scope of the Act racketeering “in connection with or in any relation to any act *in any way or in any degree affecting*” interstate or foreign commerce. The italicized words must be contrasted with the insistence . . . in the opinions of the Supreme Court that only such intra-state activities come within the commerce power of Congress as operate to obstruct or burden interstate commerce “directly,” “substantially,” or “unduly,” to select but three of the most commonly employed restrictive adverbs.¹³⁷

posal that the size of the FBI must be tripled. Moley, *Report to President Roosevelt, reprinted in N.Y. Times*, May 24, 1934, § 1, at 2 [hereinafter cited as Moley].

136. Ch. 569, 48 Stat. 979 (1934); 18 U.S.C. §§ 421–25 (Supp. 1934), *as amended*, 18 U.S.C. § 2951 (1976) (emphasis added). The operative portion of the Act was as follows:

Sec. 2. Any person who, in connection with or in relation to, any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce —

(a) Obtains or attempts to obtain, by the use or attempt to use or threat to use force, violence or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official rights; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of \$10,000, or both.

Id. Note the exception at the end of subsection (a) pertaining to payment of wages. This exception was added at the behest of the labor unions. 78 CONG. REC. 5859 (1934). In *United States v. Local 807*, 315 U.S. 521 (1942), the Supreme Court held that the exception exempted from prosecution members of the New York City truck drivers union who, by threats and violence, forced out-of-town truckers to pay them for the unwanted service of driving their trucks to and from the city. *Id.* at 531. The Court found that however illegal these activities were, they nevertheless were attempts to obtain employment, and consequently were exempted from the coverage of the Act. *Id.* at 532. The statute was reenacted to eliminate the exception. Hobbs Act, ch. 537, 60 Stat. 420 (1946). However, as the Supreme Court held in *United States v. Enmons*, 410 U.S. 396 (1973), this change in the Act was a narrow one and the Act still “did not sweep within its reach violence during a strike to achieve *legitimate* collective bargaining objectives.” *Id.* at 404 (emphasis added).

137. Note, *Racketeering, Bank Robbery and Kickback Laws*, 1 LAW & CONTEMP. PROBS. 445, 447 (1934) (emphasis in original) (citations omitted).

Thus, the very fact that racketeering did *not* have much impact on interstate commerce led to this very broad assertion of federal jurisdiction.

Despite what might have been, at that time, a fertile ground for constitutional challenge, the constitutionality of the Act has been considered in only one court of appeals case.¹³⁸ The court upheld the Act with the simple observation that the "affecting commerce" language also appeared in the grant of power to the National Labor Relations Board in the National Labor Relations Act, which had been upheld by the Supreme Court in *NLRB v. Fainblatt*.¹³⁹ Moreover, the Supreme Court has made it clear that neither the Anti-Racketeering Act nor its successor, the Hobbs Act, requires proof that the defendant has engaged in racketeering.¹⁴⁰

The second significant extension of federal jurisdictional authority occurred in the amendment to the Lindbergh Law which created a rebuttable presumption of interstate travel after seven days.¹⁴¹ The purpose of this presumption¹⁴² was to allow the Division of Investigation to get into cases before the "clues [were] cold."¹⁴³ In a memorandum to the President, Professor Raymond Moley termed this presumption "somewhat strained."¹⁴⁴ Indeed, only about fifteen percent of all kidnappings at the time involved interstate transportation, and there was no evidence that failure to locate the victim within seven days made it more likely that such travel had occurred.¹⁴⁵ Because the presumption is rebuttable and interstate transportation is easy to prove generally, the government usually has not relied on it at *trial*; noninterstate cases are turned over to local authorities for prosecution.¹⁴⁶ Thus, this "strained" presumption, used repeatedly to establish federal *investigative* jurisdiction, escaped court challenge for forty years.¹⁴⁷ In 1977, however, the

138. *Nick v. United States*, 122 F.2d 660, 668 (8th Cir.) *cert. denied*, 314 U.S. 687, *reh. denied*, 314 U.S. 715 (1941), *reh. denied*, 316 U.S. 710 (1942).

139. 306 U.S. 601, 606 (1939). *Fainblatt* held that the necessary effect on commerce could be de minimus. *Id.*

140. *United States v. Culbert*, 435 U.S. 371 (1978). As the Court noted, Congress never defined "racketeering", much less intended to include it as an element of proof of violation of the act. *Id.* at 375-76.

141. 48 Stat. 781. "[I]n the absence of the return of the [victim] and the apprehension of the [perpetrator] for or during a period of seven days it shall be presumed that such [victims] have been transported in interstate or foreign commerce, but such presumption shall not be conclusive." *Id.*

142. As originally proposed, the presumption was to operate after three days. The time period before the federal government could intervene was extended in the House Committee. H.R. REP. NO. 1457, 73d Cong., 2d Sess. (1934). No reason for the change was given, "but it seems logical to assume that the House Committee thought that the presumption would stand on firmer grounds with the length of time extended." Bomar, *The Lindbergh Law*, 1 LAW & CONTEMP. PROBS. 435, 440 (1934) [hereinafter cited as Bomar].

143. 78 CONG. REC. 453 (1934) (Remarks of Senator Copeland). In 1956 the period was reduced from seven days to 24 hours. Act of August 6, 1956, ch. 971, 70 Stat. 1043 (1956).

144. Moley, *supra* note 135. Moley argued nevertheless that the presumption was necessary as a device to bring the forces of the federal government to bear because kidnapping was "so serious in its consequences." *Id.* However, "an extension of this principle to other crimes in the future might be dangerous." *Id.*

145. Bomar, *supra* note 142 at 442.

146. *Id.* at 443.

147. See Annot. to U.S.C.A. § 1201. It is an established principle that a court's power to try a defendant is not impaired by the person's "forcible abduction" into the court's jurisdiction. *Frisbee v. Collins*, 342 U.S. 519 (1952). Thus, even if the defendant could convince a court that the presumption was invalid

government made the mistake of relying on the presumption at trial, and the court of appeals struck it down as unconstitutional.¹⁴⁸

III. THE KEFAUVER ERA

In 1934, the Justice Department had obtained the legislative authority it sought from Congress "with practically no exception."¹⁴⁹ Nevertheless, the Department continued to emphasize the seriousness of the crime problem, its constant growth despite heroic efforts by federal officials, and the need for still more federal authority.¹⁵⁰

Still, to the public, the war on crime must have appeared to be succeeding. Al Capone had been convicted of income tax evasion in 1931¹⁵¹ and John Dillinger was shot down by the FBI and Chicago police in 1934.¹⁵² Another notorious bank robber, Alvin Karpis, was arrested in 1936 and subsequently convicted of kidnapping.¹⁵³ In New York, the runaway grand jury of the ambitious young prosecutor, Thomas E. Dewey, had indicted seventy-three racketeers in the years 1935-36 and convicted seventy-one of them, including "Lucky" Luciano and Tammany leader Jimmy Hines.¹⁵⁴ New York authorities also successfully prosecuted, and executed,

and consequently the FBI had had no jurisdiction to arrest him, that would not be grounds for reversal of his conviction, assuming that the government was able to prove interstate travel at trial. *Id.*

148. *United States v. Moore*, 571 F.2d 76, 82-83 (2d Cir. 1978). The court found that there is virtually no empirical data for concluding that a kidnapping victim has been transported in interstate or foreign commerce if he has not been released within 24 hours of his disappearance. *Id.* at 86. Nevertheless, the presumption remains in the statute, and the FBI continues to rely on it to invoke federal jurisdiction. *See* 18 U.S.C. § 1201(b) (1982).

149. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME, *supra* note 81, at 302 (remarks of Attorney General Cummings).

At the conference, the majority were once again of the view that "federal assumption can only mean the complete admission that local self-government, the pride of a democratic people, is a failure. Federal assistance and cooperation, however, . . . is the manifestation of true Americanism" (remarks of Clarence Martin, Former President of American Bar Association). *Id.* at 21. The resolutions adopted by the conference stated that *state* resources should be strengthened and that "the Federal Government should stand ready within the limits of its authority to offer aid and support as and when needed." *Id.* at 450-54. Other than urging the establishment of a "national scientific and educational center," no increase in federal activities or authority was recommended. *Id.*

150. Attorney General Cummings said: "We must be under no illusions as to the nature and seriousness of our problem. Crime is not a passing phase. It spreads and grows as the complications of a complex civilization multiply about us. . . . During the decades past we have made substantial progress despite tremendous obstacles." Address by Attorney General Cummings, Founding of First Congregational Church (June 22, 1935), *reprinted in* 79 CONG. REC. 9036 (1935). The Attorney General went on to urge the establishment of a "central organization to give leadership, coherence, training and practical aid in crime prevention. . . ." *Id.* J. Edgar Hoover estimated that the annual cost of crime had risen to \$15 billion — up \$2 billion from Senator Copeland's estimate 2 years before. Address by J. Edgar Hoover, Round Table Forum of the *New York Herald Tribune* (March 11, 1936) *reprinted in* 80 CONG. REC. 4033 (1936).

151. *J. KOBLE*, *supra* note 108, at 341-43.

152. *See supra* note 103.

153. A. MILLSFAUGH, *CRIME CONTROL BY THE NATIONAL GOVERNMENT* 104-05 (1937).

154. *W. MOORE*, *supra* note 94, at 17. Luciano was convicted of compulsory prostitution and served 9 years after which he was deported to Italy. *Id.* at 31. Hines was convicted of criminal conspiracy. *Id.*

the leading mob figure, Louis "Lepke" Buchalter, along with other members of the "Murder, Inc." conspiracy.¹⁵⁵

Whether because progress was truly being made (despite the continual protestations of J. Edgar Hoover that the wave of crime was about to engulf us)¹⁵⁶ or because the public and the press simply lost interest, congressional concern with the crime problem diminished in the late thirties and, not surprisingly, disappeared altogether as World War II took over the headlines.¹⁵⁷

After the war, with the return of the fighting men and the press in need of headlines, the crime issue resurfaced. J. Edgar Hoover released statistics showing a 12.4% increase in crime in 1945 and a further 7.6% jump the next year.¹⁵⁸ It was said that, in Chicago, the Capone mob was resurging¹⁵⁹ and in New York, Frank Costello rated stories in *Time* and *Newsweek* as the elder statesman of the underworld.¹⁶⁰

Crime commissions were formed in major cities where the growing menace of organized crime was deplored,¹⁶¹ and newspaper editorials echoed the cry: "The subtle black stain of a hoodlum super-government, well protected politically, is slowly but surely spreading itself over the population centers of the United States. Like communism. . . it is superbly concealed, well-organized, and in some cases, it has adopted the robes of legitimacy."¹⁶²

In this atmosphere of renewed hysteria over the problem of organized crime, the government felt compelled to act. The Attorney General scheduled a conference on organized crime to be held in February of 1950. Before it could take place, however, the ambitious junior Senator from Tennessee, Estes Kefauver, introduced Senate Resolution 202¹⁶³ on January 5, 1950, to empower his Judiciary Committee to investigate "interstate gambling and racketeering and the manner in which the facilities of interstate commerce are made a vehicle of organized crime."¹⁶⁴ In his

155. A. Tully, *Treasury Agent* (1958) in ORGANIZED CRIME IN AMERICA 205 (G. Tyler, ed. 1962). Buchalter pleaded guilty to federal narcotics violations, then was returned to New York where he was convicted of murder in state court. *Id.* at 213-14. He was executed at Sing Sing Prison in 1944. *Id.* at 213. See also B. TURKUS & S. FEDER, MURDER, INC. (1952) (describing Buchalter's role in Murder, Inc.).

156. "Crime has reached a pinnacle of appalling height. It lives next door to us. It rubs elbows with us. Its blood-caked hands touch ours. A lackadaisical attitude now has resulted in a crisis." Address by J. Edgar Hoover, *supra* note 150, at 4033. See also Address by J. Edgar Hoover, *Fifty Years of Crime in America*, reprinted in 84 CONG. REC. 2140 (1939).

157. See CONGRESSIONAL RECORD INDEX, 1935-1950 (showing virtually no legislative activity relating to crime).

158. Hoover, *The Rising Crime Wave*, AM. MAG. 124-28 (Mar. 1946).

159. W. MOORE, *supra* note 94, at 26 (absent Capone who died in 1947 after suffering from insanity induced by tertiary syphilis).

160. TIME, Oct. 17, 1949, at 27; NEWSWEEK, Nov. 21, 1949, at 33. See also Asbury, *America's Number 1 Mystery Man*, COLLIER'S, Apr. 12, 1947 and Apr. 19, 1947.

161. See Summary of Crime Commission Activities in 96 CONG. REC. 67 (1950) (remarks by Senator Kefauver). Especially influential was the Chicago Crime Commission under Director Virgil Peterson who popularized the notion that gambling revenues were the lifeblood of organized crime. W. MOORE, *supra* note 94, at 35-37.

162. Considine, *Hoodlum Empire*, International News Service, Feb. 13, 1950, quoted in 96 CONG. REC. 1502 (1950).

163. S. Res. 202, 81st Cong., 1st Sess. (1950).

164. 96 CONG. REC. 67 (1950).

speech supporting the resolution, Kefauver averred that "there appears [sic] to be no adequate Federal statutes which can be invoked against the activities of this organized syndicate . . .,"¹⁶⁵ an interesting observation in light of the 1934 legislation. After considerable jockeying for position among other representatives and senators who wanted a piece of the organized crime issue,¹⁶⁶ Senate Resolution 202 was approved on May 3, 1950,¹⁶⁷ and the Kefauver Committee went to work.

Meanwhile, the Justice Department had its own ideas on the matter. At the Attorney General's Conference it was resolved that federal legislation prohibiting the interstate shipment of gambling devices and the transmission of gambling information by wire should be enacted.¹⁶⁸ Bills to this effect were duly drafted by the Justice Department and introduced in the Senate on April 4, 1950.¹⁶⁹ The gambling devices bill was passed but only after being severely limited to devices that were "coin operated" and "an essential part of which is a drum or reel with insignia thereon" (i.e., slot machines).¹⁷⁰ The wire transmission bill failed due to a conflict between the Department of Justice and the Federal Communications Commission, each claiming that the other should have enforcement authority.¹⁷¹

In the summer of 1950, the Kefauver Committee began holding hearings in cities around the country such as Detroit, New Orleans and St. Louis.¹⁷² The hearings

165. *Id.* In order to enlist support for his resolution, Kefauver attended the Attorney General's Conference and assured the delegates that the purpose of the investigation would not be to "make headlines" but "only for the purpose of trying to [find out] what the Federal Government can or should do in assisting in the enforcement of the laws of particular states." THE ATTORNEY GENERAL'S CONFERENCE ON ORGANIZED CRIME 24 (1950).

166. W. MOORE, *supra* note 94, at 49-63.

167. S. Res. 202, *supra* note 163.

168. THE ATTORNEY GENERAL'S CONFERENCE ON ORGANIZED CRIME, *supra* note 165, at 89.

169. 96 CONG. REC. 4639 (1950). See S. 3357, 82d Cong., 1st Sess. (1950) (related to gambling devices); S. 3358, 82d Cong., 1st Sess. (1950) (related to use of communication facilities).

170. Act of Jan. 2, 1951, ch. 1194, § 1, 64 Stat. 1134 (1951) (known as Johnson Slot Machine Act). In 1953, the Supreme Court struck down that portion of the Act which provided that dealers in gambling devices must register with the federal government. *United States v. Five Gambling Devices Etc.*, 346 U.S. 441, 442 (1953).

171. *E.g.*, *Transmission of Gambling Information: Hearings on S. 3358 before a Subcomm. on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 373 (1950).

The [Federal Communications] Commission believes that the method of enforcement provided by S3358 would involve serious administrative difficulties. . . . The FCC has neither the manpower nor the resources to properly undertake the enforcement of the complicated and ambiguous provisions of S 3358.

Id. S. 3358 provided, on pain of license revocation, that interstate communication facilities not broadcast "information . . . which might be gambling information." *Id.* This unwillingness on the part of the federal agencies to assume the authority (and hence the cost) of enforcing this Act was surprising in view of the admission of Assistant Attorney General McNerney that it would be possible for *local* police to stop bookmaking any time they wanted to "but they do not have the manpower." *Id.* at 81. Thus, the problem seemed to be one of commitment, rather than the power of the mob or the lack of legal authority.

172. See W. MOORE, *supra* note 94, at 183.

culminated in March of 1951 with a nationally televised presentation in New York which featured Frank Costello who confirmed the public image of the prototypical murderous Italian mobster as he tried to evade the Committee's questions.¹⁷³ The impact of the hearings was to convince the public that there was a "nationwide crime syndicate" which profited greatly from gambling revenues and maintained its position through "persuasion, intimidation, violence, and murder."¹⁷⁴

However, the Committee was quick to point out that the hearings themselves had an extremely salutary impact on the problem by stimulating grand jury activity,¹⁷⁵

173. *Id.* at 189.

Costello failed in his effort to create a positive image before the Committee. . . . When his counsel. . . objected to the spectacle that television was making of Costello. . . the cameras [were ordered] to turn away from the witness. Unknown to the senators at first, the WPIX cameramen focused alternately on the Committee and on Costello's hands as he crumpled a handkerchief, interlocked and picked at his fingers, grasped for a glass of water, stroked his eyeglasses where they lay on the table, and "rolled a little ball of paper between his thumb and index finger." The picture of the gambler's nervous, sometimes twitching hands suggested immense conspiratorial powers and, more than any other single episode, caught the dramatic quality of the hearings in New York. At the nightly rebroadcasts, television drew material from the newsreel cameras, which had not been ordered to turn away from Costello's face, and they showed the gambler's sleepy-eyed, almost furtive countenance as his suntan paled and as he "mopped his brow, wet his lips, opened his mouth from time to time as if to increase his intake of oxygen, and simultaneously seemed to. . . [chew] a corner of his tongue."

Id.

174. S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951) (THE THIRD INTERIM REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE) [hereinafter cited as THE THIRD INTERIM REPORT OF THE KEFAUVER COMM.].

1. There is a Nation-wide crime syndicate known as the Mafia, whose tentacles are found in many large cities. It has international ramifications which appear most clearly in connection with narcotics traffic.

2. Its leaders are usually found in control of the most lucrative rackets in their cities.

3. There are indications of a centralized direction and control of these rackets, but leadership appears to be in a group rather than in a single individual.

4. The Mafia is the cement that helps to bind the Costello-Adonis-Lansky syndicate of New York and the Accardo-Guzik-Fischetti syndicate of Chicago as well as smaller criminal gangs and individual criminals throughout the country. These groups have kept in touch with Luciano since his deportation from this country.

5. The domination of the Mafia is based fundamentally on "muscle" and "murder." The Mafia is a secret conspiracy against law and order which will ruthlessly eliminate anyone who stands in the way of its success in any criminal enterprise in which it is interested. It will destroy anyone who betrays its secrets. It will use any means available — political influence, bribery, intimidation, etc. to defeat any attempt on the part of law-enforcement to touch its top figures or to interfere with its operations.

Id. at 1. "[T]he public response to [the Committee's] revelations amounted to an unprecedented frenzy. No precise count of letters and communications to the Committee was kept, but a total of a quarter of a million would be a reasonable estimate." W. MOORE, *supra* note 94, at 200.

175. THE THIRD INTERIM REPORT OF THE KEFAUVER COMM., *supra* note 174, at 189.

exposing crooked politicians¹⁷⁶ and forcing gangsters to report their illegal income more scrupulously to the Internal Revenue Service for fear of tax prosecutions.¹⁷⁷ Moreover, the activities of local crime commissions "result[ed] in the elimination of many rackets and [in] the operation of others being made more hazardous."¹⁷⁸

Notwithstanding this optimistic view of the effect of the hearings on state and local enforcement, the Committee also introduced a score of legislative proposals which sought to cut down the influence of organized crime by limiting the narcotics¹⁷⁹ and illegal liquor traffic¹⁸⁰ and "liberaliz[ing] the process of deportation of criminals."¹⁸¹ Other measures sought to "tighten controls over organized crime through Federal taxing powers,"¹⁸² to give the Justice Department the power to immunize witnesses¹⁸³ and to give the Government a right to appeal from the pretrial suppression of evidence.¹⁸⁴ The keystone¹⁸⁵ of the Committee's proposals was three bills designed to "strike at" and "cripple" organized gambling at its "two vulnerable points: the need of the bookmaker for specialized information" and his "dependence on interstate facilities in placing lay-off and come-back bets,"¹⁸⁶ by barring

Nearly every section of the country is experiencing a wave of grand jury activity with ensuing disclosures and indictments which are a testimonial to the American system of justice and the ability of the people to rid themselves of the scourge of the underworld by judicial process.

Id.

176. *Id.*

177. *Id.* at 190.

178. *Id.* at 189.

179. S. 1695, 82d Cong., 1st Sess. (1951) (increased penalties for certain narcotics violations) and S. 1900, 82d Cong., 1st Sess. (1951) (same). See S. REP. NO. 725, 82d Cong., 1st Sess. 90 (1951) (THE FINAL REPORT OF THE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE) [hereinafter cited as THE FINAL REPORT OF THE KEFAUVER COMM.].

180. S. 1530, 82d Cong., 1st Sess. (1951) (designed to make it more difficult to import bootleg liquor into dry states), S. 1663, 82d Cong., 1st Sess. (1951) (same), and S. 2062, 82d Cong., 1st Sess. (1951) (same). See THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 179, at 91.

181. THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 179, at 92. The Committee had found that "a number of important criminals. . . had entered the United States illegally." *Id.*

182. S. 1529, 82d Cong., 1st Sess. (1951), S. 1531, 82d Cong., 1st Sess. (1951), S. 1532, 82d Cong., 1st Sess., (1951), S. 1660, 82d Cong., 1st Sess. (1951), and S. 2059, 82d Cong., 1st Sess. (1951). See THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 179, at 93-94.

183. S. 1747, 82d Cong., 1st Sess. (1951). See THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 179, at 94.

184. S. 2060, 82d Cong., 1st Sess. (1951). See THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 179, at 95. Also proposed were S. 2057, 82d Cong., 1st Sess. (1951) and S. 2058, 82d Cong., 1st Sess. (1951) (to improve congressional investigative process).

185. 97 CONG. REC. 12968 (1951) (remarks of Senator O'Connor).

186. THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 179, at 88, 89. S. 1563, 82d Cong., 1st Sess. (1951), "would substantially eliminate the wire services" by allowing the Federal Communication Commission to deny licenses to anyone who operates an interstate communications facility "primarily for use in facilitating gambling activity." THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 179, at 89. S. 1564, 82d Cong., 1st Sess. (1951), would "cripple the wire services before they are brought completely in hand by the FCC" by making it a crime to transmit gambling information without the permission of the proprietor of a sporting event. S. 1624, 82d Cong., 1st Sess. (1951), extended the old lottery bill to include any other "gambling enterprise" and extended the Johnson Slot Machine Act to include roulette

gamblers from using interstate telegraph facilities. Finally, the Committee proposed the formation of a Federal Crime Commission to coordinate the activities of the various federal agencies involved in the fight against organized crime.¹⁸⁷

None of these bills passed.¹⁸⁸ The reasons are complex and have never been completely explained. In part, it was because Kefauver had alienated his fellow senators and the Justice Department in his drive for power and prominence; in part because it was feared that a vigorous enforcement effort would uncover organized crime's connections within the Democratic party;¹⁸⁹ and finally, because the legislative proposals were so modest in their scope and so complex in their formulation that the average citizen could not even understand, much less enthusiastically support them.¹⁹⁰

Despite the lack of any concrete product, the Kefauver extravaganza seemed to sate the public and congressional appetite for crime. During the next few years, only two federal statutes were passed which had any impact on organized crime at all. The first was the Wagering Tax Act which imposed a ten percent excise tax on all wagers and required all gamblers to register with the government.¹⁹¹ The purported

wheels and other gambling devices and, finally, contained a "flat criminal prohibition against using interstate facilities in connection with any bet or wager, thus putting an end to payoff and comeback transactions between gamblers in different states." THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 179, at 88, 89.

The laying off of bets is a process by which a bookmaker, when too much money is bet on a single horse, team, etc., finds other bookmakers, or a central "bank" to share the risk. "Come-back" bets are large last minute bets by the agents of bookmakers at the track to reduce the odds on a particular horse which has been heavily bet on by the bookmaker's clients. See THE THIRD INTERIM REPORT OF THE KEFAUVER COMM., *supra* note 174, at 162.

187. S. J. Res. 65, 81st Cong., 2d Sess. (1951). See THE FINAL REPORT OF THE KEFAUVER COMM. *supra* note 179, at 96.

188. 97 CONG. REC. 12968, 6640, 8807, 5664, 6457, 10680, 5664, 7015 (1950).

189. W. MOORE, *supra* note 94, at 212. "In Congress the polite smiles barely concealed a bitter opposition born in part of jealousy and in part of the fear that the Committee's exposures would critically damage the Democratic party. . . ." *Id.* at 206.

It will be recalled that President Truman had connections with the Pendergast organization in Missouri. See W. MOORE, *supra* note 154, at 147-49. As to the Committee's proposal for a Federal Crime Commission, "Attorney General McGrath and FBI Director Hoover. . . blasted [its] establishment as a first step in the creation of a dread national police force." *Id.* at 207.

190. *Id.* at 211-12. Also, the firing of General MacArthur in April of 1951 diverted public attention from the issue. *Id.* As one staff member of the Committee put it: "When it was all over, Congress had not really laid a glove on anyone. Even the Committee's contempt citations, some thirty-six in all, aimed at notorious hoodlums all over the country, were dragged out in the courts and ultimately produced a batting average of close to zero." R. KING, GAMBLING AND ORGANIZED CRIME 91-92 (1969).

191. Revenue Act of 1951, Pub. L. No. 183, §§ 463, 471, 65 Stat. 452 (1951). This statute was struck down by the Supreme Court as violating the privilege against self-incrimination. *Marchetti v. United States*, 390 U.S. 39, 60 (1968); *Grosso v. United States*, 390 U.S. 62, 71 (1968).

During its life the Act enjoyed limited success. In congressional hearings on the enforcement of the Act, Treasury officials testified that they collected about \$5 million per year as opposed to the \$400 million predicted by Congress. *Treasury—Post Office Departments Appropriations for 1954: Hearings before the Subcomm. of the Comm. on Appropriations of the House of Representatives*, 83d Cong., 1st Sess. 643 (1953). Moreover, they stated that there had been "very little reduction in gambling because of the statute," *id.* at 647, and that, because it was well known that gamblers did not pay their taxes, "we gave people who do pay their taxes. . . something else to complain about." *Id.* at 644.

purpose of this act was *not* to eliminate gambling, which at least one Congressman realized was impossible,¹⁹² but, essentially, to concede its inevitability and try to raise some money from it.¹⁹³ The second statute was the Narcotic Control Act of 1956 which stiffened drug penalties and conferred immunity power on federal officials only in drug cases.¹⁹⁴

After a seven-year hiatus, public interest in organized crime was restimulated in November of 1957 when New York State Police raided the home of suspected gangster Joseph Barbara in Apalachin, New York, and arrested sixty-three organized crime figures from across the nation.¹⁹⁵ Shortly thereafter, the Senate Select Committee on Improper Activities in the Labor and Management Field (McClellan Committee) held hearings which exposed both the corruption of many unions, especially the Teamsters, and their close connection with organized crime.¹⁹⁶ Predictably, the

192. Congressman Gary concluded that the federal authorities could not stop gambling "regardless of the amount of money you give them. . . that it was a problem for local law enforcement." *Id.* at 645.

At about the same time, however, an American Bar Association committee concluded, based on reports from state officials, that organized crime had temporarily declined in virtually every state because of state crackdowns on wire services and the operation of the federal registration requirement. 2 ORGANIZED CRIME AND LAW ENFORCEMENT. REPORT OF THE ABA COMMISSION ON ORGANIZED CRIME 213-220 (M. Ploscow, ed. 1953).

193. See REPORT OF SENATE FINANCE COMM. ON H.R. 4473, 82d Cong., 1st Sess., reprinted in 97 CONG. REC. 11601 (1951). "Your committee believes that the continuance of the present immunity of gambling from taxation is inconsistent with the present need for increased revenue." *Id.*

194. Narcotic Control Act of 1956, ch. 629, § 7237, 70 Stat. 568 (1956), as amended, 26 U.S.C. § 7237 and 21 U.S.C. §§ 174, 176a, 184a (1956). This Act was an enhancement of the Boggs Act which had been passed in 1951. Act of November 2, 1951, ch. 666, 65 Stat. 767 (1951). For a full discussion of the history of federal narcotics legislation, see Bonnie & Whitebread, *supra* note 84.

195. H. ABADINSKY, *supra* note 87, at 11. The loose organization of the organized crime "families," which had existed since the war, began to fall apart in 1957. *Id.* at 109. Vito Genovese had fled to Italy in 1934 to escape a murder prosecution. *Id.* at 108. By 1957, however, he was once again at large in the United States because a key witness in the murder case against him had been poisoned. *Id.* at 108. He sought to regain control of the New York family then under Costello's control. *Id.* at 106. In May of 1957, Costello was shot twice, survived and retired. *Id.* at 106. Albert Anastasia, the head of "Murder Inc.," was himself murdered in a barber shop in October of that year. *Id.* at 104.

These murders, plus the general question of what the Mafia should do about narcotics, led to the November 1957 meeting in Apalachin, New York which many top Mafia figures including Genovese, Carlo Gambino, Santo Trafficante, Joe Bonanno and Joe Profaci attended. *Organized Crime and Illicit Traffic in Narcotics: Hearings before the Permanent Subcomm. on Investigations of the Comm. on Government Operations*, 88th Cong., 1st Sess. 7 (1963) (*Valachi* hearings).

Little was resolved, however, because an alert New York state policeman noticed that the host, Joseph Barbara, a known gangster, was unusually active in procuring rooms, groceries, etc., in town. See *United States v. Bufalino*, 285 F.2d 408, n.21 (2d Cir. 1960). Police surrounded his house, stopping and identifying 58 of the participants (the others apparently got away through the woods). *Id.* at 413. Twenty of the men were convicted in federal court in New York for perjury and conspiracy to commit perjury before a federal grand jury because they refused to "come clean" before the grand jury regarding the purpose of the meeting. See *United States v. Bonanno*, 177 F. Supp. 106 (S.D.N.Y. 1959). The convictions, however, were all reversed on appeal when the Second Circuit found no evidence that any crime had been committed. *United States v. Bufalino*, 285 F.2d at 411.

196. S. REP. NO. 1417, 85th Cong., 2nd Sess. (1958) (FIRST INTERIM REPORT OF THE SELECT COMM. ON IMPROPER ACTIVITIES IN LABOR OR MANAGEMENT FIELD) [hereinafter cited as THE FIRST INTERIM REPORT]. E.g., "The Committee finds that the New York garbage-collecting industry has been infiltrated and dominated by criminals including the Mafia." *Id.* at 327. See also S. REP. NO. 621, 86th Cong., 1st Sess. (1959) (THE SECOND INTERIM REPORT OF THE SELECT COMM. ON IMPROPER ACTIVITIES IN LABOR OR MANAGEMENT FIELD) [hereinafter cited as THE SECOND INTERIM REPORT]; S. REP. NO. 1139, 86th

question arose as to the Justice Department's efforts in the area. In a magazine article, Attorney General Rogers reported "substantial and continuing success" against organized crime, pointing out that in the last six years there had been one hundred and forty-five convictions for labor racketeering alone, compared to only three in the previous six years.¹⁹⁷ He predicted the continued decline of organized crime, noting that "[T]he federal government has a number of powerful weapons that it can use in this battle against syndicated crime. And today the criminal is faced by a formidable alliance of State and Federal officers."¹⁹⁸

IV. THE ERA OF ACTIVISM

One year later, to hear new Attorney General Robert Kennedy tell it, this "formidable alliance" had abandoned the field in disarray. "[T]he situation is worse than it was 10 years ago in terms of the financial power of the racketeers, the extent of their operations, the number of people involved and their political power."¹⁹⁹ Kennedy explained to Congress that the "primary source of [organized crime's] growth is illicit gambling. From huge gambling profits flow the funds to bankroll [narcotics, prostitution, and bribery]."²⁰⁰ He promised that denying use of the nation's

Cong., 2d Sess. (1960) (THE FINAL REPORT OF THE SELECT COMM. ON IMPROPER ACTIVITIES IN LABOR OR MANAGEMENT FIELD) [hereinafter cited as THE FINAL REPORT]. The future Attorney General, Robert Kennedy, was Chief Counsel for the Committee.

197. Rogers, *The New War on Organized Crime*, PARADE MAGAZINE, Feb. 7, 1960, quoted in 106 CONG. REC. 2159 (1960).

198. *Id.* See also ABA Report, *supra* note 192, at 221-22 (concluding that organized crime was on a temporary wane). J. Edgar Hoover agreed:

America has the law enforcement tools with which to do the job; we need but to use them together and with more vigor than ever before. It is encouraging that this country's citizens and governing bodies are becoming more and more concerned over organized crime and interested in providing methods of successfully fighting it. But some, in their zeal to achieve this objective, have called for federal domination over the investigation and prosecution of racketeers. Nothing could be more harmful to the tradition of American law enforcement.

H. MESSICK, JOHN EDGAR HOOVER 193 (1972); see also Law Enforcement Bulletin, Feb. 1, 1960.

199. Washington Star, Aug. 13, 1961 (speech by Robert Kennedy), reprinted in 107 CONG. REC. 6414 app. (1961). Hoover also agreed with Kennedy:

This new and vitally needed legislation, which you have proposed, will strengthen the Federal Government's hand and will provide it with additional effective weapons in stamping out the evil of organized crime. If enacted into law, these legislative proposals would certainly enable the Government to proceed more effectively against the well entrenched interstate racketeers who are beyond reach of local law enforcement.

Legislation Relating to Organized Crime: Hearings before Subcomm. of the House Comm. on the Judiciary, 87th Cong., 1st Sess. 32 (1961) [hereinafter cited as *House Hearings*].

200. *Legislation Relating to Organized Crime: Hearings before Subcomm.*, *supra* note 199, at 20. Assistant Attorney General Herbert Miller stated that in 1961, the FBI estimated the annual profit of organized crime at \$22 billion. H. Miller, *A Federal Viewpoint on Combatting Organized Crime*, 347 AN-

communications system to gamblers, which his proposed legislation would accomplish, "would be a mortal blow to their operations."²⁰¹ Kennedy proposed several federal statutes.²⁰² These proposals prohibited interstate travel in aid of racketeering (ITAR),²⁰³ expanded the fugitive felon law to cover all felonies,²⁰⁴ forbade the use of interstate communication facilities for gambling purposes,²⁰⁵ prohibited interstate shipment of materials and machines used in gambling,²⁰⁶ expanded the immunity statute to apply to labor investigations,²⁰⁷ and offered expanded protection to witnesses during the investigatory stage of the criminal process.²⁰⁸ All of these were enacted, except the immunity and witness protection proposals, albeit in slightly less ambitious forms than originally proposed.²⁰⁹

Unlike the previous legislation, these bills reached out to punish acts that were on their face completely innocent, but became wrongful because they aided activities that were unlawful under state law. Thus, making a telephone call or driving across state lines with the requisite intent was now a crime. This was an expansion of the concept of the Dyer Act, for example, where it was the movement in interstate commerce of the contraband itself which was punished.²¹⁰

While several of these statutes were important, ITAR, which Kennedy termed "the most controversial of the bills,"²¹¹ was the most significant both in terms of expansion of federal jurisdiction and subsequent use by the government as a prosecutorial tool. The reason that the Justice Department claimed to need it was that "there is a hole in the criminal laws of the United States,"²¹² in that employees of

NALS 93, 94 (1963). Actually, FBI Director Hoover was referring to the cost of *all* crime. See *House Hearings, supra* note 199, at 31-32. In either case, the author believes such estimates are utterly unsupported and unsupported by any factual data.

201. *House Hearings, supra* note 199, at 25.

202. For a detailed but uncritical discussion of these and the other anti-gambling statutes, see Blakely and Kurkland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923 (1978).

203. Pub. L. No. 87-228, 75 Stat. 498 (1961).

204. Pub. L. No. 87-368, 75 Stat. 795 (1961).

205. Pub. L. No. 87-216, 75 Stat. 491 (1961). This was a revival of the proposal which arose in the Attorney General's Conference of 1950. The proposal was not passed due to a conflict between the Federal Communications Commission and the Department of Justice—each wanting the other to enforce it, *supra* note 171. S. 1656 squarely placed enforcement authority in the Justice Department by making transmission of gambling information a crime, S. 1656, 87th Cong., 2d Sess. (1961).

206. Pub. L. No. 87-218, 75 Stat. 491 (1961), and Pub. L. No. 87-840, 76 Stat. 1075 (1961). This also revived the original proposal of the 1950 Attorney General's Conference which had been enacted as the more limited Johnson Slot Machine Act, *supra* note 170.

207. S. 1665, 87th Cong., 1st Sess. (1961).

208. *Id.*

209. A broader immunity statute, under which a witness who pleads privilege against self incrimination may be immunized from prosecution and compelled to testify, applicable to any witness in court or grand jury, regardless of the nature of the crime charged or investigated, was eventually enacted as part of the Organized Crime Control Act of 1970, 18 U.S.C. § 6005 (1978).

210. See *supra* notes 75-83 and accompanying text (discussing Dyer Act). Similarly, the Mann Act prohibited the transportation of a woman for immoral purposes, as opposed to interstate travel by the defendant. 18 U.S.C. § 398 (1910).

211. *Hearings before the Senate Committee on the Judiciary: The Attorney General's Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess. 15 (1961) [hereinafter cited as *Senate Hearings*].

212. *House Hearings, supra* note 199, at 103 (testimony of Assistant Attorney General Herbert J. Miller).

gamblers could carry the proceeds of gambling around the country without running afoul of federal law. Also, the bill was designed to reach a person who owned a gambling or prostitution establishment in Ohio, for example, but stayed in Kentucky, out of the reach of Ohio authorities.²¹³ Thus, interstate travel or use of interstate facilities, including the mail and the telephone, was criminalized.

As usual, these explanations of the need for the statute were spurious. In the first place, the other new legislation prohibiting the use of the telephone in aid of gambling and interstate transportation of gambling records and receipts²¹⁴ filled this "hole" as to gamblers, the main focus of the government's attention.²¹⁵ Moreover, the Kentucky entrepreneur would not have had any illegal enterprise left if Ohio police shut down his gambling or prostitution enterprise and locked up his employees. Ohio authorities could then indict him for conspiracy and as an accessory and have him extradited from Kentucky. They had not done so, of course, because in their hearts, the citizens of Ohio *wanted* gambling and prostitution or at least tolerated it. If they had not, both could have been quickly eliminated.²¹⁶

Aside from the arguably unnecessary expansion of the federal government's commerce power, ITAR is an extremely broad statute.²¹⁷ It provides that anyone who travels or uses any facility in interstate or foreign commerce with intent to:

1. distribute the proceeds of any unlawful activity
2. commit any crime of violence to further any unlawful activity or
3. otherwise promote, manage, establish, carry on or facilitate the promotion [etc.] of any unlawful activity and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3) shall be fined, et cetera.²¹⁸

213. *House Hearings*, *supra* note 199, at 22–23 (testimony of Attorney General).

214. S. 1656, 87th Cong., 1st Sess. 107 (1961) and S. 1657, 87th Cong., 1st Sess. (1961).

215. The main focus of the government's attention was "effectively curtailing gambling operations." *Senate Hearings*, *supra* note 211, at 11 (testimony of Attorney General Robert F. Kennedy).

216. As Kennedy himself pointed out, "an aroused citizenry" cleaned up Beaumont, Texas, a town previously "controlled" by organized crime. *Senate Hearings*, *supra* note 211, at 2.

217. One problem with ITAR is that it arguably interferes with the constitutional right to travel. *See, e.g.*, *United States v. Guest*, 383 U.S. 745 (1966) (recognizing right to travel as fundamental constitutional right). Justice Stewart, concurring in *Shapiro v. Thompson*, 394 U.S. 618 (1969), considered the right to travel "not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. . . . [It] is a virtually unconditional personal right." *Id.* at 642–43 (Stewart, J., concurring). However, the majority in *Shapiro* held that the right could be abridged in the case of a "compelling" state interest. *Id.* at 634.

In *Caminetti v. United States*, 242 U.S. 470 (1917), the Supreme Court, in upholding the constitutionality of the Mann Act, conceded *arguendo* that "Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey." *Id.* at 491. It concluded, however, that the Mann Act was different because it sought to "reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of unlawful purposes prohibited." *Id.* at 491. Despite this suggestion in *Caminetti*, the cases that have upheld the constitutionality of ITAR have done so only in the face of challenges to Congress' commerce power—the right to travel issue has apparently never been the basis of a constitutional challenge. *See, e.g.*, *United States v. Zizzo*, 338 F.2d 577 (7th Cir. 1964) (statute proscribing interstate travel in aid of racketeering is not unconstitutional), *cert. denied*, 381 U.S. 915 (1955); *United States v. Barrow*, 363 F.2d 62 (3d Cir. 1966) (tenth amendment does not operate as limitation upon powers delegated to Congress by commerce clause), *cert. denied*, 385 U.S. 1001 (1967).

218. Crimes and Criminal Procedure Act, 18 U.S.C. § 1952(a) (1952).

Unlawful activity means: 1. any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics . . . prostitution offenses [in violation of State or Federal law]; or 2. extortion or bribery [in violation of State or Federal law].²¹⁹

Lest Congress fear that this legislation might sweep too broadly, the Attorney General hastened to assure them that:

The target clearly is organized crime. The travel that would be banned is travel "in furtherance of a business enterprise" which involves gambling, liquor, [etc.] . . . Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.²²⁰

Despite the Attorney General's bland assurances, it is obvious from the face of the statute that ITAR (Interstate Travel in Aid of Racketeering) is limited to neither travel, racketeering, nor a continuous course of conduct, at least as to extortion and bribery offenses, which do not require a business enterprise. Nor have any such limitations been recognized by the Justice Department in its enforcement of the statute. Indeed, the possibilities are endless for creative federal prosecution of people who, if not exactly "interstate racketeers," to use J. Edgar Hoover's term, nevertheless "deserve" to be prosecuted in the Justice Department's estimation. For example, ITAR has been used to successfully prosecute the representative of a home building company who bribed a local zoning board,²²¹ an employee of a gambling establishment who was returning from an out-of-state visit to his sister,²²² a man and a woman who attempted to extort money from her married paramour,²²³ and a

219. 18 U.S.C. § 1952(b) (1982). Arson was added to the definition of unlawful activities in 1965. Act of July 8, 1965, Pub. L. No. 89-68, 79 Stat. 212, U.S. CODE CONG. & AD. NEWS (1965).

220. *Senate Hearings, supra* note 211, at 16. The Attorney General also assured the Senate that "we do not seek to preempt . . . the traditional responsibilities of local law enforcement . . . [But] organized crime is . . . so well entrenched on a multi-state basis that local law enforcement often is virtually powerless to act without aid and assistance of the federal government." *Id.* at 11.

221. *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976). In *Peskin* the court noted that "although the Travel Act was enacted to combat organized crime its language is not so limited." *Id.* at 76-77 (citations omitted). The court upheld the defendant's conviction on those counts where the interstate connection was that the defendant had drawn checks on an out-of-state bank to pay bribes, and had traveled out of state to participate in the scheme. *Id.* at 75-79.

222. In *United States v. Carpenter*, 392 F.2d 205 (6th Cir. 1968), the defendant worked for a numbers operation in Tennessee and occasionally traveled to Georgia to visit his son and sister. Carpenter was prosecuted for his return trips to Tennessee under the Travel Act, which prohibited travel in interstate commerce with the intent to promote or engage in illegal gambling activities. The court distinguished *Mortensen v. United States*, 322 U.S. at 369, on the ground that "the promotion of illegal activity was not the dominant motive" for Mortensen's travel. *United States v. Carpenter*, 392 F.2d at 206. The *Carpenter* court stretched to reason that interstate travel was not directly connected with the illegal activity in *Mortensen*. It could only distinguish *Carpenter* on two grounds: according to officers' testimony, Carpenter occasionally took a circuitous route, "apparently in an effort to avoid surveillance" and 2) on one occasion he had picked up a woman who worked in the gambling operation and had taken her to the gambling house. *Id.* at 207.

223. *United States v. Phillips*, 433 F.2d 1364 (8th Cir. 1970) (defendant traveled from Indiana to

man who, though not an organized crime figure, posed as one.²²⁴ Clearly all of these cases could have been prosecuted by local authorities.

Because most ITAR defendants do indeed deserve prosecution, these cases do not seem to have unduly disturbed the courts. In only one case, where the Justice Department went so far as to prosecute the customers of a small town numbers operator who crossed state lines to place bets, has the judiciary significantly stayed the Department's hand.²²⁵ ITAR has repeatedly been used to prosecute purely local gambling operations.²²⁶ While disquieting in light of Attorney General Kennedy's representations, this result is hardly surprising for Justice Department attorneys. In their understandable zeal to make cases against wrongdoers, Justice Department attorneys should be expected to push their statutory authority to the limit. Congress must anticipate this zeal in advance and not rely on Justice Department assurances that a broad statute will be used carefully and discreetly. Such care and discretion is contrary to the nature of a prosecutor who sees his mission as prosecuting to the full extent of the law, unfettered by what may have transpired at congressional hearings years before.

Notwithstanding the broad grants of authority obtained in the 1961 legislation, in the next two years the Attorney General sought greater authority from Congress. As he informed the Senate: "The picture is an ugly one. It shows . . . a private government of organized crime, a government with an annual income of billions, resting on a base of human suffering and moral corrosion. . . *Organized crime has*

Missouri to continue extortion pressure with intent to collect blackmail money), *cert. denied*, 401 U.S. 917 (1971).

224. In *United States v. Keresty*, 465 F.2d 36 (3d Cir.), *cert. denied*, 409 U.S. 991 (1972), defendants were found guilty of using interstate travel to promote extortion, extending credit, and collecting an extension of credit through extortionate means when one of them posed as "Tony from the syndicate" to scare the victim into paying a gambling debt. *Id.* at 39. The sole basis for jurisdiction under ITAR was that a defendant had borrowed a car in Ohio and driven it to Pennsylvania for the purpose of convincing the victim that this was a *syndicate car* because it had Ohio license plates. *Id.*

225. *Rewis v. United States*, 401 U.S. 808 (1971). The convictions of the bettors were reversed by the court of appeals, *Rewis v. United States*, 418 F.2d 1218 (5th Cir. 1969); the convictions of the numbers operators were reversed by the Supreme Court on the ground that Congress did not intend to prosecute local operators—at least where they made no attempt to solicit out-of-state business. *Rewis v. United States*, 401 U.S. at 812.

In fact, contrary to the court of appeals' holding, it seems quite clear under the terms of § 1952 that a customer who crosses state lines with intent to gamble and thereafter gambles has "facilitate[d] . . . the carrying on of an unlawful activity" and is therefore guilty, notwithstanding Attorney General Kennedy's remarks, *Senate Hearings, supra* note 211, at 2. (Indeed, Assistant Attorney General Miller, testifying at the same hearing as Kennedy, stated that the meaning of the term "facilitate" stated was "very broad" and would include "anything to benefit a business which is in fact unlawful." *Id.* at 106. This would certainly include travelling to patronize that business. The problem was not that the defendants were innocent, but that the statute was too broad.

226. In *United States v. Erlenbaugh*, 452 F.2d 967 (7th Cir. 1967), *aff'd on other grounds*, 409 U.S. 239 (1972), a Hammond, Indiana, bookmaker was prosecuted with no evidence offered that he, his employees, or his customers travelled interstate. *Id.* at 968-70. The sole basis for federal jurisdiction was that every morning, one of his employees went down to the local train station and picked up several copies of the *Illinois Sporting News*, which had come in on the train from Chicago, a racing newspaper which gave up-to-date information on withdrawals from races at the track. *Id.* at 969. *See also* *United States v. Carpenter*, 392 F.2d at 206-07 (interstate travel falls under statute even if trips out of state have no connection to illegal activities).

grown immensely since the days of the Kefauver investigation."²²⁷

Accordingly, the Justice Department proposed legislation to give it the power to immunize witnesses in ITAR, bribery and conflict of interest cases,²²⁸ and to give the Department the power to conduct wiretaps in certain particularly serious cases such as kidnapping and murder.²²⁹ The bill also authorized wiretapping by state authorities in similar cases.²³⁰ Once again the Attorney General promised:

[If] those three bills were passed, the wiretapping, which is the most important, plus the immunity bills, then I would think that the need for this kind of hearing 5 years from now would not be necessary. . . . [The] major effect that it [organized crime] has on peoples' [sic] lives and on communities would not exist 5 years from now.²³¹

In order to drum up enthusiasm for the bills, the Justice Department, in the autumn of 1963, produced Mafioso Joseph Valachi, who regaled the Committee with tales of blood rites, murders, and the code of *omerta*, and added *La Cosa Nostra* to the organized crime lexicon.²³² Shortly after these revelations, however, President Kennedy was assassinated and his brother lost both political power and his enthusiasm for the antiracketeering campaign,²³³ and the legislation died in committee.²³⁴

227. *Hearings Before the Permanent Subcomm. on Investigation of the Senate Comm. on Government Operations, Organized Crime and Illicit Traffic in Narcotics*, 88th Cong., 1st Sess. 6-19 (1963) (emphasis added) [hereinafter cited as *Narcotics Hearings*]. Despite these dire statements, Kennedy also pointed out that for the first six months of 1963, the Justice Department had indicted 171 and convicted 160 "racketeering figures," compared with 24 indictments and 35 convictions three years earlier. *Id.* at 8. He added that, since 1961, "we have successfully prosecuted 1,238 gamblers for wagering tax or interstate gambling violations." *Id.* at 11. Moreover, "because of the remarkable vigilance and law enforcement efforts of the Bureau of Narcotics. . . the syndicate leadership has ordered its members to stay out of the narcotics traffic." *Id.*

Obviously, the figures do not mesh. Because gamblers are clearly "racketeering figures" and it had been only two years since his prior testimony, it would seem that the six month statistics for prosecution of "racketeering figures" should be higher, or those for gamblers lower. These kinds of statistical irregularities are not unique in Justice Department reportage of organized crime enforcement. See *infra* notes 327 and 337 and accompanying text.

228. *Narcotics Hearings*, *supra* note 227, at 15 (asking for authority to provide immunity to witnesses in racketeering investigations).

229. This bill was originally submitted as S. 2813, 87th Cong., 2d Sess. (1962) (later it became S. 1308, 89th Cong., 1st Sess. (1963)). As originally introduced, the bill forbade wiretapping by private individuals, but allowed it for state and federal authorities in national security, murder, kidnapping, extortion, bribery, illegal transmissions of wagering information, ITAR and narcotics cases. *Narcotics Hearings*, *supra* note 227, at 3. The authority was limited to "interception of wire communications." *Id.*

230. *Id.*

231. *Narcotics Hearings*, *supra* note 227, at 19 (testimony of Attorney General Robert F. Kennedy).

232. *Id.* at 80. Kennedy "unleashed Joe Valachi in the vain hope that his sensational revelations would electrify the country and mobilize it behind his bill." V. NAVASKY, *KENNEDY JUSTICE* 77 (1971).

233. See V. NAVASKY, *supra* note 232, at 51-52. At least one authority on President Kennedy's assassination blames it on organized crime as retaliation for the Kennedy racketeering effort. G. R. BLAKEY, *THE PLOT TO KILL THE PRESIDENT* 179 (1970). Blakey was Chief Counsel for the House Select Committee on Assassinations.

234. A vote was never held in committee. 109 CONG. REC. PROCEEDINGS AND DEBATES OF THE 88TH

Still, the spark had been lit. In 1965, President Johnson, declaring that "organized crime is a cancer in our city," appointed a commission, headed by Attorney General Katzenbach to study the problem.²³⁵ In addition to its general report, "The Challenge of Crime in a Free Society," the Commission's Organized Crime Task Force issued a report on organized crime.²³⁶ The Task Force concluded that organized crime, with extensive operations in the fields of gambling, loan sharking, and narcotics, as well as infiltration of legitimate business and labor unions, posed a massive national problem.²³⁷ It further concluded that "efforts to curb the growth of organized crime have not been successful"²³⁸ and recommended *inter alia* that Congress should enact wiretapping and eavesdropping legislation.²³⁹ This report, combined with the Supreme Court's decision in *Berger v. New York*,²⁴⁰ which laid down a "blueprint for a constitutional system of authorized electronic surveillance,"²⁴¹

Cong., 1st Sess. (1963) and 110 CONG. REC. PROCEEDINGS AND DEBATES OF THE 88TH CONG., 2d Sess. (1964). The failure of the bill did not mean that wiretapping and electronic eavesdropping were not used extensively by the FBI against organized crime figures and other supposedly suspicious persons (including Martin Luther King, Jr.), as was subsequently revealed. See V. NAVASKY, *supra* note 232, at 67-77, 82. Federal and State law enforcement authorities were prohibited from wiretapping by the Federal Communications Act of 1934, which provided that "no person not authorized by the sender shall intercept any communication and divulge or publish the existence, contents, etc. of such intercepted communication to any person. . ." Telegraphs, Telephones, and Radiotelegraphs § 605, 47 U.S.C. § 605 (1982). See *Nardone v. United States*, 302 U.S. 379 (1937) (Communications Act includes federal officers within its sweep). However, the Justice Department took the position that the Act did not prohibit wiretapping *per se* but only wiretapping followed by divulgence, and that divulgence did not include communication to other law enforcement officials. See Roger, *The Case for Wiretapping*, 63 YALE L.J. 792, 793 (1953).

235. PRESIDENT'S MESSAGE TO CONGRESS, H.R. DOC. No. 103, 89th Cong., 1st Sess. 4 (1965). Oddly, in the same speech, Johnson proclaimed the success of the anti-racketeering effort:

Since 1961, the Federal Government has responded to this challenge in force. We have secured new legislative authority. We have achieved new levels of cooperation among the 26 different Federal law enforcement agencies. We have achieved new prosecutive energy. *The result has been a tenfold increase in racketeering convictions.*

Id.

236. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 2, at III (1967).

237. *Id.* at 2-4.

238. *Id.* at 14. The reasons cited were: difficulties in obtaining proof, lack of resources, lack of coordination, failure to develop strategic intelligence, failure to use available sanctions and lack of public and political commitment.

239. Unlike the rest of the report, the wiretapping recommendation included a minority view which had "serious doubts" about granting such authority to law enforcement. *Id.* The other recommendations of the Task Force included a general immunity statute, special organized crime grand juries, a lessening of the proof requirements in perjury cases, special sentences where a felony is committed as a part of a continuing illegal business, and computerization of the federal government's organized crime files.

240. 388 U.S. 41 (1967). In *Berger*, the Court struck down a state conviction based on electronic eavesdropping evidence which was obtained pursuant to a statute which did not require a showing of probable cause or particularity for the authorities to obtain an eavesdropping order from the court. *Id.* at 55. The Court's decision made it clear that procedural requisite, for proper order includes a showing of probable cause. *Id.* at 55-58.

241. *Bills Relating to Crime Syndicates, Wiretapping, Admissibility in Evidence of Confessions, Assisting State and Local Governments in Combatting Crime and Related Areas of Criminal Law and*

and the support of the FBI and the Internal Revenue Service²⁴² led Congress to reconsider wiretapping and electronic eavesdropping despite the opposition of President Johnson and the new Attorney General Ramsey Clark.²⁴³ Senator McClellan introduced S. 675 which was a resurrection of the Justice Department's 1962 wiretapping bill, although it extended wiretap authority to counterfeiting cases.²⁴⁴ Senator Hruska introduced S. 2050 which allowed both wiretapping and electronic eavesdropping by federal and state authorities in all of the above cases, as well as in cases involving bankruptcy fraud and welfare fund bribery.²⁴⁵ These two bills were combined and engrafted onto the Administration's bill for aid to state and local law enforcement, with Title III, the wiretapping/eavesdropping provisions, further expanded to cover obstruction of justice and interstate transportation of stolen property.²⁴⁶ After considerable manipulation on the part of its sponsors, the bill, which was finally applicable to 27 U.S. Code violations as well as national security cases,²⁴⁷

Procedures Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 937 (1967) (testimony of Prof. G. Robert Blakey) [hereinafter cited as Criminal Law Hearings].

242. "According to the New York Times, Cartha D. DeLoach, Assistant to The Director of the FBI, says that the Bureau would be handicapped in fighting organized crime unless eavesdropping was legalized." *Study of Organized Crime and the Urban Poor*, 113 CONG. REC. 24460-64 (1967). A similar sentiment was expressed by William Kolar, Director of the Intelligence Division of the Internal Revenue Service. *Id.* Professor G. Robert Blakey of Notre Dame Law School, who was Chief Counsel for the Senate Judiciary Committee, informed the author that the FBI, contrary to Justice Department policy, lobbied for wiretapping and eavesdropping legislation and even assigned lawyer/agents to assist the Committee staff in the drafting of the bills.

243. Johnson and Clark supported a right of privacy bill which forbade all wiretapping and eavesdropping by anyone except in national security cases. *Criminal Law Hearings, supra* note 241, at 358-59 (letter from Attorney General Ramsey Clark). Clark testified that despite President Johnson's nearly total ban on wiretapping and bugging which was imposed in July, 1965, the Department of Justice prosecutions against organized crime were at an "all time high." N.Y. Times, May 19, 1963 at 23, col. 1, *reprinted in Criminal Law Hearings, supra* note 241, at 941. Clark's predecessor, Attorney General Katzenbach, had also opposed wiretapping by federal authorities but would have allowed state authorities to do it. *Bills to Provide for New Federal Criminal Statutes before Subcomm. No. 5 of the House Comm. on the Judiciary, 90th Cong., 1st Sess. 138 (1967) (referring to Mr. Katzenbach's 1966 testimony before Senate Judiciary Committee).*

244. *Criminal Law Hearings, supra* note 241, at 76.

245. *Id.* at 1005. That is, the Hruska bill allowed interception of wire and oral communications, thus allowing electronic bugging as well as wiretapping.

246. H.R. 5037, 90th Cong., 1st Sess. (1967) had been amended in the Senate so as to include all of the provisions of the Senate bill (S. 1917). This could then be approved by the House, without the necessity of going to Committee. If the Senate had simply passed S. 1917, the two bills would have had to be sent to Conference Committee. Had that happened, Congressman Cellar, Chairman of the House Judiciary Committee, who felt that the bill was "bursting at the seams with unconstitutional provisions" would have killed it. 114 CONG. REC. 16,069-70 (1968).

In order to avoid a presidential veto of the wiretapping provisions (Title III), Senator McClellan promised his support for the Law Enforcement Assistance portion of the bill (Title I), which President Johnson wanted, but which lacked support among southern senators. Conversations of the author with Prof. G. Robert Blakey, *supra* note 242.

247. Murder, kidnapping or extortion under Title 18 of the United States Code; any offenses under 18 U.S.C. § 201 (1982) (bribery); 18 U.S.C. § 1084 (1982) (transmission of gambling information); 18 U.S.C. § 1952 (1982) (travel or transportation in aid of racketeering enterprises); any offense involving violations of the federal narcotics law; and conspiracy to commit any of those offenses; also, to commit robbery, illegal loans to labor organizations, bribery in sporting contests, influencing jurors, obstruction

was enacted,²⁴⁸ five years after it had originally been proposed by the Justice Department.

It is beyond the scope of this article to inquire into the details,²⁴⁹ the wisdom or the constitutionality of Title III which has been amply debated²⁵⁰ and litigated.²⁵¹ Suffice it to say that the national fear of organized crime had placed by far the most powerful tool yet in the hands of law enforcement authorities²⁵² and, as in the past, that tool was not limited to use in organized crime investigations.²⁵³ It is hard to imagine an individual who the FBI would be interested in investigating and

investigations, presidential assassinations, kidnapping and assault, interference with commerce by threats of violence, illegally influencing an employee benefit plan, theft from an interstate shipment, embezzlement from pension and welfare funds, interstate transportation of stolen property, counterfeiting, bankruptcy fraud, and extortionate credit transactions. 18 U.S.C. § 2516(1) (1982). In 1970, Title III was expanded to apply to violations of 18 U.S.C. §§ 844(d), (e), (f), (g), (h), and (i) (unlawful use of explosives); 18 U.S.C. § 1511 (obstruction of state and local law enforcement); 18 U.S.C. § 1955 (prohibition of business enterprises of gambling); and, 18 U.S.C. § 1963 (RICO) (Pub. L. No. 91-452). In 1971, 18 U.S.C. § 351 (congressional assassinations, kidnapping and assault) was also added. (Pub. L. No. 91-644).

In the original bill, as in the final Act, states were permitted to approve wiretapping by statute, subject to the federal procedural safeguards, in certain cases. Originally those cases were limited to murder, kidnapping, extortion, bribery, and narcotics. In Title III state authority was also extended to gambling and any "other crime dangerous to life, limb or property and punishable by imprisonment for more than one year." 18 U.S.C. § 2516 (1982).

248. Pub. L. No. 90-351, 82 Stat. 197 (Title III is codified as amended at 18 U.S.C. §§ 2510-2520).

249. The procedural requisites are set forth at great length in 18 U.S.C. §§ 2516-2519 (1982) and include the requirements that the wiretap may not be conducted for longer than 30 days, 18 U.S.C. § 2518(5) (1982), and that the judge not only find probable cause but that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3) (1982).

250. See ELECTRONIC SURVEILLANCE: REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO ELECTRONIC SURVEILLANCE (1976) [hereinafter cited as NATIONAL WIRETAP COMMISSION] Both the majority and minority agreed that wiretapping was an appropriate activity for law enforcement officials. *Id.* at 3. However, the minority felt that it "involves substantial invasions of privacy" and should be limited to a "small number of very serious felonies." *Id.* at 4, 180. See also Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455 (1969) (article highly critical of Title III.) For a recent, extensive discussion of the statute and its treatment by the courts, see Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1 (1983).

251. See, e.g., *United States v. Cafero*, 473 F.2d 489 (3d Cir. 1973) (upholding constitutionality of Title III despite earlier holding of unconstitutionality by district court in same circuit, *cert. denied*, 417 U.S. 918 (1974); *United States v. Whitaker*, 343 F. Supp 358 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246, *cert. denied*, 412 U.S. 953 (1973); *United States v. United States District Court*, 407 U.S. 297 (1972) (holding that "national security" wiretaps must conform to fourth amendment warrant requirements (though 18 U.S.C. § 2511(2)(e)-(f) had specified that Act was not intended to limit or define President's traditional power to wiretap in order to prevent overthrow of government)); *United States v. Chavez*, 416 U.S. 562 (1974) (holding that 18 U.S.C. § 2516(1) limits power to authorize wiretap applications to Attorney General or any Assistant Attorney General he might designate); *United States v. Giordano*, 416 U.S. 505 (1974) (same).

252. In Germany, where wiretapping has been banned since the war, fear of terrorist activities caused the enactment of a broad wiretapping statute in 1968. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1054 (1983). The authority to wiretap is applicable to and is used to investigate a long list of crimes that have nothing to do with terrorism. *Id.* at 1055. Thus, as in America, law enforcement authorities have used a problem which has aroused popular fear to gain legislation which extended their authority, and concurrently limited civil liberties, far beyond the bounds of that problem.

253. See *supra* notes 72-74 and accompanying text. However, it is true that unlike the Mann Act, for

who would not fall into one of the categories listed, including political activists,²⁵⁴ marijuana users,²⁵⁵ and local bookmakers.²⁵⁶ However, the requirements that the Attorney General or a designated Assistant Attorney General must approve the tap or eavesdrop and that the judge must find that "normal investigative procedures have been tried and have failed" (or are likely to fail)²⁵⁷ may serve to curb investigative zeal.²⁵⁸

There was another legislative development in 1968 which, while of far less practical importance than the wiretap statute, did establish yet another new jurisdictional beachhead for the federal government. This was the extortionate credit transactions (loan-sharking) provision, Title II of the Consumer Credit Protection Act of 1968.²⁵⁹ As originally introduced, the Consumer Credit Protection bills contained no provisions relating to loan-sharking,²⁶⁰ and the extensive hearings held on the bills contained no reference to this problem.²⁶¹ The loan-sharking provisions were inserted in the conference committee at the instigation of Congressmen Poff of Virginia and McDade of Pennsylvania with the "cooperation of the Justice Department."²⁶²

The Act incorporates a critical congressional finding:

A substantial part of the income of organized crime is generated by

example, where prosecutions under the statute bore little connection to the purported purposes for which the statute was enacted, wiretaps do tend to be used in cases concerning large-scale criminal activities, particularly those involving narcotics and gambling. See, e.g., *United States v. Baily*, 607 F.2d 237 (9th Cir. 1979) (heroin and cocaine importation conspiracy), *cert. denied*, 445 U.S. 934 (1980); *United States v. Votteller*, 544 F.2d 1355 (6th Cir. 1976) (large gambling operation). This is probably due more to economics—wiretaps being expensive to maintain and analyze—than to any inherent sense of propriety on the part of the law enforcement officials involved.

254. See the provisions of the wiretap law, 18 U.S.C. § 2516(1)(a) (1982), relating to violations of 18 U.S.C. § 2101 (1982) (interstate travel with intent to incite, organize, promote, encourage, participate in or cause a riot). This is the provision under which the "Chicago Seven" were prosecuted. *United States v. Dellinger*, 472 F.2d 340, 348 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

255. See 18 U.S.C. § 2516(1)(e) (1982) (relating to offenses involving buying marijuana punishable under any law of United States).

256. See the provisions of 18 U.S.C. § 2516(1)(c) (1982) and discussion *supra* note 247 relating to violations of ITAR, 18 U.S.C. § 1952 (1982).

257. 18 U.S.C. § 2516(1) (1982) & § 2518(3)(c) (1982).

258. According to the National Wiretap Commission, *supra* note 250, at 266, a total of 4334 wiretaps (957 federal and 3377 state) were conducted between 1968 and 1974.

259. Consumer Credit Protection Act, PUB. L. No. 90-321, 82 Stat. 146. (Title II is codified at 18 U.S.C. § 891-96 (1982)).

18 U.S.C. § 891(6) defines "extortionate extension of credit" as loans wherein "it is the understanding of the creditor and debtor" that delay or failure in repayment "could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." § 892(a) provides that "[w]hoever makes an extortionate extension of credit or conspires to do so shall be fined. . . ." § 893 forbids giving money to loan sharks for use in loan-sharking, and § 894 forbids collecting loans by extortionate means.

260. See S. 5, 90th Cong., 1st Sess., 114 CONG. REC. 2550 (1968) (later enacted as Consumer Credit Protection Act, *supra* note 259).

261. See *Consumer Credit Protection Act: Hearings before the Subcomm. on Consumer Affairs Comm. on Banking and Currency, House of Representatives*, 90th Cong., 1st Sess. (1967).

262. See 114 CONG. REC. 14391 (1968) (remarks of Congressmen Poff and McDade).

extortionate credit transactions. . . . Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce. . . . Even where extortionate credit transactions are purely *in-trastate* in character, they nonetheless directly affect interstate commerce.²⁶³

Consequently, the statute did not require, as all previous statutes had, that a particular transaction specifically involve interstate commerce at all, because loan-sharking now affected interstate commerce by definition. The basis for the conclusion was a congressional report entitled *STUDY OF ORGANIZED CRIME AND THE URBAN POOR*,²⁶⁴ "out of which came an anti-loan-sharking bill."²⁶⁵ The only portion of this study that could conceivably justify this conclusion is the finding that "organized crime takes \$350 million a year from America's poor through loan-sharking alone."²⁶⁶ It was this finding as well as congressional discussion of a New York Times article (discussing how loan-sharking is used to "launder" organized crime's ill-gotten gains)²⁶⁷ which led the Supreme Court in *Perez v. United States* to uphold the statute against a challenge based on the Commerce Clause.²⁶⁸

One may accept the finding of Congress that organized crime uses loan-sharking to launder money. One may even accept that loan-sharking produces a lot of income for organized crime, thereby indirectly affecting commerce in that it strengthens the hand of purveyors of illegal and untaxed goods and services. The \$350 million figure, however, is pure fantasy. Loan-sharking is far too secretive and fragmented to allow meaningful estimates of its volume.²⁶⁹ But even if these two assumptions are accepted, nothing indicates that *all*, or even most, loan sharks are members of the mob.²⁷⁰ Anybody with some extra cash and the will to collect debts through unconventional means can become a loan shark. Unlike bookmaking, which requires a complicated organization for payoffs and rapid transmission of information, as well as a permanent location or at least a phone number, loan-sharking can be, and usually is, a very mobile, individual operation, which loans money to people who cannot obtain credit from legitimate sources.²⁷¹ Thus, Congress' conclusion that

263. Consumer Credit Protection Act, *supra* note 259, Title II § 201(a) (emphasis added).

264. See 113 CONG. REC. 24460 (1967).

265. 114 CONG. REC. 14391 (1968) (remarks of Congressman McDade).

266. *Id.*

267. N.Y. Times, Jan. 28, 1968, § VI, at 19, reprinted in 114 CONG. REC. 1428-31 (1968).

268. *Perez v. United States*, 402 U.S. 146, 147 (1971).

269. This observation, based on the author's own experience, was supported by the testimony of Professor Ruth: "No one knows the full extent of loan-sharking in the United States. . . . Neither is there any way to allocate the exact proportions of loan-sharking to the amount of loan shark business that is . . . affiliated with La Cosa Nostra." *Impact of Crime on Small Business, 1968: Hearings before the Select Committee on Small Business, United States Senate*, 90th Cong., 2d Sess., 21-22 (1968) [hereinafter cited as *Small Business Hearings*]. These hearings were held before the Small Business Committee at the same time that the Conference Committee was considering the loan-sharking additions to the Consumer Credit Protection Act, *id.* at 21, and apparently played no part in the creation of the Extortionate Credit Transactions statutes.

270. *Id.* The Supreme Court recognized the existence of "independent operators" in *Perez v. United States*, 402 U.S. at 155.

271. *Small Business Hearings*, *supra* note 269, at 4 (testimony of Ralph Salerno). Salerno testified that federal legislation was needed because loan sharks, unlike gamblers, were hard to catch as a result of their

loan-sharking affects interstate commerce is highly questionable in many cases. Furthermore, there was no indication in Congress as to why the government should be excused from proving the jurisdictional element in each loan-sharking case, just as it had to do in cases under all previously enacted statutes. In truth, though it does not appear in the legislative history, the reason is that as to a given loan shark, it is virtually impossible to prove any effect on interstate commerce because no meaningful impact exists.

The civil rights cases, *Heart of Atlanta Motel v. United States*²⁷² and *Katzenbach v. McClung*²⁷³ which dealt with a similar congressional finding, and on which the Court relied in *Perez*,²⁷⁴ can thus be readily distinguished. The congressional finding in those cases was that motels which offer lodging to transient guests and restaurants which serve a substantial portion of their food to interstate travelers affect interstate commerce.²⁷⁵ This is obviously correct. While the motive behind the civil rights statutes was not primarily commercial, nevertheless, the commerce clause justification is viable. If blacks cannot readily find places to stay and eat, they will be discouraged from traveling and engaging in business, to the economic detriment of the nation.²⁷⁶ The loan-sharking statute lacks the “transient guest” and “substantial portion” requirements which made the presumption reasonable in civil rights cases.²⁷⁷ A local loan shark, who may or may not be associated with anyone else, who makes a loan to a dope addict cannot be said to be affecting commerce in any meaningful way. If the loan is made to a small businessman who cannot otherwise obtain credit, the only impact on commerce may be favorable. If threats are then used to obtain repayment or if the loan shark takes over the hapless debtor’s business, then, perhaps, an adverse effect on commerce could be proven — but not at the time of the loan. In any event, the loan shark would have violated state laws forbidding extortion or threats, and could be prosecuted by state authorities.

All of this is not to suggest that loan-sharking is a desirable activity which helps both to finance and to launder money for organized crime. As in the past, however, the need for federal legislation was due to the states’ lack of will to enforce their extortion laws, not their lack of jurisdictional authority. But unlike past legislation where the government’s claim was that the *national* character of the criminal enterprise made local enforcement impossible, the peculiarly *local* nature of loan-sharking led to a statute where the interstate connection need not (because it generally could not) be proven. *Perez*, by holding in effect that an individual can be pro-

lack of organization. (Attorney General Kennedy had previously asserted that the reason federal legislation was required as to gamblers was that they had such a large organization.)

272. 379 U.S. 241 (1964).

273. 379 U.S. 294 (1964).

274. *Perez v. United States*, 402 U.S. at 153–54. The focus is on the class of activities, not the particular activity. *Id.*

275. See *Katzenbach v. McClung*, 379 U.S. at 299–300.

276. As the Court noted in *Katzenbach*, the inability to be served in a restaurant “obviously affects commerce for one can hardly travel without eating.” *Id.* at 300.

277. The civil rights cases are confusing in that the Court adopted both the sensible argument that the inability of blacks to travel adversely affects commerce, and the questionable argument that failure to serve blacks in restaurants would reduce the amount of food moving in commerce. See Stern, *The Commerce Clause Revisited — The Federalization of Interstate Crime*, 15 ARIZ. L. REV. 271, 272–74 (1973) (discussing how *Perez* goes beyond these decisions) [hereinafter cited as Stern].

secuted by the federal government even if he can prove that his activities had *not* affected interstate commerce, culminated the trend, begun by *Champion v. Ames*,²⁷⁸ of expanding the federal police power to its limit. Robert Stern, a leading authority on the Commerce Clause, suggested that *Perez* could be read as allowing Congress to "forbid the possession or transfer of all pills... because of the difficulty of distinguishing dangerous pills from others and because some might move interstate."²⁷⁹ Certainly the reasoning of *Perez* could be applied to draw any crime within the federal ambit (as was subsequently done in the RICO statute). For example, murder is frequently employed by organized criminals to eliminate their rivals. Because murder furthers organized crime, it affects commerce and, consequently, all murders become federal crimes.²⁸⁰

V. THE PRESENT... AND THE FUTURE

Despite the accumulation of federal power since the Lottery Act, the Assistant Attorney General (Criminal Division) candidly admitted before a House Committee in 1968 that there was "no way of gauging" whether organized crime was increasing or decreasing.²⁸¹ The Committee concluded that, although the government possesses a "wealth of weapons" to fight organized crime²⁸² and, although the Justice Department's Organized Crime and Racketeering Section (OCRS) had octupled²⁸³ in size since its formation a decade and a half earlier, the efforts to cut the growth of organized crime had failed due, not to the lack of legislative authority but to the lack of coordination among the many agencies with responsibilities in the area.²⁸⁴

In November of 1968, Richard Nixon was elected to the Presidency in a campaign that emphasized "law and order" after public fear of crime and disorder had been stirred by summer riots in the country's black ghettos. While there was no reason to directly associate this problem with organized crime,²⁸⁵ and no independent events that had excited interest in the organized crime problem, the Justice Department

278. 188 U.S. 321 (1903).

279. Stern, *supra* note 277, at 280. Stern noted that in *United States v. Bass*, 404 U.S. 336 (1971), the Court implied that Congress could conclude that virtually any activity fell within the commerce clause if Congress "clearly manifests its intention to do so." *Id.* at 282-83.

Stern goes on to observe that a lawyer who fought for a realistic interpretation which would recognize that commercially the United States was one Nation, would be "surprised" to find the extent and acceptance of the recent expansion of the doctrine. *Id.* at 284.

280. Of course, one could also argue that murder affects commerce simply because dead men make no sales.

281. FEDERAL EFFORT AGAINST ORGANIZED CRIME: REPORT OF AGENCY OPERATIONS, H.R. REP. NO. 1574, 90th Cong., 2nd Sess. 29 (1968) [hereinafter cited as FEDERAL EFFORT AGAINST ORGANIZED CRIME].

282. *Id.* at 75.

283. OCRS was established in 1954 and had 10 attorneys by 1957; 85 were anticipated by 1969. *Id.* at 13-18. In 1980, OCRS had 140 attorneys. *Organized Crime and Use of Violence: Hearings before the Permanent Subcomm. on Investigations of the Comm. on Government Affairs, United States Senate*, 96th Cong., 2nd Sess. 36 (1980) (testimony of Assistant Attorney General Heymann).

284. FEDERAL EFFORT AGAINST ORGANIZED CRIME, *supra* note 281, at 75.

285. The Justice Department posited an indirect connection in that " 'deep lasting cynicism' is bred into ghetto dwellers concerning the credibility of law enforcement agencies which do nothing to curb (organized crime) operations. Much of the result is severe social discontent like that which has erupted into ghetto riots in the past." Wilson, *The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law*, 46 NOTRE DAME LAW. 41, 43 (1970).

obviously believed that the time was ripe for obtaining additional legislative authority from Congress on all fronts in the crime battle. Three months after his inauguration, President Nixon sent a message to Congress concerning organized crime.²⁸⁶ Referring to it as an "alien organization"²⁸⁷ the President summarized the problem:

For two decades now . . . the Federal effort has slowly increased. Many of the nation's most notorious racketeers have been imprisoned or deported But these successes have not substantially impeded the growth and power of organized crime syndicates. Not a single one of the 24 Cosa Nostra families has been destroyed. They are more firmly entrenched than ever before.²⁸⁸

Accordingly, the President ordered the Attorney General to engage in wire-tapping of organized racketeers,²⁸⁹ asked Congress to double (up to \$61 million) the amount spent in fighting organized crime,²⁹⁰ and proposed new legislation which "from his studies in recent weeks the Attorney General has concluded" is necessary.²⁹¹ This legislation would give the Justice Department its long sought immunity power, amend the wagering tax statutes, make local corruption a federal crime, cut off gambling income, and prevent the infiltration of legitimate businesses by organized crime.²⁹²

Actually these remarks did not reflect recent research by the newly appointed Attorney General; they were, rather, a presidential imprimatur on legislation already introduced, on January 15, 1969, by Senator McClellan.²⁹³ This bill (S. 30) contained eight titles pertinent to the problem and was designed in part to deal with the complaint of the Organized Crime Task Force in 1967 that the problem "continues to grow because of defects in the evidence gathering process."²⁹⁴ Accordingly, the bill contained several proposals to deal with this and other problems relating to organized crime enforcement. Title I provided for special grand juries to investigate organized crime.²⁹⁵ Title II was an immunity statute giving the Justice Department the power to immunize witnesses in the investigation of *any* federal crime.²⁹⁶ Title III provided for confinement, without bail (for as long as the grand jury was in session) of any witness who refused to testify before a federal grand jury "without just

286. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO THE FIGHT AGAINST ORGANIZED CRIME, H.R. DOC. NO. 105, 91st Cong., 1st Sess. 1-2 (1969).

287. *Id.* at 2. The notion that organized crime is an alien conspiracy rather than an endemic American problem, has been a popular one which has made stringent measures against it more palatable.

288. *Id.*

289. *Id.*

290. Moreover, he asked for \$300 million in LEAA money to go to the states to combat organized crime. *Id.* at 3-4.

291. *Id.* at 5.

292. *Id.* at 5-6.

293. S. 30, 90th Cong., 2d Sess., 115 CONG. REC. 829-32 (1969).

294. *Id.* at 829 (Congressional Findings and Statement of Policy).

295. S. 30, §§ 101-105 (1969). *Id.* at 829-30 (current version at 18 U.S.C. §§ 3331-3334 (1982)).

296. S. 30, §§ 201-202 (1969). *Id.* at 830 (current version at 18 U.S.C. §§ 6001-6005 (1982)). As such, the immunity statute was far broader than any previously proposed.

cause."²⁹⁷ Title IV provided penalties for false statement before the grand jury.²⁹⁸ Title V provided for the taking of depositions "whenever it is in the interest of justice that the testimony of a prospective government witness be . . . preserved" and the use of such depositions at trial if the witness was unavailable.²⁹⁹ Title VI provided protected facilities for housing government witnesses.³⁰⁰ Title VII provided for the admissibility of the statements of conspirators in federal trials.³⁰¹ Title VIII provided for enhanced sentences for "dangerous special offenders."³⁰²

Extensive hearings were held, at which the Attorney General offered the usual observations: "Organized crime poses a serious threat to our form of government and our system of criminal justice,"³⁰³ but "I am happy to report that we have made significant progress on many fronts."³⁰⁴ The bills survived the hearings essentially intact although numerous, relatively minor changes proposed by the Justice Department and others were adopted,³⁰⁵ and bills prohibiting "gambling businesses"³⁰⁶ and mob infiltration into legitimate business (RICO)³⁰⁷ were incorporated into S. 30. All of these measures passed, by an overwhelming vote.³⁰⁸

The Act provided another tremendous boost to the federal law enforcement effort. Two new substantive crimes were created — RICO³⁰⁹ and the gambling business

297. S. 30, § 301 (1969). *Id.* at 830 (current version at 28 U.S.C. § 1826 (1982)).

298. S. 30, § 401 (1969). *Id.* at 830 (current version at 18 U.S.C. § 1623 (1982)).

299. S. 30, § 501 (1969). *Id.* at 830 (current version at 18 U.S.C. § 3503 (1982)). As enacted, this procedure is now available to any party.

300. S. 30, § 601 (1969). *Id.* at 831 (current version at 18 U.S.C. § 3481 (1982)).

301. S. 30, § 701 (1969). *Id.* at 831. This title was amended to become the current 18 U.S.C. § 3504 (1982).

302. S. 30, § 801 (1969). *Id.* at 831–32 (current version at 18 U.S.C. § 3575–78 (1982)). This became Title X of the final Act. S. 30 also contained a Title IX which provided that if any portion of the Act was held invalid, the other portions would not be affected. *Id.* at 832.

303. *Organized Crime Control: Hearings before Subcomm. No. 5 of the Comm. on Judiciary, House of Representatives*. 91st Cong., 2d Sess. 153 (1970).

304. *Id.* at 154.

305. See *Measures Relating to Organized Crime: Hearings before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, United States Senate*, 91st Cong., 1st Sess. 365–77 (1969) (Department of Justice Comments on S. 30) [hereinafter referred to as *Hearings on Measures*].

306. See S. 2022 in *Hearings on Measures*, *supra* note 305, at 83. The final bills also contained a Title XII providing for a National Commission on Individual Rights to oversee the operation of the new legislation and its impact on individual rights.

307. See S. 1623 and S. 1861 in *Hearings on Measures*, *supra* note 305, at 37 & 61. See Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980) (discussing more fully legislative history of this particularly significant provision) [hereinafter cited as Bradley].

308. Organized Crime Control Act of 1970, Pub. L. No. 91–452, 84 Stat. 937 (1970). *E.g.*, the Senate vote was 73 to 1. McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55 (1970). It is beyond the scope of this article to offer detailed criticisms of the various provisions of the Act. Two principal documents were before the Congress for a critical discussion of various points. They were a letter from the American Civil Liberties Union to each Senator, reprinted at 116 CONG. REC. 35212 (1970), and a report of the Association of the Bar of the City of New York, THE PROPOSED ORGANIZED CRIME CONTROL ACT OF 1969 (S. 30) (1970). See McClellan, *supra*, for a critical discussion of various points raised by these organizations.

309. RICO (Racketeer Influenced and Corrupt Organization), 18 U.S.C. §§ 1961–1968 (1982), prohibits the acquisition of any enterprise through the investment of racketeering proceeds, 18 U.S.C. § 1962(a) (1982), as well as the acquisition or operation of an enterprise through a pattern of racketeering

prohibition.³¹⁰ Moreover, the government's ability to conduct grand jury investigations in organized crime and public corruption cases was greatly enhanced by the immunity, contempt, and witness protection statutes.³¹¹ As before, these broad statutes aimed at organized crime have been used in all manner of cases, most of which have nothing to do with the problem of organized crime. For example, RICO has been used (properly under its broad terms), to prosecute defendants who committed three robberies,³¹² a defendant who defrauded Medicare through his hospital supply business,³¹³ and a group who operated a "weekend dice and card game" in a trailer park.³¹⁴ It was conceded that all of these cases were unconnected to "organized crime" and consequently had nothing to do with the original purpose of RICO, which was to stop the infiltration of organized crime into legitimate business. While all of these defendants may have deserved prosecution, the RICO count was pure surplusage in these cases; two of the prosecutions were based upon traditional state law violations³¹⁵ and the third was a simple case of defrauding the federal government.³¹⁶ RICO has virtually never been used in a case which was not reachable by other statutes, federal and state, which were on the books prior to its passage.

activities, 18 U.S.C. § 962(b) (1982). In addition to a 20 year sentence for the violation of any of the RICO subsections, the statute also provides for forfeiture of the "racketeers' " interest in the enterprise, 18 U.S.C. § 963 (1982). See Bradley, *supra* note 307, for a detailed analysis of the criminal provisions of RICO. RICO also provides for civil remedies for RICO violations. 18 U.S.C. § 964 (1982). See Blakey, *The RICO Civil Fraud in Context: Reflections on Bennet v. Berg*, 58 NOTRE DAME LAW. 237 (1982).

310. 18 U.S.C. § 1955 (1982) makes the conducting, managing, or general operating of a gambling business (involving five or more persons) a federal crime without requiring any impact on interstate commerce. This is made possible by a congressional finding, as in the loan-sharking statute, that "illegal gambling involves the widespread use of, and has an effect on interstate commerce." S. REP. No. 617, 91st Cong., 1st Sess. 16 (1969). See, e.g., *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) (upholding the constitutionality of this provision), *cert. denied*, 449 U.S. 1111 (1981).

311. Moreover, as of 1969, the FBI, under the recalcitrant J. Edgar Hoover, finally agreed to participate in the Organized Crime Strike Forces. *Hearings on Measures, supra* note 305, at 152-153.

312. *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). The only reason that the federal government became involved in this case was that one of the robbers attempted to fence the stolen property with an undercover federal narcotics agent.

313. *United States v. Huber*, 603 F.2d 387 (2nd Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). In this case, the defendant was indicted on 42 counts for various federal violations, including a RICO count. *Id.* at 390. The Court expressed concern about the "potentially broad reach of RICO" and the "danger of abuse" but nevertheless found the RICO provision conviction proper in that the defendant operated his business through a pattern of "racketeering" activities (i.e., fraud). *Id.* at 395-96. The court's holding was clearly correct under the broad terms of RICO, but the question remains as to why it was necessary to charge or convict the defendant of anything more than defrauding the government. (A possible answer is that RICO carries a maximum 20 year penalty, whereas fraud carries a maximum 5 year penalty). See also *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (mail fraud involving Veterans Administration).

314. *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978). The defendant was convicted of violating 18 U.S.C. § 1955 (engaging in illegal gambling business), 18 U.S.C. § 894 (extorting credit transactions), and 18 U.S.C. § 1962(c) (RICO) (engaging in racketeering activity allegedly through trailer park operation). The RICO count was reversed, because the gambling had no connection to the operation of the trailer park. *United States v. Nerone*, 563 F.2d at 839.

315. *United States v. Aleman*, 609 F.2d at 301-02 (burglary and robbery of homes); *United States v. Nerone*, 563 F.2d at 838-43 (illegal dice and card games).

316. *United States v. Huber*, 603 F.2d at 390-91 (mail fraud).

The courts' attitude toward these federal enforcement efforts has been notable. Not only has federal jurisdiction been upheld, but in doing so the courts have exhibited the same sort of patriotic zeal displayed years before by the Supreme Court in *Champion v. Ames*. For example, the Fifth Circuit, in adopting a very expansive view of what constituted a conspiracy under RICO, stated: "In this case we deal with the question of whether and, if so, how a free society can protect itself when groups of people, through division of labor, specialization, diversification, complexity of organization and the accumulation of capital turn crime into an ongoing business."³¹⁷ The court's answer to this question was to create a crime of "enterprise conspiracy" which was far broader than anything envisioned by Congress in a case which involved, not the Mafia, but a disorganized group of Georgia truck hijackers.

The prosecutorial possibilities of RICO are great. For instance, by its terms RICO is applicable to "any offense involving . . . buying, selling or otherwise dealing in narcotic . . . drugs . . . prohibited under any law of the United States"³¹⁸ Thus, a person who sold marijuana cigarettes to two people (thus establishing a "pattern" for the purpose of RICO) could be sentenced to an additional twenty years imprisonment.³¹⁹ Similarly, people involved in securities and bankruptcy fraud are also drawn into RICO's net. Moreover, RICO advances the federalization of crime virtually to its outer limit by making a "pattern" (i.e. two) of specified state law offenses, including bribery, extortion, and narcotic offenses, subject to federal prosecution under RICO.

While RICO was arguably an unnecessary expansion of the federal government's powers, there is no evidence that it has been used other than to prosecute genuinely criminal behavior. This was not true of the Justice Department's use of the broad new powers conferred by the immunity statute which, by authorizing immunization from prosecution, allowed the government to coerce grand jury testimony by neutralizing fifth amendment claims.³²⁰ This is an invaluable tool in the investigation and prosecution of organized and white collar crime cases where cooperative witnesses are difficult to find. However, the potential for harassment and intimidation of people whom the government does not like is great. The Nixon administration reestablished the Internal Security Division and used the new powers to persecute anti-war and/or anti-Nixon protesters.³²¹ In recent years, however, the

317. *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978).

318. 18 U.S.C. § 1961 (1982).

319. By its terms, RICO only applies to a person who operates an "enterprise" through a pattern of racketeering offenses. 18 U.S.C. § 1962 (1982). Thus, it would seem that the marijuana seller could not be punished under RICO because there could be no enterprise other than the pattern offenses themselves. In general, the courts, influenced by the patriotic zeal to stamp out "racketeering," have not so interpreted RICO, but rather have found proof of the "pattern" sufficient by itself to prove the "enterprise." See Bradley, *supra* note 307, at 854. See also *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976) (gambling), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979) (extortion and murder), *cert. denied*, 445 U.S. 946 (1980); *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979) (distribution of narcotics and stolen goods).

320. See *supra* note 296 and accompanying text.

321. *Hearings on H.R.J. Res. 46, H.R. 1277 and Related Bills: Federal Grand Jury before the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship and International Law*, 94th Cong., 2d Sess. 213 (1976):

immunity statute, though not limited to organized crime cases, has not been used for such clearly improper purposes.

Given the vast new powers provided by the 1970 Act, the broad view the Justice Department was taking of these powers, and the permissive attitude of the courts which had adopted the government's view that organized crime threatened the "very fabric of society,"³²² it would have seemed that the federal army would at last have been prepared to smite the enemy a deadly blow. Of course, that did not happen. A 1977 study by the General Accounting Office (GAO) entitled *WAR ON ORGANIZED CRIME FALTERING* attributed the failure of the government to make significant inroads to three principal factors: 1) consumer demand for organized crime's goods and services provide it with billions of dollars each year; 2) federal work against organized crime is not planned, organized or directed efficiently; and, 3) most convictions obtained by strike forces have resulted in no prison sentences or sentences of less than two years.³²³ Equally important, the GAO found that "[t]here is no agreement on what organized crime is and, consequently, on precisely whom or what the Government is fighting."³²⁴

Each of these points bears some discussion. As to the first, certainly a major reason for the failure of the law enforcement effort against organized crime is that people do not really want it to succeed. As long as people want to gamble, patronize prostitutes and use narcotics, someone will supply them. A strenuous law enforcement crackdown might drive up the price but it is inconceivable that these sources of organized crime income could be eliminated unless demand disappears. Even if the

The Federal grand jury system has been abused—by prosecutors, and through prosecutors, by White House officials. It has been misused for partisan political purposes . . . to harass philosophical enemies . . . [and] punish distasteful non-criminal activities.

322. *E.g.*, in *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), the court, in accepting the government's very broad interpretation of RICO, declared:

Congress had no reason to adopt a constricted approach to the . . . problem. Congress was concerned with the infiltration of organized crime into the American economy and . . . the devastating effects that racketeering activity had upon it. Yet we are asked to believe that Congress' approach to a monumental problem besetting the country was myopic and artificially contained. Is it conceivable that in considering the ever more widespread tentacles of organized crime in the nation's economic life, Congress intended to ignore an important aspect of the economy? . . . We think not.

Id. at 1090-91 (footnote omitted). *See also* *United States v. Elliott*, 571 F.2d at 884. Oddly, *Elliott* did not involve the Mafia, but instead involved a group of "informally associated" car thieves and truck hijackers from rural Georgia. *Id.*

323. REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, *WAR ON ORGANIZED CRIME FALTERING—FEDERAL STRIKE FORCES NOT GETTING THE JOB DONE* (1977).

324. *Id.* at *i*.

Mafia were entirely eliminated, other criminals would organize to supply these goods and services, and hence "organized crime" will continue to exist. However, this is not necessarily true of such organized criminal activities as labor racketeering and the "protection" racket which are crimes with victims and consequently more amenable to elimination.

The second point, lack of coordination of the federal effort, reflects the age old conflicts between bureaucratic agencies struggling for power — in this case, the FBI, the Organized Crime Section of the Justice Department, the IRS, the DEA and other enforcement agencies. To some extent this problem has been alleviated by Justice Department efforts.³²⁵

The third point, few long prison sentences, almost surely was indicative of the quality of the cases rather than the leniency of the judges. There is a natural tendency to convict somebody once an investigation has begun, even if the person is not a significant figure. A 1981 GAO report found improvement in this area with forty-four percent of all strike force convictions resulting in prison sentences of two years or more.³²⁶ Still, this means that over half of the convictions are either of very minor offenders or for minor offenses.

The final point, lack of consistent definition of organized crime, has enabled the Justice Department to portray the anti-organized crime effort as either failing or succeeding depending on the Department's purposes. For example, in 1974, FBI Director Kelly testified before Congress that the FBI's "three-pronged organized crime drive of intelligence, prosecution and dissemination produced record results during the past year" of 1114 convictions of "underworld" figures compared with 813 in 1972, 631 in 1971, 461 in 1970 and 319 in 1969.³²⁷ Yet in 1983, Attorney General Smith, while claiming "dramatic successes against organized crime," reported only an average of 600 convictions a year over the preceding two years in "organized crime cases."³²⁸ Is this because the effort has fallen off greatly since 1974? No. It is simply because the FBI began keeping its statistics differently two years ago.³²⁹

325. See REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, STRONGER FEDERAL EFFORT NEEDED IN FIGHT AGAINST ORGANIZED CRIME 7-9 (1981) (follow-up to 1977 study finding various "management techniques" have "added to the effectiveness of the program to fight organized crime") [hereinafter cited as STRONGER FEDERAL EFFORT NEEDED].

326. *Id.* at *iv.*

327. *Fiscal Year 1975 Hearings before the House Committee on Appropriations*, 93rd Cong., 2nd Sess. 546 (1974). Thus, Kelly implied that the anti-organized crime effort had only really gotten started under his stewardship of the FBI. Yet, former Attorney General Ramsey Clark had attested to the tremendous success of the effort under his regime, some 5 years earlier by stating: "Despite half-hearted gestures by the FBI, the federal effort mounted. From 19 indictments of organized crime figures in 1960... it climbed steadily to 687 in 1964, ... 1017 in fiscal 1967 and 1166 in fiscal 1968." R. CLARK, *CRIME IN AMERICA* 82 (1970).

To be sure, Clark is speaking of indictments and Kelly of convictions but it seems unlikely that, if they were using the same data, 1166 indictments in 1968 would have led to only 319 convictions in 1969. See also *supra* note 227 (Attorney General Kennedy's statistics on indictments and convictions from 1960-1963); and note 235 (Lyndon Johnson's proclamation of a "tenfold increase" in racketeering convictions from 1961 to 1968).

328. *Hearings before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on S. 829 — The Comprehensive Crime Control Act of 1983*, 98th Cong., 1st Sess. (May 4, 1983) (Department of Justice Press Release pp. 2-3) [hereinafter cited as *Comprehensive Crime Hearings*].

329. Telephone interview of FBI official by author, August 1983.

What definition Kelly was using is not known. Now, the definition of an "organized crime case" is simply a case which is opened under a statute which the FBI considers to be an "organized crime statute," such as ITAR or RICO. Consequently, many of the convictions in "organized crime cases" do not involve organized crime personnel at all, but, as discussed previously, "everyday" criminals who have fallen within the broad sweep of the legislation.³³⁰ Presumably, Kelly was using an even broader definition than is currently in use.

The most recent outside evaluation of the organized crime program, made by the GAO in 1981, again recommended that organizational changes, such as transferring minor cases from Strike Forces to U.S. Attorney's offices, needed to be made.³³¹ The only legislative change suggested was that the forfeiture provisions of RICO be expanded somewhat.³³² Despite this extremely limited mandate for new legislation, in 1983 the Justice Department proposed the Comprehensive Crime Control Act of 1983.³³³ In congressional testimony, the Attorney General once again raised the specter of organized crime, detailed its corrosive influence on society and proclaimed, "it is essential to the fight against organized crime that the Congress enact the significant criminal law reforms that the President has proposed."³³⁴ Those measures are: preventive detention, restructuring the sentencing system, adopting a "good faith" exception to the exclusionary rule, severely limiting the insanity defense, and finally, strengthening the RICO forfeiture provisions. With the exception of the RICO provisions, the Attorney General did not discuss how any of these provisions would have any particular applicability to organized crime, which indeed, they would not.³³⁵

Moreover, in July of 1983, President Reagan, declaring that past anti-organized crime efforts had yielded only temporary gains, named a new commission to "break the power of the mob in America." The commission's head, Judge Irving Kaufman,

330. *Id.* As of 1976, the Justice Department had a definition of organized crime but it was too vague to be of use in compiling statistics: "Organized crime includes any group of individuals whose primary activity involves violating criminal laws to seek illegal profits and power by engaging in racketeering activities and, when appropriate, engaging in intricate financial manipulations." NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON ORGANIZED CRIME 213, app. I (1976).

331. STRONGER FEDERAL EFFORT NEEDED, *supra* note 325, at 13.

332. Specifically, that RICO should be amended to "make explicit provision for the forfeiture of the profits and proceeds of racketeering activities," to "clarify that interests forfeitable under RICO include illicitly derived assets, held in an individual capacity by defendants convicted of using an association-in-fact type enterprise to violate RICO" and to "authorize forfeiture of substitute assets." *Id.* at 38. The Supreme Court's recent decision in *Russello v. United States*, 104 S. Ct. 296 (1983) has largely resolved this problem by holding that the "profits and proceeds derived from racketeering constitute an 'interest' within the meaning of the [RICO] statute and are therefore subject to forfeiture." *Id.* at 299.

333. *Comprehensive Crime Hearings*, *supra* note 328, at 1-3. See also *Organized Crime in America: Hearings before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 19 (1983).

334. *Comprehensive Crime Hearings*, *supra* note 328, at 4.

335. The Comprehensive Crime Control Act of 1983 has recently been signed into law. Pub. L. No. 98-473. Altogether, the Act comprises 16 titles and 391 pages. In addition to the matters which the Attorney General mentioned in his testimony, there is a provision limiting access of state prisoners to federal habeas corpus (Title VI), a provision reinstating the death penalty in certain federal cases (Title X), amendments to the labor racketeering statutes (Title XI), and proposed additions to ITAR concerning use of interstate facilities in the commission of murder for hire and violent crimes in aid of racketeering activity (Title XIV).

that the "threat (of organized crime) is great and continues to grow."³³⁶ New legislative proposals, further increasing the power of the federal government, are expected.

Thus, the government continues to advance the federalization of crime with very little opposition. As should be apparent from the preceding historical discussion, this has been by no means an entirely unfortunate development. While the states, contrary to Justice Department claims, clearly do have the jurisdictional authority to deal with organized crime despite the interstate character of some of it, they have consistently shown that they lack the will. Now that the federal government has preempted the field, the prediction of Attorney General Mitchell in 1932 that the states would forever be in the background has been borne out. Yet, it seems likely that the federal government, with its financial resources, unified law enforcement effort and relative independence from local or state politicians who may be on the syndicate's payroll, has done and will continue to do a better job than the states.

The monolithic character, however, of the single Justice Department effort compared to the more feeble attempts of the fifty states carries potentially dangerous consequences. The Justice Department compiles the statistics that define the problem, investigates and prosecutes the cases, urges broad interpretation of statutory authority on the courts and proposes new legislative authority to Congress, which, impressed by the Department's characterization of the problem, has given it most of what it wants. Yet, as was discussed, the only means the Justice Department has for measuring "the problem" is by attempting to measure "the solution," i.e., by totaling up the number of investigations, indictments or convictions in "organized crime cases." These are defined as cases opened under organized crime statutes—the statutes discussed in this article.³³⁷ The flaw in this technique as a means of quantifying the problem is immediately apparent: as the number of statutes increases, the number of violations increases by definition. Also, as the number of agents dedicated to ferreting out organized criminals grows, the number of individuals caught will increase. Thus, it is not inconsistent for the Justice Department to report ever greater success against organized crime and at the same time complain that the problem is growing. As more and more officials are devoted to enforcing more and more statutes, the problem will appear to grow even if the actual number of criminals remains the same. This is not to say that the number has remained the same; no one knows how much it has grown or shrunk because the definitions keep changing.³³⁸ Whatever the actual numbers may be, this phenomenon will operate

336. UPI release (July 31, 1983).

337. See *supra* notes 329-30 and accompanying text.

338. At the time of the *Valachi* hearings in 1963, one notable critic of the anti-organized crime campaign declared that "[t]he rackets today are more petty" than they were 10 years before. Bell, *The Myth of the Cosa Nostra*, 46 THE NEW LEADER, Dec. 23, 1963, at 12, 15. It was, of course, in the early 1960's that the major Justice Department effort against organized crime began. One certainly hopes that 20 years and 20-odd statutes later the Justice Department has made some progress against its long time enemy.

Indeed, the Justice Department is currently taking a more positive view of the antiracketeering effort. *U.S. Officials Cite Key Successes in War Against Organized Crime*, New York Times, Nov. 7, 1983, at 1, col. 2. Still, despite the fact that the Justice Department cites with pride the convictions of such major Mafia figures as Raymond Patriarca, Joseph Bonanno and Carmine Persico, the FBI admits that all of the "24 traditional organized crime families are still operating in the United States." *Id.* at D18, col. 1. At

to make it seem to be growing faster than it is. In 1930, for example, loan sharks would not have been included in any federal tally of organized crime because they did not violate a federal statute. Today, organized crime statistics include loan sharks. We have no way of knowing if there are more or fewer loan sharks than in 1930, or even how many there are today. We only know how many have been caught, which depends in large measure on how many agents are dedicated to catching them. Moreover, many loan sharks may have nothing to do with "organized crime" but because they violate a "racketeering" statute, they are classified as part of the problem, thus skewing the statistics as well as the government's, and the public's, subjective view of the problem.

What is at work is a complicated version of Parkinson's Law as to a bureaucracy's tendency to perpetuate itself.³³⁹ The Justice Department identifies a problem: organized crime. It presses Congress for more legislative authority. As discussed, it is generally considered unpatriotic to disapprove these requests—being "against organized crime" is good politics. Consequently, sooner or later Congress has given the Department what it has requested. More legislative authority naturally requires more manpower and funds, which are also approved. These new agents and prosecutors zealously sally forth and make more cases against "racketeers", i.e., people who violate the new statutes. And then it is discovered, much to the consternation of all concerned, that there are more racketeers than ever. The solution? More legislative authority.

This tendency of a bureaucracy to perpetuate itself by identifying a continuing evil which it must combat is not unique to the Justice Department. The Defense Department, for example, depends for its continued prosperity upon the public's perception that a problem—the threat of the Russian military—is worse than ever, regardless of what the truth may be.³⁴⁰ Because the Defense Department is asking

the same time, other pronouncements indicate that the narcotics problem is worse than ever. See, e.g., *Organized Crime in America: Hearings before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 1 (1983) (Senator Thurmond recently reported that "[n]early \$80 billion in drugs is being trafficked in this country each year.").

In the author's view, the traditional Mafia families, whose strength came from a common Sicilian background, are breaking down as the new generation becomes more Americanized and the old generation dies out or goes to prison. There is no indication, however, that the types of crimes in which it has participated, notably gambling, extortion and narcotics, have been in any way reduced by the weakening of the Mafia. Rather, other groups have moved in to fill any voids. As an FBI official admitted, "organized crime will continue to exist as long as there is a demand for the services that they provide." *Id.* at 21.

339. C. PARKINSON, *PARKINSON'S LAW* (1957). Parkinson demonstrates that the growth of a bureaucracy has no connection to the actual subject matter with which it has to deal. Thus, the British Colonial Office continued to expand even as the British Empire diminished. The explanation for this was a pyramidal ordering of assistants. Bureaucrat A would convince his organization that he was overworked and would obtain two assistants, C and D. Whereas A had previously spent 100% of his time doing the allotted tasks of his department, now he would spend much of it overseeing the work of his assistants. When, in the fullness of time, they acquire assistants E, F, G and H, so much time would be spent passing memorandums back and forth and holding meetings that seven people working full time now accomplish what A had originally done alone. *Id.* at 2-13. In the author's experience, the Justice Department is, in fact, far less prone to this tendency than other federal agencies. Instead of a pyramidal ordering of assistants, the Justice Department has "pyramidally ordered" its statutory authority—more statutes require more personnel. As in Parkinson's examples, whether or not organized crime has actually grown or diminished over the years is irrelevant to the growth of the bureaucracy.

340. E.g., Kemp, *Warsaw Pact Forces Always Take Offensive in Invasion Rehearsals*, Wall St. J.,

for vast expenditures of money and because the defense build-up may inspire a competing build-up by the Russians, its claims seem to be met with more skepticism than those of the Justice Department whose "weapons"—statutory authority—appear to be cost free. There is no anti-law enforcement lobby.³⁴¹ Even the states, who have gradually seen their power eroded over the years,³⁴² do not complain. Every criminal that the federal government prosecutes and imprisons is one fewer that the states have to deal with—a considerable savings. Moreover, for a governor or other state politician to protest against the federal effort might raise the suspicion that he is on the mob's payroll.

But there is more to the organized crime phenomenon than simply a bureaucracy's tendency to expand. As noted, the early growth of federal power in this area came from congressional initiative, sometimes with little executive branch support (particularly from the FBI). Moreover, the federal courts have also accepted the notion that organized crime is an evil against which almost any federal legislative initiative is appropriate and necessary. In recent years, the political appointees in the executive branch have led the fight against organized crime, sometimes without the support of the FBI bureaucracy. Congress, however, has been a highly cooperative partner. This peculiar harmony among the three branches of government is both unique and disturbing, for it indicates that the traditional system of checks and balances has broken down. This might not be troublesome if the result had been the eradication of organized crime. But, in light of the fact that organized crime has not been eradicated and, as discussed, that the federal power thus acquired is not used primarily against organized crime figures, has this great build-up of federal power been appropriate? This is particularly true in light of the socio-economic phenomenon which renders "organized crime" inevitable and largely ineradicable:³⁴³ as long as people continue to demand the products that organized crime offers—

June 4, 1984, at 1, col. 6 "North Atlantic Treaty Organization officials in Brussels concede that the U.S. exaggerates Soviet military strength and plays down that country's weaknesses to gain more backing for defense budgets and military buildups."

341. On the other hand, the entrenched commercial interests which support the military buildup are not operating in the crime area.

342. Of course, the federal statutes do not deprive the states of jurisdiction, and most federal violations also involve violations of state law. The states' power has been eroded because they have not been willing to devote the manpower to the problem, not because their jurisdiction has been preempted by Congress.

343. This observation has been made by others. See, e.g., 1977 GAO report, *supra* notes 323-24 and accompanying text; statement of FBI official, *supra* note 338; H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968):

Regardless of what we think we are trying to do, when we make it illegal to traffic in commodities for which there is an inelastic demand, the effect is to secure a kind of monopoly profit to the entrepreneur who is willing to break the law.

Id. at 279. See also, R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 192-94 (1957). Moreover, there is widespread perception that the crimes of gambling and prostitution are not serious social problems. In a study of public perceptions of the seriousness of crimes where those surveyed rated crimes on a scale from 72.1 (planting a bomb that kills 20 people) to .02 (playing hooky from school), taking bets on

gambling, drugs, etc. — then someone will find a way to supply them. Because supplying these commodities requires organization, these people will be “organized” criminals. The arrest of a thousand mobsters will not stop the flow of drugs. It will merely drive up the price until a thousand new entrepreneurs step in to take their place.³⁴⁴

In the future, Justice Department descriptions of the scope of the problem and the need for new authority should be treated with considerably more skepticism than they have been in the past. When the Attorney General testifies that limiting the exclusionary rule and the insanity defense will help solve the organized crime problem, it should be recognized that he is using the organized crime shibboleth to attain political objectives which have nothing to do with organized crime. The natural tendency of the Justice Department bureaucracy to increase and multiply in both size and power must be factored into any future decisions concerning legislation or funding.

When Congress does agree to draft organized crime legislation, the statutes should be narrowly drawn to focus directly on the problem rather than depending on prosecutors to impose limits on themselves. In fact, in the author’s view, the Department has more than ample legislative authority, and Congress should consider scaling this authority somewhat; for example, by narrowing the scope of RICO to cases that really do involve organized criminals who branch out into legitimate businesses or, if this cannot be done, by abolishing RICO altogether. Similarly, wiretapping authority, the most intrusive of all current federal powers, should be limited, as was originally proposed, to investigations of only the most serious violations, rather than to virtually all cases, as was finally enacted. Finally, Congress should recognize that just as changing circumstances may require the granting of new powers, so too should consideration be given to the curtailing of old powers which are no longer needed or were unwisely granted in the first place. To date, no grant of statutory authority to the Justice Department in the racketeering area has ever been revoked or limited. All of the statutes discussed in this article are still on the books, and many of them have been expanded since their original enactment.

This article has demonstrated the ability of the federal government to greatly expand its power to deal with a threat which, though it excites the popular imagination, is not as grave or as immediate as other threats that could readily be imagined. A series of terrorist bombings, for example, would likely arouse the public, the Justice Department and the Congress to a peak of law enforcement zeal against which the organized crime scare pales into insignificance.³⁴⁵ If such an event occurs,

numbers was ranked 1.1, the same as “disturbing the neighborhood with a loud noise.” “Knowingly being a customer in a place where illegal gambling occurs” was ranked 1.8 and “being a customer in a house of prostitution” was ranked 1.6. U.S. DEP’T OF JUSTICE, NATIONAL SURVEY OF CRIME SEVERITY, REPORT TO THE NATION ON CRIME AND JUSTICE 4-5 (1983).

344. Driving up the price of drugs may be beneficial because it limits their use. It may also, arguably, be harmful because it forces addicts to commit more crimes to support their habits.

345. As previously noted, it was a reaction against terrorism that led to the enactment of wiretapping authority in Germany in 1969 after it had been forbidden since World War II, *supra* note 252.

event occurs, it is likely, if the organized crime experience is a guide, that a greater concentration of power in the hands of the Justice Department, and a commensurate reduction in civil liberties, will swiftly follow. The Justice Department might call for a relaxation on the requirements for searches and seizures and for fewer barriers to wiretapping and eavesdropping, in order to better search out and destroy elements which "threaten the very fabric of our society." The Justice Department would seek this authority because its officials might feel, in good faith, that such authority would enable them to deal more effectively with the "ever-growing threat of terrorism." It is impossible to say before the event whether their assessment would be correct or not. It must, however, be recognized that their assessment, and the statistics they will present to support it, are colored by the assumption that the best way to deal with any law enforcement problem is to give more power to the federal law enforcement authorities. Blind acceptance of this assumption by the Congress and public, as has repeatedly occurred in the past, would be a mistake.