THE DEPARTMENT OF JUSTICE AND THE LIMITS OF THE NEW DEAL STATE, 1933-1945

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TABLE OF CONTENTS:

Introduction

On February 23, 1933, using a trowel crafted from the wood and copper nails of the U.S.S. Constitution, outgoing President Herbert Clark Hoover laid the cornerstone for a sprawling edifice to house the United States Department of Justice. With nine days to go before the inauguration, Hoover could execute little more than the ceremonial functions of his lame-duck presidency. Even on this occasion, as he stood surrounded by an aging corps of Republican jurists and statesmen, it was evident that Hoover's time had passed. While Hoover spoke in vague terms of law as "the foundation stone of organized society," he remained deeply conflicted about its use as a tool of statecraft. Voluntarism – the very antithesis of law – had been the departing president's creed. Hoover, writes Arthur Schlesinger, "did not see law as the means by which a community establishes equitable standards. He saw law as an invitation to the demon state to regiment the economy and crush individual freedom."[1] In his brief remarks delivered at the groundbreaking, Attorney General William Mitchell lamented the expansion of the national government epitomized by the immense structure now needed to accommodate his Department of Justice. He cautioned that "if the time comes when this new home…is outgrown, it will mean that local self-government and local initiative have been subverted."[2]

It was Franklin D. Roosevelt, and by extension, Roosevelt's Department of Justice, who would more fully embrace the coercive dimensions of federal power in confronting the economic crisis of the Great Depression. At the dedication ceremony for the completed building the following year, Attorney General Homer Cummings too cast

[1] Arthur M. Schlesinger, *The Cycles of American History* (New York: Mariner Books, 1999, rev. ed.), 379.
[2] William Mitchell, quoted in "Hoover Stresses Law Enforcement," *New York Times*, February 24, 1933, 15.

the edifice as a visual symbol of institutional growth. He traced the history of the Attorney General's office from its humble beginnings in the days of William Randolph – the "forgotten man" of the executive branch, "expected to furnish his own quarters, fuel, stationery, and clerk" – through 1870 when Congress, under pressures of war and Reconstruction, established a Department of Justice to oversee the nation's legal affairs. Since that time, Cummings observed, the Department had grown in fits and starts but it remained "a governmental wanderer, with no local habitation of its own."[3] It was with "keen delight" that he welcomed the Justice Department to its permanent home. Echoing the substance, but not the tone, of Mitchell's remarks, he observed that one "can easily visualize the growth and size of the Department by merely looking at this handsome and imposing structure."[4] Cummings had, in the words of one historian, "a ferocious appetite for bureaucratic power." He possessed few of Mitchell's misgivings about its use. As Attorney General, he initiated a campaign of "relentless bureaucratic imperialism" which established a department truly deserving of its 1.2 million-square-foot structure on Pennsylvania Avenue.[5] Hoover may have laid the cornerstone for the Justice Department's headquarters, but it was Cummings and his successors who ultimately shaped the character of the institution the building would house.

This dissertation traces the history of the Department of Justice from the first days of the Roosevelt administration through the final days of World War II.[6] While on one

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[3] Carl Brent Swisher, ed., *Selected Papers of Homer Cummings, Attorney General of the United States 1933-1939* (New York: C. Scribner's Sons, 1939), 4
[4] Ibid., 6.
[5] Peter H. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982), 11.
[6] On the general history of the Department of Justice and the political role of the Attorney General, see: Nancy V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990*

level a history of bureaucratic expansion, this study is not organized as a traditional, chronological history of institutional growth. Rather, it is structured around a series of case studies which examine attempts by four administrators – at the Antitrust Division, the Federal Bureau of Investigation, the Bureau of Prisons, and the Criminal Division – to expand their resources and effect specific policy aims by linking their respective goals to the broader project of state expansion in the Roosevelt years. The project is divided into two parts. The first section traces the development of federal antitrust policy toward industry and labor, focusing specifically on the Justice Department's suits against the leading players of the motion picture industry and against labor unions engaged in jurisdictional disputes.[7] Both cases present instances of bold intervention by Antitrust Division attorneys confident in their use of federal power in economic affairs. The last three chapters consider the far more limited ambitions of federal officials in dealing with state and local law enforcement officers, particularly with respect to the treatment of prisoners and the accused.[8] Throughout the 1930s, federal policy was tentative, reactive,

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(Lawrence: University Press of Kansas, 1992); David Burnham, *Above the Law: Secret Deals, Political Fixes and Other Misadventures of the U.S. Department of Justice* (New York: Scribner, 1996); Cornell W. Clayton, *The Politics of Justice: The Attorney General and the Making of Legal Policy* (Armonk, NY: M.E. Sharpe, 1992); Homer and Carl McFarland Cummings, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (New York: Macmillan Company, 1937); Luther A. Huston, *The Department of Justice* (New York: Frederick A. Praeger, 1967). Key Justice Department officials have also written memoirs of their service in the Roosevelt administration: Thurman Arnold, *Fair Fights and Foul: A Dissenting Lawyer's Life* (New York: Harcourt, Brace & World, 1951); Francis Biddle, *In Brief Authority* (Garden City: Doubleday, 1961); Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt*, ed. John Q. Barrett and William E. Leuchtenburg (New York: Oxford University Press, 2004)

[7] Previous studies of the motion picture suit include: Michael Conant, *Antitrust in the Motion Picture Industry* (Berkeley: University of California Press, 1960); Alexandra Gil, "Breaking the Studios: Antitrust and the Motion Picture Industry," *N.Y.U. Journal of Law and Liberty*, Vol. 83 (2008), 83-123; Giuliana Muscio, *Hollywood's New Deal* (Philadelphia: Temple University Press, 1996).

[8] Little has been written federal prison reform initiatives prior to the civil rights era. On the history of federal corrections in general, see: Paul W. Keve, *Prisons and the American Conscience: A History of U.S. Federal Corrections* (Carbondale, Ill.: Southern Illinois University Press, 1991). On general trends in prison reform in this period, see: Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993); Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (New York: Cambridge University Press, 2008); Edgardo Rotman, "The Failure of Reform: The United States, 1865-1965," in *The Oxford History of the*

and largely based on voluntary rather than statutory programs. The sole example of coercive intervention in local police matters, through criminal prosecution of police brutality, faltered on both practical and ideological grounds, underscoring the limits of national law enforcement policy within the prevailing federalist order.[9] In sum, the dissertation is a history of both the Justice Department and the larger political moment of which it was part.

What makes this Department a particularly appealing subject for such a study is that despite its leaders' best efforts to integrate the agency more firmly into the federal bureaucracy, the Justice Department remained at the periphery of the New Deal state. As Antitrust Division chief from 1938 to 1943, Thurman Arnold worked perhaps more feverishly than any administrator before or since to establish the Sherman Act as a principal policy tool, but his enforcement program never found a comfortable home amidst the planners and deficit spenders who battled for control of Roosevelt's economic agenda.[10] The Sherman Act remained what it had always been – a residual mechanism,

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Prison: The Practice of Punishment in Western Society, ed. Norval Morris and David J. Rothman (New York: Oxford University Press, 1995), 169-197.

[9] On the early civil rights cases of the Department of Justice, see: John T. Elliff, *The United States Department of Justice and Individual Rights, 1937-1962* (New York: Garland Publishing, 1987); Glenn Feldman, ed., *Before Brown: Civil Rights and White Backlash in the Modern South* (Tuscaloosa: University of Alabama Press, 2004); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2007); Peter Irons, "Politics and Principle: An Assessment of the Roosevelt Reocrd on Civil Rights and Liberties," *Washington Law Review*, Vol. 59 (1984), 693-722; Kevin McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2004); Howard Sitkoff, *A New Deal for Blacks* (New York: Oxford University Press, 30th anniversary ed., 2004).

[10] Several historians have written on Thurman Arnold's years at the Department of Justice. See in particular: Douglas Ayer, "In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period," *Stanford Law Review*, Vol. 23, No. 6 (June 1971), 1049-1086; Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold," *Journal of American History*, Vol. 80, No. 2 (Sep., 1993), 557-579; Daniel R. Ernst, "Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943," *Law and History Review*, Vol. 11, No. 1 (Spring, 1993), 59-100; Gene M. Gressley, "Thurman Arnold, Antitrust, and the New Deal," *The Business History Review*, Vol. 38, No. 2 (Summer, 1964), 214-231; Gene M. Gressley, ed., *Voltaire and the Cowboy: The Letters of Thurman Arnold* (Boulder: Colorado Associated University Press, 1977); Wilson D. Miscamble, "Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal," *The Business*

deployed primarily at the margins of national economic policy. While Bureau of Prisons officials and the lawyers of the Department's Civil Rights Section argued forcefully for a more explicit link between economic and social justice, between federal aid for the indigent and federal intervention on behalf of the incarcerated and accused, their campaigns never enjoyed the Roosevelt administration's wholehearted support. The thrust of the New Deal was promoting economic stability. The policy initiatives of the Justice Department were marginal to those concerns. Yet it is because of its distance from the primary focus of New Deal reform – not in spite of it – that the Justice Department's experience can help to illuminate key facets of federal power and its limits in the Roosevelt years.

The institutional development of the Justice Department reflected a broader trend toward bureaucratization, professionalization, and centralization which began in earnest with the Progressives and reached its apex in the New Deal. In 1932, the antitrust division operated on a budget of $150,000 and consisted of a single clerk, two special assistants, and fifteen attorneys. At the height of his antitrust campaign in 1942, Arnold oversaw a staff of nearly six hundred and a budget of $2,235,000. While his division never quite reached the status of the Securities and Exchange Commission – a regulatory agency whose size and efficiency Arnold had hoped to emulate – it nevertheless attained for the first time the capacity to undertake systematic enforcement of the antitrust laws. J. Edgar Hoover's principal administrative reforms at the FBI predated the New Deal by nearly a decade, but it was not until the 1933 war on crime that he succeeded in

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History Review, Vol. 56, No. 1 (Spring, 1982), 1-15; Spencer Weber Waller, *Thurman Arnold: A Biography* (New York: New York University Press, 2005).

translating administrative reorganization into operational efficiency.[11] Between 1933 and 1945, the FBI grew fifteen-fold, adding more than four thousand field agents to its ranks. Moreover, it was in the 1930s that Hoover began in earnest his campaign to extend the Bureau's professional standards to police departments in the cities and states. By any measure, the Justice Department was a far more substantial institution in 1945 than it had been on the eve of Roosevelt's inaugural.

The manner in which Justice Department officials approached their objectives likewise conformed to broader patterns of New Deal reform. Throughout the 1930s, Hoover had argued that the problem of interstate crime could be met without upsetting the existing federalist system. He insisted that an "effective national police force" could develop voluntarily, "without legislative enactment of any kind."[12] The programs he introduced – a national identification database, FBI training courses for state and local police – gradually stitched together the nation's law enforcement agencies into a workable national police *system* without the expense or disruption of a centralized force. Hoover's program is highly reminiscent of New Deal banking reform, which introduced

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[11] Numerous scholars have written on the Federal Bureau of Investigation, the War on Crime, and World War II. Key works include: Raymond J. Batvinis, *The Origins of FBI Counterintelligence* (Lawrence: University Press of Kansas, 2007); Brian Burrough, *Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933-1934* (New York: Penguin Press, 2004); Athan G. Theoharis and John Stuart Cox, *The Boss: J. Edgar Hoover and the Great American Inquisition* (Philadelphia: Temple University Press, 1988); Rhodri Jeffreys-Jones, *The FBI: A History* (New Haven: Yale University Press, 2007), Francis MacDonnell, *Insidious Foes: The Axis Fifth Column and the American Home Front* (New York: Oxford University Press, 1995); Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (New Brunswick: Rutgers University Press, 1998); Richard Gid Powers, *Broken: The Troubled Past and Uncertain Future of the FBI* (New York: Free Press, 2004); Richard Gid Powers, *G-Men: Hoover's FBI in American Popular Culture* (Carbondale: Southern Illinois University Press, 1983); Richard Gid Powers, "One G-Man's Family: Popular Entertainment Formulas and J. Edgar Hoover's F.B.I.," *American Quarterly*, Vol. 30, No. 4 (Autumn, 1978), 471-492; Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* (New York: The Free Press, 1987); William Preston Jr., *Aliens and Dissenters: Federal Suppression of Radicals, 1903-1933* (Urbana: University of Illinois Press, 1963).

[12] J. Edgar Hoover, before the annual convention of the International Association of Chiefs of Police, August 1930, quoted in "Activities of the International Association of Chiefs of Police with the Federal Bureau of Investigation," RG 65: World War II Headquarters Files: Box 125, Folders 66-1723-1, Section 9, p. 99.

far greater stability into the banking system while preserving its decentralized character. The Sherman Act proved a far less subtle instrument in practice – particularly with respect to labor union conduct – but the underlying theory Arnold put forth to justify its enforcement nevertheless conformed to the Roosevelt administration's vision of a nimble, minimally intrusive state. The virtue of the antitrust laws, he argued, was in their ability to secure specific economic "ends with the least possible dislocation of existing institutions and the least possible shock to existing ideals."[13]

The history of the Justice Department also speaks to the nature of the federal bureaucracy in the Depression decade. If individual administrators – J. Edgar Hoover, Sanford Bates, and Thurman Arnold in particular – appear to play an outsized role in the pages that follow, it is because the Department of Justice of the 1930s was still an agency in flux, composed of mostly autonomous divisions whose institutional character was determined by the administrator at the helm. While the overall trajectory of New Deal reform affected the case load and responsibilities of the Department as a whole, division chiefs, not the president or the attorney general, determined which branches of the Justice Department bustled with energy or languished in obscurity. Homer Cummings may have first conceived of a national crime war, but he was swiftly eclipsed as the public face of the campaign by the director of the FBI, who had since the 1920s cultivated a powerful network of supporters from outside the federal bureaucracy. Cummings retained formal supervision over the Bureau, but it was Hoover who called the shots – who determined the nature and extent of federal partnership with state and local law enforcement and who carved out an expansive role for the FBI in the Second World War. Similarly, Antitrust Division chief Thurman Arnold conducted his three-year campaign against labor union

[13] Thurman W. Arnold, *The Bottlenecks of Business* (Washington: Beard Books, 2000, reprinted ed.), 92.

corruption and jurisdictional strikes without the formal support of his superiors. He, too, drew his political strength from outside the executive branch – from congressmen, columnists, and from the small business community. Even as his legal assault on one of the pillars of the New Deal coalition proved increasingly embarrassing for the Roosevelt administration, Arnold continued to operate unhampered by such political concerns.

This degree of autonomy was in some respects particular to the Department of Justice, which had historically enjoyed more freedom of action than the strictly political departments of the executive branch. The office of the attorney general had originally operated as a sort of hybrid between the executive and judicial branches. It was established under the Judiciary Act of 1789, which also gave rise to the federal courts.[14] The attorney general's budget and his physical office were likewise linked the judicial branch. While attorneys general were invited to attend cabinet meetings, they served primarily as legal rather than political advisers. As Lincoln's appointee observed, "the office I hold is not properly political but strictly legal; and it is my duty…to resist all encroachments, from whatever quarter, of mere will and power."[15] As the nineteenth century progressed, the office gradually shifted toward the executive branch. Under James Monroe, William Wirt abandoned the practice of extending formal opinions to congress on the constitutionality of proposed legislation; presidents increasingly turned to their chief legal officers for political advice. Yet the principle that the attorney general was responsible for upholding the law as well as the political prerogatives of the executive branch persisted well into the twentieth century. As one scholar observes, "the

[14] Ch. 20, 1 Stat. 73 (September 24, 1798) §35
[15] Cornell Clayton, *The Politics of Justice*, 49.

law officer is compelled to serve two masters—the president and the law."[16] Yet the specific nature of autonomy exercised by the Justice Department in the 1930s was shaped and nurtured by the nature of policymaking in the New Deal. Individual division chiefs did not simply uphold the law in conflict with expressed administration policy – they actively initiated and shaped policy themselves. This absence of top-down initiative and control complicates any attempts to draw broader conclusions about the limits of federal power, for only rarely did Justice Department initiatives enjoy the full backing of the executive branch. But it does demonstrate the malleability of the administrative state in the Roosevelt years.

Finally, the study of the Justice Department highlights the conceptual fluidity of the New Deal. While the core New Deal project centered on rationalizing capitalism and promoting economic security, administrators across the executive branch succeeded in linking a far broader reform agenda to the principal thrust of New Deal reform. They conceived of New Deals not only for the nation's workers and farmers, but also of New Deals for motion picture theater owners, for law enforcement officers, for prisoners in the nation's crumbling correctional facilities, and for the victims of popular and institutionalized violence in the Jim Crow South. The explicit links administrators and contemporary observers alike drew between economic recovery and these more peripheral reform projects were more than merely flights of rhetorical fancy – rather, they articulated a positive vision of federal power that extended beyond the bread and butter issues at the heart of the New Deal.

In essence, the narrative that follows is not a story of the New Deal *state* but of one of several New Deal *states*, autonomous agencies which managed with varying

[16] Nancy Baker, *Conflicting Loyalties*, 2.

degrees of success to latch their reform initiatives to the broader trajectory of federal expansion in the Roosevelt years.

PART I

Chapter 1: Hollywood on Trial: The Antitrust Division and the *Paramount* Suit

"All economic action must be opportunistic," wrote Thurman Arnold in 1940, "its effectiveness depends on the strength of your organization not on the strength of your doctrine."[1] It was a telling statement – one of the few instances when the head of the Antitrust Division offered his philosophy of government stripped of the symbols he so deftly deployed to justify his antitrust enforcement program. Throughout his career, Arnold trumpeted the value of "folklore," the symbolic basis for government action, suited "to fit the emotional needs of [the] people."[2] But he insisted that "principles grow out of and must serve organizations," not the other way around.[3] Publicly, Arnold offered a coherent, consumer-oriented antitrust philosophy that acknowledged the inevitability of large corporations while insisting that they be made to operate in the public interest. He appealed to a longstanding anti-monopoly tradition and hailed antitrust enforcement as a bulwark against a permanent regulatory presence. But in practice, he pursued a far more prosaic program of building institutional capacity and legitimizing state intervention – creating "an organization big enough to make a dent in human affairs."[4]

In this regard, Arnold was the quintessential New Dealer. For all of the ideological clashes within the administration, New Deal economic policy was short on doctrine, long on initiative. There were certainly dogmatic thinkers within the administration, but on the whole, the New Deal was opportunistic in precisely Arnold's sense of the word. The administration expressed a coherent set of goals – rationalizing capitalism, stabilizing markets, improving the economic security of workers and families

[1] Thurman Arnold to Eugene Rostow, October 21, 1940, in Arnold Papers, Box 22, Folder 1.
[2] Thurman W. Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937), 21.
[3] Edward N. Kearny on Thurman Arnold, quoted in Alan Brinkley, "The Antimonopoly Ideal and the Liberal State," *The Journal of American History*, vol. 80, no. 2 (Sep., 1993), 561.
[4] Thurman Arnold to Eugene Rostow, October 21, 1940, in Arnold Papers, Box 22, Folder 1.

– but remained flexible in its approach. The result was a patchwork of cooperative, regulatory, and anti-monopolist policies determined by political imperatives and the tools at hand. In 1935 alone, the administration sponsored the Connally and Guffey-Snyder Acts, perpetuating NRA-style arrangements to stabilize production and prices in the oil and coal industries; pushed through a Banking Act to expand the regulatory authority of the Federal Reserve; and promoted the dissolution of the "power trust" with the Holding Company Act. What unified these disparate programs was an underlying faith in government action and a desire to expand the effective capacity of the central state.

No case better illustrates this "opportunistic" character of New Deal economic policy than the Justice Department's protracted antitrust campaign to transform the motion picture industry, beginning in 1936 and culminating in a 1948 Supreme Court ruling that brought an end to the studio system that had governed Hollywood since the 1920s.[5] The Department launched its film inquiry well before the administration ever signaled a willingness to institute more vigorous enforcement of the antitrust laws, and it concluded long after the "anti-monopoly moment" of the late 1930s had subsided.[6] While the suit was based loosely on traditional anti-monopolist sentiments of promoting decentralization and checking concentrated power, the film industry never presented an obvious target for antitrust enforcement. The Antitrust Division's investigation into motion picture distribution revealed a film industry enmeshed in restrictive arrangements at all levels, from the production studios down to the smallest of neighborhood theaters. But it also revealed an impressively effective operation, one that distributed hundreds of

[5] United States v. Paramount, 334 U.S. 131 (1948).
[6] The term appears in Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Vintage Books, 1996), 106.

films annually, to more than eighteen thousand theaters across the United States, at prices that were within reach of virtually all American families, even in the Depression years.

Nonetheless, a group of attorneys in the Antitrust Division concluded that the film industry could be made to work better, with the help of the federal courts. They proposed to transform all aspects of film trade – to alter the relationship between the major studios, to upend existing patterns of theater ownership, and to change entirely a distribution scheme worked out over the course of several decades. They advanced their case with the legal tool at hand, the Sherman Act, but they openly entertained alternative solutions, whether through federal legislation or permanent regulation. Theirs was, in short, a remarkably ambitious endeavor, driven by a seemingly unexamined conviction that government administrators could craft a more vibrant motion picture trade.

This chapter traces the course of federal intervention in the motion picture industry from the early years of the Roosevelt administration to the 1948 *Paramount* decree. It follows developments both in and out of the administration, as rival interest groups jockeyed for power within the film industry, and rival executive departments sought to shape the course of federal economic policy. It focuses in particular on the work of a handful of attorneys within the Department of Justice who defined the contours of the federal investigation and who propelled the case forward amidst a changing legal and political landscape. The picture that emerges from this study is one of considerable bureaucratic autonomy, checked only by the countervailing pressures from similarly autonomous departments and groups.

* * * *

Hollywood in the 1930s was the Hollywood of the studios – sprawling, vertically integrated corporations that oversaw the entire lifecycle of a motion picture from production through exhibition. The so-called "big five" – Paramount, Metro-Goldwyn-Mayer (MGM), Warner Brothers, Fox, and RKO – produced nearly half of all feature pictures and either owned or held controlling shares in sixteen percent of all theaters, including a majority of large metropolitan theaters where the biggest profits were made. Two smaller studios – Universal and Columbia – produced and distributed films, but owned no theaters. United Artists, founded by actor-producers Mary Pickford, Douglas Fairbanks, and Charlie Chaplin, distributed films by well-known independents, but owned neither theaters nor production facilities. Together, the "big five" and the "little three" composed the "majors." Collectively, their films accounted for ninety-five percent of all box office receipts.[7] It was virtually impossible to make money in the motion picture industry – as a producer or a theater operator – without working at least in some capacity with one of the eight firms.

For the vast majority of actors, directors, producers, and screen writers, the studio system was rigid, hierarchical, and stifling. By the mid-1930s, each of the studios had already established its character – its personality, its formulas for success – to which it clung so long as box office receipts continued to climb. Warner Brothers, notes film historian Thomas Schatz, "cranked out urban crime films with Cagney….crusading biopics with Paul Muni….epic swashbucklers with Errol Flynn….[and] a succession of

[7] Temporary National Economic Committee, *The Motion Picture Industry – A Pattern of Control*, Monograph No. 43 (Washington: Government Printing Office, 1941), 21.

'women's pictures' starring Bette Davis."[8] MGM was the "star factory" of the studios, with an unparalleled roster of top talent on its payroll – Greta Garbo, Clark Gable, Spencer Tracy, Mickey Rooney, Lionel Barrymore, and Jimmy Stewart, to name a few. MGM's films were polished, star-studded productions – sweeping melodramas like *Romeo and Juliet* (1935) and *Anna Karenina* (1935), and breezy ensemble pieces like *Dinner at Eight* (1933). The most talented and enterprising of Hollywood's producers occasionally succeeded in tweaking these formulas to fit their own creative vision, but these were the exceptions. Across the industry, small armies of associate producers churned out films that followed well-established plot formulas and conformed to a given studio's style. Directors, by and large, had still less control over the content of their films. As Frank Capra lamented in an open letter to the *New York Times* in 1939, "80 per cent of directors today shoot scenes exactly as they are told to shoot them without any changes whatsoever…90 per cent of them have no voice in the story or in the editing."[9] Except for a select few, actors too, were under firm studio control. Linked contractually to a single studio, their careers were typically in producers' hands. They could be leased or borrowed, traded or simply cast aside.

The system offered somewhat greater flexibility to Hollywood's elite, particularly the handful of producer-directors whose talent and reputation gave them considerable leeway in dealing with the majors. Walt Disney, David Selznick, Frank Capra – they were the visionaries behind the celebrated films of the day, including *Snow White* (1937), *A Star is Born* (1937), *Mr. Smith Goes to Washington* (1939), and *Gone with the Wind* (1939). While nominally independent, they maintained close links with the majors: "they

[8] Thomas Schatz, *The Genius of the System: Hollywood Filmmaking in the Studio Era* (Minneapolis: University of Minnesota Press, 2010, rev. ed.), 7.
[9] Frank Capra, "By Post From Mr. Capra," *New York Times*, April 2, 1939, p. x4

borrowed the majors' personnel, leased their production facilities, and relied heavily on their first-run theaters." They worked with the studios, but so long as their films pulled in record audiences, they generally did so on their own terms. "The independents," writes Schatz, "needed the system for its resources and its theaters, while the system needed them to cultivate the 'high end' of the market."[10] The majors also needed the independents to help diffuse criticism of studio control. Whenever critics objected to the concentration of production in so few hands, the majors could point to men like Capra and Selznick as proof that talent, not back-room dealing, determined an individual's chance of success. In reality, of course, independents like Capra and Selznick came up through the studio system, while others, like Mary Pickford and Charlie Chaplin, had established themselves before the studio system fully matured. Those who sought genuine independence found themselves shut out of the industry entirely. They could not get access to actors, directors, screen writers or technicians; without studio backing, they could not persuade investors to finance their films.

Beginning in 1934, the majors' hold over the production side of the motion picture industry extended still further, owing, paradoxically, to the same forces of decency – parent organizations, religious groups, and neighborhood busybodies – who would ultimately campaign for the studio system's demise.[11] In the years immediately following the First World War, Hollywood had all the markings of a boom town. With the advent of feature films, there were now millions to be made, sometimes almost

[10] Schatz, *The Genius of the System*, 11.
[11] For a comprehensive history of censorship in the motion picture industry, see: Gregory D. Black, *Hollywood Censored: Morality Codes, Catholics, and the Movies* (New York: Cambridge University Press, 1994); Richard Maltby, "The Production Code and the Hays Office," in Tino Balio, ed., *Grand Design: Hollywood as a Modern Business Enterprise, 1930-1939* (New York: Charles Scribner's Sons, 1993), 37-72; and Stephen Vaughn, "Morality and Entertainment: The Origins of the Motion Picture Production Code," *Journal of American History*, Vol. 77, No. 1 (Jun., 1990), 39-65.

overnight. Money and fame bred excess, and excess made good copy for a gossip-hungry press. Soon, Hollywood had earned for itself a reputation as a "never-ending drunken orgy… the greatest fleshpot since Babylon."[12] While the industry's image added to its mystique, it also invited heightened scrutiny of Hollywood films. Following a series of high-profile scandals, motion picture executives recognized the choice before them – self-policing or censorship. In 1921, the leading producers of the day founded the Motion Picture Producers and Distributors of America (MPPDA), known simply as the Hays Office after its president, Will Hays.

A former chairman of the Republican National Committee, Hays was shrewd, connected, a master of public relations. The original MPPDA charter gave Hays little more than the power of persuasion, which he used to remarkably good effect. Upon taking office, Hays built strong ties with the press and convinced studio heads to tone down the wild parties and ostentatious displays of wealth, and more importantly, to demand the same from their stars. In short, he gave the industry a more professional public face. In 1927, Hays introduced a list of suggestions for the content of members' films, known popularly as the "Don'ts" and "Be Carefuls." When that, too, failed to mollify the industry's critics, the MPPDA formalized Hays' suggestions in the 1930 Production Code. The Code established the general principle that "no picture shall be produced which will lower the moral standards of those who see it." It specifically proscribed excessive violence, obscenity, and "complete nudity…in fact or in silhouette." Producers were instructed to avoid "lustful kissing, lustful embraces, [and] suggestive postures." Scenes of passion were to be presented in such a way as to "not stimulate the

[12] "The Hays Office," *Fortune*, vol. 18 (December 1938), reprinted in Tino Balio, ed., *The American Film Industry* (Madison: The University of Wisconsin Press, 1976).

lower and baser element." Finally, the Code forbade all references to sex perversion, white slavery, miscegenation, sex hygiene, and venereal disease.[13]

So long as it was in their economic and political interest to do so, MPPDA member studios made a modest effort to comply with the code's provisions. Between 1931 and 1933, the MPPDA reviewed some 1,391 scripts, of which it refused to approve nearly 20 percent.[14] Still, enforcement remained lax. As film historian Stephen Vaughn observes, the Hays office preferred "to judge movies by the standard of public taste rather than by the guidelines set down by…the Catholic Church."[15] The code notwithstanding, the period between 1929 and 1934 is generally referred to as "pre-code Hollywood" best known for flashy gangster films like *Little Caesar* (1931) and *Public Enemy* (1931) and provocative Mae West romances *I'm No Angel* (1933) and *She Done Him Wrong* (1933). As the studios began to feel the pinch of the Great Depression, they increasingly green-lit pictures that overtly flaunted both the spirit and the letter of the Production Code. Another round of congressional hearings, petitions, and recriminations followed, fueled by a series of 1933 Payne Fund Studies alleging a direct link between motion pictures and the moral decline of the nation's youth. Finally, in 1934, Hollywood, Washington, and the decency lobby reached a détente. The industry agreed to strictly police itself through a new enforcement arm of the MPPDA, the Production Code Administration (PCA), placed under the direction of the deeply conservative, Irish-Catholic activist Joseph I. Breen.

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[13] "The Motion Picture Production Code (as Published 31 March, 1930)," reprinted in Richard Maltby, *Hollywood Cinema*, 593-597.
[14] Stephen Vaughn, "Morality and Entertainment: The Origins of the Motion Picture Production Code," *Journal of American History*, Vol. 77, No. 1 (Jun., 1990), 62.
[15] Ibid.

From 1934 onward, all scripts were to be submitted for PCA review. Compliance was no longer voluntary. Any member who produced, distributed, or exhibited a film without PCA approval was subject to a fine of up to $25,000 per screening, a stiff penalty at a time when even high-budget prestige pictures rarely cost more than half a million dollars to produce. By 1937, the Hays Office passed on 98 percent of all features released in the United States. A fringe market of exploitation films – such as cult classic *Reefer Madness* (1938) – persisted throughout the decade, featured at ramshackle grindhouses and small independent venues. But any producer who wished to reach a mainstream audience was forced to work with Joseph Breen. While majors and independents alike were subject to PCA oversight, independents faced greater scrutiny. Independents insisted that the PCA regularly stripped scenes from their films while "permitting similar scenes to remain uncensored in the pictures of the eight companies." Producers of Westerns, generally independent, especially complained that they were forced to delete scenes showing "Indian fighting [and] realistic frontier warfare" while Paramount's *Lives of a Bengal Lancer* (1935) featured "mass killings and brutality" without a hint of objection from Breen.[16] The PCA, promoted as an organization of self-censorship, doubled as a vehicle for studio control.

On the exhibition side of the motion picture industry, the majors were far outnumbered by independents and unaffiliated circuits, but they nonetheless exercised considerable power. In 1935, the five studios operated 2,073 theaters, or just over eleven

[16] FBI Report, undated, re: *Paramount* antitrust suit. The antitrust division case file on the antitrust case is presently under review by the National Archives and Records Administration, and was not available at the time of writing. Prior to its transfer to the NARA, the file was in the possession of the Antitrust Division and was made available to researchers. Film historian Giuliana Muscio made copies of some of the materials, which she has graciously shared. All of the materials cited here are on file with the author and available upon request. Hereafter cited as (Paramount File).

percent of the nation's total. [17] These "affiliate" theaters were predominantly large venues with a seating capacity of more than twice the national average, three times that of independently owned theaters.[18] The majors rarely competed against one another except in major cities. They generally situated their theaters in specific regions: Fox in the West; Paramount in the South; Warner, RKO and Loew's in discrete sections of the Midwest and Northeast.

In addition to the affiliates, several independent circuits accounted for another seventeen percent of all theaters, and twenty-three percent of all seats. [19] The leading circuits – Schine, Crescent, and Griffith – each operated between 58 and 150 theaters. Much like the affiliates, the circuits concentrated their theater holdings in specific regions to magnify their influence. Schine operated in the Northeast, Crescent in the South, and Griffith in the Southwest. Their principal markets were small towns like Gallup, New Mexico; Altus, Oklahoma; Corbin, Kentucky; and Bucyrus, Ohio.[20] A majority of these communities were "closed towns" – towns where the circuits faced no competition from either affiliates or independents. Closed towns were the basis for circuit control over their respective regions. In negotiating with the majors, the circuits leveraged their position in closed towns to secure more favorable terms in areas where they faced competition.

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[17] National Recovery Administration, Division of Review, *Evidence Study No. 25 of the Motion Picture Industry*, prepared by Daniel Bertrand, November 1935, 40.
[18] Mae D. Huettig, "The Motion Picture Industry Today," in Tino Balio, ed., *The American Film Industry* (Madison: University of Wisconsin Press, 1976), 241.
[19] NRA Division of Review, *Evidence Study No. 25*, 40.
[20] Ownership statistics are drawn from the government's briefs in the three antitrust suits filed by the antitrust division against the leading circuits: *Schine Chain Theatres, v. U. S.*, 334 U.S. 110 (1948). Brief for the United States. File Date: 12/15/1947; *United States v. Griffith*, 334 U.S. 100 (1948). Brief for the United States. File Date: 12/8/1947; *U S v. Crescent Amusement Co*, 323 U.S. 173 (1944). Brief for the United States. File Date: 9/25/1944. They reflect the circuit's holdings as of 1939, when the government first launched its case. Circuit concentration increased in the mid-to-late 1930s, but the figures are generally representative of the entire decade.

The remaining seventy-one percent of all theaters were operated by independents who owned ten theaters or fewer. [21] These included the vast majority of neighborhood and small-town venues. They ranged in size from converted store fronts seating a mere one hundred patrons to modern theaters with more than one thousand seats. What linked their fate as independents was their competitive disadvantage in dealing with the majors. While the studios exercised their control in a variety of ways, two prevailing trade practices fixed the relative position of independents: "block-booking" and temporal price discrimination. Both grew out of economic considerations specific to the motion picture industry. Both reinforced affiliate and circuit control.

In principle, the practice of selling films in season-long "blocks" worked to the benefit of producers and exhibitors alike. It allowed studios to hedge against the vagaries of public taste by guaranteeing a market for an entire season's worth of films in advance of production. Block-booking did not entirely shield the majors from risk, since big-budget features were typically contracted on a percentage basis. But it ensured baseline revenue to at least recover their costs. Block-booking also simplified matters for exhibitors. Larger theaters typically rotated their films once or twice weekly. Smaller exhibitors rarely showed a given film for longer than one or two days, often as part of a double-feature. Theater operators thus required between 80 and 300 films annually to fill their screens.[22] Since no studio released more than sixty features in any given year, exhibitors required the films of at least two and possibly as many as five distributors. With such rapid turnover, theater operators simply lacked the time to evaluate each film individually on its merits.

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[21] NRA Division of Review, *Evidence Study No. 25*, 40.
[22] Mae D. Huettig, "The Motion Picture Industry Today," in Tino Balio, ed., *The American Film Industry* (Madison: University of Wisconsin Press, 1976), 248.

But in practice, block-booking placed independents at a significant disadvantage relative to the bigger players in the field. The main source of conflict was over cancellation privileges. In dealing with independents, studios typically insisted on selling an entire season's worth of films and rarely allowed more than five or ten percent to be substituted or scrapped entirely. This meant that in order to get the latest Greta Garbo or Jimmy Stewart feature, a theater owner would also have to purchase the full run of mediocre B-movies with which the studios filled out their annual list. Affiliates and circuits could negotiate for smaller blocks, purchasing only the more promising films from each of the studios. While the chains paid a small premium for the privilege, they more than recouped their expenses in box office receipts.

The motion picture industry also operated on a system of temporal price discrimination based on "run" or order of play. A successful picture might go through as many as ten or twenty runs over the course of several years, beginning in the glamorous palace theaters of Los Angeles and New York, and slowly winding its way to the nickel-and-dime theaters in immigrant enclaves and farming communities. Exclusive first-run rights were expensive, but also lucrative. They guaranteed that no other theater in the surrounding area could show the film either simultaneously, or for several days or weeks after. This black-out period between successive runs, known as "clearance," protected a theater's investment in a higher run. Admission prices fell with each subsequent run – without clearance, the last few days of a given run would bring in little revenue since patrons could save on tickets by waiting an extra day or two longer to see the film in another theater.

The run-and-clearance system maximized studio profits by perfectly capturing each individual's reservation price – the price each would be willing to pay to see a given feature. Those able to pay a dollar-fifty for the privilege of seeing the movie first could do so. Those who could only afford to pay a dime could still contribute to overall box office receipts by waiting to see a movie six to twelve months after its original release. Theaters, too, benefited from the system. A single black and white print of a feature film cost between $150 and $300 to produce. Small theaters could not afford to pay anything close to that amount and still make any money on exhibition. By sending a given print to successive exhibitors, distributors could spread the cost across multiple venues and offer subsequent run rentals for as little as ten or twenty dollars per print.[23] Moreover, most independents could not hope to compete against the majors on theater quality or amenities. They survived in part by catering to a different subset of the motion picture market, the budget-conscious consumer.

Again, the problem was not in the system but its abuse. Between the aging neighborhood store-front and glamorous downtown palace, there were thousands of modern, well-equipped theaters – some independent, some circuit – that should have been able to compete on equal terms. Size alone fails to explain why eighty percent of all metropolitan first-run theaters were in affiliate hands.[24] When it came to assigning run and clearance between competing theaters, affiliates and circuits invariably received more favorable terms. With only a handful of exceptions, affiliate and circuit theaters were assigned a higher run than their rival independents, irrespective of theater quality or willingness to pay. When a circuit theater moved in to a given area, independents were

[23] Alexandra Gil, "Breaking the Studios: Antitrust and the Motion Picture Industry," *N.Y.U. Journal of Law and Liberty*, Vol. 3 (2008), 110.
[24] TNEC, *The Motion Picture Industry – A Pattern of Control*, 11.

generally demoted to lower runs in order to accommodate the newcomer. By leveraging their market power, circuits often secured excessive clearance over rival independents, forcing theater owners to wait weeks or months to receive films. At times, independents in competition with circuit theaters could not get films at all. For enterprising theater owners who sought to improve their market position, the run-and-clearance system was an insurmountable roadblock.

In sum, the motion picture industry was a peculiar hybrid – it neither was a truly concentrated industry in which a handful of firms operated in concert and extracted monopoly rents, nor did it function as a genuinely competitive system. Films were plentiful, admission prices low. On any given day, patrons could choose between a variety of genres, from low brow comedies to sweeping dramas. They could pay as little as a dime at their local neighborhood theater, or as much as two dollars at the downtown palace. The industry created space for independents to flourish in both production and exhibition, but only to a point. The studios depended on independents like Samuel Goldwyn and David Selznick for the kinds of films that did not lend themselves to the studios' assembly-line model. They likewise extended considerable leeway to top talent within the system – to writers Lillian Hellman and Dudley Nichols, directors King Vidor and Cecil B. DeMille. At the same time, independents whose films lacked mass national appeal struggled to find a market outside the majors' distribution network. At the exhibition level, independent theater owners were certainly at the mercy of the studios when it came to negotiating contracts and securing films. But the very existence of sprawling unaffiliated circuits testified to the limits of studio control. The industry's detractors found much to criticize in the majors' web of restrictive distribution practices,

but they could not ignore the fact that each year Hollywood delivered cheap, popular entertainment to an ever expanding domestic and international audience.

Throughout the 1920s and 1930s, a loose coalition of theater owners and civic groups pressed for federal intervention to curb specific trade practices, improve the bargaining position of independents, and potentially exercise greater control over the content of motion picture films. In justifying their position, parents' groups and religious organizations pointed to Hollywood's immense power to shape attitudes and tastes, including the attitudes of American youth. Liberal columnists and academics, most notably Walter Lippmann, pointed to the lack of creativity in motion pictures, dismissing Hollywood as "an artistic parasite living upon the talents evoked in the healthier open competition of the older arts."[25] Theater owners advanced both lines of argument. They were the first to hear complaints from the local pastor over objectionable films, and preferred to see these issue handled nationally; they also recognized the potential profits that might accrue from a more vibrant industry. But mostly, theater owners sought greater freedom of action in negotiating for films. When advantageous, all three factions appealed to traditional antimonopoly sentiments of fostering competition and reasserting local control. But throughout, they remained exceptionally flexible as to the specific form that federal intervention might take, whether it be through bureaucratic oversight, legislation, or antitrust litigation. They exerted pressure on any and all agencies that seemed likely to take up their cause. In the early years of the Roosevelt presidency, this meant working with the National Recovery Administration to institute reform through industrial self-government under federal supervision. By the mid-1930s, with the

[25] Walter Lippmann, "The Morals of the Movies," *Los Angeles Times*, January 13, 1935, p. 10.

associational idea in decline, it meant turning to Congress and to the Antitrust Division of the Department of Justice for relief.

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The first attempt at reform through bureaucratic supervision, under the National Recovery Administration (NRA), did little to shift the balance of power between the majors and the independents. Like the broader economy, the motion picture industry had struggled to stay afloat in the first years of the Great Depression. Between 1930 and 1932, average weekly attendance fell by nearly 40 percent. By mid-1933, nearly five thousand theaters had closed their doors, and Paramount, Fox, RKO and Universal had all either filed for bankruptcy or gone into receivership. Exhibitors did everything in their power to spur attendance. They dropped admission prices, promoted double features, and held lottery nights, enticing movie-goers with prizes ranging from trinkets and china sets to brand new automobiles – anything to get patrons in the seats. When Roosevelt announced a program of industrial cooperation to stabilize prices and increase revenue, producers and exhibitors alike jumped at the opportunity to craft their own NRA code of fair competition.

Within a matter of weeks, pressure groups in and out of the motion picture industry mobilized to shape the code. At public hearings in Washington DC, over two-hundred witnesses testified on behalf of "producers, distributors, exhibitors, affiliated and unaffiliated interests, labor, the public, social and welfare groups, and other interested parties."[26] Groups also appealed directly to members of the Roosevelt administration, including the president himself. The Motion Picture Research Council (MPRC), a New-

[26] National Recovery Administration, *Work Materials No. 34*, quoted in Giuliana Muscio, *Hollywood's New Deal* (Philadelphia: Temple University Press, 1997), 117-118.

York based organization created to investigate the influence of motion pictures on American youth, circulated a petition calling for a code to prohibit block-booking and blind-selling, and to introduce greater competition into motion picture exhibition. The MPRC collected signatures from 238 prominent psychologists, reformers, academics, and clergymen, including Chicago's Jane Addams, and the presidents of Yale, Brown, and M.I.T.

For nearly two and a half months beginning in August 1933, code administrator Sol Rosenblatt worked tirelessly to hammer out an agreement. A young New York attorney with little firsthand experience in the motion picture industry, Rosenblatt was a poor choice to oversee the delicate negotiations between majors and independents. But ultimately, there was little he could have done to tilt the balance of power away from the Big Eight – the National Industrial Recovery Act (NIRA) provided little in the way of either sticks or carrots with which to secure concessions from industry leaders. Since the studios controlled the films without which independents could not survive, they had little reason to yield to exhibitor interests. When a leading national association of theater owners walked out of negotiations, the process continued without them.

Independent exhibitors and their supporters had hoped to eliminate compulsory block-booking, blind selling, and excessive film score charges. They also sought to curb distributors' power to designate specific play dates and admission prices. Instead, the NRA code approved all of the prevailing distribution mechanisms as "fair trade practices." Under the code, distributors continued to sell films in blocks, force shorts and newsreels along with feature pictures, and fix admission prices in rental contracts. They also continued to discriminate against independents in assigning run and clearance – all

under the auspices of a government-sanctioned code. The critical battle throughout the negotiations had revolved around the makeup of the code authority and of local arbitration boards, created to settle disputes over zoning, clearance and license provisions between studios and theaters. Independents pressed for neutral boards that would upend circuit control once and for all by awarding run and clearance based on theater quality, not affiliation. Instead, the final makeup of the code authority tilted heavily in favor of affiliated interests, signaling that at best the code would merely preserve the status quo. In 1934, the National Recovery Review Board, chaired by an aging Clarence Darrow, singled out the motion picture code as especially egregious in its discrimination against independents. For NRA critics, the code dramatized the administration's Faustian bargain to secure big business cooperation by sacrificing the interests of consumers and local proprietors.

Even before the Supreme Court struck down the NRA in the "sick chicken" case, exhibitors and civic organizations turned their attention elsewhere – toward Congress, and toward the Antitrust Division of the Department of Justice. Congress held hearings on industry practices in 1936, 1939, and again in 1940. Bills to prohibit block-booking and blind-selling were introduced in each Congress after 1935. The anti-block-booking Neely Bill passed the Senate by a comfortable majority in 1939 but stalled in the House.[27] In 1936, the Justice Department launched a formal investigation of the motion picture industry and in 1938, filed suit against the eight majors under the Sherman Antitrust Act. The studios' ability to co-opt the NRA code authority had convinced key reform groups

[27] The Senate voted 46 to 28 in favor of the Neely Bill. In the House, the Interstate Commerce Committee, persuaded by a parade of Hollywood luminaries opposing the measure, voted to dispose of the measure.

that more government meddling was needed, not less. Just how far federal intervention might go, and to what ends, remained to be seen.

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In April of 1936, Attorney General Homer Cummings instructed John Dickinson of the Antitrust Division to investigate the motion picture industry for possible violations of the Sherman Antitrust Act. Dickinson assigned the case to Paul Williams, one of several special assistants within the division. Throughout the NRA days, the Division had received twice as many complaints against the majors and their affiliates as it had against any other industry.[28] In February and March of 1936, the House and Senate heard testimony from dozens of theater owners who objected to studio control. Given this degree of public scrutiny of the film industry in the mid-1930s, the Justice Department's inquiry was a logical next step. As one attorney observed, "complaints of certain independent producers and exhibitors have been so persistent throughout the years that the Department should know whether there are, in fact, violations of law involved."[29] Yet there is little to suggest that either Cummings or Dickinson had particularly high hopes for the investigation's outcome. An antitrust suit would not have been unprecedented – the Justice Department had already instituted major suits against industry leaders twice before, in 1912 and again in 1929.[30] But in light of recent Court decisions and the

[28] See Russel Hardy testimony, National Industrial Recovery Administration, Hearing Held Before the National Recovery Review Board, in the matter of: The Motion Picture Code, March 26, 1934, 7, in RG9, Entry 44, Box 219.
[29] Memorandum, Benham to Williams, September 17, 1936, quoted in Muscio, *Hollywood's New Deal*, 240, fn. 17.
[30] United States v. Motion Picture Patents Company, 225 F. 800 (E.D. Pa., 1915), appeal dismissed by stipulation, 247 U.S. 524 (1918); United States v. Paramount Famous Lasky Corporation et. al., 34 F.2d 984 (1929), upheld in Paramount Famous Lasky Corporation et. al. v. United States, 282 U.S. 30 (1930).

peculiar economic structure of the film industry, the applicability of the Sherman Act to core industry practices was uncertain at best.

Passed by a nearly-unanimous legislature in 1890, the Sherman Act asserted federal authority to check economic concentration in two plainly-worded, type-written pages. Section 1 of the Act prohibited "every contract, combination…or conspiracy…in restraint of trade or commerce among the several States." Section 2 declared it a misdemeanor to "monopolize, or attempt to monopolize, or combine or conspire…to monopolize any part of the trade or commerce among the several states." Each violation was punishable by a maximum fine of $5,000 and imprisonment of up to one year. Sections 4 authorized the Attorney General and the U.S. Attorneys within their respective districts to institute civil proceedings to "prevent and restrain" violations of the Sherman Act. Section 7 permitted injured parties to sue for treble damages in federal court.[31] Nowhere did the Act enumerate the practices that might constitute restraints on trade or specify the degree of market control a defendant need possess to monopolize trade. Congress left it up to the courts to implement this broad denunciation of monopoly power. Over the next forty years, through dozens of rulings, the courts gradually defined and redefined the scope and meaning of the Sherman Act. A number of cases dealt either directly or indirectly with the structure and practices of the motion picture industry as it existed in 1936.

[31] The remaining sections of the Sherman Act were largely technical. Section 3 extended the Sherman Act to the territories and to the District of Columbia; Section 5 permitted federal court judges to summon parties not immediately named in the suit; Section 6 authorized the seizure of property pursuant to antitrust proceedings, and Section 8 specifically defined corporations and associations as "persons" under the Sherman law. 26 Stat. 209, chap. 647 (1890).

In 1912, the Justice Department filed suit under Sections 1 and 2 of the Sherman Act to break up the Motion Picture Patents Company (MPPC), a patent pool established in 1908 by leading producer-distributors, including industry pioneer Thomas Edison. By consolidating their patents on camera and projection equipment, and entering into a series of exclusive licensing arrangements with producers, film exchanges, and exhibitors, the MPPC quickly established control over the motion picture industry. In its complaint, the Justice Department insisted that that the patent pool served primarily to exclude rivals and to establish a monopoly in film production. In 1915, the District Court agreed. Before the Supreme Court could rule on the merits of the case, the MPPC lost a critical patent infringement suit, and in 1918, the so-called Patents Trust dissolved.[32]

The following decade witnessed the birth of the studio system and the consolidation of theater ownership in the form of affiliated and independent circuits. While the majors continued to extend their reach throughout the 1930s, the principal features of the motion picture industry crystallized in the pre-Depression years. In 1929, the Justice Department filed suit once more against ten leading distributors, alleging violations of Section 1 of the Sherman Act. This was the antitrust division's first *Paramount* case, challenging the majors' use of uniform contracts in leasing films to exhibitors. Before the mid-1920s, studios and exhibitors had negotiated rentals on an ad hoc basis, leading to unnecessary confusion and delays. The uniform contracts grew out of several years of discussion between producers and exhibitors, including many but not all of the independents. The Federal Trade Commission supervised the negotiations as part of its Trade Practice Conference Program. Under the terms of the contract, all disputes were to be settled by arbitration boards drawn in equal proportion from producer

[32] 255 F. 800 (E.D. Pa., 1915).

and exhibitor organizations. Any exhibitor who failed to abide by the provision forfeited his right to lease films not only from the specific distributor involved, but from any member of the MPPDA. Shortly after the final version of the contracts went into effect, the Justice Department filed suit, alleging that the contracts' mandatory arbitration clause violated the Sherman Antitrust Act. The Department charged that the contract provisions were unduly oppressive, intended to exercise control over independent exhibitors rather than further any justifiable economic interest in the motion picture industry. Both the District Court and Supreme Court ruled in the government's favor, forcing the majors to offer alternative mechanisms for settling disputes.[33] While undoubtedly a victory for the Justice Department, the ruling did little to alter the basic structure of the motion picture industry. Uniform contracts were not the principal basis for studio control.

On the central issues of motion picture production and distribution, the applicability of the Sherman Act was less clear. On block-booking, the Second Circuit refused in 1932 to uphold a Federal Trade Commission ruling ordering major distributors to cease and desist from selling films in blocks. The FTC had concluded that block-booking "tends to create a monopoly in the motion picture industry" by excluding independents from the industry and "[denying] to the exhibitors freedom of choice in leasing films."[34] It filed suit to enforce its order under Section 5 of the Federal Trade Commission Act, which authorized the agency to take action against "unfair methods of competition."[35] Both the district and appellate courts disagreed, ruling that each motion picture distributor was well within his rights to "select his own customers and to sell such

[33] 34 F.2d 984 (1929); 282 U.S. 30 (1930).
[34] Federal Trade Commission v. Paramount Famous-Lasky Corporation et. al., 57 F.2d 152, 155 (C.C.A. 2d, 1932).
[35] §5, Federal Trade Commission Act, Chapter 311, 38 Stat. 717, 718 (1914), 15 U.S.C.S. §45 (1925-1926).

quantities at given prices, or to refuse to sell at all to any particular person for reason of his own."[36] The Circuit Court rejected the government's claim that block-booking placed any restraints on exhibitors, who were free to accept or reject the studio's terms. Perhaps more significantly, the court found "a lack of monopolization by the respondent and, in fact, lack of ability to achieve a monopoly." After reviewing production and exhibition statistics submitted by both parties, the court declared that "a state of free competition" exists in the motion picture industry.[37]

The issue of runs and clearance was likewise murky. In 1934, the Ninth Circuit reversed a district court ruling awarding damages to Los Angeles' Seville Theater, which was forced to close after it was demoted to a lower run status to accommodate a new Fox West Coast circuit theater nearby. The plaintiffs had alleged that the zoning system by which run and clearance were awarded was in itself an illegal restraint on trade. The court did not rule directly on the legality of clearance, finding instead that the plaintiffs had endorsed the clearance system so long as it had been in their financial advantage to do so; if the system were indeed illegal, they could not use prior profits to justify damages under the revised arrangement.[38] In the early 1930s, the Justice Department successfully negotiated consent decrees against two major theater circuits who had insisted on excessive clearance against rival independents.[39] While these agreements suggested that undue clearance might be constituted as a restraint on trade, neither spoke to the overall legality of run and clearance arrangements.

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[36] 57 F.2d 152, 156 (C.C.A. 2d, 1932).
[37] Ibid., 156.
[38] First National Pictures v. Robinson, 72 F.2d 37 (C.C.A. 9th, 1934).
[39] United States v. West Coast Theaters, Inc. (S.D. Cal., August 21, 1930) 4 Fed. Trade Reg. Service ¶ 4206; United States v. Balaban & Katz Corp. (N.D. Ill., April 6, 1932) 4 Fed. Tr. Reg. Service ¶ 4221.

There were still other potential applications of the Sherman Act, though at least in the context of the motion picture industry, none had been tested in court. Circuit power in motion picture exhibition presented one possible target for antitrust action. Both affiliated and independent circuits concentrated their theater holdings in specific regions, leveraging their monopoly power in closed towns to secure concessions from the studios in competitive districts. This blatant use of market power to drive out competition was precisely the type of behavior the Sherman Act had been designed to combat.

On the production side, each of the major studios operated as an independent corporation, but there was considerable evidence of collusion between the majors at the expense of independent competitors. The studios shared with one another "their star actors and actresses, their contract performers, directors, writers, camera men, technicians, stage sets, and other studio property."[40] The "big five" had particularly strong incentives to cooperate with rival studios. Since they profited from ticket sales as both producers and exhibitors, they had a financial stake in their competitors' success as well as in their own. While individually each produced but a small fraction of feature films, together, the majors accounted for a substantial share of the motion picture market. There was a case to be made that their actions constituted an attempt to drive out independent competition and monopolize the motion picture trade.

Perhaps the most obvious antitrust angle involved price fixing, which was central to the entire run and clearance system. All motion picture rental agreements included a minimum price of admission. This was done in part to protect studio interests, since big-budget films were typically rented on a percentage basis. It was also the only way to

[40] FBI Report, undated, re: *Paramount* antitrust suit (Paramount File). The report appears to be from early-to-mid 1938.

allocate runs and clearance while ensuring that later-run exhibitors would not so lower their prices as to take business away from earlier runs. Indeed, theater owners insisted on stipulated prices in all contracts for subsequent runs. The rigidity of the price fixing system may have frustrated exhibitors who wished to increase their business by lowering admission prices or offering promotional discounts, but from an industry-wide perspective, the prevailing system protected the interests of all concerned. The effect of price fixing on patrons was less clear cut. For any given feature, the price fixing arrangement undoubtedly kept prices above what they would otherwise have been. At the same time, average theater admissions prices had fallen from 30 cents in 1929 to just 20 cents in 1934. While prices subsequently recovered, a ticket in 1941 still cost less in current dollars than it had at the start of the decade. While it is conceivable that prices would have been lower still were a different system in place, it is equally likely that studios would have reacted to the prospect of lower profits by simply releasing fewer films, putting upward pressure on ticket prices.

From a legal stand point, price fixing presented one of the clearest violations of antitrust law. Until the mid-1930s, the courts had generally frowned upon any and all agreements between competitors to fix prices, however reasonable those prices might be.[41] In *United States* v. *Trenton Potteries Co.* (1927), the Supreme Court reaffirmed the illegality of price fixing agreements "without regard to the reasonableness of the prices fixed or the good intentions of the combining units, whether prices were actually lowered

[41] In United States v. Trans-Missouri Freight (1897), the Court rejected the railroads' defense that their object was to lower rather than raise prices to the consumer. The court ruled that "trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained." 166 U.S. 290, 323. In Addyston Pipe & Steel Co. v. United States (1899), the Court struck down an agreement between pipe manufacturers to fix prices in an apparent effort to prevent ruinous competition in the industry. 175 U.S. 211 (1899). See also Dr. Miles Medical Co., v. Park & Sons Co., 220 U.S. 373 (1911); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

or raised."[42] But then in 1933, the Supreme Court ruled in *Appalachian Coals* v. *United States* that a joint-marketing agreement between 137 bituminous coal producers to fix the price of coal did not violate the Sherman Act.[43] The justices concluded that the arrangements were warranted by conditions in the coal industry and did not reflect an attempt to monopolize the trade. The decision signaled a possible willingness on the part of the Court to relax its stance on price fixing in cases of economic necessity. [44] Whether the courts would see the prevailing pricing system in the motion picture industry as equally critical to the industry's survival remained to be seen.

Together, the nearly thirty years of Sherman Act litigation in the motion picture industry presented the Justice Department with several possible angles of attack. Yet these potential avenues offered little more than an opportunity to nibble at the edges of studio control – to curb specific practices like block-booking or to eliminate rigid price fixing in rental agreements. In its early stages, then, motion picture investigation was little more than a general inquiry to determine what actions if any the Department could take given the vociferousness and persistence of independents' complaints. It certainly did not reflect a broader desire on the part of Dickinson or the Roosevelt administration to reshape the entire film industry or rekindle the antimonopoly movement. Were it not

[42] United States v. Trenton Potteries Co., 273 U.S. 392, 395 (1927).
[43] Appalachian Coals v. United States, 288 U.S. 344 (1933).
[44] Sheldon Kimmel makes a compelling case that the Court had not in fact thrown out the *per se* rule in Appalachian Coals (1933) and subsequently reestablish the rule in United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940). Kimmer argues that the facts of the case in Appalachian Coals did not reveal a price-fixing agreement that would have properly fallen under the *per se* rule. For the purposes of this paper, however, contemporary interpretation of *Appalachian Coals* is what matters, and at the time, most observers within the legal procession interpreted *Appalachian Coals* as a shift away from a rigid interpretation of the Sherman Act with respect to price fixing arrangements. Sheldon Kimmel, "How and Why the Per Se Rule Against Price-Fixing Went Wrong," EAG Discussion Papers, No. 200607 (March 2006), Antitrust Division, Department of Justice. http://www.justice.gov/atr/public/eag/221879.pdf

for the insistence of Paul Williams, the lead attorney in the case, it is unclear that the investigation would ever have attained the scope it ultimately did.

Six months into the investigation, Williams identified "theatre control by the major producers" as "one of the most disturbing problems now confronting the administration of the antitrust laws so far as the motion picture industry is concerned." He acknowledged that "such restraints as are imposed as a result of this relationship" might only be "those that may be reasonably expected in the lawful exercise of property rights." But he nevertheless instructed the FBI to shift its focus from the corporate structure of the integrated majors to the overall pattern of theater ownership in the United States. In particular, he asked for evidence to demonstrate that ownership of "de luxe" theaters allowed the majors to exercise control over both the production and exhibition sides of the industry.[45]

In the months that followed, the Bureau undertook a careful study of majors' theater holdings, collecting data from the Film Boards of Trade in each of the 31 exchange districts through which the majors distributed their films. They pored over exhibition contracts between the major studios and affiliated circuits to determine what if any concessions the studios extended to each other's affiliates. Agents also turned to the vast stores of statistical data accumulated by other agencies within the New Deal bureaucracy. They examined filings submitted to the Internal Revenue Service, the National Labor Board, and the SEC. They made use of voluminous Federal Trade Commission investigation records, as well as the boxes of reports, surveys and statistical materials compiled by the NRA Division of Review. Indeed, nothing illustrates better the

[45] Memorandum, Williams to Dickinson, January 6, 1937, quoted in Muscio, 151.

extension of federal authority in the New Deal years than the compendium of information at the FBI's disposal.

The picture that emerged from the Bureau's investigation confirmed most of the charges leveled against the majors over the previous decade. Where competition existed in the motion picture industry, it was between affiliates and independents, and between rival independent circuits. In dealing with one another, the majors generally settled on terms that were "mutually beneficial and satisfactory" to the parties involved.[46] The Bureau documented multiple instances whereby one of the integrated majors sold its theaters to a rival affiliate who controlled a given area. They also uncovered profit-sharing and joint-ownership agreements between affiliate chains in major metropolitan areas where the majors preferred to pool their resources rather than genuinely compete. Records showed that in distributing their films, the majors often entered into multi-season franchise agreements that fixed affiliate theaters' first-run status for two, three, sometimes ten years. Finally, the Bureau assembled dozens of stories from independents whose run position had been reduced and subsequent profits curtailed when one of the big five affiliates moved in to the region. In the aggregate, the evidence was damning. By mid-1937, recently-appointed antitrust division chief Robert Jackson had become convinced "that the moving picture men are engaged in a widespread conspiracy to put independents out of business."[47]

Taken on their own, however, none of the aforementioned instances presented clear-cut, provable violations of the Sherman Act. A standard exhibition contract included at least a handful of terms on which rival exhibitors could conceivably compete

[46] FBI Report, re: *Paramount* antitrust suit, undated (Paramount File), 32.
[47] Robert Jackson, "Memorandum for Paul Williams," July 14, 1937, in Jackson Papers, Box 78, Folder: "Motion Picture Industry."

– admission price, rental fees, seating capacity, previous earnings, and circuit size. Whenever faced with specific complaints, the majors offered compelling reasons for favoring one theater over another, for deciding to sell theaters rather than compete with rival affiliates, or for pooling their resources in specific towns. Moreover, the precise line between competition and monopolization was often in the eye of the beholder. Jackson admitted as much in a letter to Senator Burton K. Wheeler, who had submitted to the Department a complaint from one of his theater-owning constituents who had lost half of his first-run films when a new theater opened in town. Jackson explained to Wheeler that the theater owner's complaint was not against monopoly but against competition – "if the motion picture companies agreed with him that they would furnish him pictures and would not furnish them to his [new] competitor that might constitute a violation of the law in itself."[48] What the Justice Department needed, then, was a legal argument that could attack in the aggregate practices which on their own would fall beyond the sanction of the Sherman Act, as interpreted by the courts in recent years.

Paul Williams, who adopted early on a firm stand against the majors, offered just that in a draft civil complaint, submitted to Jackson in October of 1937. The eighteen month investigation had convinced Williams that "the principal evil in the industry…rests in the control and monopolization of exhibition by the major companies through the ownership and domination of the best theaters in the country, coupled with their own production of by far the greater part of the best motion pictures." Williams advocated "the complete severance and separation of the production and distribution

[48] Robert Jackson to Burton K. Wheeler, October 27, 1937, in Jackson Papers, Box 78, Folder: "Motion Picture Industry."

branches of the industry from the exhibition branch. Only in this way," he concluded, "can true competitive conditions be restored."[49]

To support divorcement – by far the most drastic remedy available under the Sherman Act – Williams proposed a theory which had "never been presented in an antitrust suit instituted by the Government." He argued "that the motion picture theatres of the country constitute the sole, ultimate market for the sale and distribution of motion pictures and, as such market, should be free from all domination and control by the major producer distributors in order to comport with the standards of free competition." [50] He insisted further that the majors' degree of control be measured not by their relative share of theaters, but by their control of specific venues – large metropolitan first-run theaters. In effect, it was an argument against vertical integration, but one that sidestepped the Supreme Court's prior ambivalence toward vertical arrangements.[51]

At the same time, Williams continued to insist that "before the industry can be operated in the public interest and with fairness to all elements composing it, ultimately some Federal regulation will be necessary," preferably under an "administrative tribunal" with the power to settle "the innumerable specific complaints that are continually arising

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[49] Paul Williams to Robert Jackson, October 27, 1937, in Jackson Papers, Box 78, Folder: "Motion Picture Industry."

[50] Ibid. His primary inspiration for this line of argument was a 1926 book entitled, *The Public and the Motion Picture Industry*. William Marston Seabury, a New York lawyer familiar with industry practices, had identified "the union…of production and distribution with that of exhibition" as the "keystone of the arch of monopoly."

[51] Robert Bork offers a detailed and compelling overview of prior vertical integration cases in Robert Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," *The University of Chicago Law Review*, vol. 22, no. 1 (Autumn, 1954). Bork argues that the courts had early on demonstrated their suspicion of vertical integration, particularly in cases where integration threatened to promote monopoly control. But he acknowledges that most legal scholars had interpreted Supreme Court and lower court decisions prior to the mid-1940s as generally permissive toward vertical combinations. He cites three cases in particular that contributed to this misconception, all of which were critical Sherman Act cases and were cases in which the courts took no issue with vertically-integrated firms: United States v. United States Steel Corp., 251 U.S. 417 (1920); United States v. Standard Oil Co. of New Jersey, 47 F.2d 288 (E.D. Mo., 1931); United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio, 1935).

in the industry." He also suggested that "all of the illegal conditions which are included in the proposed petition could be more expeditiously and effectively corrected through legislation by Congress."[52] This was a striking admission from the lead attorney in the case. Williams had concluded that the motion picture industry did not function optimally, at least so far as independents were concerned. He advocated the complete divorcement of production and exhibition as the only way to protect independent interests and force the majors to genuinely compete amongst themselves. To justify divorcement through antitrust litigation, he proposed a novel and expansive interpretation of the Sherman Act. Yet he openly admitted that divorcement might not fix the industry's problems, and insisted that a permanent regulatory presence would be necessary to fully address independents' concerns. Here was an argument for an antitrust suit based not on the premise that the Sherman Act offered the best means to address the plight of independents, but that the Sherman Act happened to be the tool close at hand. It was the epitome of opportunistic economic action: policy stripped of doctrine, ambitious in scope, ambivalent as to means, and rooted in the statist assumption that federal intervention could ultimately bring about the desired results.

Williams spearheaded the push for divorcement. He established the parameters of the investigation, crafted the Department's legal argument, wrote the briefs, developed the strategy, and pressed the case. But without a shift in the administration's posture toward big business and accompanying shifts in Antitrust Division personnel, Williams' investigation would likely have taken a very different turn. In particular, Williams

[52] Paul Williams to Robert Jackson, October 27, 1937, in Jackson Papers, Box 78, Folder: "Motion Picture Industry."

benefited from John Dickinson's return to private practice in January of 1937. Robert Jackson, a close personal friend of the president and a more vigorous champion of the antitrust laws, took over the Division. The following year, Jackson accepted the Solicitor Generalship, and Yale law professor Thurman Arnold was appointed in his place. In Jackson, Williams found an enthusiastic if occasionally reticent supporter; in Arnold, Williams found a champion of the film industry case.

Jackson brought to the Antitrust Division a "crusading spirit" that neither Cummings nor Dickinson possessed.[53] Jackson subscribed to the "Wilsonian doctrine" that "society was better off if business was not allowed to get too big."[54] He recognized that the NRA "had given encouragement to businessmen to get together and solve their problems" by driving out "chiselers." He thus thought it "essential, at that particular time, that the department become, and be known to become, more aggressive in asserting the old anti-trust philosophy."[55] Jackson also appreciated the political advantages of challenging the unbridled power of large corporations. In December of 1937, as the nation plunged once more into Depression, Jackson delivered a series of incendiary speeches that lay the blame for the economic crisis squarely at the feet of the nation's tycoons. Borrowing a phrase from German writer Johann Wolfgang von Goethe, Jackson described the philosophy of big business as "aristocratic anarchy." Business leaders, he declared, "have now seized upon a recession in our prosperity to 'liquidate the New Deal'

[53] Jackson observes in his oral history that "Cummings favored a revival of the anti-trust philosophy. I don't know that he would have done it in quite as crusading a spirit as I did and as many people wanted it done, because Cummings was not a crusading type…. I don't think Dickinson had quite adjusted to the conditions that resulted from the existence and demise of the NRA and had probably not pressed such matters with Cummings to any great extent." See: "The Reminiscences of Robert H. Jackson," based on interviews by Harlan B. Phillips, 1955, in Jackson Papers, Box 258, Part IV, 488-489. Hereafter cited as Jackson Oral History.
[54] Jackson Oral History, 491.
[55] Ibid., 497

and to throw off all governmental interference" with their anarchic economic order. They have inaugurated "the first general strike in America" – a "strike of capital."[56] As Division chief, Jackson reinforced his rhetorical jibes against corporate power with high-profile suits against leading players in the oil, aluminum, and automobile industries. He also backed Williams' ambitious investigation of Hollywood's producer-distributors.

Still, Jackson never fully embraced the Sherman Act as a tool of economic policy. He argued throughout his tenure that the antitrust laws needed to be made more specific, defined by concrete economic practices rather than vague concepts of monopoly and competition. He often cited corporate attorneys' complaints "that they have been unable to advise a client in advance as to whether certain practices would or would not constitute a violation."[57] Jackson further lamented that the Justice Department could pursue at most a fraction of the cases submitted to it annually, and that without strict guidelines on which to proceed, case selection was inevitably political, based on the identity and persistence of the interest groups involved. As a result, he found his time at the antitrust division as "relatively unsatisfactory and troublesome." Jackson may have embraced the symbolism of the Sherman Act but questioned its use in practice.

Unlike Jackson, Thurman Arnold expressed few concerns over the ambiguity of the Sherman Act. Jackson later recalled that Arnold had been "very cynical…about the anti-trust laws" prior to joining the administration, but had subsequently become "a believer in them, in fact a more fanatical believer than I was myself."[58] Jackson's

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[56] Robert Jackson, "The Menace to Free Enterprise," December 29, 1937, in RG 60, Entry 132, Box 18, Folder: "Antitrust Matters"
[57] Ibid., 508
[58] Ibid., 498. Jackson mistakenly identifies *Symbols of Government* as Arnold's "cynical" book on the antitrust laws. In fact, Arnold's critique of Sherman Act enforcement appeared in his 1937 *Folklore of Capitalism.*

characterization could not have been farther off the mark. Arnold had not, as Jackson suggested, found religion. Rather, Arnold had simply embraced the power of the Sherman Act as a tool of economic policy once he himself was tasked with its enforcement. As Arnold insisted in a letter to Eugene Rostow some years later, he could "get identically the same trust-busting results out of the NRA and the AAA as I can get out of the Antitrust Division if I can pick the men to run them." He mocked those who failed to see the consistency in his support for the AAA in the early New Deal as "a useful instrument to distribute goods" and his subsequent enthusiasm for AAA's alleged antithesis, the Sherman Act.[59] For Arnold, both the Sherman Act and the Agricultural Adjustment Act had the potential to improve market function, so long as they were properly deployed.

As head of the Antitrust Division, Arnold set about to improve the Justice Department's capacity to effectively apply the Sherman Act. Williams' bold, ambitious use of the antitrust law against the majors was perfectly suited to Arnold's agenda. Throughout his tenure, Arnold offered a series of novel applications of the Sherman Act. In the auto-finance case against Ford, Chrysler, and General Motors, the antitrust division charged that the three firms had forced automobile dealers to exclude independent finance companies in favor of the automakers' own subsidiary lenders. Arnold pressed for a decree that curbed not only such overt discrimination, but also restricted the automaker's right to advertise their finance companies by name. Arnold criticized the branding of uniform goods – milk, gasoline, and comparable finance plans. He argued that brand-name advertising of uniform products fostered monopoly by putting "competitors at a disadvantage for the sole reason that they do not have the resources

[59] Thurman Arnold to Eugene Rostow, October 21, 1940, in Arnold Papers, Box 22, Folder 1.

sufficient to expend equally large sums." Under the terms of the auto-finance decree, the firms agreed to advertise only specific plans of financing, without mentioning the lenders by name. Arnold acknowledged that the antitrust laws did not legally prohibit branded advertising, but suggested that the auto-finance case could be used as a basis for future decrees.[60] Arnold likewise advocated using the antitrust laws against labor unions engaged in featherbedding, racketeering, and jurisdictional strikes. While a handful of Arnold's labor cases drew on a prior history of antitrust jurisprudence, others advanced untested interpretations of the Sherman Act. It is therefore not surprising that Arnold emerged as a leading champion of divorcement in the government's case against the motion picture industry. The majors' tactics clearly violated the spirit of the Sherman Act, and a victory on divorcement would have expanded the range of remedies available to Justice Department attorneys in future suits. Appearing before Congress, Arnold insisted that "no system of integral control, such as we see in operation in connection with the marketing of motion pictures….can be altogether fair."[61] The case against the majors offered an opportunity to test this theory in court.

On July 20, 1938, the Department of Justice filed a petition in equity against the leading distributors in the Southern District of New York. The petition charged the eight majors – Paramount, Warner Brothers, Fox, Loew's, RKO, Universal, Columbia, and United Artists – with monopolizing and attempting to monopolize exhibition in metropolitan first-run theaters; monopolizing production of feature films; and imposing

[60] Department of Justice, Public Statement, November 7, 1938 re: Consent Decrees in Automobile Finance Cases, in Roosevelt Library, Printed Materials, Box 197, Folder: "Antitrust Division Statements"
[61] United States Senate Committee on the Judiciary, Hearings on S. 3735 re: Motion Picture Theatre Divorcement, vol. I, April 22, 1940 (Washington, D.C.: Charles A. Brown, 1940), 38A.

discriminatory trade practices on independent exhibitors. The Department asked that defendants be enjoined from engaging in monopolistic trade practices, including block-booking, full line forcing, blind selling, and price fixing. [62]

The Department also prepared suits against three powerful theater circuits – Schine, Crescent, and Griffith – alleging several violations of Sections 1 and 2 of the Sherman Act. In three separate 1939 complaints, the Department charged that the circuits monopolized motion picture exhibition in their respective regions and conspired with the majors to exclude independents from the motion picture trade. The Justice Department asked that defendant circuits be dissolved into several smaller circuits and that these smaller circuits be enjoined from collectively negotiating rental agreements.[63] The circuit cases were critical to the success of the Department's overall project to remake the film industry. Were the government to win its divorcement suit against the majors but lose its dissolution cases against the circuits, the victory would be a hollow one at best. Left intact, a dozen large theater circuits, each confined to a specific region, would still have the power to exclude independents and restrict the distribution of motion picture films.

By 1939, then, it appeared that the independents' appeals for federal intervention in the motion picture industry might finally pay off. The Justice Department had instituted antitrust suits against the circuits and studios. The independents' congressional supporters kept up pressure on the majors with yet another two-week hearing on film industry practices in April. In July, the Senate passed the Neely Bill prohibiting block-

[62] This summary is drawn from Giuliana Muscio's overview of the original 1938 complaint, and the 1940 amended and supplemental complaint, which retained the charges and prayer while updating theater ownership data to reflect more recent figures. See Petition in Equity No. 87-273 (S.D.N.Y., July 20, 1938), and Petition in Equity, No. 87-273, Amended and Supplemental Complaint (S.D.N.Y., November 14, 1940). See also Muscio, 157-158.

[63] United States v. Griffith Amusement Co., Civil Action No. 172 (W.D. Okla., 1939); United States v. Schine Chain Theaters, Civil Action No. 223 (W.D. N.Y., 1939); United States v. Crescent Amusement Co., Civil Action No. 54 (M.D. Tenn., 1939).

booking and blind selling by a vote of 46 to 28.[64] Hollywood, observed a *New York Times Headline*, prepared for the worst.[65] Yet the worst never materialized – Hollywood entered World War II relatively unscathed by either litigation or legislation. While independents had mobilized support in the Senate and in the Department of Justice, the majors turned their attention toward other members of the Roosevelt administration, particularly within the Department of Commerce. As the subsequent course of the motion picture suit suggests, there were multiple avenues through which outside groups could shape economic policy in the later years of the New Deal.

As the Justice Department prepared its case for trial, the majors pressed forward with a plan of their own – a voluntary trade practice agreement to address exhibitors' concerns in lieu of a formal decree. Promises of self-government had saved the studios from federal meddling throughout the 1920s and 1930s on the censorship front. The studios justly assumed it might work once more. Shortly after the Justice Department announced its suit, the studios sponsored a series of industry-wide conferences to appease independent exhibitors and undercut the government's case. The strategy was predictable but effective. It enabled studio heads to act the part of responsible businessmen working toward a constructive solution, while simultaneously driving a wedge between the various organizations that purported to speak for independent interests.

Beginning in the fall of 1938, studio heads and exhibitors gathered for a series of meetings and conferences to hammer out an agreement. Over the course of several drafts, an agreement acceptable to the studios and a number of independent theater organizations

[64] "Senate Votes Film Block Booking Ban," *Los Angeles Times*, July 18, 1939, 1.
[65] Douglas Churchill, "Hollywood Prepares for the Worst," *New York Times*, June 11, 1939, X3

slowly fell into place. The draft code extended to exhibitors graduated cancellation privileges for all season-long contracts – from 20 percent of films licensed for under $100, down to 10 percent of films licensed for $250 or more. It prohibited distributors from forcing shorts and newsreels along with feature rentals. The agreement did not eliminate blind selling entirely, but the studios promised when possible to circulate detailed plot synopses of future films. Most importantly, the proposed code established an arbitration system modeled on NRA run and clearance boards but substantially revised to address exhibitors' concerns. Boards would be composed of an equal proportion of distributor, exhibitor, and neutral representatives, with a complex set of checks and balances to ensure parity. Virtually all disputes between producers and exhibitors, and between rival theater owners, would be subject to arbitration. Only run assignment would remain off limits – a prerogative which distributors insisted on retaining for themselves.

Theater owners' reactions to the proposed code revealed deep divisions between the two principal groups who represented independent theaters – divisions which hinged on the groups' respective attitudes toward the structure of the motion picture industry and the degree of studio control. Harry Brandt, who operated a large independent circuit across New York's five boroughs, represented the hundreds of independents who objected to specific industry practices but generally thrived under the majors' protective umbrella. Brandt was president of the Independent Theater Owners Association (ITOA), which wholeheartedly endorsed the majors' proposed code. When it came to negotiating reforms, Brandt stressed that while he would like to see his clearance position improve, he did not "not expect to upset the Loew and RKO protection system" in New York.[66] The majority of independents who comprised Abram Myers' Allied States Association of

[66] "Brandt Foresees 90% Theatre Acceptance of New Code," *Box Office*, May 27, 1939, p. 19.

Motion Picture Exhibitors, however, opposed not only specific practices but the very organization of the industry itself. They dismissed studio-backed concessions as mere "crumbs" that failed to address the structural iniquities that pervaded the industry.[67]

In August of 1939, Thurman Arnold torpedoed the industry's efforts. In a public statement, he declared that any agreement preserving the integrated structure of the motion picture industry would constitute a violation of the Sherman Act and would "only lead to continued and perhaps additional prosecutions."[68] Predictably, Myers backed Arnold's pronouncement while Brandt of the ITOA denounced the Assistant Attorney General's move. In a harshly-worded letter to Roosevelt, Brandt accused Arnold of "insisting that the cure, if any, must be government auspices… or not at all." Brandt requested that Roosevelt "place this matter in the hands of one of the other government agencies for the purpose of setting up a new set of fair trade practices in the motion picture industry."[69]

In fact, Roosevelt had already done just that. Even before trade code negotiations crumbled under pressure from the Justice Department, the majors' campaign for a trade practice code had convinced key members of the Roosevelt administration that a constructive solution to the industry problems was within reach, and could be secured in lieu of a federal suit. In March of 1939, with the trade practice agreement still in its second draft, Jack Warner of Warner Brothers Pictures had similarly appealed to Commerce Secretary Harry Hopkins for help. Since the primary function of the Commerce Department's Motion Picture Division was to promote American films

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[67] "Sees Plan for Arbitration as Pact's One Redeeming Virtue," *Box Office*, March 18, 1939, p. 5.
[68] Thurman Arnold to Austin C. Keough, et. al., reprinted in "Text of Thurman Arnold's Bombshell," *Variety*, August 23, 1939, 4.
[69] Harry Brandt to Franklin D. Roosevelt, September 25, 1939, in OF 73, Box 4, Folder: "1939 Jan – Aug"

abroad, Warner framed the antitrust suit as a threat to foreign trade. American films accounted for $150 million in exports. Despite foreign quotas, censorship laws, and government campaigns to promote local directors, American motion pictures continued to fill as much as seventy percent of screen time in theaters across the globe. Warner insisted that the American film was "America's greatest salesman," of "untold benefit [to] American industries whose produces and wares are shown in our pictures. Electric refrigerators, gas stoves, automobiles, radios, furniture, bathroom-fixtures and a hundred and one other items" are daily advertized in American films: "Our films fairly shriek 'Buy American.'" Warner cautioned that "no company could undertake, year after year, the production of a large and ever increasing number of quality pictures without the assurance" of profits made possible by theater ownership. Far from stifling the development of quality films, the majors' control of exhibition encouraged their production. Warner questioned "the wisdom and judgment" of the Justice Department's stance and urged Hopkins to undertake his own review.[70] Warner's letter appears to have had its intended effect. That same month, studio heads conferred with Roosevelt and Commerce Secretary Harry Hopkins on the state of the motion picture industry.[71] Shortly thereafter, Roosevelt approved a Commerce Department investigation of the industry, intended to resolve once and for all the conflict between independents and the "big eight."

Hopkins, best known for putting some eight-million Americans to work through the sprawling Works Progress Administration, was not entirely unsympathetic to the anti-

[70] Warner to Hopkins, March 6, 1939, Hopkins Papers, Box 117, Folder: "Motion Pictures."
[71] While the meeting was not mentioned in the press, there are at least two references to March 1939 meetings in Roosevelt's correspondence. See: Jack L. Warner to FDR, November 25, 1940 in OF 77, Box 4, Folder: "1939, Jan.-Aug.," and Will Hays to FDR, November 20, 1939, in PPF 1945, Folder: "1934-1945." The timing also fits with the launch of the commerce department study.

monopolist view. In 1937 he had joined Jackson in urging a more confrontational stance toward the business community. One historian likened his appointment as Commerce Secretary the following year to "deputizing the fox to guard the chickens."[72] Yet in practice, he remained a committed advocate of fiscal stimulus. He showed little enthusiasm for the kind of intrusive tinkering that consumed trustbusters and planners alike. His role as commerce secretary was to present "effectively and consistently… the view point and experience of businessmen of intelligence" who proved "quite willing to go along with necessary reforms" but who remained wary of "unnecessary dislocations and misunderstandings."[73] The Hollywood press wholeheartedly endorsed Hopkins' investigation as "a less hard-boiled" alternative to the Justice suit.[74]

The results of the Commerce Department report revealed sharp differences between the two departments over the form of government intervention in the motion picture industry. The report proposed an ad-hoc regulatory system, loosely supervised by a Commerce representative. The Commerce Department suggested that blind-selling be abolished in favor of trade-shows in each of the exchange districts and proposed that films be leased in small blocks of up to five pictures. To mitigate against circuit control, the report insisted that film rentals in each exchange district be negotiated independently – no longer would circuits be able to negotiate terms in one region based on their market control in another. Much like the trade practice code devised by the industry itself, the Commerce draft proposed that disputes between exhibitors and distributors should be

[72] Kim McQuaid, *Big Business and Presidential Power: From FDR to Reagan* (New York: William and Morrow, 1982), 64.
[73] *Department of State, Justice and Commerce Appropriation Bill for 1940, Hearings before the Senate Committee on Appropriations*, 76th Cong., 1st Sess. (Washington: Government Printing Office, 1939), 73.
[74] "Washington insiders cast dubious looks on Hopkins for his 'Big Brother' policy," *Box Office*, July 22, 1939, p. 7.

settled by arbitration boards composed of industry-appointed and neutral representatives. In sum, the report followed well-established patters of New Deal reform in calling for greater standardization and transparency as the principal objectives of government intervention. It also conformed to Hopkins' principal objective as Commerce chief – to effect economic reform without upending existing patterns of ownership.

It was a plan not unlike the decrees Arnold had approved in the auto-finance and tile industry suits. But in this case, antitrust division lawyers dismissed the Commerce plan as unworkable. From the start, the motion picture case had been predicated on securing greater freedom of action for independent producers and exhibitors by injecting competition into distribution and exhibition. Careful study of the inner workings of the motion picture industry had convinced Arnold and his staff that only divorcement could advance this objective. Arnold forwarded the Commerce plan to independents for comment, but throughout the spring of 1940, he refused to consider the draft as anything more than a partial solution. Only if the studios agreed to still "litigate the question of divorcement" would he "accept the provisions of the Commerce plan."[75]

Representatives of the studios took every advantage of this growing divide within the administration. In a remarkable letter to Roosevelt, Will Hays warned that Thurman Arnold might take advantage of Harry Hopkins' illness to impose his own views on the Commerce Department study. Making no effort to veil his disdain toward the antitrust division chief, Hays contrasted the Commerce study, "based on proper business and practical necessities," with Arnold's investigation based "solely on legalistic theories…. Certainly," he continued, "the Commerce Department's report and recommendations should go to you before Mr. Arnold confuses it by threats or by forcing his own theories,

[75] E.A. Tupper to Harry Hopkins, May 31, 1940, (Paramount File).

whatever they may be, on Harry's people." He predicted that the Commerce study would finally provide a "comprehensive and constructive readjustment of the whole business" which "should end litigation." Taking a more conciliatory tone, Hays then assured that the commerce plan would go farther than he and Roosevelt had ever discussed. Only because of Roosevelt's personal interest in the case were "our people" prepared "to go to the most extreme length" to secure reform. [76]

Roosevelt shrewdly asked the Justice Department to prepare a response, which pointedly made clear that there was "no inconsistency between the activities of the Department of Commerce on the one hand and the prosecution by the Department of Justice… on the other."[77] But it would be a mistake to make too much of Roosevelt's dismissive reply. Hays' letter had struck a tone that no doubt appealed to Roosevelt's understanding of how the antitrust laws should function. Much like his fifth cousin and role model Theodore Roosevelt, the President conceived of the antitrust laws mainly as a way to assert national sovereignty and keep business in check. With respect to the motion picture investigation, Roosevelt had been ambivalent from the start. In his memoirs, Jackson recalls a conversation with Roosevelt in 1937, as the Department prepared to file a suit in equity against the major studios and distributors:

> I went to the President and told him that I wanted to start an action against them. The president said, "Well now, of course, they've been doing wrong, but do you really need to sue these men? If you would bring them here and let me talk with those fellows, don't you think they would change their practices? I think they can be straightened out." My answer, of course, was that these men were in a sense victims of their practices as well as perpetrators of them. It was a system that had grown up to where

[76] Will Hays to FDR, November 1939 (undated), in PPF 1945, Folder: "1934-1945." Emphasis comes from original letter. Letter also included in Berge Papers, Box 24. The Berge papers also include Arnold's proposed reply to go over FDR's signature. The reply went out as Arnold proposed.
[77] FDR to Hays, November 20, 1939, in PPF 1945, Folder: "1934-1945" or Berge Papers, Box 24.

> no one man or group could break it up without the intervention of government.[78]

According to Jackson, Roosevelt never fully grasped that the problems facing the motion picture industry would not give way to cajoling or stern reproach. "He still thought of…antitrust," writes Jackson, "as punishing a conspiracy, thinking of a conspiracy as a dark cellar operation in which evil men got together in masks and plotted to do something."[79] Roosevelt thus found it easier to understand punitive measures to check egregious wrongdoing than the more constructive objectives implicit in the motion picture suit. Where problems were structural rather than moral, the President seemed naturally to favor cooperation to coercion. The studios' trade code overtures, which the Commerce Department insisted were sincere, likely confirmed in Roosevelt's mind that the antitrust proceedings had served their purpose.

Elsewhere, too, Arnold's support appeared to be dwindling. Attorney General Robert Jackson, never entirely comfortable with Arnold's vigorous application of existing antitrust laws, had grown increasingly frustrated with the division chief's tactics and personal style, describing Arnold as one of "two prima donnas in the Department of Justice who would present problems of one kind or another."[80] Jackson's successor, Francis Biddle, recalled that Jackson "went along with the antitrust program halfheartedly," and that "the two men did not get along too smoothly"[81] With respect to the motion picture case, Jackson's later writings suggest he viewed the Commerce draft

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[78] Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt*, John Q. Barrett and William E. Leuchtenburg, ed. (New York: Oxford University Press, 2004), 119
[79] Jackson, *That Man*, 120
[80] Jackson to Gordon Dean, quoted in Wilson D. Miscamble, "Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal," *The Business History Review* 56 (Spring, 1982), 13. The other was FBI Director J. Edgar Hoover. James Rowe wrote FDR in August 1940 that Jackson had "reached the limit of his patience with Arnold." Quoted in Muscio, 186.
[81] Francis Biddle, *In Brief Authority* (Garden City: Doubleday, 1961), 272; also quoted in Miscamble, 13.

as reform enough.[82] By the summer of 1940 Arnold's antitrust program had also begun to run up against defense preparations. When the National Defense Commission objected to Arnold's investigation of Standard Oil's relationship to German-based I.G. Farben, Arnold privately threatened to "bolt to Wilkie" in the 1940 election.[83] With the entire antitrust program thrown into doubt by the war, there were only so many battles Arnold could fight at any given time.

It was against the backdrop of these divisions – between Brandt and Myer, between Commerce and Justice, and between Jackson and Arnold – that the case finally came to trial. On June 3, 1940, lawyers representing the federal government and the eight defendants converged on Foley Square in Lower Manhattan. Judge Henry W. Goddard, a Harding appointee, presided. Arnold opened the government's case with a meandering overview of his division's enforcement philosophy and its application to the motion picture industry. He framed the case as an example of what happens "when an industry gets this overwhelming domination." The majors' control of distribution had contributed to a "situation of terror," a "notorious waste."[84] Williams followed with a more precise examination of the motion picture industry and the development of the studio system. Throughout their opening statements, both Arnold and Williams emphasized structure – patterns of ownership and longstanding agreements that impeded competition in the production and exhibition of motion pictures. Defendants' attorneys countered with a more personal approach, stressing the history of their respective studios and rattling off the industry's contributions to the public interest. Paramount attorney Thomas Thatcher

[82] Jackson Oral History, 544.
[83] Rowe to FDR, August 15, 1940, quoted in Muscio, 186
[84] Arnold, quoted in Muscio, 178.

detailed founder Adolph Zukor's battles against powerful theater circuits in the early 1920s, framing vertical integration as a bulwark against truly destructive monopoly power.

The majors' plausible defense of vertical integration and industry practices succeeded in clouding the issues before the court. Williams wrote to Arnold that "after having listened to opening statements for four days," Judge Goddard "had obtained no grasp of the case or of the operations of the motion picture industry, whatsoever, and frankly so stated." [85] Williams' frustration was not at all uncommon among antitrust prosecutors. In his TNEC monograph on antitrust enforcement, law professor Walton Hamilton recites the overwhelming challenges that confront the trial judge in an antitrust equity suit: "Within a few weeks he must make his way through a culture of trade practices which the business executives have unconsciously mastered …. He is expected to have a critical mastery of corporate finance, marketing practice, industrial structure…. He must be able to sense the place of small units within the trade, to discover the real relation between large companies and independents, to appraise industry-in-action in terms of the legal norms of competition." All the while, "He is beaten upon by the smooth advocacy… of skilled attorneys who seek to impress opposing pictures upon the none too certain facts."[86]

Goddard's confusion was thus to be expected. Nevertheless, Williams expressed concern that "while the Judge is upright and honest, he will not be able to grasp the minute and complex ways in which restraints of trade are brought about in this industry, and that therefore it is extremely unlikely that a decree in the Government's favor may be

[85] Williams to Arnold, June 7, 1940, quoted in Muscio, 182
[86] Temporary National Economic Committee, *Antitrust in Action*, Monograph No. 16 (Washington: Government Printing Office, 1940), 71.

expected of him."[87] When defendant attorneys surprised Williams with a move to dismiss on the ground that the issues should have been litigated in an earlier theater circuit case, Williams concluded that perhaps it was best to settle the case instead of proceeding with trial.[88] And so, a mere four days after the Paramount case finally got off the ground, the Department turned its attention toward negotiating a decree.

Consent decrees had long been applied, or in Arnold's view, misapplied, as a tool of antitrust enforcement. Settlement by consent decree has distinct advantages for all concerned. Lengthy trials benefit no one save corporate attorneys. By avoiding costly proceedings, the cash-strapped antitrust division could in theory prosecute more cases and magnify its impact on the economy. The division could also impose specific conditions on the defendants without having to prove their necessity in trial. A 1920 decree entered in the meat packers' case prohibited defendants from distributing 114 separate food products. Had that case gone to trial, the division would have had to provide concrete evidence on the market structure for each of the products in question.[89] Defendants, for their part, welcomed the consent decree as a way to avoid the costs and publicity of a drawn-out trial, and to adjust more quickly to new competitive arrangements. Unlike a traditional decree following trial, a consent decree could not be

[87] Williams to Arnold, June 7, 1940, quoted in Muscio, 182

[88] The defendants claimed that the issues should have been litigated in the Interstate Circuit Case, in which all of the principal defendants were also named in the petition. Interstate Circuit, partly owned by Paramount, joined with the eight distributors to force independents to raise prices on subsequent runs if they wanted to get pictures from any of the major studios. In 1939, the Supreme Court affirmed the lower court decision issuing an injunction against future agreements to fix prices on subsequent runs. 306 U.S. 208 (1939).

[89] Charles F. Phillips, Jr., "The Consent Decree in Antitrust Enforcement," *Washington and Lee Law Review*, vol. 18 (1961), 47.

used as prima facie evidence in damage proceedings by injured competitors – a distinct benefit to defendants hoping to shield themselves from future suits.[90]

Yet as Arnold noted in 1938, the consent decree had been used more often than not merely to enjoin practices that were already illegal under the antitrust laws, and to do so long after the damage had already been done. He likened the practice to an incident from his days as a student at Princeton, when a powerful football player, exhilarated after winning a big game, plowed into a "small and bespectacled" professor, knocking him down the stairs. The player then "smiled genially… and said, 'I'm sorry. It was my mistake.'" Too often, Arnold argued, giant corporations like the Aluminum Company of America were permitted to run roughshod over smaller competitors and years later, with competition virtually eliminated from the industry, sign a consent decree that amounted to little more than an apology and a promise to behave better in the future.[91] In this form, "the consent decree was nothing more or less than a form of unemployment relief for lawyers."[92]

As head of the antitrust division, Arnold insisted that on a more judicious use of the consent decree, requiring defendants to propose a solution which went "beyond any results which may be expected in a criminal proceeding."[93] His success in applying his policy in the first years of his tenure, however, depended on a confluence of specific circumstances that were absent in the motion picture case. The vast majority of consent decrees signed prior to 1940 involved defendants who could ill-afford a protracted trial. The most comprehensive decrees were entered against trade associations, labor unions

[90] Chap. 323, 38 Stat. 730 (October 15, 1914) §5.
[91] Thurman Arnold, "What is Monopoly," June 15, 1938, RG 60, Entry 132, Box 18, Folder: "Antitrust II"
[92] Thurman Arnold, *The Bottlenecks of Business* (New York: Reynal & Hitchcock, 1940), 142.
[93] Ibid.

and small firms.[94] Of the major cases instituted by the antitrust division, only the auto-finance case against Ford, Chrysler and General Motors had resulted in a voluntary decree against two of the three defendants. In that case, car manufacturers had penalized dealers who offered customers financing through any firm other than the manufacturers' own subsidiary lender. The consent decree standardized financing practices, enjoined manufacturers from discriminating against rival lenders, and prohibited dealers from advertising any specific firms to their prospective clients. While the decree instituted an elaborate oversight mechanism and forced manufacturers to compete more equitably with rival lenders, it did not substantially alter the structure of the automobile industry. In short, it made for a relatively painless adjustment. The motion picture case, by contrast, challenged the fundamental structure and settled practices of powerful firms within a well-established industry. A decree approaching Arnold's standard of efficacy would have required the majors to make costly concessions to exhibitor interests. The consent decree ultimately entered against the majors in November of 1940 fell far short of the mark.[95]

With the exception of a few minor details, the eventual settlement followed the contours of the Commerce draft that antitrust division attorneys had previously dismissed as inadequate. It mandated trade shows of all future films and prohibited the sale of motion pictures in blocks larger than five. It proscribed agreements linking film rentals in theaters located across multiple exchange districts, but like the Commerce draft, it said nothing of circuit-wide contracts within the same district. Contrary to the Justice

[94] William R. Peterson, "Consent Decrees: A Weapon of Antitrust Enforcement," *University of Kansas City Law Review*, vol. 34 (1949), 45-46.
[95] The decree was entered against the five theater-owning defendants only. United Artists, Universal, and Columbia refused to sign. The department continued its negotiations with the "little three" for the following year, but never pressed its case to trial.

Department's assertion in its original complaint, the consent decree "recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."[96] It made no mention of price fixing in rental agreements. Most importantly, the consent decree introduced an arbitration system that offered little more than token relief to exhibitors engaged in run and clearance disputes. It granted arbitration boards the power to adjust excessive clearance, but established the narrowest of grounds on which exhibitors could contest their run position. To even bring its case before the arbitration board, a theater owner would have to prove that he had either enjoyed the desired run position at some point between 1935 and 1940, or had requested a higher run, in writing, prior to the decree. Since the prevailing run and clearance structure had mostly fallen into place by mid-decade, the arbitration clause preserved the majors' prior gains at independents' expense.

Technically, the decree was crafted as a temporary solution. It was set to expire in three years, leaving open the possibility of a divorcement suit if conditions did not improve. But few at the time saw it as anything but a final settlement. Lead Justice Department attorney Paul Williams expressed serious doubts "any one in the Department is ever going to become excited enough once the case has been settled to carry on a crusade of the type we have been conducting."[97] Abram Myers characterized the decree as "a capitulation by the Department of Justice as astonishing as it is complete."[98] The majors, meanwhile, concluded that their troubles with the Justice Department were

[96] "The Consent Decree of 1940 and Rules of Arbitration Under It," entered November 20, 1940, reprinted in U.S. v. Paramount Pictures, Inc., 334 U.S. 131 (1948). Appendix., File Date: 1/21/1948. *U.S. Supreme Court Records and Briefs, 1832-1987*. Gale, Cengage Learning, Online Database.
[97] Williams to Arnold, August 6, 1940, quoted in Muscio, 247.
[98] Abram Myers, quoted in "The Sherman Act and the Motion Picture Industry," *The University of Chicago Law Review*, Vol. 13, No. 3 (Apr., 1946), 351, fn. 30.

effectively behind them. Their posture in subsequent negotiations throughout the mid-1940s suggested that they no longer took seriously the prospect of divorcement proceedings. "All in all," notes film historian Thomas Schatz notes, "the majors emerged from the antitrust suit in remarkably good shape."[99] Looking back on the consent decree some years later, a division attorney remarked that it served "merely… to entrench the Majors more firmly in their dominant positions, clothed with the cloak of legal authority and government sanction."[100]

The watered down consent decree secured few of the far-reaching reforms proposed in the original 1938 complaint. Williams and Arnold's ambitious campaign to transform the motion picture industry had run up against the practical constraints of on policy makers within the New Deal state. Without a coherent agenda, the administration's economic initiatives in the late 1930s worked at cross purposes. Roosevelt, notes one historian, "did a little of everything and a lot of mischief."[101] The Commerce Department and the Department of Justice had become proxies in the battle between majors and independents, and the majors proved far better able to marshal their resources and to put forward a reform plan that conformed to prevailing ideological trends. From the beginning, the case had been propelled by a low level official, from a small division, in a department generally marginalized by the powerful executive agencies that sprung up in the course of the New Deal. It rested on a novel interpretation of the Sherman Act at a

[99] Thomas Schatz, *Boom and Bust: American Cinema in the 1940s* (Berkeley: University of California Press, 1997), 20.
[100] Shelby Fitze to Wright, February 14, 1944, Berge Papers, Box 46, Folder: "Antitrust – Motion Pictures." Original document has "entrenched" misspelled as "intrenched".
[101] David M. Kennedy, *Freedom From Fear: The American People in Depression and War* (New York: Oxford University Press,1999), 358.

time when the Court's attitude toward even the core provisions of the Sherman Act was very much in doubt. From that perspective, the suit went remarkably far. But from the perspective of independent theater owners and the attorneys of the Justice Department, it did not go nearly far enough.

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From the vantage point of 1940, the Roosevelt-Era campaign by independents, civic organizations, and the Department of Justice to transform the motion picture industry appeared to come to an end. Paul Williams had left the case in the middle of negotiations when it became clear that the Commerce draft would serve as the basis of the decree. Arnold, too, shifted his attention elsewhere. All along, his project had been to expand the scope of the Sherman Act and, by extension, his department's effective capacity to shape industrial behavior – a project of which the motion picture case was just one small part. With a decree in place, he turned toward pending investigations of the dairy and construction industries, and toward the problems of antitrust enforcement in national defense. Independents continued to protest the Department's agreement, but at least in the first year, made an effort to take advantage of the new arbitration system. The studios, meanwhile, celebrated the end to their legal troubles and generally continued with business as usual.

Of course looking back from the 1950s, as the studio system unraveled in the wake of court-ordered divorcement, the consent decree of 1940 turned out to be only the beginning. In 1944, with the decree expired, the Antitrust Division resumed its case against the majors, insisting that divorcement alone would restore competitive conditions

to production and exhibition. That the Division renewed its efforts, and that it ultimately succeeded in upending the prevailing structure of the film industry, underscores profound changes in antitrust enforcement and jurisprudence between 1938 when the case began, and 1948 when it came to a close.

The Antitrust Division of the mid-1940s differed markedly from the division Arnold inherited in 1938. Arnold instituted just fourteen cases in 1938, most inherited from Jackson. He subsequently filed another thirty-eight cases in 1939, ninety-two in 1940, one-hundred-and-six in 1941, and seventy-four in 1942.[102] To handle the ballooning case load, Arnold hired dozens of new attorneys and support staff, made possible through generous appropriation hikes in 1940 and again in 1942. At the height of his antitrust campaign, Arnold oversaw a staff of nearly six hundred and a budget of $2,235,000. Even after the war pulled attention away from antitrust enforcement, Arnold managed to keep the division's budget above 1940 levels throughout the conflict.[103] Yet the changes he instituted took time to implement, particularly with respect to personnel. Robert Jackson recalled that during his own tenure as division chief, he had a great deal of difficulty in "getting the right kind of men." The bulk of applicants were either "those who haven't got started in their profession," or "those who are on the downgrade in private practice, and therefore want to get into something with security. The weakness of the young men…is a lack of practical experience and a lack of knowhow in

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[102] See: United States Commerce Clearing House, *The Federal Antitrust Laws, With a Summary of Cases Instituted by the United States, 1890-1951* (Chicago: Commerce Clearing House, 1952), 179-300.

[103] Antitrust division appropriations, FY1938-1947:

1938: $423,000	1943: $1,800,000
1939: $789,000	1944: $1,760,000
1940: $1,309,000	1945: $1,540,000
1941: $1,324,000	1946: $1,875,000
1942: $2,325,000	1947: $2,089,000

accomplishing things in court. The weakness of the fellows who have practiced for some years is…that they are downgraders and perhaps are not too industrious."[104] These same issues no doubt persisted as Arnold worked to build a staff of several hundred attorneys. Since so few cases had been instituted in the past, there was a dearth of candidates with any degree of familiarity as to the Sherman Act or the peculiarities of its enforcement.

More importantly, the legal framework within which Antitrust Division attorneys were forced to operate had shifted markedly since the late 1930s. Like many New Deal initiatives, Arnold's program benefited from what historians have described as the "Constitutional Revolution of 1937" which reversed the Supreme Court's decades-long hostility toward government intervention in economic affairs.[105] After striking down one New Deal statute after another in the mid-1930s, the Supreme Court decidedly changed course. Beginning in March of 1937, the Court upheld first a Washington State minimum wage law and later, the Wagner and Social Security Acts. Whether motivated by Roosevelt's "court packing" scheme, shifting political tides, or broader trends in American constitutional thought, the Court adopted a far more permissive attitude toward federal regulatory power in the years that followed.[106] On the antitrust front, the Supreme Court proved similarly willing to both broaden the scope of the Sherman Act and to consider more drastic remedies in checking economic concentration. Several rulings pertained directly to the issues at stake in the Paramount complaint.

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[104] Jackson Oral History, 499-500.
[105] The most exhaustive examination of the 1937 "Constitutional Revolution" is William Leuchtenburg's *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).
[106] A particularly concise summary of the debate appears in a special *American Historical Review* forum in the October 2005 issue. *American Historical Review*, vol. 11, no. 4 (October 2005), 1046-1115.

With respect to price fixing, the court's landmark ruling in *Socony-Vacuum* (1940) actually preceded the consent decree by several months, though its significance was not entirely obvious at the time. In a five-to-four decision, the Court declared "agreements to fix prices in interstate commerce… unlawful *per se*," irrespective of their rationale or economic effects. Previously, most notably in *Appalachian Coals* (1933), the Court had taken a more permissive stance toward such arrangements so long as they did not unreasonably restrain or monopolize interstate trade.[107] Yet in the written opinion, Justice William O. Douglas denied any apparent conflict between *Socony* and earlier rulings, arguing that the specific circumstances of those cases did not apply. Only with subsequent decisions in the 1940s did the Court's new "per se" doctrine become apparent.[108]

The Supreme Court had yet to rule directly on vertical integration, though two lower court decisions were particularly encouraging. In 1944, a Pennsylvania District Court ordered the Pullman Company to divest itself of either its railway car manufacturing or passenger car service unit, breaking the firm's hold on the sleeping car industry.[109] The following year, the Second Circuit Court of Appeals found that Alcoa's power over aluminum prices, whether or not it had been abused, ran afoul of the spirit and letter of the antimonopoly laws. The ruling narrowed the distinction between vertical and horizontal agreements, arguing that "it would be absurd to condemn" horizontal

[107] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
[108] See for example United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. United States Gypsum Co., 333 U. S. 364 (1948).
[109] United States v. Pullman Company, 55 F. Supp. 985 (1944).

price-fixing arrangements "unconditionally and not to extend the condemnation" to integrated monopolies.[110]

Key rulings also signaled the Supreme Court's willingness to impose far-reaching decrees in equity cases, a welcome sign given the government's goal of fundamentally altering the structure of the motion picture industry. Of particular relevance was the Court's ruling in another of the government's motion picture cases – against a major Southern theater circuit, Crescent Amusement Company. Over the course of several years, Crescent had acquired controlling shares in existing independent circuits and used its buying power to systematically drive out remaining independent competitors in parts of Alabama, Kentucky and Tennessee. Upon finding the defendants guilty, the District Court ordered Crescent to divest itself of shares in a substantial proportion of affiliated circuits. In its 1944 ruling, the Supreme Court not only upheld divestiture but also ordered the lower court to amend the decree so as to require Crescent to demonstrate affirmatively that any future acquisitions would not unduly restrict competition. "Those who violate the Act," wrote Justice Douglas, "may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience."[111] Admittedly, Crescent had been particularly ruthless in its dealings with affiliates and had left an incriminating paper trail of exclusionary contracts with major distributors. Nevertheless, the Supreme Court's support for divestment in that case suggested it might be willing to require major distributors' circuits to do the same.

Other rulings that did not immediately affect the Paramount case nevertheless suggested the court had moved toward a more robust application of the Sherman Act. In

[110] United States v. Aluminum Company of America, 148 F.2d 416 (2nd Cir., 1945)
[111] United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

1943, the Supreme Court rejected the American Medical Association's claim that doctors did not engage in commerce and were thus immune from antitrust claims.[112] Two years later, the Court held that freedom of speech did not protect the Associated Press from accusations that its bylaws discriminated against new entrants. If anything, wrote Justice Black for the majority, "The First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public… Freedom to publish," he concludes, "means freedom for all, and not for some."[113] Only in labor union cases did the Supreme Court reject Arnold's broad application of the antitrust laws. While none of the cases guaranteed the government would necessarily prevail against the *Paramount* defendants, they prompted greater assertiveness on the part of division lawyers. In 1946, Attorney General Robert Clark stressed to Congress the importance of "the seldom used processes of dissolution, divorcement, and divestiture" in settling antitrust cases, a sentiment he reiterated in his 1947 annual report.[114]

With the changing legal landscape in mind, and with the consent decree set to expire in 1943, the Justice Department pushed for an amended decree. While the studios grumbled over the administrative costs associated with the decree's arbitration and rental provisions, they were generally content to extend the agreement in its present form. Department attorneys were far less satisfied with the status quo. For the system to work,

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[112] American Medical Association v. United States, 317 U.S. 519 (1943). In 1944, the Supreme Court ruled that insurance companies are likewise subject to the antitrust laws. United States v. South Eastern Underwriters Association, 322 U.S. 533 (1944). They were granted a limited exemption by Congress with the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.
[113] Associated Press v. United States, 326 U.S. 1, 20 (1945).
[114] Robert Clark, quoted in Walter Adams, "Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust," *Indiana Law Journal*, Vol. 27, No. 1 (Fall 1951), 4, fn. 15.

they insisted, a new decree would have to lift all constraints on the arbitration boards' authority to settle disputes over clearance and run. Shelby Fitze, an attorney involved in the negotiations, suggested that "a very simple Decree could be drawn up" giving the Arbitration Tribunal complete "authority to grant such relief as an equitable determination of the controversy would require," irrespective of "whether the discrimination were in favor of a theater operated by a Major distributor, a circuit of any size, or an independent theater."[115] Only so broadly worded an agreement, he argued, could hope achieve the Department's goals in lieu of formal divorcement proceedings.

Over the course of several months in 1943, the majors and the Justice Department went back and forth over the terms of an amended decree. The studios showed no intention of caving to the Antitrust Division's demands. Fitze complained that "not only is the Department not getting anywhere in negotiating with the defendants, but…any possibility of ever working out an acceptable agreement is steadily deteriorating, in that each successive draft submitted by the defendants offers substantially less than the preceding one." Their "past experiences with the Department," he observed, "have not been such as to induce a healthy feeling of apprehension that the divorcement suit will actually be tried." [116] In light of the majors' intransigence, Robert Wright, the lead attorney in the motion picture suit, decided to push once more for divorcement. In mid-1944, the Antitrust Division flatly rejected the studios' latest proposal and filed a formal petition to amend the decree. The Division's proposed decree lifted prior restraints on arbitration tribunals and provided that all theater owning defendants dispose of their

[115] Shelby Fitze to Tom Clark, October 23, 1943, in Berge Papers, Box 46, Folder: "Antitrust – Motion Pictures."
[116] Shelby Fitze to Robert Wright, February 14, 1944, in Berge Papers, Box 46, Folder: "Antitrust – Motion Pictures."

theaters within a period of three years. In October of 1945, attorneys for the Justice Department and the majors returned once more to Foley Square for trial.

Initially, the antitrust division ran up against many of the same difficulties it had encountered back in 1940. After weeks of testimony, the three judge panel seemed as confounded as ever about the inner workings of the industry and the degree of studio control. While the judges eventually ruled in the government's favor on most points, the victory was incomplete. In its findings of fact, the Court reiterated key arguments raised by the both sides – arguments that appeared in the end to cancel each other out.[117] In the end, the court fell back on the aggregate statistics. "The five defendant-exhibitors," the judges concluded, own "little more than one-sixth of all theaters in the United States, and by such theater holdings alone… do not and cannot… have a monopoly of exhibition."[118] Given its ambivalence, the court predictably stopped short of ordering complete divorcement of production and exhibition. Instead, the judges stitched together a decree that combined incompatible elements from proposals submitted by the parties involved. The result was a cumbersome, unworkable system that, paradoxically, favored the defendants themselves. The decree prohibited block-booking, mandating instead that

[117] The court acknowledged that in 38 of 92 cities with populations over 100,000, "there are no independent first run theaters." In large cities with independent competitors, the court continued, affiliated theaters often enjoyed greater access to feature films. Thus in cities like Boston, Chicago and Los Angeles, the large independent theaters each played fewer than eleven features released by the major studios on the first run. But then parroting a key argument raised by the defendants, the court cited numerous instances whereby affiliated theaters were unable to secure feature films from the other defendants. Perhaps most importantly, the court refused to see concentrated theater holdings in a given region as proof of monopolistic intent. Specifically, the judges found that "In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theaters comparable to those of the defendants, or from the preference of the public for the best equipped houses." The government had failed to demonstrate that such local monopolies stemmed from some "inherent vice" on the defendants' part.

[118] Findings of Fact, United States v. Paramount Pictures Inc., 70 F. Supp. 53, 68 (S.D.N.Y. 1948).

each film be licensed individually under a competitive bidding scheme that would have raised prices to independent exhibitors while leaving intact the pattern of affiliate control.

Neither the Justice Department nor the majors were satisfied with the outcome of the case. On appeal, the Department argued principally against the competitive bidding scheme, insisting once more on divorcement and dissolution. The majors, meanwhile, objected to the court's findings that the prevailing distribution system constituted a conspiracy to violate the Sherman Act. In a landmark seven-to-one decision, the Supreme Court sided with the Justice Department on virtually all counts. It affirmed the lower courts' prohibition on block-booking and price-fixing, and it set aside the unwieldy bidding scheme. "If a premium is placed on purchasing power," wrote Justice Douglas for the majority, "the court-created system may be a powerful factor toward increasing concentration in the industry, rather than cleansing the competitive system of unwholesome practices."[119] In its place, the Supreme Court ordered the District Court judges to reconsider the question of divorcement, insisting that "the fruits of conspiracy" – first-run metropolitan theaters – "must be denied to the five major defendants."[120]

On remand, the District Court ruled that in lieu of the bidding scheme rejected by the Supreme Court, divorcement alone could bring the film industry in line with the provisions of the Sherman Act.[121] In the years that followed, the Justice Department worked out final decrees with the Paramount defendants that provided for the complete divorcement of production and exhibition, as well as for the partial dissolution of affiliate circuits in areas where competition had ceased to exist. More than a decade after the

[119] United States v. Paramount Pictures Inc., 334 U.S. 131, 164 (1948).
[120] Ibid., 136.
[121] United States v. Paramount Pictures Inc., 85 F. Supp. 881 (S.D.N.Y. 1949).

Department of Justice filed its initial complaint, the Hollywood studio system had effectively been brought to an end.

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As Michael Conant carefully documents in his 1967 study, the *Paramount* decrees had profound ramifications for the workings of the industry. No longer guaranteed a market for their films, studios cut back on production, eliminating most of the so-called "B" pictures and Westerns. Independent producers, long shut out of the industry or forced to operate under studio control, especially benefited from the decree. As studios cut back on production, they turned increasingly to distributing independent films. By 1957, more than half of all films distributed by the five major defendants were produced by independent firms.[122] The decree also had an immediate impact on financing available to independents. Before 1949, unaffiliated producers had been unable to secure financing without a distribution deal. Just one year later, twenty pictures secured financing and began production without a distribution contract in place.[123] The five major defendants likewise adjusted to divorcement with minimal disruption to their net earnings and profit margins. Any decrease in total profits, Conant suggests, stemmed more from television competition than the terms of the decree.

On the exhibition side, large downtown independent theaters were finally able to secure first-run showings of leading pictures. Neighborhood theaters willing to pay higher prices also found their run and clearance positions improved. While most exhibitors still chose to purchase films in blocks, the prohibition on mandatory block-

[122] Tax policy likewise encouraged independent production. Producers could avoid the steep taxes on top-bracket salaries by organizing each film as a separate production firm and paying taxes under the much lower capital gains rates. See Conant, 115-116.
[123] Ibid.

booking allowed them to negotiate for greater cancellation privileges from the majors. Small theater owners, many of whom had been the strongest proponents of divorcement, found the decree a mixed blessing. Greater saturation of first and second runs, along with the advent of television and drive-in theaters, depleted their sources of patronage. As studios cut back on the low-budget films that had been the bread and butter of small theaters, exhibitors found themselves squeezed from both ends. More than four thousand four-wall theaters shut down in the decade after World War II, though as Conant points out, most would likely have closed irrespective of the *Paramount* ruling. The subsequent fate of independents was an ironic outcome in a case propelled by their complaints. But it hardly came as a surprise. Independents' claims against the majors had dramatized the structural inequities in the motion picture industry but by the 1940s, the case had ceased to be about their concerns. For the Department of Justice, the case offered an opportunity to bring a new set of economic restraints under the purview of the Sherman Act and to establish a precedent of more vigorous enforcement.

The two *Paramount* trials – the aborted four-day proceedings of 1940 and the drawn out court battle between 1945 and 1948 – point to two parallel currents in the history of the antitrust division and the broader trajectory of the New Deal state. The early years of the case, from the initial investigation through the 1940 consent decree, underscore the lack of coordination in the administration's economic policies. The initial investigation was prompted by outside pressures, the lobbying efforts of two independent theater owners and civic organizations. As the case progressed, Antitrust Division attorney Paul Williams enjoyed a great deal of autonomy in shaping its course, despite the ambitious and potentially disruptive reforms he sought to effect. When the Division's

suit was ultimately derailed, the countervailing pressures came not from the top, but from a rival department, which likewise entered the case in response to direct interest group appeal. A long view of the case, one that incorporates the Department's ultimate legal victory against the majors, demonstrates the enduring legacy of Arnold's antitrust campaign – a legal climate favorable to a more vigorous application of the Sherman Act, by "an organization big enough to make a dent in human affairs."[124]

[124] Thurman Arnold to Eugene Rostow, October 21, 1940, in Arnold Papers, Box 22, Folder 1.

Chapter 2: Righting Labor's Wrongs: Jurisdictional Disputes and the Antimonopoly Ideal

In 1938, the American Federation of Labor and the breakaway Congress of Industrial Organizations opened a new front in their fierce battle for jurisdictional control – the docks and roadways of Louisiana's "Crescent City." In a successful organizing campaign, the United Transport Workers of America, a CIO affiliate, recruited nearly ninety percent of the men employed by New Orleans' principal trucking concerns and appealed to employers for a collective bargaining agreement. Preferring to deal with the more conservative AFL, the companies rushed instead to sign a closed shop agreement with the International Brotherhood of Teamsters, who represented few if any of the workers in the firms' employ. Immediately, some eight hundred CIO-affiliated truckers called a strike, punctuated by violence on all sides.[1]

Initially, the federal machinery established to deal with labor disputes under the National Labor Relations Act (NLRA) – or Wagner Act – worked as intended. On appeal from the Transport Workers, the National Labor Relations Board (NLRB) set aside the contract between the Teamsters and the motor carriers' association and called an election to determine which union would represent drivers and helpers through collective bargaining.[2] On March 25, 1939, roughly eighty percent of eligible employees cast secret ballots under Board supervision. An overwhelming two-thirds sided with the CIO-affiliated UTWA, which was promptly certified as the exclusive representative of all 845 drivers and helpers employed by the principal firms.[3]

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[1] Bernard A. Cook and James R. Watson, *Louisiana Labor: From Slavery to "Right-to-Work"* (Lanham, NY: University Press of America, 1985), 223-229; See also 11 N.L.R.B. 173 (1939).
[2] The NLRB also found that the trucking firms had engaged in unfair labor practices by favoring the Teamsters over the CIO's Transport Workers. 11 N.L.R.B. 173, 199-202 (1939).
[3] 12 N.L.R.B. 121, 122-123 (1939).

Determined to seize control of New Orleans trucking, the Teamsters refused to let such a minor setback get in the way. What they failed to accomplish at the ballot box they pursued through brute economic force. In May, with the support of the city's AFL Building Trades Council, the Teamsters declared a boycott on any trucking firm that employed CIO drivers. Members of the building trades unions – representing the vast majority of the city's plumbers, carpenters, painters, and machinists – refused to handle any materials delivered by the trucking concerns. If New Orleans contractors wanted the city's houses built and driveways paved, they would need to have their supplies delivered by firms that employed Teamsters labor.[4]

Since construction materials represented a considerable portion of the hauling trade, the trucking firms risked substantial losses if they honored their agreement with the CIO. If they gave in to Teamsters' demands and fired all truckers who refused to join the AFL affiliate, they faced sanction by the NLRB, which had ruled that economic coercion was no defense for engaging in unfair labor practices.[5] While the Labor Board lamented the "unenviable" position of squeezed employers, it was powerless to enforce its decision against labor unions that questioned the Board's legitimacy and had the power to defy its authority.[6] And so New Orleans trucking found itself in the intractable situation that had at one time or another paralyzed dozens of industries since the great AFL-CIO split of 1937.[7]

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[4] United States v. Building and Construction Trades Council of New Orleans, Louisiana, Indictment, January 15, 1940, in Arnold Papers, Box 62, Folder 1.
[5] 5 N.L.R.B. 498 (1937); Upheld in NLRB v. Star Publishing Co., 97 F .2d 465 (C.C.A. 9th, 1938).
[6] 5 N.L.R.B. 498, 505 (1937).
[7] For a general discussion of jurisdictional disputes, and also the relevant policy of the NLRB, see: "The New Personnel and Policies of the National Labor Relations Board," *Harvard Law Review*, Vol. 54, No. 7 (May 1941), 269-279; Walter Galenson, *Rival Unionism in the United States* (New York: American Council on Public Affairs, 1940), 244-273; Louis L. Jaffe, "Inter-Union Disputes in Search of a Forum," *Yale Law Journal*, vol. 49, no. 3 (1939), 424-460; Harry A. Millis and Emily Clark Brown, *From the*

A potential resolution to the impasse came from the unlikeliest of sources – the Antitrust Division of the Department of Justice. In November of 1939, a federal grand jury returned a criminal indictment against the Teamsters and the Building Trades Council under Section 1 of the Sherman Antitrust Act, which prohibited all conspiracies and combinations in restraint of trade.[8] The indictment charged that the unions' boycott constituted a conspiracy to restrain the free flow of building materials and fixtures in and out of New Orleans. In defending the government's position in the case, Antitrust Division chief Thurman Arnold insisted that when labor organizations stage boycotts with the sole purpose of destroying their rivals, their actions fall outside the realm of legitimate labor activity and within the purview of the Sherman Act.

The New Orleans Teamsters indictment and the investigation that preceded it grew out of Thurman Arnold's two-year campaign to spur residential construction by purging the industry of economic restraints that curbed innovation and inflated prices to the consumer. Throughout his tenure at the Justice Department, Arnold argued for a reconfigured antimonopoly ideal that distinguished between institutions not on the basis of size, but on their effect on distribution and prices. He rejected as meaningless the notion that "small units are better than big units."[9] He contrasted the concentrated automobile industry, which brought car ownership within reach of a growing percentage of working families, with the atomized building trades, which seemed incapable of

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Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations (Chicago: University of Chicago Press, 1950), 220-233, 471-476; Harry A. Millis and Royal E. Montgomery, *Organized Labor* (New York: McGraw-Hill Book Company, 1945), 271-300.

[8] United States v. Building and Construction Trades Council of New Orleans, et. al., No. 19865 (E.D. La., 1939), in Arnold Papers, Box 62, Folder: "Building & Construction Trades (I)"

[9] Thurman Arnold, "What is a Monopoly?" in RG60, Entry 132, Box 18, Folder: "Antitrust (II)"

building homes that average Americans could afford without federal aid. He insisted that small firms, unions, and farmers' cooperatives were equally capable of wreaking havoc in the economy by restricting the free flow of trade.

The Antitrust Division's construction investigation had revealed an industry permeated by collusive arrangements between suppliers, contractors, trade associations, labor unions, and local governments. Tile manufacturers combined with contractors to artificially fix tile prices and installation fees. Carpenters combined with lumber wholesalers to limit the number of firms engaged in the trade. Labor unions helped enforce agreements between contractors and suppliers by refusing to work on materials manufactured by outside firms, or for employers who opposed collusive bidding schemes. Unions also piled on restraints of their own. They insisted that contractors hire unnecessary labor and precluded the use of labor-saving technologies or prefabricated materials. In cities across the country, contractors, workers, and trade associations succeeded in codifying their arrangements into local building ordinances which set strict guidelines for the techniques and materials that could be used. Arnold described each of these restraints as a "bottleneck" in distribution – a choke point that restricted production, raised prices, and excluded competitors.

Yet paradoxically, Arnold's most controversial and hard-fought cases, including the New Orleans case against the Teamsters, had little to do with such overt restraints. Instead, they targeted a longstanding and increasingly problematic tactic in union organization – the jurisdictional strike. Confrontations between rival craft unions had plagued the construction industry for decades. Machinists and carpenters battled over the right to erect and dismantle machinery; plumbers and steamfitters each claimed

jurisdiction over pipe installation; hod carriers and masons clashed over the job of mixing and hauling cement. The conflicts periodically resulted in jurisdictional strikes, holding up construction projects for days, weeks, and sometimes months. The growing divide between the industrial unions of the CIO and the craft locals of the AFL added a new dimension to the problem of jurisdictional disputes, as did the labor machinery established under the New Deal. The AFL-CIO split increased the frequency and severity of jurisdictional strikes as rival locals of the two national organizations scrambled to expand their ranks. As the New Orleans case demonstrates, the Wagner Act complicated the position of employers, who were now legally required to recognize certified unions, but who faced pressure from rival labor organizations who chose to disregard election results.

While jurisdictional strikes were of concern to labor's supporters and detractors alike, Arnold's reasons for involving his division in these intractable disputes are not immediately apparent. Publicly, Arnold made swift rhetorical leaps between house prices, labor-capital combinations, and these more traditional labor conflicts; all, he insisted, were symptomatic of an industry bogged down by unnecessary restraints. He also emphasized that his Division would target all interference with interstate trade, whether initiated by farmers, unions, or employers. Yet politically, Arnold would have been better off focusing on collusive labor-capital arrangements which were far more pervasive within the housing industry and which contributed far more to overall construction costs. That he chose to target make-work schemes and jurisdictional disputes underscores perhaps the most puzzling aspect of Arnold's campaign – its emphasis not only on consumer prices, but on the internal management of unions and direction of labor reform.

Arnold argued that public acceptance of collective bargaining hinged on the government's ability "to confine organized labor to legitimate labor objectives." At present, "the right of collective bargaining is being enforced in favor of organizations which are using that right for illegitimate purposes, against the interests of consumers, against the interests of efficiency, and against the interests of labor itself….The whole labor movement," he concluded, "suffers from the depredation of a few political gangs whom labor itself cannot remove."[10] He insisted that the public, unable to distinguish between isolated abuses and the labor movement as a whole, would eventually turn against the Wagner Act and the NLRB. While Arnold's statements reflected a plausible reading of the political landscape, they also betrayed his own discomfort with labor unions, particularly their tendency to stifle internal dissent in the interest of cohesion. As his campaign wore on, Arnold spoke increasingly of "labor dictators" who levied steep dues, embezzled union funds, and stifled dissent.[11] He insisted that more democratic unions would flourish if left unhampered by jurisdictional challenges from more established rivals. As he would argue in 1940 before the Supreme Court, "it is essential to the growth of an intelligent labor movement that competing unions should not succeed or fail solely with reference to their ability to bring pressure against each other."[12]

In both rhetoric and practice, Arnold went beyond an antitrust enforcement campaign that happened to target unions. By the early 1940s, he was actively involved in

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[10] Thurman Arnold, *The Bottlenecks of Business* (New York: Reynal & Hitchcock, 1940), 241-245

[11] See for example: Thurman Arnold, "Memorandum for the Attorney General," February 21, 1941, in Arnold Papers, Box 23, Folder 2; Thurman Arnold, "Memorandum to the Attorney General," February 21, 1941, in Arnold Papers, Box 23, Folder 2; Thurman Arnold to Reed Powell, February 21, 1941, in Arnold Papers, Box 23, Folder 2; Thurman Arnold, "Labor's Hidden Holdup Men," *Reader's Digest* (June 1941), Manuscript version in Arnold Papers, Box 80.

[12] United States v. Hutcheson, 312 U.S. 219 (1941). Brief for the United States, 20. File Date: 11/6/1940. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning, Online Database.

shaping federal labor policy through the antitrust laws.[13] Arnold's ability to wage a three-year campaign against one of the pillars of the New Deal coalition, and to do so without support or interference from his superiors at the Department of Justice, underscores the lack of coordination in the Department's economic policy and the political uncertainty of labor's position in the later years of the New Deal. Arnold's ultimate failure to convince either congress or the courts of the validity of his campaign demonstrates the incongruity between his objectives and the policy tools at his disposal.

At the time of his nomination to serve as head of the antitrust division, there was little in Arnold's record to foreshadow his dogged prosecution of labor unions under the antitrust laws. An iconoclast with a wry sense of humor, he relished in dramatizing the folly of clinging to the worn out dogmas still espoused by the nation's economic and political elite. In his celebrated *Folklore of Capitalism*, Arnold took aim at the "personification of the corporation" which led men "to believe that their own future liberties and dignity are tied up in the freedom of great industrial organizations from restraint." He praised John Lewis as a "great organizer" within the labor movement. He lampooned "editorial table-pounders" who "insisted that the real issue" at stake in the 1937 General Motors sit-down strike was whether "irresponsible men would not feel that they had the right to destroy our homes by conducting sit-down strikes in the parlors."[14]

[13] Arnold himself described it as "program to protect independent unions from the aggressive attacks of labor leaders who sought personal domination against the desire of the workers." See: Thurman Arnold, "Labor Against Itself," in a 1943 issue of *Cosmopolitan*. Manuscript version in Arnold Papers, Box 81.
[14] Thurman Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937), 185, 51-52.

Little wonder then, that the *Wall Street Journal* described him as "the most pronounced radical whom the President has yet named to an important post."[15]

Only with the benefit of hindsight can one discern the qualities that precipitated Arnold's showdown against the AFL. Arnold's impatience with "sacred cows" – whether capitalist institutions or labor unions – all but guaranteed that he would not hesitate to prosecute unions if presented with labor restraints on trade.[16] Like others within the legal realist tradition, Arnold saw no inherent value in deferring to custom, particularly at the expense of innovation or social progress.[17] He thus rejected AFL locals' allusions to customary trade rights – the jurisdictional boundaries between respective crafts – as a valid justification for labor restraints on trade. Perhaps most importantly, Arnold had few reservations about state coercion in economic affairs, particularly if the alternative meant "permitting industrial war to involve whole communities of nonparticipating people. No one would seriously contend for the right to create a public nuisance by fighting outside of court over an ordinary lawsuit. Why," he asked, "should labor and employers inconvenience millions of others by publicly fighting over labor disputes?" He concluded that only "confused difference to ancient ideals" stood in the way of compulsory arbitration between labor and capital.[18]

Arnold was another in a long series of administrators and reformers who sought to advance workers' material objectives while shielding the public from industrial conflict.

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[15] Frank R. Kent, "The Great Game of Politics," *Wall Street Journal*, March 11, 1938, p. 4.
[16] In a letter to H. L. Mencken in 1942, Arnold reflected on his controversial prosecutions, writing that "My technique is simple. I roam about in pastures filled with sacred cows. I never pass a sacred cow without patting it and all the time talking about the fraudulent practices of some other sacred cow in another field. So instead of trying to convince you on the doctors, I should be telling you about labor unions." June 24, 1942, Arnold Papers, Box 28, Folder 2.
[17] Daniel R. Ernst, "Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943," *Law and History Review*, Vol. 11, No. 1 (Spring 1993), 70.
[18] Thurman Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935), 218, 115.

In the mid-1880s, amidst a wave of bitter, often violent strikes, middle-class reformers and a number of prominent politicians turned to voluntary or compulsory arbitration to settle industrial disputes. Arbitration, writes historian William Akin, "offered a means of freeing society from industrial violence and providing justice to labor, business, and the public, while avoiding the hard core issue of readjusting economic and political power."[19] In a special message to Congress in 1886, President Grover Cleveland condemned labor's "resort to threats and violent manifestations" and capital's "grasping and heedless extraction." He advocated a three-member arbitration board to hear disputes and settle, "when possible…all controversies between labor and capital." Its proposals would be non-binding, backed only by the weight of "popular support and sympathy."[20] Cleveland enjoyed the tentative support of the Knights of Labor, whose platform advocated the principle of compulsory arbitration as preferable to strikes, and who had lobbied for state arbitration boards throughout the decade. Ultimately, Cleveland's plan faltered on its lack of enforcement and on the unwillingness of employers and craft unionists alike to cede their prerogatives to a government tribunal.[21] Federal intervention in the last tumultuous decades of the nineteenth century was instead characterized by judicial injunctions against striking workers and by military intervention to break strikes and restore order.

The desire to rationalize industrial disputes persisted, embodied in the formation of the National Civic Federation, a coalition of employers, union leaders, and prominent public figures who recognized trade unionism and advocated peaceful settlement of labor

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[19] William Akin, "Arbitration and Labor Conflict: The Middle Class Panacea, 1886-1900," *The Historian*, Vol. 29, No. 4 (August 1967), 566.
[20] Grover Cleveland, Special Message to Congress, April 22, 1886, in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, Vol. XI (New York: Bureau of National Literature, 1897), 4980
[21] For a detailed look at the arbitration debate, see Melvyn Dubofsky, *The State and Labor in Modern America*, 1-36.

conflicts through bargaining and arbitration.[22] The sentiment was also reflected in Progressive Era programs to regulate hours and wages, improve working conditions, introduce workers' compensation, and increase protections for specific classes of employees, such as women and children – reforms intended to improve the material condition of workers and thereby eliminate the roots of violent industrial conflict. The 1935 Wagner Act, "an act to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce," was similarly predicated on these longstanding concerns.[23]

The Wagner Act was precipitated by a wave of strikes that paralyzed industries across the Depression Era United States. In 1933, Congress had lent its tepid support for labor organization through Section 7a of the National Industrial Recovery Act, which reaffirmed workers' "right to organize and bargain collectively through representatives of their own choosing."[24] The Act provided scant mechanisms for enforcement, and the few tools available to code administrators were scarcely used for fears of alienating business interests and crippling Roosevelt's New Deal. Yet workers took the NIRA pledge to heart. Labor leaders across the country stepped up organization efforts, provoking bitter standoffs with recalcitrant employers on San Francisco's docks, in Appalachian mines, and in textile mills across the eastern seaboard. The administration sided at times with workers, at times with their employers, though rarely with any degree of resolve. In short, writes one historian, federal labor policy in Roosevelt's early years had "simultaneously

[22] Its membership included Samuel Gompers, Grover Cleveland, John D. Rockefeller, Jr., and Charles M. Schwab, among others. See: Melvyn Dubofsky and Rhea Dulles, *Labor in America: A History* (Wheeling, Il.: Harlan Davidson, 2004), 173-174.
[23] Chap. 372, 49 Stat. 449 (1935)
[24] Chap. 90, 48 Stat. 195 (1933), §7(a).

generated a massive movement for trade unionism and thwarted its realization."[25] Responding to the threat of industrial upheaval, labor's supporters in Congress advanced a more comprehensive bill to force employers to recognize legitimate unions and bargain collectively with workers' representatives. Justifying the proposed legislation, Wagner observed that for decades Congress had paid lip service to labor's right to organize, while "private warfare…[placed] the taint of hatred and the stain of bloodshed across the pathway to amicable and profitable business dealings."[26] Through firm support for collective bargaining, enforced by a National Labor Board, the proposed bill would curb industrial strife and usher in a new era of economic stability.

In a move Arnold would subsequently criticize, the Wagner Act stopped short of nineteenth century arbitration proposals by not asserting federal authority over labor and capital alike. Tapping into many of the same ideological principles that Arnold would seek to uphold, proponents of the Wagner Act framed the measure as an extension of political democracy into the industrial sphere. In supervised elections employees would vote for representatives of their choosing. Federal protection against "unfair labor practices" would guarantee elections and bargaining free from employer coercion, but beyond that, workers and employers could work out their disagreements as they saw fit. Wagner and his contemporaries insisted that labor organizations would retain their legitimacy only so long as they represented the independently conceived interests of their members. Time and again, they waved aside fears of corrupt or authoritarian labor leadership as unlikely within the new democratic regime. "If the American Federation of Labor or any other union is not honestly and sincerely and devotedly interested in the

[25] Dubofsky, *The State and Labor in Modern America*, 112.
[26] Senator Robert F. Wagner, *Congressional Record*, 74th Congress, 1st Session, 7565, 7567, 7573.

welfare of its members," argued Massachusetts Senator David Walsh argued, "sooner or later the employees belonging to it will, in some election, move out of the American Federation of Labor and into an international union, or… a different union of their own."[27]

This was a necessary fiction – perhaps the only way to legitimize the use of government coercion to enforce workers' bargaining rights. But as countless historians have argued, and as shrewd observers acknowledged even at the time, this vision of collective bargaining and industrial democracy conflicted with customary trade union organizing and bargaining practices.[28] AFL craft unions, writes Nelson Lichtenstein, were "often more interested in 'organizing' the employer than the workers."[29] It was far easier and more practical to draw on the union's economic power to secure a closed-shop agreement, and only then to bring existing workers into the fold. Even industrial unions, which on the surface aligned more closely with the representative ideal, required strong national leadership to back local organizing efforts. As CIO unions grew in power, they too became susceptible to authoritarian control.[30] This fundamental tension between the need for powerful national unions to preserve workers' rights and the desire to protect individual laborers and unorganized employers was never fully resolved by the labor

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[27] Senator David I. Walsh, *Congressional Record*, 74th Congress, 1st Session, 7660.
[28] See especially, David Brody, *Labor Embattled: History, Power, Rights* (Urbana: University of Illinois Press, 2005), 99-109; Melvyn Dubofsky, *The State and Labor in Modern America*, 129-135; Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton: Princeton University Press, 2002), 30-53, 59-71; Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (New York: Cambridge University Press, 1985), 103-147.
[29] Nelson Lichtenstein, *State of the Union*, 66.
[30] See for example Lizabeth Cohen's discussion of the Steel Workers' Organizing Committee in Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (Cambridge: Cambridge University Press, 1990), 357-360.

relations machinery established under the New Deal. It was this conflict that Arnold sought to resolve through his prosecution of labor unions under the antitrust laws.

Arnold argued that unions like the Teamsters were able to wield such power because they occupied strategic positions in production and distribution channels. Their control of trucking in major urban centers gave them unparalleled flexibility of action – they could bring a competing union or recalcitrant firm to its knees by blocking the delivery of any one of a firm's raw materials or halting the distribution of finished products at key points across the country. Tapping into the ideological origins of the antimonopoly movement, Arnold likened the Teamsters to railway operators of the previous century, who had incurred the public's wrath by their ability to arbitrarily fix freight rates and thereby determine which businesses and communities flourished or failed.[31] Situated at the nexus of the nation's agricultural and industrial networks, these railway giants had been early and persistent targets for populist reformers and federal regulators. While the Teamsters could hardly muster the power of the great railway corporations, they nevertheless enjoyed unparalleled leverage over consumers and employers. If unchecked, such power encouraged abuse, putting independent unions and unorganized employers at risk.

The problem was structural rather than moral. Union leaders were no more or less susceptible to corruption than businessmen or politicians. Arnold contended that many adopted restrictive practices out of necessity, either to challenge existing combinations of employers or help rationalize industries susceptible to ruthless price wars and depressed wages. The Teamsters' organizing strategy, for example, was shaped in large part by the

[31] Thurman Arnold testimony, in United States Congress, House, *Delays in National Defense Preparations, Hearings before the Committee on Judiciary, Part I*, 77th Cong., 1st Sess. (Washington: Government Printing Office, 1941), 2.

bleak and chaotic conditions existing in urban trucking markets.[32] Similarly, building trades unions often secured contracts from fickle employers in the construction industry by offering something in return – reduced competition and stable prices. Their position differed markedly from that of steel workers at Republic and Bethlehem, or autoworkers at General Motors and Ford. By virtue of their size and capital, these employers held tremendous power, as evidenced by their long and brutal campaigns to thwart unionization. National unions might rival these great corporations, but they could not dictate terms at will. This distinction was not reflected in New Deal labor legislation, but it flowed naturally from Thurman Arnold's brand of anti-monopolist thought.

Yet like his predecessors, Arnold based his proposed solution, Sherman Act enforcement, on a set of fictions that he never fully resolved – that strong unions could persist without compulsion over individual workers; that complex labor disputes could be settled in the criminal courts; and that the antitrust laws could be applied to check union abuses without simply rolling back labor's substantial gains in the Roosevelt years.

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In early 1939, Arnold announced that the economic section of the antitrust division had been conducting a survey of building costs to establish if trade restrictions had resulted in artificially high prices.[33] The construction industry had been particularly hard-hit by the economic turmoil of the 1930s. By virtually any measure – employment, wages, output – its recession was deeper and recovery less pronounced than in other

[32] David Witwer offers a comprehensive history of the Teamsters and the problem of corruption in unions more generally in David Witwer, *Corruption and Reform in the Teamsters Union* (Urbana: University of Illinois Press, 2008); David Witwer, *Shadow of the Racketeer: Scandal in Organized Labor* (Urbana: University of Illinois Press, 2009).
[33] "Government Opens Home Cost Fight," *New York Times*, February 18, 1939, p. 9.

sectors of the economy. As the largest source of non-agricultural employment in the United States, the industry's plight necessarily attracted the attention of New Deal administrators. Federal expenditures on construction projects, Home Owners Loan Corporation financing, and Federal Housing Administration mortgage insurance programs were all geared toward stabilizing this crucial sector. After picking up steadily in 1935 and 1936, new housing starts plummeted once again with the recession of 1937. *Fortune* described the industry as "a display of fireworks that had been rained on. For years it has threatened to explode in a pyrotechnic spectacle. For five years the New Deal has applied fire to its fuses. And for five years it has sputtered feebly, at intervals… and gone out."[34] While some within the administration continued to stress the importance of federal financing as the most efficient way to spur residential construction, Arnold and his supporters argued that restraints on trade kept housing prices above what the vast majority of Americans could pay. Fewer than fifty percent of urban dwellers could afford to buy or rent homes worth more than $4,000, yet in 1936, just fifteen percent of homes were sold for less than that amount.[35] Only by bringing down costs and promoting more efficient building methods could the industry meet consumers' needs without perpetually relying on federal subsidies.

Over the course of the year-long inquiry, investigators in major cities across the country uncovered a web of restrictive arrangements to raise prices, shut out competitors, and block the introduction of new methods and materials. They found well-orchestrated bidding rings that allocated jobs in advance and structured their bids accordingly. The

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[34] "The Trouble With Building Is…" *Fortune*, Vol. 17, No. 6 (June 1937), 100-103, originally cited in Robert A. Christie, *Empire in Wood: A History of the Carpenters' Union* (Ithaca, NY: Cornell University Press, 1956), 307.

[35] Corwin Edwards, "Antitrust Action and American Housing," in RG60, Entry 132, Box 19, Folder: "Antitrust III"

schemes operated at multiple levels – subcontractors fixed bids to contractors, who in turn coordinated their own bids to consumers. Local dealers coupled with trade associations to exclude out of state merchants willing to deliver supplies at a lower price. Unions helped enforce these conspiracies by refusing to work for outside firms, while adding restraints of their own. Painters' locals limited "the paint brush that can be used to 4½ inches"; hod carriers refused to work with ready-mixed cement.[36]

Such arrangements predated the New Deal by several decades. In fact, Arnold's discovery of labor-capital combinations echoed earlier exposés of gridlock in the building trades. After a series of setbacks in the 1890s depression years, trade unions had enjoyed a period of rapid growth. Total union membership increased from 447,000 in 1897 to over 2 million in 1904.[37] As David Brody observes, "the conservative message issuing from the AFL was reassuring" to business leaders and public officials alarmed over the prospect of class conflict. Employers big and small found reason to embrace "conservative trade unionism" as a means to ensure labor peace and rationalize competitive industry.[38] Through a series of standoffs and strikes, unions in cities across the country secured closed-shop agreements ensuring higher wages, shorter hours, and greater union control over workplace decisions.

Some observers, skeptical of employers' motives, saw in these agreements the portents of vast labor-capital monopolies that would dwarf the so-called "trusts" both in their size and in their danger to the public. Between 1903 and 1904, *McClure's Magazine* ran a series of essays by renowned muckraker Ray Stannard Baker on this "new industrial

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[36] Thurman Arnold to Dorothy Thompson, in Gene M. Gressley, ed., *Voltaire and the Cowboy: The Letters of Thurman Arnold* (Boulder: Colorado Associated University Press, 1977), 295.
[37] David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* (New York: Oxford University Press, 1980), 24.
[38] Ibid.

conspiracy" in urban centers. Baker opened with a damning exposé of a combination between the Coal Teamsters' Union and the Coal Team Owners' Association to "monopolize" Chicago's coal supply. He next turned his attention to the building trades, presenting detailed accounts of bid-rigging schemes, collusion, and graft among contractors and workers in Chicago, San Francisco, and New York. [39] Like Arnold, Baker feared most for the "unorganized public" – the poor unskilled laborers and the "professional" men of the middle class. [40]

Baker's evidence, however, was largely anecdotal. Labor-capital combinations never reached the scale Baker implied, nor did they spread far beyond the atomized building trades. Employers, writes David Brody, quickly tired of what they perceived to be "an unremitting flow of fresh demands." In manufacturing, the "managerial quest for efficiency," culminating in Frederick Taylor's system of scientific management, dealt a heavy blow to union efforts to regulate the shop floor.[41] Increasingly, employers reestablished a more militant stance toward unions, undercutting labor's gains and easing concerns over a labor-capitalist monopoly. Craft unions retained some of their former strength in the construction industry and occasionally succeeded in institutionalizing union regulations in city building codes. Overt combinations with employers, however, became more difficult to enforce until the 1930s, when they were buttressed by the federal government under the auspices of the National Recovery Administration (NRA).

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[39] Ray Stannard Baker, "A Corner in Labor," *McClure's Magazine*, Vol. XXII, No. 4 (Feb 1904); Ray Stannard Baker, "The Trust's New Tool - the Labor Boss," *McClure's Magazine*, Vol. XXII, No. I (Nov 1903); Ray Stannard Baker, "Capital and Labor Hunt Together," *McClure's Magazine*, Vol. XXI, No. 5 (Sept 1903).
[40] Ray Stannard Baker, "A Corner in Labor," 378.
[41] David Brody, *Workers in Industrial America*, 25.

From the perspective of the building trades, the most critical development in the early Roosevelt years was the National Recovery Administration's support for local trade agreements in select industries – including construction and trucking – to supersede national codes. Once approved by the President, these agreements on wages, prices and production automatically applied to all workers and employers in the applicable area and trade, whether or not they took part in drafting the initial terms. Local enforcement boards composed of workers and employers ensured compliance. By the time the NIRA was ruled unconstitutional in 1935, a total of 278 such agreements were submitted by the construction industry for approval.[42]

A number of Arnold's early building trades cases sought to break up agreements that paralleled or extended NRA area agreements, absent government supervision. A Detroit case – the first to include "all branches of an industry" – charged tile manufacturers, contractors, and unions with an elaborate scheme to raise prices and exclude competitors from the market.[43] According to the indictment, tile contractor associations and union locals had formed a Joint Arbitration Board, ostensibly to negotiate labor agreements. In actuality, the Board worked to police collusive agreements and exclude all tile contractors deemed to engage in "unfair" practices. Under threat of boycott, the Board secured an agreement with the nation's eight primary tile manufacturers to withhold tile from the sixty or so "independent" contractors who did not belong to contractor associations. In exchange, association members agreed to purchase

[42] Only 48 were actually approved, though given the private means of enforcement it is likely the remainder nevertheless had some effect. Solomon Barkin, "Collective Bargaining and Section 7 (B) of NIRA," *Annals of the American Academy of Political and Social Science*, vol. 184, (Mar., 1936), 173-174. The effect of the NRA is also briefly discussed in Miles L. Colean, *American Housing: Problems and Prospects* (New York: Twentieth Century Fund, 1944), 104-105.
[43] "Unions, Employers Sued as Plotters," *New York Times*, December 6, 1939, 1.

tile exclusively from these eight dealers and unions agreed to perform work only on those eight brands of tile. Union members were likewise banned from working for non-member contractors, irrespective of the wages or conditions such employment might offer.[44] Interviewed after the indictment was announced, one of the union members openly "admitted the truth of the charges" though he insisted that his union never intended to violate the law. He explained that his "union proposed only to improve conditions by eliminating cutthroat competition and ruinous price-cutting in the industry" – language that self-consciously echoed the objectives of the discredited NRA.[45]

Had the antitrust division limited its actions to such cases, Arnold would have likely remained on the sidelines of the broader labor debate. Instead, Arnold chose to take a stand not only on the legality of labor-capital combinations, but on the legitimacy of longstanding organizational tactics and aims. In an open letter to union leaders, Arnold established a narrow set of parameters for the legitimate ends of labor organization – wages, hours, health, safety, the speed-up system, or the establishment and maintenance of collective bargaining. He further expressed his division's intent to prosecute unions for "strikes, boycotts, or coercion" designed: "to prevent the use of cheaper material"; "to compel the hiring of useless and unnecessary labor"; "to enforce systems of graft and extortion"; "to enforce illegally fixed prices"; and "to destroy an established and legitimate system of collective bargaining."[46] The first and most famous of these cases involved a jurisdictional dispute between two AFL unions at an Anheuser-Busch plant,

[44] U.S. v. Wheeling Tile Company Et Al., Criminal Indictment, No. 25537 (E.D. Mich., 1939), in Arnold Papers, Box 62, Folder 1.
[45] Statements paraphrased in: "Unions, Employers Sued as Plotters," *New York Times*, December 6, 1939, p. 1.
[46] Thurman Arnold, Department of Justice Press Release, November 20, 1939, in RG60, Entry 132, Box 19, Folder: "Antitrust III."

and resulted in a criminal indictment against William Hutcheson, president of the United Brotherhood of Carpenters and Joiners.

The jurisdictional dispute at Anheuser-Busch had little to do with either the NRA or the Wagner Act. It differed little from similar conflicts that had befuddled employers, quite literally for centuries. Indeed, English history is replete with examples of bitter and costly disputes between rival crafts going back at least as far as the fourteenth century.[47] Wrapped up in the notion of craft jurisdiction as property right, these disputes were notoriously difficult to resolve, particularly as technological innovation introduced new techniques that blurred customary divisions between the trades. As one English trade association declared in 1889, "We are fighting this battle on the principle that every trade shall have a right to earn its bread without the interference of outsiders." Said another, "that no employers should, in suiting their convenience, give away another man's means of living, any more than that no workman would be allowed or justified to go into an employer's office and take his money from his safe and give it to another."[48]

The skilled craft trades that comprised the American Federation of Labor adopted a similar justification for their own jurisdictional claims, prompting decades-long conflicts that ensnared unwilling third parties and prompted widespread public indignation. As early as 1902, Samuel Gompers observed that "beyond doubt the greatest problem, the danger, which above all others most threatens not only the success, but the very existence of the American Federation of Labor, is the question of jurisdiction…. No

[47] Sidney Webb and Beatrice Potter Web, *Industrial Democracy* (New York: Longmans, Green and Co., 1902, rev. ed.), 510-511, n.1; Cited originally in Donald R. Colvin, "Comment: Jurisdictional Disputes," *Washington Law Review and State Bar Journal*, vol. XX, no. 4 (1945), 217.
[48] Both quoted in Webb and Webb, *Industrial Democracy*, 514-515.

combination of labor's enemies need cause us the apprehension which this fratricidal strife does in the claims made by unions for the extension of their trade jurisdiction."[49] His dire assessment did not, however, result in an appreciable shift in Federation policy toward its member trades. The AFL constitution did not specifically establish guidelines for settling jurisdictional conflicts; it empowered the Executive Council to "assist" but not to direct rival unions in settling their claims.[50] The Federation could revoke a union's charter with a two-thirds vote, but such a draconian measure was rarely applied. More often than not, disputes, particularly between two powerful unions simply dragged on for decades, prompting successive resolutions and calls for arbitration, but no definitive action from the AFL command.[51]

Congress did not specifically provide for the resolution of inter-union disputes when it established the National Labor Relations Board, and opponents of the bill made hay of the Act's failure to define jurisdictional strikes as an "unfair labor practice." At least some NLRA supporters countered that the Board's power to guarantee workers' rights incorporated the authority to intervene in such cases.[52] But in 1939, William Green recalled that he had been given specific assurances that the board would stay out of internal Federation conflicts.[53]

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[49] Samuel Gompers, "President Gompers' Report," in *Report of Proceedings of the Twenty-Second Annual Convention of the American Federation of Labor* (Washington, DC: Law Reporter Company, 1902), 16.
[50] Article IX, Section 5 of the AFL constitution, cited in Louis L. Jaffe, "Inter-Union Disputes in Search of a Forum," *Yale Law Journal*, vol. 49, no. 3 (1939), 432.
[51] Jaffe, "Inter-Union Disputes in Search of a Forum," 429-443. For a history of the problem with respect to the carpenters in particular, see Robert A. Christie, *Empire in Wood*, and Walter Galenson, *The United Brotherhood of Carpenters: The First Hundred Years* (Cambridge: Harvard University Press, 1983).
[52] Martin F. Sweeney makes the point in *Congressional Record*, 74th Congress, 1st Session, 9706; Wagner would later claim that he was under the impression that the Act allowed employers to petition the board for an election, especially in cases involving jurisdictional disputes between two unions. *Congressional Record*, 76th Congress, 1st Session, 4068.
[53] William Green in *Liberty Magazine* (March 18, 1939), reprinted in *Congressional Record*, 76th Congress, 1st Session, Appendix 954.

In a 1936 decision, the Board acknowledged that it had the power to hear jurisdictional disputes, but argued that it was in the long-term interest of organized labor not to intervene. "Self-organization of employees," the Board concluded, "implies a policy of self-management…. In its permanent operation the act envisages cohesive organizations, well-constructed and intelligently guided. Such organizations will not develop if they are led to look elsewhere for the solutions to such problems."[54] Whether the public would wait patiently for such institutions to gradually come about was, of course, a different matter.

While the AFL leadership resolved many such disputes, it had not developed a strategy for dealing with its more recalcitrant union affiliates – notably William Hutchesons's Brotherhood of Carpenters. "Big Bill" Hutcheson was a vocal opponent of government meddling in union affairs and a leading labor critic of the New Deal. A stalwart supporter of craft unionism, he was unabashed in his use of strikes or boycotts to wrest jurisdiction of carpentry and building jobs from other trade unions within the AFL. Particularly bitter was his decades-long dispute with the International Association of Machinists, also an AFL affiliate, over which union would control the construction and dismantling of machinery. For at least twenty-six years the AFL Executive Council had attempted to mediate the conflict to little effect. Hutcheson waged his campaign for machine construction jobs on multiple fronts, one of which happened to be the St. Louis headquarters of Budweiser brewer Anheuser-Busch.

The brewery was by all accounts a model employer. As company president August A. Busch, Jr. testified before Congress, his grandfather had signed a union contract with the Knights of Labor more than fifty years prior, and at the time of the

[54] In re Aluminum Company of America, 1 N.L.R.B. 530, 537-538 (1936).

carpenters' strike all factory employees belonged to one craft union or another. So positive was the firm's reputation that when Hutcheson's workers walked out, the local AFL Central Trades and Labor Union refused to extend its support, voting unanimously to praise Anheuser-Busch as a "fair" employer.[55]

For a period of eighteen months prior to June 1939, Anheuser-Busch had been in negotiations with leaders of the Carpenters and Machinists over the distribution of disputed jobs on new construction projects. Machinist representatives offered a temporary compromise that would have allocated jobs equally between the two unions pending a final decision; AFL President William Green and the Executive Council urged the two sides to work out a permanent settlement.[56] Under the terms of their labor contract with Anheuser-Busch, both unions had agreed to submit complaints to arbitration before taking more decisive action. Hutcheson refused arbitration and called the roughly eighty carpenters, millwrights and cabinet-makers employed by Anheuser-Busch out on strike. When Busch appealed once more to William Green, he received the following reply:

> I have exhausted all efforts at my command to bring about a settlement of controversy between machinists and carpenters organizations employed at your plant. I have urged a settlement of the controversy by the representatives of the two organizations involved. I regret I lack authority to do more. I am willing however to render any service that lies within my power.[57]

The workers walked off the job on June 28. The strike was timed to coincide with a major expansion project planned at the St. Louis plant, which was put on hold indefinitely on

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[55] "Anheuser-Busch Fair to Labor, Says Central Trades Body," reprinted in United States Congress, House, *Proposed Amendments to the National Labor Relations Act, Hearings before the Committee on Labor,* Vol. 6, 76th Cong., 1st Sess. (Washington: Government Printing Office, 1939), 1836.
[56] Machinists' Union to William Green, reprinted in Ibid., 1810-1811; See also: excerpt from *St. Louis Post-Dispatch* summarizing conflict, June 30, 1939, reprinted in Ibid., 1813-1814; and Ibid., 1820-1835.
[57] William Green to August A. Busch, Jr., reprinted in Ibid., 1801.

account of the labor strife. Another firm, which leased its land from Anheuser-Busch, was likewise prevented from expanding its facilities. Allegedly under Hutcheson's orders, the striking workers set up a picket-line around the brewer's facility with signs labeling Anheuser-Busch as "unfair to labor." The carpenters also called on members across the United States to boycott the firm's beer.

On November 3, with the Carpenters still out on strike, a federal grand jury in St. Louis indicted Hutcheson and three other members of the carpenters union under Section 1 of the Sherman Act. The indictment charged the four individuals with a conspiracy to restrain the interstate trade in construction materials intended for use by Anheuser-Busch and in beer distributed by the St. Louis brewery. According to the indictment, there had been "no dispute" between the brewery and its employees "concerning the terms and conditions of their employment or…any other legitimate objects for which employees might organize and strike." It declared "unlawful" the true object of the strike – to coerce Anheuser-Busch to break it agreement with the machinists.[58]

Public reaction was immediate. The *Washington Post* cheered Arnold's decision to "[draw] a distinction between legitimate activities of labor unions and illegal and oppressive practices that are patently against the public interest."[59] The *Wall Street Journal* similarly argued that labor would benefit from "drawing a distinct and legally valid line between labor's…injurious tactics and its legitimate pursuit of its own best interests."[60] Liberal Democrats and labor spokesmen, on the other hand, greeted the suit

[58] United States v. Hutcheson, No. 21231 (E.D. Mo 1939), reprinted in United States v. Hutcheson, 312 U.S. 219 (1941), Transcript of Record, *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning, Online Database.
[59] "Impartial Indictments," *Washington Post*, October 14, 1939, p. 10. The editorial board made the same point in "Unions and the Law," *Washington Post*, November 24, 1939, p. 8.
[60] "Courts or Picket Lines," *Wall Street Journal*, November 21, 1939, p. 4.

with appreciable alarm. AFL's Joseph Padway railed against the indictments as "reactionary, vicious, outrageous." He declared himself "aghast and horrified."[61] William Green dismissed the "sham pretext that in calling a jurisdictional strike a union is not lawfully carrying out its legal objects."[62] He accused Arnold of seeking to establish a labor "Gestapo" by which "labor would soon find itself tied hand and foot."[63]

AFL spokesmen naturally took issue with all government meddling in union affairs – whether by the Department of Justice or the National Labor Board. But perhaps most objectionable from their point of view was the specific statute applied in the prosecutions – the Sherman Antitrust Act. Though passed to prevent the concentration of capital, the antitrust law had proven over the decades to be an especially potent weapon against the concentration of labor.

As eventually passed by both the House and Senate, the Sherman Act proscribed "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."[64] The question of whether Congress intended the vague language to apply to labor unions provoked sharp debate, and the legislative history provided plenty of fodder for both sides.[65] An earlier version of the Senate bill expressly exempted labor and farm organizations, but the exemption was stripped in the Judiciary Committee, which drafted the bill in its final form. Despite the revision, pro-labor Senators who had initially insisted on the labor exemption voted to pass the bill anyway, suggesting they believed that union activities still fell beyond the scope of the Sherman Law.

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[61] Joseph Padway, quoted in Robert A. Christie, *Empire in Wood*, 311.
[62] William Green, quoted in "Green Scores Trust Buster," *Los Angeles Times*, November 23, 1939, p. 14.
[63] William Green, quoted in "Green Accuses Thurman Arnold of Setting Up Labor 'Gestapo,'" *Washington Post*, December 24, 1939, p. 5.
[64] Sherman Antitrust Act, Chap. 647, 26 Stat. 209 (1890), §1.
[65] Alpheus T. Mason argues in favor of the law's applicability in *Organized Labor and the Law* (Durham: Duke University Press, 1925), 122-127; Edward Berman disagrees sharply with Mason's analysis in *Labor and the Sherman Act* (New York: Harper, 1930), 11-54.

The Department of Justice and the courts, for their part, showed little doubt about the Act's applicability to the so-called "labor trusts." Historian Daniel Ernst observes that turn of the century judges and lawyers, steeped in the "atomistic individualism" of Victorian-era thought, viewed powerful labor organizations as a "threat to individual morality, the personal independence of workers and employers… and equal rights before the law."[66] In 1894, the Justice Department brought a contempt proceeding against Eugene Debs of the American Railway Union for failing to comply with an injunction to break up the violent Pullman strike. In upholding the injunction, the circuit court based its decision on the Sherman Act, though the Supreme Court later took a different view. It upheld the injunction on the "broader ground" of the commerce power without passing judgment on the applicability of antitrust law.[67]

The Supreme Court finally upheld the Sherman Act with respect to labor in *Loewe v. Lawlor (1908)*, the so-called "*Danbury Hatters"* case. The defendants were all members the United Hatters of North America, an affiliate of the American Federation of Labor (AFL). By 1901, the union had successfully organized all but twelve of the eighty-two hat manufacturers in the United States; it viewed the few remaining holdouts, located primarily in Connecticut, as a threat to the stability of union shops.[68] The plaintiff, German-born Dietrich Loewe, had previously experimented with unionization at his plant in the 1880s and early 1890s. His experience left him convinced that union conditions would drive up production costs and price him out of the competitive New York markets. Even when faced with a strike and boycott, he refused to capitulate to union demands,

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[66] Daniel R. Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (Urbana: University of Illinois Press, 1995), 1.
[67] In re: Debs,, 158 U.S. 564, 600 (1895). The Department of Justice also brought a case in 1893 against the Workingmen's Amalgamated Council of New Orleans, 54 Fed. Rep., 994; 57 Fed. Rep., 85.
[68] Loewe v. Lawlor, 208 U.S. 274, 305 (1908)

supposedly declaring, "If I am to die, I am going to die my way."[69] He essentially got his wish. Within a year, the Hatter's boycott, aimed primarily at Loewe's distributors, choked off his firm's access to its principal markets. By 1902, Loewe's balance sheets showed him $17,600 in the red.[70] In its unanimous decision, the Supreme Court ruled that the hatters' "secondary boycott" of Loewe's buyers showed a clear violation of the Sherman Act, which they argued "makes no distinction between classes."[71]

While *Danbury Hatters* opened the door to private damage suits against labor unions, it was ironically the 1914 Clayton Act, enacted in part to free labor from the Sherman Act, that introduced a far more dangerous weapon into employers' arsenals – the private suit injunction. As Congress debated proposals for more effective antitrust legislation, labor's advocates in Congress and in the Wilson administration pushed for a clearly worded labor exemption. Most assumed they had secured it with Section 6 of the Clayton Act, which declared that "the labor of a human being is not a commodity or commerce," and that nothing in the "antitrust laws shall be construed" to prohibit labor or agricultural combinations or to prevent them "from lawfully carrying out the legitimate objects thereof."[72] AFL president Samuel Gompers dubbed the Clayton Act labor's "Magna Carta."[73]

But some expressed doubts over the measure's actual accomplishments. Drafters had inserted the terms "lawful" and "legitimate" to assuage concerns that the act would give license to all forms of labor coercion. But by diluting the force of the labor

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[69] Dietrich Loewe, quoted in Ernst, *Lawyers Against Labor,* 16; Ernst notes that the United Hatters' account noted a slightly different version of the quote.
[70] Ernst, *Lawyers Against Labor,* 19
[71] 208 U.S. 274, 275 (1908).
[72] Clayton Act, Chap. 323, 38 Stat. 730 (1914), §6.
[73] Samuel Gompers, "The Charter of Industrial Freedom—Labor Provisions of the Clayton Antitrust Law," *American Federationist* 21 (Nov. 1914), 971-2, quoted in Ernst, *Lawyers Against Labor,* 165.

exemption, Congress made possible a reading of the act as "a simple reaffirmation of the law."[74] It was precisely this interpretation that the court adopted in *Duplex Printing Press Company v. Deering* (1921) when it upheld an injunction against a secondary boycott staged in the course of an organizing campaign. The introduction of the private suit injunction as a remedy in unionization disputes proved particularly disastrous for organized labor. The labor provisions of the Clayton Act turned out to be, in the words of one observer, "gold bricks containing dynamite."[75]

In the decade after *Duplex Printing*, a Republican-dominated Court demonstrated its willingness to curb union activity by applying the narrowest possible reading of legitimate labor activity under federal law. Time and again, conservative jurists fell back on logic of property rights, insisting that corporations had a right to ship their goods in interstate commerce without interference from concerted interference from organized labor. In another 1921 case, the Court declared that "the name 'picket' indicated a militant purpose inconsistent with peaceable persuasion" and established a limit of "one representative" at each entrance or exit.[76] Upon employer petitions, unions were regularly enjoined from striking, picketing, or otherwise persuading workers to organize if such actions could in any way be conceived as a restraint on interstate trade.

At the same time, the courts took an increasingly lenient stand on concentration of capital. Justice Lewis Brandeis commented on this inconsistency in a vigorous dissent in another union case, *Bedford Cut Stone* (1927). He observed that the Sherman Act was held in *U.S Steel* (1920), "to permit capitalists to combine in a single corporation 50

[74] Ernst, *Lawyers Against Labor*, 187
[75] Quoted in Ernst, *Lawyers Against Labor*, 190; Ernst suggests the comment may have come from AFL-lawyer Thomas Spelling.
[76] American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184, 205 (1921).

percent of the steel industry of the United States;" and in *United Shoe Machinery* (1918) "to combine in another corporation practically the whole shoe machinery industry of the country…. It would indeed be strange," he argued, "if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work when that course was the only means of self-protection against a combination of militant and powerful employers."[77]

Only with the enactment of the Norris-LaGuardia Act in 1932 were unions finally granted a reprieve. In addition to prohibiting yellow-dog contracts, Norris-LaGuardia proscribed federal courts from issuing injunctions in cases involving labor disputes. The Act did not entirely free unions from prosecution or from treble damage suits by private parties, but in contrast to the unceasing prosecutions and injunctions of previous decades, the 1930s proved to be a period of relative calm as far as the Sherman Act was concerned. Against this backdrop of invariable disappointment with judicial interpretation of the Sherman Act, union leaders were understandably disturbed by Thurman Arnold's renewed campaign of antitrust enforcement against labor groups.

Arnold's superiors at the Department of Justice likewise expressed their unease. Arnold later recalled that Murphy "became very much alarmed at the fact that labor was likely to be prosecuted" in the course of the building trades inquiry. Murphy disapproved of the Hutcheson indictment, and it appears Arnold moved forward without his consent.[78] When Arnold proposed to respond to labor complaints with a formal policy statement

[77] Louis Brandeis dissent in Bedford Cut Stone Co. v. Stone Cutters' Assn., 274 U.S. 37, 65 (1927); citing United States v. United States Steel Corp., 251 U.S. 417 (1920); United States v. United Shoe Machinery Co., 247 U.S. 32 (1918).

[78] Thurman Arnold to Robert Jackson, January 23, 1940, in Arnold Papers, Box 19, Folder 2. Murphy and Arnold offer competing views of what took place. As Sydney Fine notes, Arnold later recalled that the grand jury had insisted on moving with the indictment. Murphy believed Arnold had "jumped the gun." SEE: Sydney Fine, *Frank Murphy: The Washington Years* (Ann Arbor: University of Michigan Press, 1984), 53.

from the Department, Murphy insisted it go out over Arnold's signature, and that Arnold eliminate "all reference to the Department of Justice or the Attorney General."[79] Robert Jackson, who took over from Murphy in early 1940, was similarly opposed to Arnold's labor suits. When the Supreme Court ultimately rejected Arnold's reasoning in 1941, Jackson wrote that "a different result would have been 'embarrassing' to the Justice Department and 'bad for the country.'"[80] Neither took steps to stop Arnold, but neither was willing to put the full force of the Justice Department behind his campaign.

For these and other observers, the danger that Arnold's prosecutions would pave the way for a new era of labor crackdowns was a principal concern. In a critical examination of jurisdictional disputes in 1939, law professor Louis Jaffe characterized the prosecutions as "a dangerous response to a situation that," admittedly, "has become exasperating to the point of madness."[81] Specifically, he took issue with Arnold's assertion that either he or the courts should decide what labor activities were "legitimate." While Arnold operated under a relatively narrow construction of illegitimate behavior, there was nothing in the law to stop judges or future prosecutors from taking a different view. Arnold himself, Jaffe notes, "has written two books devoted to the proposition that laws are symbols rather than rational, definite propositions. They are sacramental mumbo-jumbos which enable judges to impose their decisions upon the credulous and the vulgar. The antitrust laws particularly are a veil of pretence behind which corporations are allowed to grow big and labor unions are discouraged." Had the laws changed in

[79] Thurman Arnold to Robert Jackson, January 23, 1940, in Arnold Papers, Box 19, Folder 2.
[80] Robert Jackson to Felix Frankfurter, quoted in Fine, 53.
[81] Louis L. Jaffe, "Inter-Union Disputes in Search of a Forum," *Yale Law Journal*, Vol. 49, No. 3 (1939), 424

some way so as to keep "Mr. Justice No-Love-Lost-on-Labor" from construing the government's actions "as an announcement of open season" on labor unions?[82]

Arnold admitted these dangers, at least in part. To Arthur Sulzberger of the *New York Times*, he acknowledged that "the chief weapon against me is that the antitrust laws are too uncertain to admit of any fair enforcement thereof."[83] In a memo to Jackson he suggested that "it would be desirable to increase the protection of labor from private suits by abolishing the right to employers to collect triple damages," since "private law enforcement is always accompanied by injustice."[84] But as Arnold often insisted, "the best way to get a bad law repealed or modified is… to enforce it."[85] He likely convinced himself that future injustices could be mitigated by congressional action.

While labor leaders and their supporters rejected Arnold's reasoning, they posed little danger to his antitrust program, at least in the short run. While unions stood at the center of the New Deal political coalition, 1939 was not a great year for the administration to condone alleged labor abuses. The conservative drumbeat against unions and the NLRB had culminated in lengthy Congressional hearings, beginning in May of 1939. NLRB opponents, including the AFL, stitched together a damning portrait of an agency run amok, infiltrated by communists and fellow travelers, intent on using its power to impose the radical CIO on American workers and employers. Paradoxically, the hearings also dwelled on the problem of costly jurisdictional disputes which, more often than not, involved the more conservative AFL locals either battling one another or

[82] Ibid., 425, 427.
[83] Thurman Arnold to Arthur Sulzberger, August 25, 1941, Arnold Papers, Box 17, Folder 4.
[84] Thurman Arnold to Robert Jackson, February 21, 1941, Arnold Papers, Box 23, Folder 2.
[85] Thurman Arnold to Wesley Stout, August 25, 1941, Arnold Papers, Box 17, Folder 4.

flouting workers' expressed wishes by trying to impose AFL unionism on CIO plants. By the fall of 1939, a fairly coherent legislative agenda had begun to emerge from the often contradictory aims of NLRB critics. Any hope of maintaining the integrity of the Wagner Act would depend at least in part on the administration's ability to demonstrate an evenhanded stance on labor issues.

In fact, there is some evidence to suggest that the Labor Board had privately endorsed Arnold's prosecutions, possibly as a way to take some of the heat off its alleged one-sidedness toward unions. In May, before the building trades prosecutions were officially announced, Board member J. Warren Madden testified before Congress that proposed amendments proscribing certain labor union activities as unfair labor practices were "wholly unnecessary…. [Where] such practices by employees do affect interstate commerce, and therefore become a Federal issue, they are subject to regulation under the Federal antitrust laws. In this respect, therefore, the proposal is entirely superfluous."[86] A *Wall Street Journal* article published in October notes that "the decision to use the anti-trust laws as a weapon against the jurisdictional strike was made only after prolonged" discussion between Justice and the NLRB, and that while "the board itself is not actively participating in the Justice Department moves… it is believed that the action has the tacit approval of at least two board members."[87]

The CIO for its part took a largely utilitarian stance toward the prosecutions, opposing antitrust application to labor unions in principle, but taking distinct pleasure in the fact that the indictments overwhelmingly targeted affiliates of the AFL. Appearing

[86] J. Warren Madden, in United States Congress, House, *Proposed Amendments to the National Labor Relations Act, Hearings before the Committee on Labor*, Vol. 2, 76th Cong., 1st Sess. (Washington, D.C.: Government Printing Office, 1939), 476.
[87] "Labor Trust Test," *Wall Street Journal*, October 21, 1939, p. 1.

before Congress in February 1940 to oppose AFL-backed amendments to the Wagner Act, CIO council Lee Pressman specifically alluded to the Department of Justice investigations to make his case. Arguing against an amendment to bar the NLRB from setting aside existing contracts with bona fide labor unions, he declared that Arnold's antitrust prosecutions were bringing to light "conspiracies between certain employers and certain union leaders in the building trades industry…. [E]mployers have entered into contracts with heads of unions in the building-trades industry, regardless of the membership which that union may have in that situation… regardless of the will or the desires of the men then working." These "collusive arrangement[s]" at the heart of Department prosecutions "would be condoned and authorized by Congress if they enacted" the amendment proposed by the AFL. [88]

The CIO also capitalized on the Justice Department's investigation of AFL building trades unions by launching its own campaign to organize construction workers. On July 31, 1939, the CIO announced a plan to form the Construction Workers' Organizing Committee, an industrial union to incorporate all workers in the building trades.[89] The new union's pitch to employers followed precisely the logic of Arnold's campaign: "The contractor using CIO labor does not worry about having to bargain with 20 separate craft unions. One single union speaks for every worker on the job. Since there are no jurisdictions he does not have to worry about jurisdictional strikes. There are no regulations against the use of new materials. Hourly rates are calculated on a reasonable

[88] Lee Pressman testimony, in United States Congress, House, *Proposed Amendments to the National Labor Relations Act, Hearings before the Committee on Labor*, Vol. 2, 76th Cong., 1st Sess. (Washington, D.C.: Government Printing Office, 1939), 2595.

[89] Walter Galenson notes that John Lewis was likely motivated in part by a desire to retaliate against AFL raids on United Mine Workers' jurisdiction in the coal fields. But as he goes on to note, the organization campaign had practical advantages for the CIO.

basis."[90] While Arnold was careful not to take a public stand on the AFL-CIO split, he was undoubtedly sympathetic to the CIO drive. He spoke frequently on the antiquated craft structure of the building trades as one of the principal limitations on innovation and standardization. Some years after leaving office, Arnold spoke more openly on the CIO model of industrial unionism, and its potential to revolutionize the building trades.[91] The CIO, writes labor historian Walter Galenson, "greeted [Arnold's campaign] with undisguised satisfaction."[92]

Politically, it appeared Arnold might just prevail in what he had predicted to be a tough fight over the labor indictments. As he wrote to his father in December 1939, his public statements on the prosecutions had "developed so much support throughout the country that I think we are safe for the time being…. I am getting offers of assistance… from every corner of the United States, letters to Congressmen… and I think I am going to win out."[93] On the legal front, too, Arnold secured a handful of early victories. Prosecutors favorably settled the Detroit tile matter when the international union stepped forward with a proposed consent decree. Though not named in the initial indictment, the international agreed to submit itself to the court's authority and to police the actions of the indicted locals.[94] The Supreme Court, meanwhile, refused to throw out a case against

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[90] CIO Executive Board Minutes (June 13-15, 1939), quoted in Walter Galenson, *The CIO Challenge to the AFL: A History of the American Labor Movement, 1935-1941* (Cambridge: Harvard University Press, 1960), 522.
[91] See for example, Thurman Arnold Testimony, in United States Congress, House, *Constriction Site Picketing, Hearings before the Subcommittee on Labor-Management Relations*, 86th Congress, 2nd Session (Washington, D.C.: Government Printing Office, 1960), 323-331.
[92] Walter Galenson, *The CIO Challenge to the AFL*, 517.
[93] Thurman Arnold to C. P. Arnold, December 11, 1939, Arnold Papers, Box 18, Folder 4
[94] Department of Justice Press Release, June 10, 1940 in Arnold Papers, Box 62, Folder 2. See also Thurman Arnold to Westbrook Pegler, June 9, 1940, and Wendell Berge to Howard Vincent O'Brien, both in Arnold Papers, Box 20, Folder 3

dairy processors and a milk drivers' union in Chicago, thereby buttressing Arnold's claim that the antitrust laws applied to those organizations as well.[95]

Yet Arnold's early victories and broad public support obscured the vulnerability of his position. Though most Democrats publicly condemned the practices he sought to curb, and though some members of the administration welcomed the suits as a shield against charges of labor bias, Arnold would likely never gain the full backing of the Democratic core for his antitrust campaign. Nor would he enjoy the genuine support from the anti-labor coalition on the Right.

Arnold was no labor baiter. His antitrust prosecutions targeted a narrow range of practices that he felt increased consumer prices without genuinely advancing labor's legitimate interests. These practices included featherbedding, price-fixing, racketeering, and jurisdictional strikes against independent labor organizations. They also included attempts to restrict the use of cheaper or more efficient materials, unless such restrictions were necessary to ensure worker safety. When Arnold spoke of labor and capital equality before the law, he meant something quite different than did many of his supporters, for whom "restoring the balance between business and labor" meant dramatically scaling back labor's gains under the Wagner Act. Conservative columnist and self-proclaimed "Red-baiter" Westbrook Pegler may have lent his support to Arnold's move against union restraints on trade. But he also fulminated against the "defiant lawlessness" of sit-down strikes, the dictatorship of "Communistic Unioneers," and the generally "lopsided"

[95] United States v. Borden Co., 308 U.S. 188 (1939). The court ruled specifically that the Agricultural Marketing Act of 1937 did not repeal the application of the Sherman Antitrust Act with respect to agricultural producers or distributors. The court did not rule on the labor exemption from the Sherman Act per se because the lower court had not deemed unions exempt and thus the question of the law's applicability to unions was not a subject of the government's appeal. Nevertheless, the antitrust division cleared an important hurdle with the case. Moreover, the technical reason for the court's unwillingness to rule on the labor issue was lost in popular press coverage, and thus from a purely political standpoint it was a major victory for the antitrust division.

contest between New Deal-backed labor and the business community.[96] Indeed, Pegler was one of those "editorial table-pounders" whom Arnold excoriated in *Folklore* for completely misreading the conflict between labor and capital.

While Arnold's critique of featherbedding, jurisdictional disputes and collusive agreements resonated with the growing critique of the NLRA, the major proposals circulating in 1939 and 1940 would have done little to address Arnold's concerns. While in the earlier stages of the debate some conservative congressman had argued for a more "balanced" NLRA that incorporated unfair employee practices as well, by 1940 they had seemingly resigned themselves to simply emasculating the Labor Board and letting employers deal with unions on their own. Thus the 1940 Smith Bill which grew out of the House committee hearings focused mainly on eliminating the existing board, weakening the collective bargaining provisions, introducing employer "free speech," and eliminating the reinstatement privilege of strikers engaging in violent acts. Politically, it seems, conservatives had found it easier to attack the much-maligned Labor Board than to curb the specific, and relatively rare, practices that inflamed public opinion against unions and their government allies.

At the outset, Arnold had little reason to dwell on the glaring inconsistency between his own views and those of his backers. So long as he could act independently of the political establishment, he could take his support where it lay and ignore the deeper fissures within his shaky coalition. The turning point came in 1941, when the Hutcheson case reached the Supreme Court.

[96] Westbrook Pegler, "Fair Enough," *Atlanta Constitution*, January 26, 1937, p. 6; Westbrook Pegler, "Fair Enough," *Atlanta Constitution*, August 11, 1939, p. 8; David Witwer, *Shadow of the Racketeer: Scandal in Organized Labor* (Urbana: University of Illinois Press, 2009), 34.

In the majority opinion, Felix Frankfurter rejected the Department's claim that jurisdictional strikes were an illegitimate exercise of labor's prerogatives. "So long as a union acts in its self-interest and does not combine with nonlabor groups," he wrote, "the licit and the illicit... are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." And the means – striking, peaceful picketing and primary boycott – were all legitimate practices under the terms of the Clayton Act.[97] Going a step further, Frankfurter argued that the Sherman, Clayton and Norris-LaGuardia Acts must be read as "interlacing statutes." In enacting Norris-LaGuardia, congress had intended to redress what it perceived to be a misinterpretation of labor's original antitrust exemption in the Clayton Act. While the text of Norris-LaGuardia explicitly dealt only with the labor injunction, "such legislation must not be read in a spirit of mutilating narrowness." Rather, the court should "[give] 'hospitable scope' to Congressional purpose even when meticulous words are lacking." Thus, Norris-LaGuardia "reasserted the original purpose of the Clayton Act" by moving trade union activities beyond the reach of the Sherman law.[98]

Arnold acknowledged that "the Hutcheson case throws doubt over all of our labor prosecutions excepting those where labor has combined with employers."[99] Shortly after the ruling, his division dismissed an indictment against the AFL International Longshoremen's Union in New York, which had combined with the Teamsters to drive a

[97] United States v. Hutcheson, 312 U.S. 219, 232 (1941).
[98] 312 U.S. 219, 235-236.
[99] Thurman Arnold to Edward Evans, February 17, 1941, Arnold Papers, Box 23, Folder 1.

rival CIO-affiliate from the city's lumber yards.[100] But Arnold maintained that the *Hutcheson* precedent should not apply in cases where unions conspired to artificially fix prices, exclude materials manufactured out of state, thwart more efficient methods, or eliminate a rival union certified by the NLRB.[101] In the spring, Arnold brought two more labor cases before the Court on appeal. In a Chicago case involving a union ban on ready-mixed concrete, Arnold argued that a strike against efficient building methods fell outside the bounds of legitimate labor action. In the New Orleans trucking case, Arnold argued that the *Hutcheson* decision did not apply since the Teamsters were attempting to destroy a C.I.O. affiliate certified by the NLRB as the workers' legitimate representative. If the Supreme Court had based its *Hutcheson* ruling on a reading of the Clayton Act in light of Norris-LaGuardia, perhaps the Court would now be willing to read both acts in light of the subsequently-passed NLRA, which affirmed workers' right to representatives of their own choosing. The Supreme Court rejected the department's appeals in both cases, citing its decision in *Hutcheson* earlier that year.[102]

Together, the three rulings brought Arnold's building investigation to a halt, but they did little to diminish Arnold's enthusiasm for the antitrust laws as a solution to contemporary labor strife. If anything, the rulings shifted Arnold's attention from the threat posed by labor restraints to consumers and employers, to the dangers of unchecked union power to workers themselves. In a letter to Jackson in February of 1941, Arnold listed two primary issues facing the Department in the wake of the *Hutcheson* ruling: "the

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[100] United States v. International Longshoremen's Ass'n, No. 106-448 (S.D.N.Y. 1940). Nolle prosequi entered on February 11, 1941.
[101] Thurman Arnold testimony, in United States Congress, House, *Delays in National Defense Preparations, Hearings before the Committee on Judiciary, Part I*, 77th Cong., 1st Sess. (Washington: Government Printing Office, 1941), 3-7.
[102] United States v. International Hod Carriers & Common Laborers' District Council et. al. 313 U.S. 539 (1941); United States v. Building & Construction Trades Council et. al., 313 U.S. 539 (1941).

protection of the employer from retaliatory action when he deals with a legitimate union," and "the protection…of the workman himself from exploitation by labor dictators who charge him for his right to work."[103] Arnold referred to a series of charges received from disgruntled workers and members that pertained solely to internal union affairs:

> It is notorious that the carpenters' union charges poor people for the right to work and denies them the privilege of belonging to the union. The Hod Carriers' Union furnishes one of the most pathetic of these cases. On a single project…$600,000 has been collected…in two years. There is no accounting for the funds. There has been no election for 29 years. There is at present only $2000 in the union's treasury. With reference to accounting we have a constant succession of complaints from working men whose cards have been taken away…because they were too inquisitive about the expenditure of union funds….Such evils bid fair to become a national scandal.

Arnold followed up with a second memo on "the dictatorial manner in which union leadership stifles all efforts on the part of the members…to select their own officers" or to request an accounting of funds. Again, the practices to which he referred concerned matters internal to the labor movement. He cited a case of two men allegedly expelled from their union of more than twenty-five years after they circulated a petition calling for an election. He pointed to another labor leader's misuse of union funds, including a $500 payment to the Biscayne Kennel Club at Miami Beach, and a $1000 check to a Chicago gambling joint.[104] To law professor Reed Powell, Arnold wrote still more impassionedly on the fate of the "hundreds of poor devils…flooding [his] office with complaints" of abuses by union officials.[105] Time and again, he argued for criminal prosecution under the Sherman Act as the "simplest way" to protect workers' rights. Arnold no longer

[103] Thurman Arnold, "Memorandum for the Attorney General," February 21, 1941, in Arnold Papers, Box 23, Folder 2.
[104] Thurman Arnold, "Memorandum to the Attorney General," February 21, 1941, in Arnold Papers, Box 23, Folder 2.
[105] Thurman Arnold to Reed Powell, February 21, 1941, in Arnold Papers, Box 23, Folder 2.

framed labor cases as a byproduct of protecting consumer interests; both privately and publicly, he justified antitrust enforcement against unions as an end in itself.

As he stepped up his rhetorical push against union abuses, Arnold made one last attempt to press his case in court, in a suit against Teamsters Local 807 of New York. Since at least the turn of the century, the Teamsters had faced persistent charges of corruption, and already by the mid-1930s, several of the Teamsters locals had well-established links to organized crime. But the issue of corruption was never as clear cut as the union's critics charged. As labor historian David Witwer observes, the term had come to encompass everything from concrete instances of bribery, extortion, and embezzlement, to broader abuses of union power at the expense of employers or the consuming public. New York's Local 807 had been notoriously aggressive, even ruthless, in its organizing campaigns – its members did not shy away from using violence as a negotiating tactic – but internally, its leadership fought hard for workers' interests and fiercely resisted efforts by waterfront gangsters to infiltrate the union's ranks. Arnold saw little distinction between the two forms of corruption. When "a legitimate organization" was used for "illegitimate purposes," internal corruption of the more pernicious sort was certain to follow. He insisted that to sustain independent unionism, "we must give industry some protection against the kind of banditry which always springs up in organizations that are not confined by outside pressures to their legitimate sphere of action."[106]

The case against Local 807 presented one last opportunity to delineate the boundaries of this legitimate sphere. Initiated under his predecessor, Robert Jackson, it

[106] Thurman Arnold, *The Bottlenecks of Business* (Washington, D.C.: Beard Books, 2000, reprint), 242.

was the Roosevelt administration's only major labor prosecution to predate Arnold's tenure, and the only labor case to receive Roosevelt's written approval, over the vehement protest of Teamsters' President Daniel Tobin.[107] Beginning in late 1935, the Justice Department and the New York U.S. Attorney's office had received dozens of complaints from over-the-road truckers and merchants alleging violence and intimidation from members of Local 807. In May of 1938, a grand jury found evidence sufficient to justify indictments against Local 807 and its individual members under the Sherman Anti-Trust Act and the 1934 federal Anti-Racketeering Act.[108] The indictments alleged that groups of two or more Teamsters routinely stopped out-of-state trucks at major entry points into New York City and instructed drivers to pay a sum of $9.42 per truck – equal to a day's wages – in order to safely unload their merchandise within city limits. While some Teamsters offered to help with driving or unloading in exchange for the fee, others refused to perform any services at all. Drivers who refused to pay were threatened with property damage or bodily harm. Once a driver was persuaded to cooperate, a Teamsters representative would contact the driver's employer to establish a permanent "contract" in exchange for the safe return of the driver and truck. While the contract only stipulated hours and wages, the actual agreement required merchants to pay $9.42 per truck for each New York delivery. Payments went directly to the Teamsters' member who first "stopped" or "made" the job.[109]

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[107] In a brief note to Attorney General Homer Cummings, FDR described the case as "interesting and serious," instructing Cummings to "go ahead with the enforcement of the law." Franklin D. Roosevelt, Memorandum for the Attorney General, October 15, 1937. OF 2978.
[108] Anti-Racketeering Act of June 18, 1934, Chap. 569, 48 Stat. 979 (1934).
[109] Indictments Nos. 102-394 and 102-395, United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, et. al. (S.D.N.Y. 1938), in Arnold Papers, Box 67.

During the six week trial, prosecutors paraded dozens of witnesses, some members of other Teamsters locals, who relayed tales of violence, extortion, and local police indifference.[110] After two full days of deliberations, the jury found Local 807 and twenty-six individual defendants guilty on both charges.[111] It was the first time members of a labor union had been convicted under the 1934 racketeering law – a fact which the trial judge used to justify sentences far lighter than the maximum provided under the law. Local 807 was fined a total of $10,000. Individual penalties ranged from probation to two years jail time.[112]

On appeal, the Second Circuit reversed the verdicts on both counts, following the higher court's precedent in *Hutcheson* on the antitrust charge, and ruling labor exempt under the Racketeering Act.[113] The antitrust division brought only the latter ruling up for appeal to the Supreme Court. At stake was the interpretation of Section 2 of the 1934 Act, which exempted "the payment of wages by a bona-fide employer to a bona-fide employee," and Section 6, which provided that no part of the Act should be applied "in such a manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof."[114] During the trial, the judge instructed the jury that "the fact that any defendant may have done some work on a truck of an employer is not conclusive as to whether payments received by

[110] United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, 315 U.S. 521 (1942). Transcript of Record, vol. IV, 2519-2524. File Date: 6/5/1941. *U.S. Supreme Court Records and Briefs, 1832-1978*. Gale, Cengage Learning, Online Database.
[111] Ibid., 2464-2484.
[112] Ibid., 2519-2533.
[113] 118 F.2d 684 (2d Cir. 1941).
[114] Chap. 569, 48 Stat. 979, 980 (1934).

such defendants were wages." Equally important was whether payments were made in exchange for services or for protection from possible damage to persons or property.[115]

The government argued that whether or not the Teamsters proffered their services in good faith, the merchants viewed the payments solely as tribute. In protest, one company's treasurer had even stamped check payments with the words, "for protection against racketeering."[116] The Teamsters distanced themselves from the excesses of individual members, and argued instead that such actions took place in the course of a legitimate labor dispute, and were thus immune federal antitrust and racketeering charges. The union's objective was clear: "to obtain employment for its members, by limiting the operation of trucks within the City of New York…to its own members."[117] The vast majority of trucking firms who complained of Teamsters' abuses were small enterprises with just one or two vehicles, who found it difficult to compete against larger concerns if forced to pay union wages and operate by union rules. In an already depressed industry, with thousands of men working only part time, organizing these small truckers was a legitimate union goal – "the question is not whether the union has correctly solved the problem involved…but rather whether there was a social problem which the union was seeking to solve."[118]

The Supreme Court sided with the Teamsters, rejecting the government's interpretation of the Racketeering Act. In a 6 to 1 decision, the court ruled that while Teamsters had undeniably resorted to violence, and while some may have refused to perform any services at all, the trial judge had erred in instructing the jury that the

[115] United States v. Local 807, 315 U.S. 521 (1942). Transcript of Record, vol. IV, 2450-2451.
[116] United States v. Local 807, 315 U.S. 521 (1942). Transcript of Record, vol. II, 838.
[117] United States v. Local 807, 315 U.S. 521 (1942). Brief for the Respondents, 9.
[118] Ibid., 15.

employers' state of mind was relevant to the case at hand.[119] So long as the Teamsters made a genuine offer of services which they were qualified to perform, their further actions were exempt from the racketeering laws, even if their offer was denied and subsequent payments were made under threat of violence. The Court likened the Teamsters' position to that of a standby orchestra at a local venue. Musicians' unions often required that their "members be substituted for visiting musicians, or, if the producer or conductor insists upon using his own musicians, that the members of the local be paid the sums which they would have earned had they performed." The Court argued that "the standby musician has a 'job' even though he renders no actual service. There can be no question that he demands the payment of money regardless of the management's willingness to accept his labor." Even if the musician secured payment "by force or threat," he would be immune from punishment under the racketeering laws. [120] In a heated dissent, Chief Justice Harlan Fiske Stone dismissed the analogy, distinguishing between violent action to secure a job – even a standby job – and violent action "where the objective is to force the payment of money."[121] Stone drew a distinction between the Teamsters' initial offer of services, and their subsequent use of violence to secure payment when the services were denied. The test of guilt, he argued, must be the "intended and actual effect of the violence on the victims" – "to pay the money not as wages, but in order to secure immunity from assault."[122]

Thurman Arnold was stunned. Testifying before congress three weeks later, the spurned division chief declared that "today, under the Federal law, there is no right in the

[119] 315 U.S. 521, 534-539 (1942).
[120] Ibid., 535.
[121] Ibid., 541.
[122] Ibid., 543.

farmer… consumer… [or] independent businessman… which labor is bound to respect. Labor today," he continued, "can compel any independent businessman to stop business, either by refusing to deal with him or by putting an unjustifiable burden on him and compelling him to hire useless work."[123] Heated in tone, Arnold's statement reflected his exasperation. With *Local 807* he had played his last hand.[124]

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In Arnold's reading of the situation, his campaign to check the excesses of labor power faltered because a Roosevelt-appointed court had refused to draw the necessary distinctions between legitimate and illegitimate union aims. Distracted by the Court's expressed reasoning in the *Hutcheson* and *Local 807* cases, Arnold failed to recognize the broader sentiment underpinning the two rulings – the belief that the Courts were ill-suited to address the complexities of collective bargaining and labor organization. This was a concern Arnold never fully recognized or addressed. The more Arnold defended antitrust enforcement as a solution not only to the problems of the construction industry but to the labor question more broadly defined, the more impractical his program appeared.

In the wake of the *Hutcheson* ruling, Arnold called on congress to strip labor of the antitrust exemption that the Court had read into the Sherman, Clayton, and Norris-LaGuardia Acts. He published articles, corresponded with journalists and legislators, and testified before any congressional committee that would have him. With domestic

[123] Thurman Arnold statement, in United States Congress, House, *Registration of Labor Organizations, Business and Trade Associations, Hearings before Subcommittee No. 3 of the Committee on the Judiciary*, 77th Cong., 2nd Sess. (Washington, D.C.: Government Printing Office, 1942), 70.
[124] Shortly after the Supreme Court's decision in *Local 807*, the House passed an amendment to the 1934 Racketeering Act eliminating labor's exemption. A slightly revised version of the bill was eventually signed into law as the Hobbs Act in 1946. Chap. 537, 60 Stat. 420 (1946).

economic concerns largely eclipsed by the European war, Arnold increasingly linked his lobbying efforts to the problem of labor in national defense industries, and to the mounting conservative critique of labor strife as a challenge to American security.

Throughout 1941 and 1942, Arnold made what he thought to be a compelling case for antitrust enforcement as a necessary step toward ensuring a more ordered transition to defense production. He pointed to reports of labor strife from across the country that conformed to the patterns he first identified in the course of the construction inquiry. In one defense project after another, AFL locals refused to work on materials produced by CIO workers and vice versa. In industries operating under closed-shop contracts, some locals refused new members entry and instead levied steep daily fees for the right to work. While in the grand scheme of things, such cases were relatively rare – an unfortunate byproduct of the haphazard mobilization effort – Arnold could justly claim that after *Hutcheson*, these abuses could no longer be checked under existing federal laws.

Yet while Arnold identified a critical gap in federal labor legislation, his proposed solution – renewed criminal prosecution under the antitrust laws – seemed increasingly naïve in light of the complex problems of which he spoke. Testifying before congress, Arnold referred to a series of complaints his division received of unions charging as much as $2 a day for temporary work permits on closed-shop defense projects. “In one of our camps,” he declared, “there was a union of about 100 men charging three or four hundred men for the right to work. How was it that the tail could wag the dog? Why

could not the 200 men organize and vote the 100 men down?"[125] They could not do so, he argued, because if workers tried to set up their own union with more affordable dues, they would be driven out of existence immediately by the more powerful, established labor organization. Were these actions once again made illegal under the antitrust laws, the department could intervene and ensure new laborers a fair say.

Yet Arnold never specified how antitrust laws could actually work in practice to meet the ambitious goals of workplace democracy on defense jobs. Without resurrecting the labor injunction – a move Arnold opposed – the antitrust division could only institute cases after the fact, following intensive investigation, lengthy grand jury proceedings, and invariable pre-trial delays. Even if the division could eventually secure a conviction and fine against participating labor officials, the result would come months, possibly years, after the initial offense. And what, exactly, would such intervention accomplish? It would certainly dramatize the government's resolve to protect individual workers. But as a practical matter, it would have little effect except perhaps at the margins. Even an expanded antitrust division could prosecute but a fraction of possible cases. To quote Arnold himself, "When we really want a dispute efficiently settled we turn to arbitration…. When we want laws administered efficiently we turn to administrative tribunals."[126] And certainly in time of war, he might have added, we do not turn to slow and uneven enforcement through federal courts.

More to the point, freeing workers to form their own unions by protecting them from retaliation would do little to actually encourage independent unions or more

[125] Ibid., 76. See also Thurman Arnold statement, United States Congress, House, *Delays in National Defense Preparations, Hearings before the Committee on Judiciary, Part I*, 77th Cong., 1st Sess. (Washington: Government Printing Office, 1941), 20-26.
[126] Ibid., 128-129.

responsible leadership. If policymakers learned anything in the years after 1935, it was that workers rarely formed effective organizations without the backing and expertise of seasoned activists and national unions.[127] The notion that workers, who may have previously been out of work for months, even years; who were often new to the industry; and who almost certainly lacked experience with collective bargaining, would spontaneously organize a union of their own had little basis in fact. That they would be able to withstand even moderate employer opposition and wrest a favorable labor agreement was even more farfetched. Little wonder, then, that congress took no action on the antitrust amendments Arnold's supporters attempted to usher through.[128]

The more Arnold fulminated against "labor dictators" and lamented the fate of the "poor devils" barred from forming "a union of their own choice," the more he resembled the turn-of-the-century anti-monopolists who struggled to adapt to the realities of private economic power in the hands of business and labor alike. Indeed, Arnold's frustration highlights the extent to which a pluralist model of collective bargaining built on a balance between powerful economic interests conflicted with ideological currents running deep within the American political tradition. However much Americans had come to accept the influence of vast, impersonal organizations in their daily lives, their dormant suspicion of concentrated power was quick to activate when that power seemed to be abused. In the abstract, Arnold recognized the critical role that unions played in checking

[127] On the importance of both grassroots organizing and national union support to the success of unionization campaigns after the Wagner Act, see for example Chapters 7 and 8 of Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (Cambridge: Cambridge University Press, 1990); Chapters 1 and 2 of Nelson Lichtenstein, *State of the Union*; and Chapter 2 of Robert H. Zieger, *American Workers, American Unions* (Baltimore: Johns Hopkins University Press, 1994, 2nd ed.).
[128] Oklahoma Democrat A.S. "Mike" Monroney introduced amendments to the antitrust act to reverse the *Hutcheson* decision in 1941 and 1942; neither bill made it out of the House Committee on the Judiciary.

corporate excess and advancing the welfare of American workers. But he grew increasingly suspicious of labor power when confronted with its practical consequence – the loss of individual agency.

Writing shortly after the *Hutcheson* decision, Arnold fumed against "liberals today" who "are unable to see any individuals. They see unions and they see labor movements." In language hyperbolic even for him, Arnold declared that "when individuals are crushed they think no more of it than Mr. Hitler does who is also working for an ideal system in which there is a place for everyone and everyone has a place."[129] Arnold's frustration reflected his profound disappointment with the Left for refusing to acknowledge what he saw as a fundamental difference between John Lewis's heroic campaign to organize big steel and the tactics employed by entrenched leaders within the AFL, who clung to antiquated technology and obsolete jurisdictional claims to the long-run detriment of their own members and society at large. "Disregarding the rights and dignities of the human individuals whom they cannot see because of their prejudices," he grumbled, liberals steadfastly champion "labor with a big 'L,'" conservatives "capital with a big 'C'. They [personify] these fictitious giants and take one side or the other absolutely disregarding the complexity of the situation."[130] Both sides maintain their unwavering postures to the detriment of the largely unorganized interests – consumers, small business, the urban poor – who suffer most from the partisan clash of wills.

But while Arnold tapped into longstanding anxieties and identified legitimate concerns, he remained wedded to tools that were ill-suited to encouraging more responsible management of union affairs. Prior to 1941, Arnold's antitrust campaign had

[129] Thurman Arnold to Reed Powell, February 21, 1941, Arnold Papers, Box 23, Folder 2.
[130] Thurman Arnold, unsent letter to Charles J. Connick, December 4, 1941, Arnold Papers, Box 26, Folder 2.

found a comfortable niche within the existing political landscape as a partial solution to the Labor Board's inability to deal with jurisdictional disputes. In light of the tremendous scope of defense mobilization, Arnold's proposed reliance on antitrust laws just seemed too small, too idealistic, and too cumbersome to have any practical effect. In reality, it had been all along. The war simply brought the inconsistency between Arnold's bold ambitions and limited instruments into sharp relief.

In the tense months following the Japanese assault on Pearl Harbor, Arnold's maniacal focus on labor's role in hampering national defense finally became too much of a liability for the administration. Publicly disavowing Arnold's anti-labor statements before Congress as "unfortunate," Francis Biddle banned Arnold from testifying further without his approval. One year later, Roosevelt relieved Arnold of his duties with a face-saving promotion to the federal bench. "I guess I'm like the Marx brothers," observed Arnold at the time, "they can be awfully funny for a long while, but finally people get tired of them."[131]

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Arnold's antimonopoly framework, in particular his emphasis on the danger of isolated "bottlenecks" in production, offered a powerful explanation for why unions that occupied strategic positions were so susceptible to internal coercion and external strife. His proposed antitrust campaign, however, was ill-suited to the complex and thorny issues left unresolved by national labor law. The antitrust statutes were too vague, too open to interpretation, and too susceptible to abuse by employers determined to halt

[131] "Last Roundup," *Time Magazine*, Vol. 151, No. 8 (February 22, 1943), 18. Cited originally in Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold," *Journal of American History* 80, no. 2 (Sep., 1993), 578.

labor's advance. Judicial proceedings were too slow and too costly to effect change on a scale that would justify the long term risks to the union cause. That most of the crucial precedents in antitrust law were established by divided courts hardly boded well for the courts' ability to ensure the stability and consistency necessary for industrial peace. The instinct to limit judicial control over labor affairs, reflected in the Norris La Guardia Act and its interpretation by the Supreme Court, was based on a realistic appraisal of the difficulties inherent in leaving labor policy in the hands of federal judges.

Nonetheless, Arnold's campaign underscored a fundamental contradiction in federal labor policy that was never fully resolved in the Roosevelt years. Practically, a sustainable labor program required policymakers to acknowledge the vast diversity of circumstances among labor organizations. Politically, however, few actually benefited from drawing such distinctions. Not the Left, which justifiably suspected any move against labor to be an entering wedge for more drastic reform. Not the Right, which gained far more leverage by casting all independent unions as a potential threat to corporate autonomy. And so the Wagner Act faltered on its inability to bring federal power to bear on unions that refused to acknowledge the Labor Board's legitimacy. The Taft-Hartley Act that eventually succeeded it brought down the heavy hand of the state on unions which, by virtue of leadership or circumstance, had never enjoyed the coercive power to engage in featherbedding, secondary boycotts, or jurisdictional strikes.

John Kenneth Galbraith, who in the 1950s championed the theory of "countervailing power" as the best chance for stability in a capitalist democracy, underscored the shortsightedness of both the Wagner and Taft Hartley Acts' one-size-fits-all approach to labor policy. In a compelling reformulation of ideas implicit in

Arnold's antitrust campaign against labor unions, Galbraith distinguished between "original" and "countervailing" power. "When, anywhere in the course of producing, processing, or distributing a particular product," he wrote, "one or a few firms first succeed in establishing a strong market position they may be considered the possessors of original market power…. Countervailing power invades such positions of strength, whether they be held by suppliers or customers, and redresses the position of the weaker group." He observed that "some trade unions and some farm groups are clearly the possessors of original power. Thus workers in the building trades, although they are not highly organized or exceptionally powerful in any absolute sense, are strong in relation to the small-scale employers with whom they do business."[132] Galbraith suggested that "restrictive practices" within the building trades would be "a proper object of interest by the Department of Justice while the absolutely (though not relatively) far more powerful unions in steel or automobiles… would not be."[133] The goal of translating this distinction between original and countervailing power into federal legislation continued to elude policy makers in the postwar decades.

Asked in 1959 to comment on a proposal to exempt agricultural processors from the Sherman Act, an aging Thurman Arnold took full advantage of the opportunity to remind his opponents from the 1940s of the long-run impact of labor's antitrust exemption. "Many years ago powerful labor unions acquired an exemption from any kind of public or private prosecution for their predatory activities…. Some unions, such as the Teamsters which controlled transportation, thus obtained effective power to engage in

[132] John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (White Plains, New York: M. E. Sharpe, 1980, rev. ed.), 137-139. Galbraith of course found much to criticize in Arnold's prosecutions in other areas, but with respect to the building trades prosecutions, he and Arnold were in complete agreement.
[133] Ibid., 140.

predatory practices, secondary boycotts, and the elimination of independent businesses. Most unions, such as industrial unions, count not effectively exercise such predatory power."[134] In the wake of McClellan Committee hearings on corruption and mob influence within the Teamsters' ranks, Arnold surely felt vindicated in his original assessment of the dangers inherent in granting additional leeway to an already powerful national organization. But even then, he could not convincingly explain how antitrust laws could accomplish what a far more powerful labor board could not – and do so without simply turning back the clock on labor's advances since the New Deal.

[134] Thurman Arnold statement, in United States Congress, Senate, *Farmer Cooperatives, Hearings before the Subcommittee on Agricultural Production, Marketing, and Stabilization of Prices*, 86th Cong., 1st Sess. (Washington: Government Printing Office, 1959), 136.

PART II

Chapter 3: Forging a National Police: Law Enforcement Cooperation under Hoover's FBI

The slender twenty-nine-year-old gunman who greeted Horace Grisso on the morning of June 10, 1933 displayed few hints of his future status as "Public Enemy Number One." A recently paroled convict from small-town Indiana, he was just another outlaw with little money and fewer prospects in the desperate days of the Great Depression. At the bank he selected for his first robbery – a modest institution in a tiny community just north of Dayton – he launched a crime spree that would captivate the nation and help justify a massive federal campaign against interstate crime.

The gunman was John Dillinger. In the year that followed, Dillinger and his crew robbed nearly a dozen banks in Ohio, Indiana, Wisconsin, Iowa, and South Dakota, netting more than a quarter of a million dollars.[1] They drew on underground contacts in Chicago and St. Paul to purchase weapons, learn of potential targets, and fence stolen goods. To evade the law, they traveled as far south as Daytona Beach, Florida, as far north as Manitowish, Wisconsin. All told, they crisscrossed an area spanning over a dozen states and covering a territory roughly five times the size of France. Dillinger's sensational prison breaks, not to mention his run of luck, elevated him to a near-mythic status in popular lore. But like the dozens of bandits who looted convenience stores and raided Midwestern banks in the 1920s and 1930s, Dillinger owed his success to the failure of law enforcement to adapt to the new realities of national life. While Americans became increasingly mobile, peace officers remained tightly circumscribed by local, county, and state lines. Not one of Dillinger's crimes, beginning with that first bank job,

[1] G. Russell Girardin puts the figure at $300,000; Jeffrey S. King estimates the Dillinger Gang's take to be $250,000. See: G. Russell Girardin, et. al., *Dillinger: The Untold Story* (Bloomington: Indiana University Press, 1994), 260; Jeffrey S. King, *The Life and Death of Pretty Boy Floyd* (Kent, Ohio: Kent State University Press, 1998), 2.

was confined to a single jurisdiction. Each time he crossed into a new county or state, he passed beyond the reach of the local law enforcement officials tasked with bringing him to justice.

But time was not on his side. Just one week after Dillinger robbed his first bank, a deadly assault on federal officers in Kansas City, Missouri drew the Department of Justice into the nation's first "war on crime." Dillinger's infamous wooden-gun escape from an Indiana County Jail nine months later gave the Roosevelt administration the leverage it needed to drive a series of crime bills through a reticent Congress. Gunned down by Bureau agents later that summer, Dillinger delivered, in his death, a landmark victory for federal police.[2]

The war on crime emerged as a federal solution to the widely acknowledged inability of local police to cope with the problem of interstate crime – a failure that, in the words of a 1931 national commission report, had "caused a loss of public confidence in the police of our country."[3] The crime war conformed to a broader trend toward federal intervention into areas of social and economic life that extended beyond the confines of any given state. Progressive Era reformers had similarly urged national legislation to regulate railroads, break up industrial trusts, and inspect the nation's food and drug supply when states proved unequal to the task. Franklin D. Roosevelt justified the dramatic expansion of federal regulation and relief under the New Deal in precisely the same terms.

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[2] For a more detailed account of John Dillinger's exploits, see Bryan Burrough, *Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933-1934* (New York: Penguin Press, 2004).
[3] National Commission on Law Observance and Enforcement, *Report on Police*, vol. 14 (Washington: Government Printing Office, 1931), 1.

Yet federal intervention, particularly on a scale contemplated by the Roosevelt administration, could not entirely bypass the states. The success of Roosevelt's relief program, especially in the first years of his administration, depended in large part on federal administrators' ability to coordinate efforts at the state and local levels.[4] The Federal Emergency Relief Administration relied heavily on existing state and local institutions to provide the manpower and local knowledge necessary to rapidly distribute federal aid. Unemployment benefits, established under Title III of the 1935 Social Security Act, are to this day administered by state boards. Similarly, the fledgling Bureau of Investigation could not combat interstate crime – much less provide federal leadership in resolving the myriad issues plaguing local police – without the cooperation of the roughly 150,000 law enforcement officers operating across the United States. But while New Deal relief administrators could draw on billions in federal funds and the pressures of an unprecedented national emergency to coax state and local governments into line, the Bureau had no comparable resources at its disposal. Coordination of law enforcement activities would have to be voluntary. And it would depend on Hoover's ability to convince the law enforcement community that federal intervention would not come at the expense of state and local police.

Hoover's effort to impose order and uniformity on the disaggregated system of state and local law enforcement in the 1930s has largely been eclipsed in the historical literature by his remarkable success in catapulting the FBI out of obscurity and establishing the agency as a powerful arm of the central state. Written in the 1970s and 1980s, after congressional investigations had revealed the scope of the Director's

[4] See James T. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton: Princeton University Press, 1969).

campaign against the political left, the first authoritative accounts of the FBI focused primarily on explaining Hoover's rise to power and unearthing the origins of the Bureau's domestic surveillance network. Looking back at the Roosevelt years, historians saw the portents of the FBI's Cold War misadventures in its close monitoring of unions and civil rights groups; inauguration of domestic wiretapping; and development of a Custodial Detention Index of left-wing activists and enemy aliens prior to World War II. Neither these controversial episodes nor the Director's paranoid political sensibilities are the focus of this study. Rather, it explores the relationship between national and local law enforcement at a time when the balance of American federalism shifted decisively toward the central state. It argues that the Bureau's ability to draw on the resources of state and local law enforcement helps account for the agency's reach, which was out of proportion with its limited budget and staff; as a result of Hoover's emphasis on coordination, the expansion of federal policing prompted a concomitant expansion of policing capacity and effectiveness at the local level.

Though the number of federal criminal statutes climbed steadily as the American nation matured, law enforcement remained overwhelmingly the responsibility of state and local authorities. The Constitution expressly asserted federal criminal jurisdiction over a handful of offenses: treason, crimes committed by ambassadors, and crimes committed on federal territories or on the high seas. Only a decade removed from arbitrary justice under monarchical rule, the framers were far more consumed with assuring protections against federal police power – encompassed in the fourth, fifth, sixth

and eighth constitutional amendments – than with buttressing the enforcement arm of the state.[5]

As the nineteenth century unfolded, turnpikes, canals and trains put growing numbers of Americans in motion. The criminal justice system, on the other hand, continued to evolve within existing jurisdictional boundaries. Complex police organizations developed in the booming metropolises of the North and Midwest, but across the vast expanse of the still sparsely-settled United States, the constable and county sheriff remained the norm. Rural law enforcement received a boost when Pennsylvania established the first modern state police force in 1905, and in the subsequent decades other states followed suit.[6] Ranging from modest highway patrols to extensive constabulary forces, state police lent much needed support to local sheriffs. Particularly in the North, they also took over the role formerly played by the National Guard, intervening on behalf of industry to break labor strikes. The development of state police agencies did not bring about any appreciable degree of centralization in law enforcement. Rather, state agencies shared parallel jurisdiction with a latticework of decentralized local departments. State officers had no power over county sheriffs, who in turn had no authority over local police.

Meanwhile at the national level, the dawn of the automobile age brought with it the 1919 Dyer Act, which banned the transportation of stolen vehicles across state lines. Progressive Era reformers helped usher in a host of federal statutes: the Mann Act, which

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[5] Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 72.
[6] Several states had actually established nineteenth century precedents to state police departments, most notably the Texas Rangers, who operated on and off from 1835. For a detailed history of state police, see H. Kenneth Bechtel, *State Police in the United States* (Westport, Conn.: Greenwood Press, 1995); and Gerda W. Ray, "From Cossack to Trooper: Manliness, Police Reform, and the State," *Journal of Social History*, Vol. 28, No. 3 (Spring, 1995), 565-586.

made it a crime to take a female across state lines for immoral purposes; the Harrison Narcotics Act, which sought to curb and regulate the sale of opiates; and of course the era's most ambitious endeavor, national Prohibition. Initially touted by temperance activists as a panacea for social ills, Prohibition had instead given rise to a sprawling underworld economy. In the countryside, profitable stills emerged as the rural counterparts to the urban speakeasies, extending the reach of criminal gangs into the smallest communities of the South and Midwest. The prospect of repeal – the logical and increasingly popular antidote to the disastrous social experiment – created its own law enforcement conundrum as bootleggers sought out new avenues for profit in racketeering, bank robbery, and most alarmingly from the public's perspective, kidnapping for ransom.

At the outset, kidnappers targeted those with ties to the underworld, offering a degree of solace to the law-abiding public. Any pretense of invulnerability was shattered on March 1, 1932, when the curly-haired toddler of aviator Charles Lindbergh was snatched from his crib in the middle of the night. Immediately, the *New York Herald-Tribune* proclaimed the crime "a challenge to the whole order of the nation;" the *Washington Times* called it a national "disgrace."[7] *The St. Louis Star* seethed that the American people themselves unleashed the many-headed "monster" of organized crime; "the Lindbergh baby," the paper declared "could have been left unguarded and safe in England, France, Germany.... It would have been safer in the African Congo, Patagonia, or the interior of China than on the outskirts of New York."[8] Not to be outdone, Illinois Democrat Adam Karch echoed that "jungle law will have superseded the law of

[7] "Editorials Stress Need of New Laws," *New York Times*, March 3, 1932, p. 10.
[8] Reprinted in: *Congressional Record*, 72nd Congress, 1st Session, 5406-5407.

civilization" if organized crime is not brought under control.[9] The Lindbergh baby saga – the error-ridden ransom note, the frenzied search for the missing child – held front-page coverage throughout the ordeal and prompted calls for federal intervention to bring the kidnappers to justice. President Herbert Hoover immediately authorized all federal agencies to take part in the investigation, but he did so without any formal legal authority. As was the case with most felonies, kidnapping was not yet a federal crime. The disappearance of Charles Jr. all but assured national legislation, and, after the discovery of his decomposing body in May, Congress acted quickly to make transporting a kidnap victim across state lines a federal crime.

But anyone who assumed that the kidnapping law signaled a new era of federal law enforcement leadership would likely have been disappointed. Even the author of the House bill, Missouri Democrat John Cochran, showed only tepid support for an expanded federal role. In the event of an interstate kidnapping, he envisioned that just "one man" from the Department of Justice would step in to help, extending to local police the jurisdiction necessary to track the culprits across state lines.[10] Attorney General William D. Mitchell vehemently opposed the legislation on both practical and philosophical grounds; neither he nor President Hoover made use of the political opportunity the new federal power provided. The Bureau of investigation, its budgets slashed by Depression-Era cuts, investigated fewer than a dozen kidnapping cases by the time Roosevelt took office.[11]

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[9] Ibid., 5557.
[10] Ibid., 7826.
[11] In September 1933, Cummings put the number of FBI kidnapping cases to date at 15, which included the first six months of Roosevelt's term. See: Homer S. Cummings, "Predatory Crime," September 11, 1933, in Cummings Papers, Box 212.

Prior to Roosevelt's inauguration, only his personal secretary and close adviser Louis H. Howe appeared to give much thought to a federal drive against crime. The banking crisis and the deepening recession were the president's chief priorities, and the flurry of legislative action in the first hundred days kept busy his last-minute pick for Attorney General, Homer S. Cummings. Roosevelt's initial choice for the post, Montana Senator Thomas Walsh, had died of a heart attack while en route to Washington, prompting Roosevelt to appoint Cummings in his place.

Bureau of Investigation Director J. Edgar Hoover, meanwhile, was concerned primarily with keeping his job. With Walsh at the helm of the Justice Department, Hoover's ouster had been all but assured. The Montana senator had been one of the Bureau chief's fiercest critics, dating back to the 1919 Palmer Raids, which Hoover helped coordinate as head of the short-lived Radical Division in the Department of Justice. The senator's death granted Hoover a short reprieve, which he used to ingratiate himself with the new Attorney General. For the moment, that meant complying with belt-tightening program Cummings imposed on the entire department. After shaving seven percent off his Bureau's budget for a second straight year, Hoover could offer little in the way of federal leadership against interstate crime.

Indeed, absent the Kansas City Massacre, the Department of Justice may have waited quite a bit longer before launching a national campaign against crime. On June 17, 1933, three local officers and a Bureau agent were gunned down while transporting a federal prisoner back to the U.S. Penitentiary at Leavenworth. Their prisoner – explosives expert Frank Nash – was also killed. Seeing an opportunity to raise the profile of his

Department, Cummings seized on the attacks as a challenge to national authority. He proposed a war on crime.

* * * *

While Bureau field agents rushed to deliver on the promise of a federal crime war, the Roosevelt administration set about to construct a concrete national law enforcement agenda out of the jumble of ideas that poured in to the Department of Justice in the summer and fall of 1933. Thousands of proposals arrived from anti-crime groups and average citizens, for whom the sensational crime wave provided a welcome respite from the grim economic reality of the Depression. Political leaders, wary of falling out of step with prevailing public opinion, scrambled to get out in front of the charge against crime – in August 1933 Congress convened a commission to study the so-called "rackets," though in practice its scope quickly broadened to encompass all interstate crime. Law enforcement officials, who had perhaps the most at stake, wrote letters, testified before committees, and met with members of the administration. Together these voices gave shape to the range of alternatives open to the Department of Justice in shaping the future of national policing.

Perhaps the most popular suggestion was for the Bureau of Investigation to serve as an "American Scotland Yard." Faced with a seemingly intractable crime problem, Americans understandably were drawn to the determined, efficient detectives colorfully portrayed in English crime novels. That England enjoyed crime rates far below those in the United States only heightened the appeal of enforcement models from across the Atlantic. As a proposal, the idea for an American Scotland Yard was exceedingly vague, its precise meaning obscured by the slew of misconceptions about the English institution.

While inspectors from the fictional Scotland Yard regularly sped off to unravel murder mysteries across all of England – at times over the objections of local constables – the actual agency had confined itself to the London metropolitan area in all but two cases in 1933. Since most Americans were familiar with the crime novel version of the institution, "Scotland Yard" could serve as shorthand for a range of enforcement models, from a national police force with unlimited jurisdiction, to a more modestly-conceived detective force with the authority to step in at local request.

Two of the more outspoken advocates for an American Scotland Yard were New York Senator Royal S. Copeland and Roosevelt's secretary and close adviser, Louis M. Howe. Copeland, who chaired the Senate's racketeering investigation, proposed a system whereby the Governor of each state would name two officers to the FBI. These men, after completing the requisite training, would serve in joint capacity as both federal and state officials, enjoying the power both to investigate violations of state law and to pursue suspects across state lines.[12] Howe's idea, while more elegant in its conception, was only marginally closer in form to its English counterpart. In *The Saturday Evening Post*, he called for "a national body of trained crime detectives... unaffected by local politics or local sympathy.... a National Scotland Yard, with local headquarters in every state and trained men ready to proceed instantly to the scene of the crime, without expense to the state or county, at the request of the local police authorities."[13] Similar proposals were

[12] United States Congress, Senate, *Investigation of the So-Called "Rackets," Hearings before a Subcommittee of the Committee on Commerce*, 73rd Cong., 2nd Sess., Vol. 1, Part 1 (Washington: Government Printing Office, 1933), 29.
[13] Louis McH. Howe, "Uncle Sam Starts after Crime," *Saturday Evening Post*, Vol. 206, No. 5 (July 29, 1933), 71.

endorsed by editorials in leading papers, including the *Atlanta Constitution, Wall Street Journal,* and the *New York Times.*[14]

Copeland's and Howe's plans were ambitious in scope, but both were careful to avoid the suggestion of a national police force with power to usurp local authority at will. Other proponents of an American Scotland Yard were less concerned with preserving this essential balance of power between state and federal authority. The racketeering committee of the Federal Bar Association (FBA) advocated a constitutional amendment that would have given an American Scotland Yard concurrent jurisdiction over a broad range of "felonies, misdemeanors and high misdemeanors," subject to Congressional discretion. Given that the FBA represented attorneys and judges practicing in federal courts, the organization's preference for a national solution came as no surprise.

Local officials, however, were also open to such proposals. Joseph B. Keenan, Assistant Attorney General in charge of the Criminal Division, observed that local police chiefs submitted proposals that were "much more drastic in form than expected, and included many new suggested federal offenses that would greatly broaden the field of federal criminal activities."[15] The warden of New York's Sing Sing prison, Lewis Lawes, testified before Congress in favor of a sweeping reorganization of American law enforcement. "The National Government," he argued, "must assume full responsibility in every field that affects the peace of the country.... All major crime should be made Federal offenses." And "it may be," he conceded, "that our Federal Constitution may have to be rewritten." He justified his ambitious proposals by cloaking them in the underlying principles of Roosevelt's New Deal:

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[14] "Action against Crime," *The Washington Post*, August 30, 1933, p. 6; "Federal Police," *The Atlanta Constitution* August 3, 1933, p. 6; "The President on Crime," *New York Times*, December 12, 1934, p. 22.
[15] Joseph B. Keenan to Louis B. Howe, November 3, 1933, in OF 10, Box 1.

> America is homogeneous in a political sense. President Roosevelt is successfully establishing for us a commercial homogeneity. We appreciate the advantage and importance of centralization in banking, in industry, in many forms of civic and social undertakings. State lines mean nothing in price regulation. Why, then, continue to maintain that friction in crime regulation? Why continue to suffer 48 distinct jurisdictions in dealing with problems that immediately affect life and property?

Both in and out of the administration, partisans of a national police force drew similar parallels between federal coordination of social welfare and federal coordination of law enforcement. Roosevelt's economic policies did not in and of themselves create support for national policing. Citizens groups had been clamoring for federal intervention for some time. But the dramatic expansion of the national government into new areas of social and economic life put such proposals well within the mainstream of public opinion on the proper responsibilities of the central state.

Support for a national police force was just one sign of the urgency with which some approached the problem of interstate crime. For other examples, one need only look to Congress. In April of 1934, West Virginia Congressman Jennings Randolph proposed that the United States declare "open season" on the nation's criminals: "when wild animals become too abundant and destructive to property," he declared, governments can justifiably call for their extermination. A month later, the House passed a bill that effectively codified what Randolph had in mind. H.R. 9370, introduced by Texas Democrat Hatton Sumners, authorized the Attorney General to offer "rewards for the capture, dead or alive, of anyone who is charged with violation of criminal laws of the United States or of more than one State."[16] As a handful of Congressmen quickly pointed out, the measure would in essence have established the death penalty – carried out

[16] *Congressional Record*, 73rd Congress, 2nd Session, 8137.

without any formal legal proceedings – for any offense deemed applicable by an appointed member of the executive branch. While Sumners offered assurances that the Attorney General would use such powers judiciously, the bill left open the possibility that anyone with a prior criminal record could become a target of a reward-seeking lynch mob, sanctioned by U.S. law. Though cooler heads prevailed in the Senate, the measure passed overwhelmingly in the House.

In contrast to these more dramatic suggestions, the “Twelve Point Program” put forth by Attorney General Homer Cummings was relatively modest in scope. While it incorporated elements of the oft-proposed Scotland Yard and asserted the need for a federal solution to interstate crime, it also reflected the administration's desire to alter as little as possible the fundamental structure of American law enforcement. In his message to Congress, Cummings introduced a handful of federal statutes to cover the interstate elements of racketeering, extortion, and property theft. He also proposed laws against killing a federal officer, robbing a national or Federal Reserve member bank, and interfering with the administration of a federal prison. To round out the program, Cummings advocated a series of reforms to streamline the administration of federal justice by limiting types of motions and appeals available to defendants in criminal trials.

Just one measure raised the prospect of federal intervention in matters of a purely local or state character: the Fugitive Felon Act, which made it a crime to cross state lines in order to evade arrest or to avoid giving testimony in a felony trial. In its basic logic, the act echoed the similarly-named Fugitive Slave Act of 1850, which had required federal marshals to arrest runaway slaves who sought refuge in the free North. Both acts brought the federal government directly into the business of enforcing state laws. Since the very

act of moving from one jurisdiction to another prompted federal involvement, both laws essentially created crimes of mobility. Only under the 1934 act, however, could an individual actually be charged with violating a federal law.

In its application, the Fugitive Felon Act essentially codified the underlying premise of an "American Scotland Yard" – a system by which federal officers could intervene in major cases at the request of local police. To secure a federal flight warrant, a local official needed only to show reasonable cause for believing that the perpetrator had crossed state lines. Given the ease and speed of modern travel and the propensity of criminals to flee the scene of the crime, the bar for federal intervention was set quite low. Critics immediately jumped on the provision as an unacceptable extension of federal authority. As liberal criminologist William Seagle asserted in *Harper's*, it gave the Federal government "to a greater or lesser extent... the jurisdiction over... rape, assault... mayhem... murder, robbery, [and] burglary." Yet Seagle's subsequent contention that the measure deprived the States "of their traditional control over crime" missed the essential logic of the bill.[17] Since local police would have to certify interstate flight, control over which cases would fall within the purview of federal authorities remained with the cities and the states.

Taken in its entirety, the Twelve Point Program was far more limited than what Lawes, or even Howe, had in mind. It may also have been less expansive than Cummings himself would have wanted. It was Cummings, after all, who had initially envisioned a kind of "Super Police Force" composed of the Bureaus of Investigation, Identification

[17] William Seagle, "The American National Police: The Dangers of Federal Crime Control," *Harper's Magazine*, Vol. 169 (Nov. 1934), 751.

and Prohibition.[18] In their final form the crime bills best approximated the views of J. Edgar Hoover, who balked at the prospect of taking on more authority than his agents could effectively handle, and described the "so-called Scotland Yard program" as "impracticable, extravagant, and unadaptable,...foreign to the fundamental principles upon which our American Government is based."[19]

The crime bills also reflected a fundamental reality facing the New Deal as a whole. Any national program had to contend with existing state and local institutions, many of which constituted powerful political pressure groups. In this respect law enforcement presented a particular challenge in that there were already as many as 40,000 police units operating at the various levels of government, each with a stake in seeing the status quo.[20] While local police were some of the most vocal proponents of federal intervention, they were also generally adamant in wanting to see the overall balance of power preserved. In October of 1933, the International Association of Chiefs of Police (IACP) presented Cummings with a detailed proposal for police reform, a plan remarkably similar to the final legislative agenda put forth by the Department of Justice.

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[18] Cummings did in fact combine the Bureau of Prohibition, the Bureau of Investigation and the Identification Division into a unified force in August 1933, under the directorship of J. Edgar Hoover. However, Hoover refused to merge the allegedly corrupt prohibition agents into his Bureau, keeping them as a separate force. When Prohibition ended a few months later, Prohibition Bureau agents were either let go or returned to Treasury.

[19] "Activities of the International Association of Chiefs of Police with the Federal Bureau of Investigation," in RG 65, World War II Headquarters Files, 66-1723-1, Section 1, Folder 1, 204.

[20] Estimates as to the number of law enforcement agencies in operation across the United States vary widely, from as few as 20,000 to more than 40,000. Karl Detzer's 1934 estimate of 40,000 includes the 3,000 municipal departments, 3,000 county sheriffs offices, the 30,000 township constables, and the several thousand minor enforcement agencies (fire marshals, game wardens, liquor law inspectors, etc). See: Karl Detzer, "The Twilight of the Sheriff," *Saturday Evening Post*, Vol. 206, No. 34 (February 17, 1934), 14. Bruce Smith offers the same figure in *Police Systems in the United States* (New York: Harper, 1960), 310. The 1967 President's Commission on Law Enforcement and Administration of Justice likewise put the figure at 40,000 in *Task Force Report: Police* (Washington: Government Printing Office, 1967), 7. Subsequent studies have revised that estimate down to between 15,000 and 25,000. See for example, David Bayley, *Forces of Order: Police Behavior in Japan and the United States* (Berkeley: University of California Press, 1976), 189; Albert J. Reiss, Jr., "Police Organization in the Twentieth Century," *Crime and Justice*, Vol. 15, Modern Policing (1992), 54.

Just three IACP proposals failed to make it into the Twelve Point Program or subsequent federal initiatives: deportation of all alien felons, universal fingerprinting, and direct federal aid to police. All were either politically untenable or simply too costly in the economically-strapped times. The rest became the foundation for the subsequent federal drive against crime, codified through some twenty bills passed in May and June of 1934.

Armed with this new legislation, the Department of Justice stepped up its assault on Dillinger, Floyd and the rest of the bandits who had thus far evaded the reach of the law. Historians have rightly treated the "war on crime" primarily as an exercise in "myth-making" – a bloody but largely symbolic conflict in the realm of popular culture. Having built up a handful of bandits as "public enemies" that could only be hemmed in by the central state, the Department now needed to produce results, and to do so in a way that satisfied the public demand for dramatic victories in the fight against crime. Thus in the months that followed, every arrest was billed as a triumph of organizational efficiency and scientific policing over the brute force of lawlessness. In press accounts, crime and policing did, as historians have argued, take on a national character. A bank robbery was no longer simply a robbery; a kidnapping no longer a kidnapping. They were direct challenges to the authority of Uncle Sam.

From a public relations standpoint, the war on crime was an unqualified success, providing a steady stream of laudatory press coverage of the Department of Justice. For the Roosevelt administration, it served as a highly-visible symbol of the positive application of federal power to the nation's problems. By involving the citizenry in the drama of federal policing, the drive against the nation's criminals further strengthened the

bonds between the public and the New Deal state.[21] Of course its greatest benefactor was J. Edgar Hoover, who emerged by the end of 1935 as the nation's leading crime fighter and a celebrity in his own right. Hollywood's timely release of a half-dozen FBI dramas in 1935 helped solidify his stature by casting the Bureau director, rather than the Attorney General, as "Public Hero Number One." By the end of the decade Hoover's life and habits – meeting for drinks at New York's fashionable Stork Club, vacationing at his friend's posh mansions in Palm Beach and Beverly Hills – became regular fodder for the gossip mill.[22]

Most importantly, the crime war gave birth to the modern FBI. Prior to the war on crime, Hoover's agents were little more than a band of investigators – they lacked the power of arrest, and per Bureau policy, did not carry weapons. Hired for their professionalism and legal training more than their investigative experience, most of the agents were ill-prepared to take on the nation's outlaws. After the Kansas Massacre, some agents privately wondered if the Bureau could pull off the job.[23] As William Burrough catalogs in *Public Enemies*, the campaign against Dillinger and his fellow bandits forced the FBI literally to "grow up" – agents learned to use guns, share information and make contacts with underworld informants.[24] While they never attained the legendary status ascribed to them in popular lore, they came to pose a serious threat to anyone who chose to break federal law.

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[21] For a detailed discussion of Bureau outreach methods, see: Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (New Brunswick: Rutgers University Press, 1998); Richard Gid Powers, *G-Men: Hoover's Fbi in American Popular Culture* (Carbondale: Southern Illinois University Press, 1983).
[22] Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* (New York: The Free Press, 1987), 209.
[23] Brian Burrough, *Public Enemies* (New York: Penguin Press, 2004), 54
[24] Ibid., xiii.

Yet the FBI that emerged from the war on crime was by no means a national police force. Though the Bureau doubled in size between 1934 and 1936, at roughly 600 agents and 900 support staff, it was comparable in size to the police departments of San Francisco or Cleveland. New York City, by contrast, had over ten times the number of employees in 1936. Federal jurisdiction, expanded by the 1934 crime bills, was nevertheless highly limited in scope, and did not put a significant dent in the responsibilities of state and local police. The FBI's case load increased by 50 percent between 1933 and 1936, but its 46,587 cases still accounted for just a tiny fraction the major felonies – murder, rape, robbery, and the like – handled by police forces across the country.[25] The "war on crime" may have created the "national 'myth' of the G-man" but it left only a modest imprint on the structure of American law enforcement, which survived the federal drive against crime in its highly decentralized form.[26]

Throughout the war on crime, the FBI drew substantially on the resources of state and local police. Hoover's Bureau had always depended on local law enforcement. Until 1934, Bureau agents lacked the power of arrest, and thus relied on local police and U.S. Marshalls to take suspects into custody. Even after 1934, the FBI did not have the manpower necessary to carry out its ambitions. Local police officers augmented the Bureau's tiny force. More than a half-dozen Memphis policemen joined Bureau agents in apprehending Machine Gun Kelly. Chicago police officers and Bureau agents took turns staking out the alleged hideout of gunman Verne Miller. When another stakeout failed

[25] A good estimate might be 3 to 4 percent. In a testimony before Congress Hoover estimated that 1,500,000 major crimes were committed across the nation; the estimate is supported by the statistics in: Federal Bureau of Investigation, *Uniform Crime Reports*, Vol. VIII, No. 1 (Washington: Government Printing Office, 1937), 24. Only 987 cities representing a population of roughly 35 million submitted detailed statistics to the FBI that year, and major crimes totaled 460,000. Even if crime rates were lower across the rest of the nation, the 1,500,000 figure is within acceptable range.

[26] Perhaps the best account of this myth-making process can be found in Richard Gid Powers, *G-Men: Hoover's Fbi in American Popular Culture* (Carbondale: Southern Illinois University Press, 1983).

immediately to pan out, agents turned the cumbersome task over to local police and directed their own limited resources elsewhere. An East Chicago police detective first put Bureau agent Melvin Purvis in touch with Ana Sage, the infamous "lady in red" who betrayed Dillinger's whereabouts to the police and set him up for the fatal run-in with federal agents at Chicago's Biograph Theater.[27]

But during the peak of the campaign, such cooperation faced considerable obstacles. Author and criminologist Karl Detzer put it best: "It's very difficult to recruit, organize and train an army after the shooting begins."[28] A permanent cooperative framework required long-term planning and investment which were incompatible with the quick victories the public demanded. Moreover, while the FBI at times acknowledged the contributions of local law enforcement, what the agency needed in the short run were *federal* victories in the war against crime. The myth of the unrelenting G-man depended on the complementary myth of the overmatched sheriff. The real work of imposing order on the chaotic system of state and local policing would have to wait until the shooting died down.

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In the long run, the Bureau's enforcement model necessitated a greater degree of coordination between federal and local law enforcement. For both practical and ideological reasons, Hoover resisted expanding the FBI beyond what could be effectively supervised from its Washington office. The sprawling, mismanaged, and hopelessly corrupt Bureau of Prohibition stood as an object lesson in federal overreach. He

[27] Burrough, 131, 150, 375, 397. Throughout his account of the crime war, Burrough lists dozens of other instances when local police worked alongside, or on behalf of, the FBI.
[28] Karl Detzer, "The Twilight of the Sheriff," *Saturday Evening Post*, Vol. 206, No. 34 (February 17, 1934), 14.

envisioned the FBI as an elite investigative corps that could draw on, rather than duplicate, the work of local officers. Its ties to local departments offered the Bureau a way to tap into criminal syndicates and political networks without exposing its own agents to the corruptive influences that plagued federal law enforcement in previous years. The FBI rotated field agents regularly to ensure they remained at arm's length from local interests. In the course of just five years, Special Agent Melvin Purvis moved from the Minneapolis office to field offices in Columbus, Chicago, Cincinnati, Washington, and then Chicago once more.[29] Institutional links with local police departments compensated for the firsthand local knowledge lost through frequent transfers.

But throughout the 1920s, Bureau agents struggled to form partnerships with the local rank and file. Burrough notes that agents often faced "the hostility of police departments, who viewed Hoover's men as unarmed, inept dilettantes" and "mocked them as 'Deeyajs' or 'College Boys.'"[30] Hoover recognized that to gain genuine cooperation, the Bureau would have to prove its usefulness to local police. He envisioned the Bureau first and foremost as a "national clearinghouse" for state and local law enforcement, facilitating the exchange of identification records, criminal justice statistics and other pertinent information between decentralized state and local agencies. Having such information at its disposal would expand the Bureau's reach and investigative capacity while at the same time providing a tangible benefit to local departments. Hoover also extended FBI resources on a more informal basis, offering direct assistance or

[29] Potter, *War on Crime*, 52-55.
[30] Burrough, 11-12.

expertise at local request. As one historian observes, “Service, rather than graft” was “Hoover's currency.”[31]

One of Hoover's first acts as director of the Bureau of Investigation had been to establish a national fingerprint database. It was an elegant solution to a problem that had long vexed law enforcement officials in the days before formal identification systems – the inability to establish with any degree of certainty that an individual was who he pretended to be. A train ticket, a new haircut and a convincing alias were all a culprit required to forge a new identity far from the scene of the crime.[32] What police needed was a system that definitively tied an individual’s physical body to his criminal past. As the eccentric Pudd'nhead Wilson explained to a jury in Mark Twain’s 1894 novel, written more than a decade before fingerprint evidence would actually be used in a criminal trial, “Every human being carries with him from his cradle to his grave certain physical marks which do not change their character, and by which he can always be identified.... These marks are his signature, his physiological autograph, so to speak, and this autograph can not be counterfeited, nor can he disguise it or hide it away, nor can it become illegible by the wear and mutations of time.”[33] The immutability of fingerprints was crucial – it distinguished fingerprints from facial features, hair color, even height, which were subject to errors in measurement and could shift over time. Even the identical twins Pudd’nhead Wilson hoped to exonerate each possessed a unique set of prints. Properly implemented, fingerprint identification offered an ideal solution to the dual problems of

[31] Potter, *War on Crime*, 39.
[32] Lawrence M. Friedman argues that it was a problem exacerbated by the exceptional fluidity and mobility of American society in the nineteenth and early-twentieth centuries. See Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 193-195,
[33] Mark Twain, *The Tragedy of Pudd'nhead Wilson and the Comedy of Those Extraordinary Twins* (Hartford, Conn.: American Publishing Company, 1900), 286-287. Originally published in 1894.

modernity – mobility and anonymity. With the diligent cooperation of local police who were urged to print all suspects, officials could essentially inscribe an individual's criminal history onto the unalterable whorls and ridges of his fingertips.

In the opening decades of the twentieth century, urban police departments moved to incorporate fingerprint records into existing identification bureaus, first to supplement, later to supplant, the Bertillon system of anthropometric measurement. The Chicago Police Department began fingerprinting suspects in 1904, the New York Police Department in 1906. By the early 1920s, all major departments and a handful of state agencies operated fingerprint bureaus. The federal government kept identification records for all federal prisoners at Fort Leavenworth, and the International Association of Chiefs of Police (IACP) maintained a small subscription-based database. Initially, departments used these records primarily to track recidivists within their own jurisdictions for sentencing purposes. If local records did not produce a match, officers might send photocopies of a suspect's prints to a handful of neighboring departments or to the IACP. Each request had to be made separately, and the number of agencies a department would be willing to contact depended on the severity of the crime. A lack of standardization further complicated interdepartmental cooperation. Without a central authority to oversee the extension of fingerprinting, departments developed their own variations or extensions of the two primary fingerprint classification systems in use within the United States. Thus the New York City system differed from that of New York State, which in turn differed from that of Boston or Newark. Each time a department received a fingerprint card from another jurisdiction, an identification clerk needed first to reclassify the record before searching for a match in his files.

In 1924, the newly-established Identification Division within the Bureau of Investigation took over the Leavenworth and IACP files, and in the year that followed, methodically reorganized both files around the Bureau's own classification system. All records were copied onto standard eight-by-eight inch cards, blank copies of which were distributed to police departments free of charge. The Bureau also provided franked envelopes for sending prints to Washington; instructions on proper fingerprinting procedure; and a detailed description of the classification system applied to Bureau files.[34] Beginning in September 1932, the Identification Division extended its services with a monthly Law Enforcement Bulletin, which included arrest warrant notices submitted to the FBI by local police. Each notice included the fugitive's name, known aliases, brief description and fingerprint classification code, ensuring that participating departments would at least learn, if not adopt outright, the Bureau's classification system.

By the end of 1932, the Identification Division had just over three million prints on file; its holdings would expand still more dramatically in the Roosevelt years. By the close of World War II, the Bureau held 15 million criminal prints in its identification files. Far more significant was the extension of identification to the smaller police departments across the United States. The 3,074 agencies that regularly contributed prints to the FBI in 1930 likely represented the vast majority of cities with populations of 2,500 or higher – of which there were 3,183 in that year. By 1945, 12,503 agencies sent fingerprints to the FBI.[35] Given that 40 percent of Americans still lived in small rural

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[34] J. Edgar Hoover, "The Identification Unit of the Division of Investigation," January 2, 1934, in RG 60, Entry 132, Box 54, Folder: "J. Edgar Hoover – Division of Investigation."

[35] "Hearing before the Subcommittee of House Committee on Appropriations in Charge of Departments of State, Justice, Commerce and Labor Appropriation Bill for 1937," (Washington: Government Printing Office, 1936), 67; "Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, Seventy-Ninth Congress, First Session on the Department of Justice Appropriation Bill for 1946," (Washington: Government Printing Office, 1945), 239. All population data drawn from Susan B.

communities as of 1940, this four-fold increase in the number of contributing departments reflected a substantial expansion of the Bureau's reach.[36]

In speeches and memos throughout the decade, Hoover emphasized that police departments opted in increasing numbers to submit fingerprint records to the FBI because the system yielded results. To demonstrate he drew on the panoply of anecdotes at his disposal - an escaped killer safely returned to a Texas insane asylum, a wandering vagrant identified as an army deserter wanted for murder across the Atlantic.[37] A close look at a Pennsylvania murder case demonstrates the ways in which the work of the Identification Division shaped policing practices and contributed to the overall effectiveness of American law enforcement.

On December 13, 1937, police arrived at the suburban home of Wilma Carpenter to find the thirty-eight-year-old widow slumped over on the floor of her upstairs bedroom. Mary Griffin, a young beauty shop operator who was with Carpenter at the time of her death, told police that the two women had returned from a shopping trip to find an intruder waiting for them inside. The young man corralled the women into an upstairs bedroom, where he knocked Griffin unconscious, and after struggling with Carpenter, shot her twice, in the back and head. He tied Griffin to the bed and tried to attack her, but eventually relented. He then proceeded to bathe, get dressed and leave with what little cash he had secured.[38]

Carter et. al., ed., *United States Historical Statistics, Millennial Edition Online* (New York: Cambridge University Press, 2006).

[36] The 40 percent figure includes all individuals living in incorporated areas with fewer than 2,500 inhabitants. See *United States Historical Statistics*.

[37] Herbert Fearon, "Uncle Sam, Ace Detective," *Scientific American*, Vol. 151 (October 1934), 173-176.

[38] "Suspect Hunted in Widow's Death," *The Atlanta Constitution*, December 15, 1937, p. 21; "I.C. #32-21183 Wendall Forrest Bowers," March 9, 1939, in RG 65, Interesting Case Write-ups, Box 15, Folder: "I.C. #32-21183"

From the start the crime appeared to be the work of an amateur. Both the rope and gun had come from the widow's house, suggesting the assailant was ill-prepared for a possible altercation. After shooting Carpenter he seemed to lose his nerve, leaving Griffin to later identify him to police. He left his fingerprints all over the victim's home. In fact, police were able to establish the culprit's identity within days of the crime. Presented with nearly two hundred photos of recently released convicts from nearby jails, Griffin immediately recognized nineteen-year-old Wendell Bowers as her "marble-eyed" attacker.[39] Latent fingerprints found at the scene matched Bowers' prints on file. Nineteen-year-old Bowers had spent his teenage years in and out of jail on burglary charges, his frequent arrests suggesting he was not particularly skilled at evading the law.[40] But three days had passed since the murder – if Bowers had boarded a train, he could literally be anywhere.

Acting on a tip from a witness who claimed to have driven Bowers into Delaware, the district attorney requested that the FBI issue a federal warrant for his arrest under the 1934 Fugitive Felon Act. FBI involvement drew immediate national attention, and within days Bowers sightings were reported across the eastern United States. In Washington, D.C., police received dozens of calls, including one from the wife of Senator William E. Borah, who was certain she had spotted Bowers just off Pennsylvania Avenue. Panicked congressmen urged D.C. police to step up their search, complaining that they feared "leaving their wives and children at home...while he was at large."[41]

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[39] "Woman Identifies Suspect's Picture," *The Atlanta Constitution*, December 17, 1937, p. 10.
[40] "I.C. #32-21183 Wendall Forrest Bowers," in RG 65, Interesting Case Write-ups, Box 15, Folder: "I.C. #32-21183"
[41] "Saw Murder Fugitive, Borah's Wife Reports," *The Washington Post*, December 21, 1937, p. 1.

Bowers, it would later turn out, had never been in D.C. Nor had he hitch-hiked into Delaware, or begged for food at a Fredericksburg farmhouse as the papers reported. Federal intervention brought publicity, but it yielded little in the form of tangible results. As Hoover had continuously reminded proponents of an American Scotland Yard, the FBI did not have the manpower to scour the countryside for a murder suspect. Agents lent limited support to search efforts in Delaware and Virginia, but in essence, all the FBI could do was put law enforcement agencies on alert and wait for Bowers to turn up.

The day before a Bowers look-alike had thrown Capital wives into a frenzy, police in Louisville, Kentucky arrested a man by the name of George Francis Lewis for vagrancy. While Lewis stewed in lockup, reports came in of recent robberies in the area, to which the young drifter confessed. Following a procedure Hoover had advocated for over a decade, officers collected Lewis's prints and mailed a copy to the Identification Division of the FBI. His fingerprints arrived at the Division of Identification on the morning of January 3. From the mailroom, his card traveled to one the division's classification experts, who assigned to it an alphanumeric code derived from the distinctive patterns on each of the ten fingers. It might have looked something like this:

$$\frac{17\ \ L\ \ 5\ \ R\ \ OOI\ \ 2}{M\ \ 12\ \ W\ \ IOI}$$

To a layman it would be a meaningless jumble of numbers and letters. An experienced fingerprint specialist would know immediately that the individual had "whorl" patterns on his left thumb, as well as his right middle, left index and left ring fingers; that he had a "radial loop" on his right index finger; and that his left and right middle fingers had ridge

counts higher than 10.[42] A specialist would also know precisely which drawer might contain a match.

To maximize efficiency, the Bureau's eight million prints had been painstakingly subdivided into hundreds of thousands of groups. Files were organized first by the 1,024 categories produced by the primary classification number ($\frac{5}{12}$ in the code above), derived from the distribution of whorl-pattern prints on the suspect's fingers. Each group was then sorted by the secondary ($\frac{R}{W}$), subsecondary ($\frac{OOI}{IOI}$), major ($\frac{I}{M}$), final ($\frac{S}{-}$) and key ($\frac{17}{-}$) codes. A typical search took between six and eight minutes, but since some classifications appeared more frequently than others, clerks occasionally had to check several hundred cards for a possible match. The FBI acquired an IBM punch card sorter in 1934 to speed up the process, but as of 1938, only a tiny fraction of records had been transcribed to work with the machines.

In long, brightly-lit halls, waist-high filing cabinets doubled as work spaces for the dozens of neatly-dressed identification experts, all male, who checked the incoming prints against the division's master file. Methodically, searchers flipped through stacks of cards, their eyes trained to focus on the one or two characteristics that best distinguished the reference print. Of the potential matches to Lewis's fingerprints, at least one card would have immediately stood out – it was marked with a bright red tab, signifying that it belonged to a fugitive wanted by police. The names on the two cards differed, but the prints were an exact match. Both cards were immediately transferred to the correspondence section, where one of the division's female typists prepared an urgent

[42] Lewis's actual identification card was destroyed upon his death. The cited classification code is drawn from an FBI instructional booklet on the science of fingerprinting: Federal Bureau of Investigation, United States Department of Justice, *The Science of Fingerprints: Classification and Uses* (Washington, D.C.: Government Printing Office, 1977), 92.

reply to the Louisville Department. George Francis Lewis was none other than Wendell Bowers. Presented with the overwhelming evidence against him, Bowers confessed the following morning to the FBI agents dispatched to interrogate him. Since murder carried a far greater penalty than the felony flight charge, he was promptly returned to Pennsylvania to stand trial.

To demonstrate the value of his Identification Division, Hoover could scarcely have asked for a better case. A vagrant traveling under a false identity had been identified as the target of a manhunt more than six hundred miles away. When Bowers' fingerprint card arrived at FBI headquarters, it was one of nearly five thousand sets received that day. All five thousand were processed and searched against the Bureau files within thirty-six hours – standard practice and, for Hoover, a point of pride. Agents secured Bowers' confession less than forty-eight hours after his prints arrived in Washington, D.C. Without the aid of the Identification Division, Wilma Carpenter's murder would very likely have remained an unsolved case. False leads had confined the manhunt to states along the Eastern seaboard, so following a short stint for burglary at the Louisville County Jail, Bowers could have disappeared into the western United States with relative ease. The widespread adoption of fingerprinting by police agencies across the country dramatically narrowed Bowers' options. Disheveled and unemployed, he would no doubt have attracted the attention of local police, if not in Louisville then elsewhere. In 1938, the FBI received over a million fingerprint cards for comparison, roughly half of which were collected following arrest for minor offenses such as vagrancy, public intoxication or petty theft.[43] From these prints, the Bureau identified seven thousand individuals as

[43] The identification division searched a total of 1,283,423 prints in 1938, of which 565,544 turned up a match in Bureau files. Only the 565,544 were included in FBI uniform crime report statistics, and of those,

fugitives from justice. A single offense in any one of the jurisdictions that submitted prints to the FBI would likely have ended Bowers' days on the run.

The Bowers case and others like it also demonstrated the potential for harnessing the benefits of coordinated law enforcement without the dangers and expense of a national police or the cumbersome battle for federal legislation. FBI outlays in the Bowers case were minimal, likely no more than one or two days' time divided among various Bureau officials. Local and state police bore the brunt of the work – they collected the evidence, interviewed suspects, conducted the three-week manhunt and put Bowers on trial. The entire system that facilitated Bowers' arrest required just two Congressional statutes, a 1924 measure to establish the Identification Bureau and the 1934 Fugitive Felony Act. The rest was put in place through the voluntary participation of local police. As Hoover often noted, no amount of federal coercion could have secured the cooperation of local officials without engendering a level of resentment that would have rendered such efforts costly and ultimately useless. Better to appeal to what historian David Kennedy describes as "the reflexive American preference for voluntary rather than statutory means to social ends."[44]

Such voluntarism had its limits even in the Bowers case – Louisville attorneys grumbled to reporters, for example, that the FBI took more credit than due – but generally speaking, criminal identification was a task perfectly suited for the kind of national cooperative framework Hoover had in mind. Fingerprinting was a cheap,

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half had been arrested for minor offenses when their prints were sent to the Bureau for verification. Given that first offenders (who were excluded from the uniform crime reports) likely included a greater share of petty offenders than those with prior criminal records, the 50% figure stated in the text is actually a conservative estimate.

[44] David M. Kennedy, *Freedom From Fear: The American People in Depression and War* (New York: Oxford University Press, 1999), 183

standardized procedure that required only a modest outlay from participating agencies. Moreover, it was a system that posed no threat to existing state or local institutions. If anything, states that established independent identification databases simplified the Bureau's task by assembling and forwarding prints from towns that might not otherwise have submitted records to the FBI. In essence, criminal identification presented the rare case whereby federal expansion neither diminished the potential for state or local initiative, nor placed an undue burden on local officials in complying with a national program.

Police training, on the other hand, did not lend itself quite so easily to centralization. The absence of substantive training for law enforcement officers was perhaps the greatest weakness of contemporary policing and a key area of focus for the FBI. The history of Bureau efforts in this field demonstrates both the vast potential for non-statutory coordination and the considerable limits imposed on national policy by the American federalist system.

Throughout the Progressive Era, training took a back seat to what at the time seemed like more pressing reforms: wresting police departments from the corrupt hold of party bosses and reshaping the administration of justice around rehabilitation rather than punishment. Urban police departments were incorporated into the civil service, but the modest improvements in the quality of new recruits had little effect on the day to day practice of law enforcement. Civil service requirements could not, for example, ensure that police departments would take full advantage of developments in forensic science, which unfolded at a remarkable pace in the first decades of the twentieth century.

In 1931, the National Commission on Law Observance and Enforcement, popularly known as the Wickersham Commission, delivered a scathing indictment of the nation's police. The Commission, established by Herbert Hoover to address the effects of prohibition, concluded that in all but a handful of standout departments, training was insufficient or, as was more often the case, simply non-existent. In towns with populations under 10,000, the authors observed that "there is absolutely nothing done which by any stretch of the imagination could be considered as police training." A recruit was, quite literally, just given a badge and a gun. In 216 of 225 towns surveyed, no one even bothered to inquire if the new officer had ever handled a weapon.[45] The situation in larger cities was only marginally less grim. Of the 383 cities that returned the commission's questionnaire, just 20 percent gave recruits some form of training. Of those, the Commission estimated that only fifteen – or just 4 percent of all departments – "gave courses which could be considered to qualify the recruit as the possessor of a proper background for efficient work."[46] In some cities, universities and state police departments offered classes for law enforcement personnel. While commendable, such efforts did not begin to address the Herculean task of training the nation's police.

A federal drive to improve police training was one of the key proposals to emerge out of the Attorney General's conference on crime, held in December of 1934. As a tentative plan, the conference adopted a resolution in favor of a "national scientific and educational center... in Washington, D.C."[47] How the center would operate relative to

[45] National Commission on Law Observance and Enforcement, *Report on Police*, vol. 14 (Washington: Government Printing Office, 1931), 70.
[46] Ibid. 71
[47] Department of Justice, "Resolutions, Adopted by the Committee on Resolutions at the Attorney General's Conference on Crime ," December 13, 1934, in RG 60, Entry 132, Box 15, Folder: "R"

existing law enforcement and training organizations was left up for debate, and again, opinions within the administration varied widely.

At one end of the spectrum stood Justin Miller, who joined the Department of Justice as a Special Assistant to the Attorney General and chair of Cummings' Advisory Committee on Crime. A former Dean of Duke Law School with strong progressive credentials, he was brought in to mollify concerns over the rapid expansion of national policing. Miller envisioned an expanded federal role, but one geared toward an earlier reform model for the administration of justice. In a memo to Cummings he suggested that "it would be quite possible for the federal government to set up standards for the selection and training of police, prosecutors, investigators, medical examiners and judges, to establish short courses for the training of such officers, and to make grants of aid in terms of money or of assistance by federal officials, conditioned upon state conformance with such standards and state use of such educational facilities." He based his proposal on federal aid programs for "highway construction, agricultural education and military training" and predicted that a comparable program for law enforcement would "receive very favorable consideration by the Congress whenever it is made."[48]

Hoover reacted to Miller's proposal with palpable alarm. "Any initiation of direct grants of Federal money for state or local law enforcement," he argued, would set the Federal Government on "a course…upon dangerous, uncharted seas, the results of which cannot possibly be foreseen, and may lead to the expenditure of tremendous sums of money, as well as the development of individual rivalries and jealousies which would have an undesirable effect" on law enforcement cooperation. In particular, he "[feared]

[48] Justin Miller, "Memorandum for the Attorney General," January 24, 1935, in Cummings Papers, Box 189, Folder: "Memoranda of H.S.C., 1934 Sept. – 1936 Dec."

that the question of whether the individual state conforms with the standards set [would] prove an almost insurmountable stumbling block."[49] Instead, Hoover proposed a far more modest endeavor. "Would it not be possible," he inquired, to invite "approximately six (at one time) law enforcement officials from various parts of the country" to attend the regular training program of the FBI? The program "would, of course, be entirely voluntary, and there would be no semblance of attempt to impose Federal standards upon any community not desirous of conforming thereto." To make his case, Hoover pointed to the success of the Identification Division, which expanded tremendously in its first ten years "because, at the inception, no sweeping claims were made, nor was the machinery of so complicated a character as to incur opposition or antagonistic feeling…. Progress in cooperative lines" he concluded, should be gradual.[50]

Hoover understandably drew attention to his own achievements, but he could just as easily have pointed to the difficulties Harry Hopkins of the Federal Emergency Relief Administration (FERA) encountered in trying to hold states accountable to federal mandates. As James Patterson convincingly demonstrates, the issues plaguing the FERA "typified the problems which would sadden advocates of a cooperative and mutually beneficial federalism under the New Deal."[51] Under the FERA, which operated from 1933 to 1935, states were expected to "[contribute] $3 for every $1 of federal funds" and "to provide adequate administrative supervision."[52] A number of states failed to live up to one or both of these arrangements, putting FERA administrators in the uncomfortable

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[49] J. Edgar Hoover, "Memorandum for the Attorney General," February 5, 1935, in Cummings Papers, Box 189, Folder: "Memoranda of H.S.C., 1934 Sept. – 1936 Dec." Hoover's original memo has "insurmountable" misspelled as "unsurmountable."
[50] Ibid., 2
[51] James T. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton: Princeton University Press, 1969), 52.
[52] Ibid., 50-51.

position of having either to swallow the additional expenditures or threaten to cut off relief. “Personality clashes” further soured relations between federal and state administrators – “Hopkins and his aides… often bluntly criticized state administrators,” who “in turn tended to resent what they called the arrogance or impetuosity of federal agents.”[53] The FERA operated on a scale and budget that far surpassed any potential police training efforts. But like politicians and administrators, law enforcement officers are a sensitive lot. Hoover’s suspicion that federal regulation of training standards would only multiply existing jealousies was not unreasonable.

To Miller, such concerns rang hollow. He dismissed Hoover’s proposal as “much less than is expected of the Department at this time” – so much so, that it “would make us the laughing-stock of the country.” Miller thought Hoover made far too much of potential rivalries. These, he argued, already “exist in infinite numbers” and could be minimized by the development of “selected and well trained officials.” Underlying this critique of Hoover’s timidity was Miller’s concern that the FBI would narrow the scope of training to “detection and apprehension,” leaving out important elements of administration, crime prevention, and juvenile justice.[54]

Hoover's argument won the day, but in the five years that followed, the FBI would attempt to secure the kind of power and influence over police training that Miller had envisioned. Conforming to Hoover's distaste for coercion, the Bureau initiative relied entirely on voluntary cooperation. The FBI never attempted to control local police practices through either monetary or statutory means. Even still, agents encountered a

[53] Ibid., 53
[54] Justin Miller, "Memorandum for the Attorney General," Februrary 16, 1935, in Cummings Papers, Box 189, Folder: “Memoranda of H.S.C., 1934 Sept. – 1936 Dec.”

veritable minefield of resentments and competing interests, suggesting that Miller far underestimated the limits to direct federal control over the training of local police.

In June 1935, twenty-three officers gathered at FBI headquarters for the first session of the Bureau's police school. Boston, Chicago, Detroit, Miami and New York all sent representatives, as did smaller towns like Tamaqua, Pennsylvania and Pittsfield, Massachusetts. For three months the officers lived in Washington and studied alongside new recruits at the FBI. Courses covered scientific and technical methods, recordkeeping, firearms training, investigative procedure, and police administration. Forty-one criminologists and police officials complemented the Bureau's regular staff to cover areas specific to the needs of local police. Though practical techniques of detection and apprehension dominated the program, faculty members from Yale, Georgetown and other leading universities addressed topics like criminal psychology and the social causes of crime.[55] Following the success of the initial program, the FBI continued to invite classes of up to forty officers to Washington two, later three times a year. The modestly named Police Training School became the National Police Academy (NPA) – a change meant to reflect its status as the premier law enforcement training institution. All graduates were expected to extend their FBI schooling to members of their home departments by either participating in existing programs or launching police schools of their own. By 1937, Hoover bragged, 59,744 law enforcement personnel served in

[55] Department of Justice, "Press Release," July 25, 1935, in RG 60, Entry 132, Box 28, Folder: "FBI Police Academy"

departments with NPA graduates. Over seventy million Americans lived within their jurisdictions.[56]

Training programs operated by NPA graduates fostered a closer connection between local law enforcement and the FBI, which extended to these schools instructors, equipment and expertise. Bureau firearms experts wowed local officers with their marksmanship – an ironic turn for a Bureau that, just a few years earlier, had itself turned to urban police departments for firearms training.[57] Forensic specialists demonstrated an array of laboratory techniques used to tie a suspect to the scene of the crime. In the classroom, agents sold local officers on the Bureau's limited ambitions and stressed the importance of interagency cooperation in addressing the problem of crime. These courses complemented existing Bureau efforts to coordinate local and federal law enforcement activities – departments that received Bureau training were more likely to send fingerprints to the FBI, make use of the agency's laboratory facilities, submit arrest records for use in the Bureau's Uniform Crime Reports, and alert FBI agents to possible violations of federal law.

Local participation in police training depended on the initiative of individual chiefs of police, who differed widely in their attitudes toward FBI schools. As FBI ambitions mounted, these differences of opinion threatened to embroil the Bureau in conflicts Hoover had heretofore managed largely to avoid. No longer content to simply participate in locally-sponsored programs, Hoover attempted in 1939 and 1940 to

[56] Department of Justice, "Press Release," July 12, 1937, in RG 60, Entry 132, Box 28, Folder: "FBI Police Academy"

[57] When Hoover lifted the Bureau's ban on firearms in 1933, the vast majority of agents had never fired a weapon. To quickly get up to speed, agents turned to police departments in major cities – particularly Chicago – for guidance.

establish direct control over police training in the United States. It was a bold initiative that yielded occasional victories, but one from which the agency was ultimately forced to recede.

Why Hoover moved to assert greater control over police training in 1939 is not entirely clear. To special agents in the field, he explained that "the Bureau desires to assume the same commanding position in the field of police training as [it] assumes in the field of fingerprint identification." [58] In Hoover's speeches, identification and training went hand in hand as examples of Bureau-driven cooperation. FBI leadership in police training conformed to Hoover's broader aim of establishing a national framework for the disaggregated law enforcement system. Hoover's timing suggests he may also have been reacting to the expansion of federal funding for vocational education under the 1936 George-Deen Act, which, for the first time, extended money to police training. Initial grants were distributed in July of 1937, and by 1939 a number of states had established new schools for law enforcement professionals. Though Hoover publicly denied any clashes with the Department of Education, which oversaw the disbursal of funds, he could not have been less pleased.[59] The grant program represented a watered-down version of Miller's proposal – federal funding for state-administered programs, but without any federally-mandated standards for the quality of training or the content of the curriculum. Operated through state boards of education, it bypassed entirely the Federal Bureau of Investigation.

Whatever his motives, Hoover shifted his commitment in 1939 from police training in general, to FBI training in particular. As the year unfolded, he increasingly

[58] J. Edgar Hoover, "Letter to Fletcher," March 10, 1939, in RG 65, Classification 1, Box 5, Sub 287.
[59] H.H. Clegg, "Memo to Hoover Re: Kansas Training Schools," May 17, 1940, in RG 65, Classification 1, Box 4, Sub 4.

berated his special agents for letting other organizations take control of training within their jurisdictions. To the Los Angeles division, Hoover wrote that "it is obvious from the present situation that your office has permitted the State Board for Vocational Education to obtain what amounts to virtual control of police training…. It will be incumbent upon you to correct this situation."[60] He chastised Agent Fletcher in Oklahoma City for extending Bureau assistance to a program run by the State of Oklahoma. Doing so, Hoover explained, reflected "a continuation of a follow along policy which has resulted apparently in the State [Education] Bureau obtaining and maintaining complete leadership in police training matters in the Oklahoma City Division." He instructed Fletcher to "forward… immediately [his] recommendations as to what steps the Bureau can take in order to regain its position of leadership in police training matters."[61] The FBI intended to control training, "even to the point of superseding other organizations."[62]

Spurred by Hoover's condemnation, agents worked assiduously to wrest control of police training from state agencies. They appealed directly to police chiefs by stressing the benefits of FBI-backed programs or offering training on more favorable terms. Where states operated area schools out of local colleges, Bureau agents offered in-house training to individual departments. Where police chiefs explicitly favored state-run schools, agents established competing programs nearby to pick off individual officers who might prefer Bureau training. In a number of states these efforts yielded impressive results. FBI records indicate that in Wisconsin, the state-sponsored instructor complained to colleagues that he "had been more or less pushed aside" after "the FBI had opened up a

[60] J. Edgar Hoover, "Letter to Special Agent in Charge," November 9, 1939, in RG 65, Classification 1, Box 4, Sub 10.
[61] J. Edgar Hoover, "Letter to Fletcher," April 13, 1939, in RG 65, Classification 1, Box 5, Sub 287
[62] J. Edgar Hoover, "Letter to Fletcher," March 10, 1939, in RG 65, Classification 1, Box 5, Sub 287

large number of schools, between fifteen and twenty." A representative of the Minnesota League of Municipalities observed a similar situation in his state.[63]

In Indiana, where the historical record is less fragmentary, several factors accounted for the Bureau's success in at least temporarily edging out competing programs. Shortly after Special Agent Sackett arrived at the Indianapolis office, he informed Hoover that the Indiana Board of Vocational Education, with federal funding under the George-Deen Act, had assumed virtually total control of police training in the state. Industrial Education Supervisor A.T. Hamilton, who appeared to have little if any experience in criminal justice, had passed responsibility for police training on to Bernard C. Gavit, Dean of Indiana University's school of law. Gavit in turn selected a member of the University faculty, Jesse H. Williamson – a practicing attorney and a not-so-successful former agent of the FBI – to conduct thirteen-day police schools across the state.[64] From the beginning, it seems, Williamson's courses enjoyed little support from local police. In interviews with Bureau agents, police chiefs expressed disdain for both Williamson and his methods of instruction. "At Elkhart, Indiana," Williamson was asked "to discontinue his school at the expiration of the first day due to the utter lack of constructive training in the course offered."[65] The chief of police at Logansport informed the Bureau that "neither he nor his men learned anything [from Williamson's training]

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[63] The comments are referenced twice in Bureau records but the letters do not themselves appear in fragmentary files. For a summary of the comments, see H.H. Clegg, "Memo to Hoover Re: Kansas Training Schools," May 17, 1940, in RG 65, Classification 1, Box 4, Sub 4

[64] According to Bureau records Williamson served in the Bureau twice with little distinction – "The Bureau files reflect that one Jesse H. Williamson was employed during the World War, that he participated in some election fraud prosecutions in Indianapolis prior to 1919, that his services were terminated, and that he later was appointed on October 2, 1919, at Detroit and that he resigned December 24, 1919…" in H.H. Clegg, "Memorandum for the Director," Februrary 12, 1940, in RG 65, Classification 1, Box 4, Sub 39.

[65] C. W. Stein, "Police Training Schools Commencing January 15, 1940, at Hammond, Whiting, Laporte, Valparaiso, Elkhart and Logansport, Indiana," February 3, 1940, in RG 65, Classification 1, Box 7, Sub 728.

and that he was honestly ashamed to force his men to attend the course."[66] At yet another school, an entire class of officers walked out after Williamson was forced to admit that he had never actually participated in making an arrest.[67]

When Special Agent Sackett moved to inaugurate police schools in fifteen departments across the state, he encountered considerable opposition from Williamson and his superiors, but little or no protest from actual law enforcement personnel. Supervisor Hamilton's apparent lack of interest in police training eased matters considerably as far as the Bureau was concerned. While Williamson and Gavit fumed over federal interference, Hamilton seemed open to letting the FBI take control. During an extended conversation with Special Agent Sackett over police training matters, Hamilton explained that he had relied on Gavit's expertise in picking Williamson, but that in light of FBI reports of the instructor's incompetence, "he was convinced in his own mind that he was wasting money sending Williamson around." He added that "he could well use the money which he is spending on police training to hire instructors along industrial education lines" since "the FBI is very efficiently taking care of police training in the State of Indiana."[68] Following the discussion, Sackett cheerfully informed Hoover that "it now appears we are going to put them out of business entirely," an assumption he confirmed a few months later.[69]

In Kansas, the Special Agent in Charge encountered a markedly different state of affairs. For several years the FBI had cooperated with the Wichita Police Department in

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[66] B.E. Sackett, "Letter to Hoover, Re: Police Training Generally," December 7, 1939, in RG 65, Classification 1, Box 4, Sub 39.
[67] B.E. Sackett, "Letter to Hoover, Re: Police Training Generally," February 5, 1940, in RG 65, Classification 1, Box 4, Sub 39.
[68] Ibid.
[69] Ibid., B.E. Sackett, "Letter to Hoover Re: Firearms Training Schools," April 3, 1940, in RG 65, Classification 1, Box 7, Sub 728

extending police training to officers in the area. The officer who ran the program, Captain Leroy Bowery, attended the National Police Academy at his own expense and seemed enthusiastic about the benefits of Bureau support for his school.[70] Like the Indiana program, the Wichita school was funded almost entirely by the State Office of Education, backed by federal grants.

When the FBI launched its own police training course in Coffeyville, Kansas, some one hundred and fifty miles from Wichita, in 1939, relations between Bowery and the FBI immediately soured. Bowery, now chief of police, complained directly to Hoover about the timing of the FBI school, scheduled for just two weeks prior to Wichita's annual program. He also added that "we are firmly behind police training programs sponsored by the Federal Bureau of Investigation, but are apprehensive of the wave now sweeping the country for every agency to inaugurate a police school" – a rather convoluted statement given that the FBI was most likely the only agency to pose a direct challenge to the Wichita school. Bowery's subsequent actions clarify matters somewhat. Though FBI instructors participated in the Wichita school, Bowery removed all references to the Bureau from programs and promotional materials.[71] In private statements, word of which reached the FBI, Bowery complained of Bureau efforts to encroach on local police work. When he nevertheless requested FBI instructors for the Wichita school the following year, he was summarily rebuffed. In a letter to Special Agent Brantley, Hoover insisted that "the Bureau take no part in any police training program or project" connected to Bowery in any way.[72] The FBI continued to hold police

[70] R. T. Harbo, "Memo for Tolson ," October 4, 1938, in RG 65, Classification 1, Box 4, Sub 4.
[71] Dwight Brantley, "Re: L.E. Bowery, Chief of Police," January 20, 1940, in RG 65, Classification 1, Box 4, Sub 4.
[72] J. Edgar Hoover, "To Special Agent in Charge," May 25, 1940, in RG 65, Classification 1, Box 4, Sub 4.

schools in individual departments, but the initiative for statewide training remained with the Wichita force.

Several factors explain Kansas proved to be a far less welcoming territory for Bureau training programs. Law enforcement personnel, rather than university instructors, operated the Wichita school. Bowers, an NPA graduate, shared the FBI's general philosophy as to the form and purpose of police training – his classes likely differed little from what Bureau instructors could provide. Most importantly, the Wichita school predated federal funding by several years. It was instituted in 1931 by then-police chief O.W. Wilson, best known for his later efforts to reform the Chicago Police Department in the 1960s. During his tenure in Wichita, Wilson expanded the academy, improved training facilities, and forged ties with law enforcement professionals and state administrators. In 1936 he instituted a cadet training program in conjunction with the Municipal University of Wichita. Carefully selected police science students served six-week terms in his department to gain practical experience to complement their University training; he then placed graduates in departments across the state.[73] In other words, the Wichita school was already a well-respected organization that made use of federal support to expand its operations – it was not hastily assembled merely to attract a new source of federal funds.

The divergent outcomes in Kansas and Indiana are instructive in other ways, revealing the limitations of both George-Deen and FBI models for promoting police training. An obvious downside of federal funding absent federal standards was the resulting lack of standardization. In Indiana, administrators lacked first-hand experience

[73] William J. Bopp, *"O.W.": O.W. Wilson and the Search for a Police Profession* (Port Washington, N.Y.: Kennikat Press, 1977), 49-50, 56-58.

in either law enforcement or police training, and the quality of instruction suffered considerably as a result. Federal grants promoted sprawling state bureaucracies which, once established, had an interest in seeing their programs preserved. In Indiana, the Board of Vocational Education hired a program administrator, who passed responsibility for police training on to a University dean, who in turn hired a member of the faculty to organize the schools. At least a half-dozen people participated in overseeing a training program with just one instructor. National police training, particularly under the supervision of the FBI, posed its own set of problems. Entering the field after a number of states and municipalities had already instituted their own schools, the Bureau could not hope to centralize training without alienating large swaths of the law enforcement profession. By 1931, the New York Police Department already required all new recruits to undergo eighteen weeks of full-time training prior to joining the force.[74] The NYPD did not need federal support, nor would it have welcomed the introduction of federal standards. Even a limited, strictly voluntary program pushed the Bureau into direct confrontation with state and local officials who saw any national initiative as a threat to local control.

The FBI did not entirely recede from police training in the postwar decades – indeed, it expanded the National Police Academy, eventually bringing an average of one thousand officers to Washington each year. Most departments, as Hoover had predicted in 1935, would eventually have at least one NPA graduate in their ranks. But the Bureau remained a minor player in an increasingly crowded field. Police training developed

[74] National Commission on Law Observance and Enforcement, *Report on Police*, vol. 14 (Washington: Government Printing Office, 1931), 73.

largely at the local and state levels, with individual departments, community colleges and state-run programs providing a patchwork of training opportunities to aspiring cadets.

The Bureau failed to achieve the dominant position in training that it had achieved in identification, owing in large part to the inherent conflict between national training and local control. But in the short run, FBI efforts to expand training beyond the Washington-based Police Academy yielded considerable dividends, the full value of which would become apparent with the onset of World War II.

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"Should war come, America will have, for the first time in its history, a force of trained men ready to combat Fifth Column efforts…with precision and efficiency." So Hoover declared in August of 1940, assuring Americans that the FBI had been preparing for such an emergency "ever since the First World War."[75]

Indeed, the experience of World War I weighed heavily on the minds of all senior officials in the Department of Justice. In 1917, the hopelessly under-funded Bureau of Investigation enlisted the support of the American Protective League (APL), a Chicago-based civic organization, to keep tabs on the nation's enemy aliens. Anyone could join, and all members were issued "official-looking badges" with the words: "American Protective League—Secret Service."[76] The Justice Department extended to the organization its wholehearted public support, describing the APL as "a most important auxiliary and reserve force."[77] By war's end these amateur spy hunters numbered 250,000. They "bugged, burglarized, slandered and illegally arrested other Americans.

[75]J. Edgar Hoover, "M-Day for the FBI," *The Atlanta Constitution* , August 11, 1940, B4.
[76] David M. Kennedy, *Over Here: The First World War and American Society* (New York: Oxford University Press, 1980), 82.
[77] "300,000 Aid Espionage," *Washington Post*, September 3, 1918, p. 2.

They opened mail, intercepted telegrams, [and] served as *agents provocateurs*."[78] Most famously, they helped round up thousands of individuals in a series of sensational "slacker raids" aimed at ferreting out draft evaders.[79]

With Germany once again on the offensive by the late 1930s, civic societies and neighborhood busybodies readied to stand vigilant once more. The 1938 discovery of a German spy-ring in New York City reignited dormant fears of foreign subversion on American soil. When Nazi armies overran Norway, Denmark, France and the Low Countries in 1940, many in the United States (mistakenly) attributed those nations' stunning defeats to the insidious plotting of fifth-columnists within their midst. Such fears were buoyed by Congressional demagogues, chief among them Texas Democrat Martin Dies. Though best known for his later attacks on Communists, the chairman of the House Committee to Investigate Un-American Activities fanned the flames of prewar hysteria with his widely-publicized allegations of fifth-column activities in the United States. Chicago alone, he warned, had as many as "twenty thousand fifth columnists, headed by professional agents in the pay of Germany, Russia and Italy."[80] An August 1940 Gallup poll showed that "48 percent of Americans believed their own communities had been infiltrated by Fifth Columnists." Another "26 percent were not sure."[81]

Between 1939 and 1941, dozens of groups with colorful names like "Silent Watch" and "Vigilantes of America, Incorporated" sprang up across the country to root

[78] Kennedy, *Over Here*, 82.
[79] For a detailed account of the "slacker raids" see Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008), 41-54.
[80] "20,000 Chicago 5th Columnists, Says Rep. Dies," *Chicago Daily Tribune*, June 26, 1940, p. 16.
[81] August 27, 1940 Gallup Poll, cited in Francis MacDonnell, *Insidious Foes: The Axis Fifth Column and the American Home Front* (New York: Oxford University Press, 1995), 7-8.

out subversives and saboteurs of all stripes.[82] Patriotic and veterans' societies, most notably the American Legion, prepared to transform their expansive organizations into government auxiliaries along the lines of the APL. That their initiatives never came to fruition speaks volumes about the transformation of American law enforcement in the interwar decades.[83]

The Federal Bureau of Investigation charged with policing the home front in World War II differed markedly from its counterpart in the previous conflict. At 1,600 agents in 1941, it dwarfed the World War I Bureau by a factor of six. But across the vast territory of the United States, even the nearly 5,000 field agents eventually deployed would have been quickly overwhelmed by the influx of war work. On the eve of Pearl Harbor the FBI already received over 20,000 defense-related complaints each month, a figure that increased substantially in the first year of hostilities.[84] What truly distinguished the Bureau was its ability to draw on an existing network of state and local law enforcement officers to share the investigative burden and to help sap the enthusiasm of self-appointed sleuths.

On September 6, 1939, Roosevelt declared publicly what he had already circulated privately in June – that the FBI would take charge of all matters relating to espionage and subversion in the Western Hemisphere. At Hoover's urging, Roosevelt

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[82] "The Program of the Federal Bureau of Investigation to Advise the American People of Its Jurisdiction and Activities During the National Emergency Which Began in June, 1939," September 21, 1942, in RG 65, World War II Headquarters Files, 66-1723-1-28, Folder 1.

[83] Historians have thus far paid little attention to the absence of vigilantism during World War II. Francis MacDonnell's *Insidious Foes* traces American perceptions of fifth column activities throughout the war, but he puts too much emphasis on public statements, attributing Hoover's success in clamping down domestic vigilantism largely to the Director's requests that members of the public leave espionage to the FBI.

[84] U.S. Congress, House, *Hearings before the Subcommittee of the Committee on Appropriations on the Department of Justice Appropriation Bill for 1943*, 77th Cong., 2nd Sess. (Washington: Government Printing Office, 1942), 114.

also instructed "all police officers, sheriffs, and all other law enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them relating to espionage, counterespionage, sabotage, subversive activities and violations of the neutrality laws."[85] Hoover in turn urged all civic groups to do the same. His instructions were clear – "report every suspicious instance but… investigate none."[86]

One by one, the Bureau contacted each of the recently-formed vigilante organizations, directing them to disband or, at the very least, to refrain from carrying out any independent investigations. Groups that continued their counterespionage activities were publicly disavowed and, if they persisted in claiming Bureau affiliation, threatened with federal prosecution.[87] Well-established organizations like the American Legion were dealt with in a more nuanced fashion. The Legion approached then Attorney General Robert H. Jackson in June of 1940 and "proposed that he authorize the 11,000 Legion posts to investigate 'subversive activities' in their geographic areas." When Jackson politely declined, "Legion officials offered their services elsewhere, to the Dies Committee or to military intelligence."[88] Wary of antagonizing American veterans and keen on retaining supremacy over domestic surveillance, Hoover suggested a plan to "obtain for the Department of Justice the support of the American Legion and at the same

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[85] Franklin D. Roosevelt, "The Federal Bureau of Investigation is Placed in Charge of Espionage Investigation," September 6, 1939, in Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt*, 1939 vol. (New York: Macmillan Company, 1941), 478.
[86] U.S. Congress, House, *Hearings before the Subcommittee of the Committee on Appropriations on the Department of Justice Appropriation Bill for 1943*, 77th Cong., 2nd Sess. (Washington: Government Printing Office, 1942), 109.
[87] "The Program of the Federal Bureau of Investigation to Advise the American People of Its Jurisdiction and Activities During the National Emergency Which Began in June, 1939," September 21, 1942, in RG 65, World War II Headquarters Files, 66-1723-1-28, Folder 1.
[88] Athan G. Theoharis and John Stuart Cox, *The Boss: J. Edgar Hoover and the Great American Inquisition* (Philadelphia: Temple University Press, 1988), 194.

time keep the membership of that organization so occupied that there will be no attempt on the part of the members to carry on actual investigative activity."[89]

The full extent of Legion surveillance on behalf of the FBI is not entirely clear. Officially, Legionnaires were to "keep the FBI apprised of the activities of their respective ethnic groups." Those "employed at key defense plants" were to act as "informers." They "were not to conduct investigations but merely to report what they had learned from everyday activities."[90] Actual Legion efforts likely went quite a bit further. Hoover confidentially instructed Special Agents in Charge (SACs) to use the organization's help in securing intelligence on groups with "un-American sympathies," particularly "the identity of the leaders of these groups, the locations of their meeting places" and the scope of the groups' propaganda activities.[91] Subsequent critics have charged that Hoover essentially transformed the American Legion into a network of confidential informants.[92] But unlike members the American Protective League, Legionnaires did not arrest suspects, raid organization headquarters, or carry out widespread round-ups of draft evaders. They performed their limited tasks under close Bureau supervision without interfering with the far more comprehensive national defense program – the Law Enforcement Officers Mobilization Plan.

The origins of the Mobilization Plan lay squarely with the National Police Academy – so much so that internal Bureau histories would later claim that the NPA was

[89] J. Edgar Hoover to Robert Jackson, November 18, 1940, quoted in Theoharis and Cox, *The Boss*, 195.
[90] Theoharis and Cox, *The Boss*, 195.
[91] Personal and Confidential Letter, Hoover to all SACs, December 4, 1940, quoted in: Theoharis and Cox, *The Boss*, 195.
[92] Particularly critical are: Athan G. Theoharis and John Stuart Cox, *The Boss*; Richard Gid Powers, *Broken: The Troubled Past and Uncertain Future of the Fbi* (New York: Free Press, 2004).

established in 1935 specifically to meet future national emergencies.[93] By 1940, Hoover publicly described the Academy as the "West Point of Law Enforcement," its graduates as a "reserve force" that could "be mustered into the service of the FBI." Along with the "thousands upon thousands of law-enforcement officers" trained in FBI-sponsored police schools, they would protect Americans from any emergency that might arise.[94] Though the image of a tightly-integrated reserve army of police professionals was meant to dissuade amateur sleuthing, it also reflected a fundamental reality of Bureau operations – years of working closely with local departments on police training and other matters had left the FBI well-equipped to organize law enforcement efforts during the war.

Mobilization began in earnest with the inauguration of Quarterly Police Conferences, the first of which took place in the fall of 1940. Held every three months, these day-long conferences initially complemented, later supplanted, existing Bureau training programs. By 1943, an average of 50,000 law enforcement officers representing 10,000 departments attended the sessions each quarter.[95] Part publicity exercise, part police school, the ideal conference combined meaningful instruction with carefully-orchestrated entertainment. A typical program began with an early-morning session open to the public and to members of the press. A prominent member of the community – a governor, a mayor, perhaps an editor of a local paper – touched off the event with a reflection on the role of peace officers, reporters, or private citizens in time of war. After a brief motion picture, the conference adjourned for the closed session, restricted to

[93] "Origin, Developments and Achievements of the FBI Law Enforcement Officers Mobilization Plan for National Defense and the Quarterly Police Conference Program," August 30, 1943, in RG 65, World War II Headquarters Files, 66-1723-1-28, Folder 1, 5.
[94] J. Edgar Hoover, "M-Day for the FBI," *The Atlanta Constitution,* August 11, 1940, p. B4.
[95] "Origin, Developments and Achievements of the FBI Law Enforcement Officers Mobilization Plan for National Defense and the Quarterly Police Conference Program," 2.

official law enforcement personnel. Each quarter, Special Agents in Charge delivered a new set of lectures on matters relating to national defense. Topics ranged from "Bombs and Explosives" to "Riots and Unlawful Assemblies," though particular attention was always paid to FBI-approved investigative procedures and report-writing techniques. Lectures were typically followed by round table discussions, question and answer sessions, and instructional films. In the evenings, officers were treated to barbecues or banquet dinners, hosted by local civic organizations.[96]

Time and again, Hoover prompted his Special Agents in Charge to "exercise their initiative, ingenuity, and imagination in order to make these meetings interesting and attractive and of such definite value that the enthusiasm of the officers present would be sensed by the public and the press."[97] He also fostered a "friendly rivalry" between field offices by circulating reports on the "first 10 ranking offices in total police attendance… each quarter."[98] Regular conferences were augmented by defense training schools, regional meetings and other community events, often established in conjunction with graduates of the NPA. All these efforts were intended to display a united front against subversion and prepare police officers for the central role they were expected to play in the Bureau's mobilization program.

Reports of potential subversive activities began piling up at Bureau headquarters within months of Roosevelt's September 1939 directive. Not all complaints were of equal value, but only the truly spurious could be dismissed without at least a cursory investigation. As the number of unassigned or delinquent cases piled up, Hoover grew increasingly adamant in insisting that all cases which are "not too confidential" or "too

[96] Ibid., 31-33.
[97] Bureau letter dated February 17, 1941, 66-9340-12, in Ibid., 35.
[98] Bureau letter dated October 30, 1942, 66-9340-172, in Ibid., 51.

complicated for assignment" be passed along to state and local agencies. In October 1941, Hoover expressed disappointment that "although these [quarterly] conferences were reported as well received… the main purpose of such conferences, that is securing profitable results by active investigation of national defense cases, is lacking in a majority of field offices."[99] He put the blame squarely on the shoulders of his Special Agents, carefully tracking the number of cases each field office farmed out and chastising those who fell behind the curve. If police "do not investigate national cases assigned to them," he explained, "their enthusiasm has not been properly directed" by the Special Agents in Charge.[100]

Internal Bureau memos indicate that there were numerous obstacles to full cooperation on matters of national defense. Overzealous local officers at times jumped the gun in arresting suspects under investigation by the FBI, complicating the task of identifying co-conspirators. [101] Underfunded and understaffed, some departments deputized private citizens to help handle war work, ignoring specific Bureau instructions to the contrary.[102] FBI agents also clearly varied in their degree of enthusiasm for cooperating with local police. The lack of uniformity in investigative and reporting standards across departments and regions was perhaps the chief concern, particularly in areas where the Bureau had failed to take charge of training in the past. In late 1940, John Bugas, the Special Agent in Charge of the Detroit field office, partnered with the local police department to institute a training course for "detectives who would be conducting

[99] Bureau letter dated October 13, 1941, 66-9340-77 in Ibid., 39.
[100] Bureau letter dated April 25, 1942, 66-9340-122, in Ibid., 44.
[101] Bureau letter dated April 24, 1942, 66-9340-126, in Ibid., 44.
[102] J. Edgar Hoover, "Outlaw the Vigilante," *Los Angeles Times*, August 18, 1940, p. H2; Jordan D. Jones, *The First Century: A History of the Wichita Police Department* (Wichita, Kan.: Wichita Police Department, 1980), 63.

national defense investigations in connection with this office." Bugas developed the course outline, much of it geared toward standardizing investigation and reporting procedures in defense-related cases. After the multi-week session concluded, he informed Hoover that "as evidenced by the type of report we are now getting from the Detroit Police Department… the school has had a most salutary effect. Most of the reports we now receive… are nothing short of excellent." At that point, approximately 500 cases had been assigned, generating "a constant stream of investigative reports."[103]

In all likelihood, Bugas wrote this self-congratulatory report in an effort to score points with the fickle Director. But read a different way, the letter reveals the extent to which the quality of reporting determined the efficacy of a federal-local partnership. The content of Quarterly Conference sessions offers another clue, as reporting procedures were repeatedly stressed by Bureau staff. In 1942, the FBI developed special forms to be used by FBI agents in referring cases, and by local police in reporting their results.[104]

Despite these various obstacles, state and local law enforcement agencies undertook an unprecedented number of investigations on the Bureau's behalf. Between October 1940 and October 1942, 135,264 national defense cases were investigated and closed by local or state police – as many as 30 percent of all federal defense cases received in those years.[105] These were matters of minor importance compared to the high-

[103] John S. Bugas, "Letter to Hoover, Re: Detroit Police Department Training School," December 13, 1940, in RG 65, Classification 1, Box 4, Sub 29.
[104] "Origin, Developments and Achievements of the FBI Law Enforcement Officers Mobilization Plan for National Defense and the Quarterly Police Conference Program," 44.
[105] In fiscal years 1941 and 1942, corresponding roughly with the aforementioned dates, the FBI received a total of 672,157 complaints, of which approximately two-thirds involved matters of national defense. Unfortunately a detailed breakdown of regular and defense-related cases is available for 1941 only. The two-thirds figure reflects the conservative assumption that the number of regular criminal cases did not increase during the war (FBI statistics, though not entirely conclusive, show a slight up-tick in criminal cases in this period).

profile cases Bureau agents kept for themselves, but they required an investment of time and resources the FBI could little afford to spare.

Local police also extended considerable assistance with alien registration. Under the 1940 Smith Act, all five million resident aliens were required to register with the federal government and submit their fingerprints. Following the outbreak of war, the Department of Justice and the U.S. Army asked Roosevelt to approve a second round of alien registration, this time confined to the 1.1 million aliens of Italian, Japanese and German dissent. The FBI, along with the Immigration Service, undertook the task of verifying all information submitted. Almost immediately after the program's inception, Hoover informed his agents that "local law enforcement agencies throughout the country will be utilized in verifying the accuracy of certain information submitted."[106] In addition to saving the bureau countless man-hours, the arrangement put local police in direct contact with enemy aliens, simplifying the task of monitoring the sizeable population.

All these efforts – the conferences, the investigations – yielded little in the way of actual intelligence. There were certainly foreign spies and saboteurs, and the Bureau enjoyed, in the words of historian Richard Gid Powers, "some spectacular intelligence triumphs, none more dramatic than its capture of eight Nazi saboteurs" in 1942. But, as Powers further notes, "the danger from a Nazi fifth column was as overblown as the threat from the public enemies: a few pathetic blowhards feeding their private demons by dressing up in brown shirts and goose-stepping in country hideaways like farmyard

[106] Bureau letter dated March 1, 1942, 66-9340-113, in "Origin, Developments and Achievements of the FBI Law Enforcement Officers Mobilization Plan for National Defense and the Quarterly Police Conference Program," 43.

führers."[107] Hoover as much as anyone contributed to the fifth-columnists' outsized reputation by repeatedly stressing the potential dangers of a foreign menace.[108]

Yet the Bureau's complicity in exaggerating the foreign threat and the ultimate failure of fifth-columnists to materialize in substantial numbers should not necessarily detract from the FBI's principal accomplishments during the war – quashing the machinations of amateur spy-hunters and assuring Americans that the home front would remain safe from attack for the duration of the conflict. Nor should wartime rhetoric and public posturing obscure the substantial cooperation between federal and local law enforcement agencies behind the scenes. The Quarterly Law Enforcement Conferences and Defense Schools resulted in widespread public acclaim for Hoover and the FBI, and were conceived at least in part with that purpose in mind. But they also ensured an unprecedented level of coordination in wartime policing and civilian defense.

* * * *

Writing in the 1960s, Morton Grodzins saw the relationship between local, state and federal law enforcement officers as a model of "cooperative federalism." He observed over half-a-dozen ways that a police department in a "Midwestern city of approximately 50,000" interacted with the FBI:

> The local force used the FBI fingerprint file daily…. On from ten to 15 occasions a month, cases involving bad checks and forgery made it advisable to send hand writing specimens for analysis to the FBI…. In the preceding 12 months, evidence from "eight to a dozen cases" was sent for analysis and identification to the FBI laboratory…. FBI men visited the local police department two or three times a week "collecting information for their own uses."… Exchange of information on matters of mutual concern—with respect to narcotics, bootlegging, stolen mail, and stolen cars, for example—was "continuous."… When crimes occurred in neighboring towns, outside the area of the local police radio system, the

[107] Powers, *Broken*, 190.
[108] Powers, *Secrecy and Power*, 168-169.

> FBI notified the local police "as a matter of routine courtesy."… The relationship with local FBI activities was particularly close because one of the resident agents had formerly been a member of the local force, and "we're good friends."… The chief and his assistant were graduates of the (FBI) National Police Academy…. A number of local officers had attended a state-sponsored police training school, directed by an ex-FBI agent. [109]

The Bureau systematically established the foundation for all these programs in the 1930s and 1940s, amidst the fanfare of its campaigns against bandits and subversives which thus far have garnered the most attention.

A closer look at Hoover's efforts to promote law enforcement cooperation fills in an important chapter in the Bureau's history and roots the FBI much more firmly in the broader history of the New Deal – as one of many federal agencies forced to contend with underdeveloped state and local institutions in its efforts to implement a national agenda. James Patterson observes that states, prodded to implement federal programs, instituted much-needed reforms in administrative efficiency and expanded the merit system. "Partly because of federal activism," states by 1940 "spent more, taxed more, and provided much more than it had two decades before. And three decades later [their] importance had grown even further, following many of the same guidelines and policies on grants that had been established from 1933 to 1940." [110] Federal intervention also promoted greater uniformity across a range of public and private endeavors. "Just as the [Securities and Exchange Commission] introduced standardized accounting practices into the securities industry," notes David Kennedy, the Home Owners Loan Corporation "encouraged

[109] Morton Grodzins, *The American System: A New View of Government in the United States*, Daniel J. Elazar, ed. (Chicago: Rand McNally and Company, 1966), 105-106.
[110] Patterson, *The New Deal and the States*, 198.

uniform national appraisal methods throughout the real estate industry," and the Federal Housing Administration "defined national standards in home construction."[111]

The expansion of the federal government's role in law enforcement had a similar effect on state and local police. Through its National Police Academy and its support for local police schools, the FBI helped elevate professional standards, particularly in the rural departments that still blanketed much of the United States. The Identification Division facilitated the extension of fingerprinting and other forensic methods, while Bureau efforts to compile national crime statistics promoted uniform record keeping and recording practices.

In the postwar decades, the federal government increasingly offered leadership on law enforcement matters – epitomized by nation-wide campaigns against juvenile delinquency or crack cocaine – but implementation remained almost entirely with the cities and states. The federal share of law enforcement expenditures across all levels of government shot up briefly during World War II, but during the 1950s and 1960s, it remained roughly the same as in 1932, at around 10 percent.[112] Local police had entered the Depression sapped of vitality and credibility by the failures of prohibition. They emerged from World War II with greater respect and more importantly, with far greater capacity to preserve the peace. The FBI, in turn, solidified its position as the nation's premier law enforcement agency; J. Edgar Hoover established himself as one of the most powerful political figures in the twentieth century United States.

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[111] Kennedy, *Freedom from Fear*, 369.

[112] Susan B. Carter et. al., ed., *United States Historical Statistics, Millennial Edition Online*. For the period in question, data are only available for expenditures on "police protection," which includes all categories except corrections and judicial process. The federal share of law enforcement expenditures actually dipped briefly in the 1930s with the end to prohibition, increased to approximately 17% in World War II, and then fell back to 10-11% for the 1950s and 1960s.

Chapter 4: Federal Prison Policy and the Limits of Administrative Reform

Long before John Dillinger appeared on public enemy lists of the Federal Bureau of Investigation, he was of interest to the Federal Bureau of Prisons – as one of thousands of men hardened into a life of crime following a stint at the nation's state and county jails. In contrast to the sensational exploits of Dillinger the criminal stood the unremarkable origins of Dillinger the man. In a standard mix of fact and fiction, the national press had cast Dillinger as a typically mischievous farm boy, a grocer's son from an "average small town of the older Middle West."[1] Dealt a rough hand – he lost his mother before his fourth birthday, his father was hardworking but distant – Dillinger knocked about for much of his youth, frequenting pool halls and dabbling in petty theft. He enlisted in the Navy but soon deserted. Returning to his hometown, he married, but proved ill-suited to settled life. Following his arrest for a botched burglary attempt at a local filling station, the twenty-one-year-old Dillinger pled guilty to assault and conspiracy to commit a felony. He was sentenced to an unduly harsh ten years behind bars.

There, the papers insisted, that Dillinger the schoolboy became Dillinger the outlaw. The *Times'* Mildred Adams put the blame on overcrowding, which made possible "close association with other criminals."[2] Dillinger's eight-and-a-half year term offered "an intensive course of training in organized and major crime. His teachers [were] well-known convicted criminals. His classrooms [were] the cells and the workshops built by

[1] Mildred Adams, "Evolution of a Criminal, the Case of John Dillinger," *New York Times*, April 29, 1934. See also: Felix Bruner, "Mill of Fate Turns Schoolboy Dillinger Into Desperado," *Washington Post*, April 29, 1934; "Steps in Dillinger's Notorious Career," *Chicago Daily Tribune*, March 4, 1934.
[2] Mildred Adams, "Evolution of a Criminal, the Case of John Dillinger," *New York Times*, April 29, 1934.

the state to punish and reform."[3] Other reporters echoed Adams' account of Dillinger's decline – he was "an apt pupil at learning the secrets…of young men hardened to criminal pursuits"; the Indiana Reformatory and Indiana State Prison were his "high school [and] college" of crime. By 1933, Dillinger emerged from prison a "baffling desperado."[4] It was this Dillinger, forged by the failures of penal administration, who was of interest to the Federal Prison Bureau.

Bureau Director Sanford Bates and his successor, James Bennett, spoke often of jails as "crucibles of crime" which unleashed upon society men and women armed with "an additional supply of acquired depravity."[5] They stressed that between 750,000 to 1,000,000 Americans spent time in local jails each year, exposed to habitual criminals and any number of communicable diseases. These institutions were "hoary with age, rickety shambles of tinder." Morally degrading and structurally unsound, they were also hardly secure. Dillinger, they liked to note, escaped with ease from Indiana's Crown Point Jail.[6] Outside of the major industrial states of the Northeast, there had been scant progress in jail administration in the first decades of the twentieth century.

Like J. Edgar Hoover of the FBI, Bates envisioned the BOP's relationship with state and local officials as an extension of its federal responsibilities. And like Hoover, Bates was motivated by practical as well as philosophical concerns. Whereas the FBI depended in part on the efficacy of state and local law enforcement to carry out its investigations, the BOP relied on local and county jails to house nearly half of all prisoners in its care. In 1930, when the Bureau of Prisons was formally established within

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[3] Ibid.
[4] Ibid.
[5] James Bennett, "It's a Crime to use the Jail," reprinted from *Forum*, November 1938, in RG 129, A1. Entry 8, Box 232, Folder: "Bennett, James," p. 6, 2.
[6] Ibid., 1.

the Department of Justice, it had just nine institutions under its direct authority, including three federal penitentiaries, two reformatories, and four road camps. As of June 30, 1930, just over 13,000 prisoners resided in one of these facilities. Another 6,000 were on out on probation or parole. The remaining 13,000 federal prisoners – generally those awaiting trial or serving brief terms – were placed in state and local jails across the United States. Because of the high turnover rate at these institutions, the actual number of federal offenders who passed through state and local jails was higher still. All told, more than 50,000 individuals in federal custody served one or more days in non-federal institutions in 1930 alone. Initially, the BOP established a formal inspection service to keep track of conditions in local jails. In time, the Bureau expanded its activities, lending its staff to state prison commissions which lacked the manpower and expertise to initiate reform.

Outside the Bureau of Prisons, national interest in state and local correctional facilities likewise expanded in the 1930s. The National Recovery Administration established a special committee to study the problem of competition between free and convict labor, and in 1935, Roosevelt established the Prison Industries Reorganization Administration (PIRA), an independent executive agency to help states transition their prison factories to a state-use system of production. The Works Progress Administration and the Project Works Administration invested more than $50 million in prison construction and renovation projects. Between 1929 and 1940, Congress passed three separate prison labor statutes which progressively narrowed available markets for convict made goods. The 1929 Hawes-Cooper Act enabled state governments to regulate the sale of prison-made goods within their borders, including goods produced out of state. In 1935, the Ashurst-Sumner Act made it a federal offense to knowingly transport convict-

made wares into a state in violation of state law. And in 1940, Congress prohibited outright the interstate sale of prison-made goods.

In adopting a mix of statutory and cooperative measures to develop the infrastructure and management of locally-operated facilities, federal prison reform efforts paralleled those of the FBI and other federal agencies toward state and local police. But far more than the FBI, the Bureau of Prisons and the PIRA struggled to provide federal leadership in penal administration. The following chapter considers the relative effectiveness of federal inspections, construction grants, and direct administrative interventions in transforming conditions in state and county institutions. It opens with Prison Bureau inspections of county jails in Massachusetts, Indiana, South Carolina, and Oregon – the only four states for which inspection records were preserved in Bureau files. It then turns to PIRA and BOP reform efforts in two states – California, where the construction of a new state prison offered an opportunity for the PIRA to shape state policy through federal grants; and Georgia, where the PIRA and the BOP intervened on two separate occasions to improve the administration of Georgia's state prison at Tattnall. It argues that ultimately, all three federal initiatives were reactive at best – responding to and drawing on existing local efforts and only occasionally succeeding in shaping local programs to fall more in line with national priorities.

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For the fledgling Bureau of Prisons, decentralized control over the nation's jails was a source of constant concern. In principle, Bureau reports recognized the limits of federal power, acknowledging that "in the last analysis," deteriorating conditions in

county jails were "an entirely local problem."[7] Yet practically, they were not an entirely local problem at all. When federal prisoners were put through the ringer by Kangaroo Courts – convict-run tribunals established to extract money from new inmates and enforce cell-block discipline – their families turned to the Bureau with their complaints. When inmates slept on vermin-infested cots, subsisted on just two monotonous meals a day, or suffered at the hands of ruthless and incompetent guards, the Bureau was responsible, albeit indirectly, for their substandard care.

In 1930, the Prison Bureau introduced a formal inspection service to ensure that county jails met the Bureau's minimum standards for safe custody – at the very least, that prisoners were housed in secure and sanitary cells, and fed a palatable, balanced diet. Dense, thirteen-page forms ensured that inspectors took note of all facets of prison life, from the daily menu to the availability of toilet paper and soap. Inspectors also offered more subjective impressions of the facility, including the competence of local administrators and their general attitude toward federal intervention in local affairs. At the end of the review, inspectors assigned each jail a rating out of 100, based on the extent to which it met Bureau standards. Eleven categories comprised the final score, weighted based on their relative importance. Food quality alone accounted for 500 out of a total of 2600 points. Building construction added another 400, while administration and personnel each contributed 300 points to the final score. Other categories, such as sanitation, religious instruction, and hospital facilities each counted for 100 to 200 additional points. Though the Bureau did not establish a formal cutoff, jails earning 1300 points or more – a rating of 50 percent - were rated as "fair" and generally approved for

[7] United States Department of Justice, Bureau of Prisons, *Federal Offenders, 1930-1931* (Fort Leavenworth: United States Penitentiary Annex Press, 1931), 22.

Bureau use.[8] At least in theory, jails that consistently fell below the 50 percent mark would no longer receive federal inmates. The vast majority of state and local jails fell short of even these minimal standards. By 1936, federal officials had inspected 2,913 jails, of which just 909, or fewer than one third, were approved for federal use. Only 52 jails earned ratings above 70 percent.

The wellbeing of federal prisoners was the Bureau's primary concern, but from the beginning, Bates saw the inspections as a way to also shape conditions in the nation's degraded county jails. While acknowledging that individual communities would ultimately have to decide the fate of these institutions, he argued that Federal Bureau of Prisons could offer leadership and expertise, much like the Federal Bureau of Investigation offered to local police. In practice, too, Bureau inspection policy reflected the agency's lofty goal of elevating conditions in local jails through regular inspections and reviews. Year after year, inspectors paid visits to jails that, by virtue of size or location, were simply not needed for federal use. Between 1932 and 1940, Knox County Jail in Vincennes, Indiana, rarely housed even a single federal prisoner. The U.S. Marshall for the region preferred to board prisoners in nearby Evansville, located in the same town as the federal courthouse. Yet inspectors dutifully toured the jail nearly every year, spending three, sometimes four hours on the premises examining conditions and making detailed suggestions for improvement. The sheriffs who cycled in and out of office showed little interest in receiving a greater share of Indiana's federal prisoners, but they welcomed BOP officials into the jail and occasionally made an effort to address the inspectors' concerns.

[8] Egregious problems in any one of the key categories could result in a jail being blacklisted even if it earned a score above fifty percent.

Federal officials drew on a range of incentives and sanctions to coax wardens into improving their jails. A key benefit to meeting federal standards was financial. Sheriffs often received higher fees for boarding federal prisoners than they would normally get for taking prisoners from the county or state. Marion County Jail in Indiana was case in point. Throughout the 1930s, the federal government boarded a daily average of twenty-five to thirty prisoners in the jail. The Bureau of Prisons paid a fee of 60 cents per prisoner per day – nearly twice what the sheriff received for each county prisoner in his care. So long as the county allowed him to keep the surplus funds to defray the cost of prison maintenance and improvements, the sheriff welcomed federal prisoners and gladly complied with Bureau suggestions. When the county sought to appropriate his additional income into the general treasury fund, the sheriff threatened to stop taking federal prisoners altogether, arguing that the cost of maintaining federally-mandated standards would exceed his budget allowance.[9]

For jails located near federal court houses, income from housing federal prisoners could account for twenty, sometimes thirty percent of these institutions' annual budgets. Particularly for wardens and prison commissioners already predisposed to reform, the promise of federal funds offered the necessary incentive to move forward. In Florence County, South Carolina, jailer J.R. Turner expressed great interest in housing a greater proportion of the state's federal prisoners. At the time, the jail rarely held more than one federal inmate at any given time. The Bureau's inspector surmised that "conditions would be greatly improved" if the jail were "given sufficient prisoners to encourage them to

[9] The county paid 12 cents per meal, or 36 cents per day total. See Marion County Jail Inspection, December 23, 1935, RG 129, NC-43, Entry 13, Box 2, Folder: "Marion County Jail"

make improvements."[10] The following year, the Prison Bureau doubled its use of the jail, promising to board more prisoners still if reforms continued. Acting on the Bureau's assurances, the Board of Commissioners appropriated $23,000 – nearly five times the jail's annual budget – to construct an additional tier of cell blocks specifically for housing federals. The investment appears to have paid off. By 1935, the federal government housed a daily average of 12 prisoners in the jail, earning the county some $3,000 annually. For the remainder of the decade, federal prisoners accounted for up to thirty percent of Florence County's inmate population. On two occasions, in 1935 and again in 1938, inspectors found substantial deficiencies in sanitation and administration, and threatened to pull federal prisoners from the jail. Both times, officials made rapid, dramatic improvements. Having invested so heavily in securing a place on the Bureau's approved list, the county could ill-afford to lose its standing.

For well-intentioned officials, Bureau inspections also stood in for formal training, which was sorely lacking across much of the United States. Time and again, inspectors relayed accounts of two, three hour conversations on all aspects of jail administration. In Colleton County, South Carolina, the sheriff delegated most of his jail duties to his son, who worked as the turnkey and unofficial jailer. "Young Maxey" knew little of prison management, but "was anxious to learn how the better jails were run."[11] In Coquille, Oregon, a Bureau inspector walked newly-appointed jail personnel through all facets of prison administration, even though structural deficiencies precluded federal use

[10] Florence County Inspection Report, June 29, 1932, in RG 129, NC-43, Entry 13, Box 7, Folder: "Florence County Jail"
[11] Colleton County Jail Inspection Report, February 3, 1938, in RG 129, NC-43, Entry 13, Box 7, Folder: "Colleton County Jail"

of the facility.[12] By the mid-1930s, then, prison inspections operated in part as an informal training program, not unlike the police training programs offered to local police officers by the FBI.

Annual Bureau inspections also complemented sheriffs' own efforts to keep tabs on jail administration. In larger counties with dedicated jail administrators, even sheriffs with the best of intentions found little time to make regular visits to the county jail. In Lake County, Indiana, persistent labor troubles and other pressing wartime matters forced the sheriff to entrust his jailer with greater administrative responsibilities – responsibilities which the jailer was apparently ill-prepared to handle. Were it not for a Bureau inspection, weeks or even months may have gone by before the he learned of deteriorating conditions in the jail, previously rated as one of the state's finest.

A similar scenario played out in Indiana's other highly-rated institution, the Vanderburgh County Jail. Remodeled in 1938 according to Bureau specifications, the jail consistently earned superior marks from federal inspectors. One official even went so far as to deem "the administration and discipline of this jail…the best of any he has ever inspected."[13] But by 1940, Vanderburgh's sheriff had likewise left day to day operations in the hands of full-time prison staff. A subsequent Bureau inspection revealed multiple irregularities in supervision and sanitation, which left the sheriff more than a little "distressed." In the inspector's presence, he convened a meeting of all prison officials and immediately fired one of the guards for "incompetency."[14] The Bureau visit and

[12] Coos County Jail Inspection Report, November 15, 1937, in RG 129, NC-43, Entry 13, Box 5, Folder: "Coos County Jail"
[13] Vanderburgh County Jail Inspection Report, June 13, 1939, in RG 129, NC-43, Entry 13, Box 3, Folder: "Vanderburgh County Jail"
[14] Vanderburgh County Jail Inspection Report, April 30, 1940, in RG 129, NC-43, Entry 13, Box 3, Folder: "Vanderburgh County Jail"

resulting shakeup had their intended effect. From then on, management was once again "splendid."[15] Since the Prison Bureau used the jail only sparingly, the sheriff was not simply catering to federal demands – rather, he was using the federal inspection service to help maintain high standards for his own, or his county's, benefit.

For skilled administrators, inspection reports, both good and bad alike, served a political purpose as well. County commissioners were often hesitant to invest in prison construction and maintenance, particularly in the cash-strapped Depression years. A strongly worded letter from the Bureau of Prisons detailing necessary improvements provided leverage in negotiating appropriation requests. Sheriffs often asked for such letters directly, at times going so far as to specify the changes they'd like to see happen in the coming year.[16] In some cases, inspectors agreed to testify before county commissioners in an effort to push through reforms. The Bureau's files suggest such actions yielded results – in one jail after another, inspectors noted with enthusiasm that all of their suggestions had been put into effect. In Knox County, Indiana, a sheriff seeking reelection requested a more positively worded letter from the Bureau praising his administrative abilities and leaving out the few changes that still needed to be made. It's unclear whether the inspector obliged, but the very request suggests that Bureau opinions could, in the right circumstances, carry considerable political weight.[17]

When financial incentives and goodwill did not suffice, the Bureau could draw on its limited arsenal of coercive measures to spur compliance. In addition to banning jails

[15] Vanderburgh County Jail Inspection Report, August 21, 1941, in RG 129, NC-43, Entry 13, Box 3, Folder: "Vanderburgh County Jail"
[16] See for example Lake County Jail Inspection Report, January 31, 1941, in RG 129, NC-43, Entry 13, Box 2, Folder: "Lake County Jail"
[17] Knox County Jail Inspection Report, April 27, 1944, in RG 129, NC-43, Entry 13, Box 2, Folder: "Knox County Jail"

outright, the Bureau increasingly turned to the local press to shame jails into submission. In June of 1938, for example, the Justice Department issued a press release explaining in vivid detail its reasons for not reinstating West Virginia's Mercer County Jail to its approved list. According to the statement, when Bureau officials arrived, the jailer announced to inmates that the men were federal inspectors, not "fresh meat" for the Kangaroo Court. The release went on to note that inspectors returned to Washington with a thirty-inch leather strap used in Kangaroo Court proceedings – the smaller of two straps found in the cell blocks of the county jail.[18] Another release played up the incompetence, or indifference, of prison officials in Sweetwater, Texas, who allowed five prisoners to escape even after being warned of an impending break.[19] The following year, the Charlotte News published excerpts from a Bureau of Prisons letter informing local officials that their jail, too, would remain on the blacklist so long as prisoners were granted special privileges and allowed to wander off the premises unsupervised.[20] Even when the Bureau did not publicize its actions, reporters took note when local institutions were condemned for federal use.

Throughout the years, the Bureau remained outwardly optimistic about the effect of its inspections on conditions in local jails. In his 1932 report, Bates noted a "general tendency by the local…officials to improve their jails and bring them nearer the

[18] "Proposed news release re: Mercer County Jail, Princeton, West Virginia," June 21, 1938, in RG 60, Entry 132, Box 14, Folder: "Jails: County"
[19] Department of Justice Press Release, October 29, 1937, in RG 60, Entry 132, Box 14, Folder: "Jails: County"
[20] Transcript of Charlotte News Article, "Federal Man Criticizes Practices," September 3, 1939, in RG 209, E. 4, Box 4, Folder: "Jails"

Government standard."[21] Undoubtedly, he could point to counties that, in response to federal prodding, instituted much needed administrative reforms. But these sporadic success stories concealed a grim reality – as the decade progressed, county jails continued their precipitous decline.[22] The Bureau of Prisons was hardly to blame. Local factors – including appropriations, management, and local interest – determined the fate of individual jails. Yet the downward trajectory of prison conditions, particularly of institutions regularly visited by federal inspectors, nevertheless underscores the limits of federal prison policy, particularly as conceived in the Roosevelt years.

For some counties, bringing their jails into compliance with federal standards was simply more trouble than it was worth. In Cherokee, South Carolina, the Sheriff Zebe Welchel cordially welcomed federal inspectors and listened to their suggestions, but expressed serious doubts that his tiny ten-cell jail would ever "qualify as a place to keep prisoners at all."[23] Oregon's Deschutes County jail, another tiny two-room facility, was likewise too small to safely house federal inmates. Since the county didn't even have a court house building – a construction project that would inevitably take precedence over

[21] United States Department of Justice, Bureau of Prisons, *Federal Offenders, 1931-1932* (Fort Leavenworth: United States Penitentiary Annex Press, 1932), 14.

[22] To illustrate, the following table shows the percentage of jails in each state that earned ratings below 50% (generally considered sub-standard), and ratings above 60% (indicating sufficient compliance with Bureau demands). Specific states were selected both for regional variation, and because in these three states, all but one or two jails had already been inspected at least once by 1932, providing a more accurate comparison across the three years.

	1932		1936		1945	
	<50% rating	>60% rating	<50% rating	>60% rating	<50% rating	>60% rating
South Carolina	50%	9%	85%	2%	87%	0%
Indiana	20%	20%	47%	2%	82%	0%
Pennsylvania	20%	27%	27%	20%	54%	15%
National Average	32%	23%	65%	4%	81%	3%

Ratings drawn from Department of Justice, Federal Bureau of Prisons, *Federal Offenders*, for the years 1932, 1936, and 1945.

[23] Cherokee County Jail Inspection Report, January 4, 1932, in RG 129, NC-43, Entry 13, Box 7, Folder: "Cherokee County Jail"

a new jail – the Bureau's inspector did not even bother with suggestions for improvement. Across the United States, hundreds of local jails were excluded for structural reasons alone. In those instances, compliance with federal standards depended solely on the goodwill of individual sheriffs and jailers.

Larger facilities presented their own set of problems. Structurally, these recently-built facilities could easily accommodate federal prisoners; where they faltered was in administration. Paradoxically, the Prison Bureau's very justification for prison inspections – its dependence on local jails for short-term commitments – was also the greatest handicap on the agency's ability to effect reform. By 1945, the BOP had banned 2,349 jails outright and approved another 350 for emergency use only. In the aggregate, the Prison Bureau appeared to take a hard line on the treatment of federal offenders. But in practice, certain jails were easier to do without than others. Some institutions were indispensable, no matter how dire conditions became. As Bates explained to inspectors in a 1936 memo, it was simply "not possible to discontinue using all unsatisfactory jails." Factors such as distance to court, total capacity, and overall demand weighed heavily on Bureau officials as they decided which jails to exclude.[24]

Indiana's Marion County Jail opened the decade on a promising note, consistently earning high marks on food, administration, cleanliness, and personnel. By the mid-1930s, however, conditions had deteriorated considerably. Political tensions between an independent-minded sheriff and the local party elite left the jail chronically underfunded and ill-equipped. In 1939, an ambitious and reform-minded sheriff took over, instituting widespread changes throughout the institution. But constant overcrowding and untrained

[24] Department of Justice, Memorandum to the Inspectors, August 27, 1936, in RG 129, NC-43, Entry 11, Box 26, File 44-3-4-1.

personnel at the lower rungs took their toll. After 1942, inspectors consistently rated the jail as "poor" – by 1944, it ranked a mere 43 percent on the Bureau's scale, down from a high of 63 a decade prior. While local officials remained courteous to federal officials, they no longer appeared to heed prison inspectors' advice. In particular, they ignored the Bureau's repeated requests that juvenile prisoners be segregated from adult offenders, or, barring that, allowed to sleep in the corridors at night rather than cells with adult inmates. In 1943, several county prisoners sexually assaulted a young federal juvenile, resulting in "very serious injury." While local officials immediately removed the adult offenders to a separate cell, they appeared largely indifferent to the Bureau's subsequent condemnation of the incident.[25] Yet inspectors continued to recommend the jail's use for adult prisoners given the absence of more suitable alternatives. After cataloging the list of the jail's shortcomings – from "obsolete and dilapidated" fixtures to a "lazy, indifferent…and ignorant" staff – Inspector Casey nevertheless concluded that "in view of the fact that this is the most convenient and important jail in the Southern District" its use "cannot be restricted."[26] The federal government continued to board an average of 20 prisoners at a rate of $0.80 per day, paying the county nearly $6,000 for its substandard treatment of federal inmates. Given the jail's proximity to the Indianapolis courthouse, there was little the Bureau could do.

In Aiken, South Carolina, Bureau inspectors likewise protested in vain as conditions deteriorated in the county jail. The more critical the inspection reports, the more intransigent the sheriff's response. Between February of 1939 and September 1941,

[25] The inspector noted that "It appears that jail officials have not taken this matter in a serious enough way and my condemnation of this did not seem to greatly impress them." Marion County Jail Report, February 10-12, 1943, in RG 129, NC-43, Entry 13, Box 2, Folder: "Marion County Jail"
[26] Marion County Jail Report, April 24-25, 1944, RG 129, NC-43, Entry 13, Box 2, Folder: "Marion County Jail"

the jail's rating plunged from an already substandard 45 to an entirely abysmal 29. Since the jail was located just two blocks from the federal courthouse, the Bureau once again resisted blocking its use entirely, hoping instead that regular inspections would result in eventual improvement. But the jailer – who doubled as the courthouse janitor – gave little thought to prison management. The sheriff, described by one inspector as "a great big, ignorant, blow-hard, type" saw Bureau criticism as an affirmation of his worst suspicions of Roosevelt's New Deal. In mid-April of 1943, after spending much of the morning avoiding a Bureau inspector wishing to discuss the latest report, the sheriff finally greeted his visitor with a rambling soliloquy from the courthouse steps. Before a small audience of local supporters, the sheriff rattled off a list of "grievances from Appomattox to the shortcomings of the New Deal." He insisted that "he did not want Federal Prisoners in his jail… had never requested them to be put there, and that if the Marshal placed them there he would accept them and care for them as he cared for his other prisoners, but that he did not want any inspectors coming around his jail and criticizing the operation."[27] Rather than see declining ratings as a reflection on his facility, the sheriff took the opposite view. He had been elected – and consistently reelected – by the people of Aiken County, who apparently saw little cause for concern in his treatment of local inmates. If the Bureau of Prisons objected to prevailing conditions, it could take its prisoners elsewhere. In such cases, there was simply nothing the federal government could do. After making one more attempt to inspect the jail the following year, the Bureau finally gave up on using the jail, though it's unclear whether it ever took formal steps to prohibit its use outright.

[27] Aiken County Inspection Report, August 14, 1943, RG 129, NC-43, Entry 13, Box 7, Folder: "Aiken County Jail"

For all of the cases at opposite extremes – from far-ranging reforms in Florence to brazen indifference in Aiken – there were also hundreds of jails that simply muddled along throughout the Depression years. In response to federal prodding, jailers ordered new mattresses and provided clean bedding; but in one case after another, inspectors returned the following year to see the bedding once again sullied, the new mattresses once again worn down from overuse. Sheriffs abolished Kangaroo Courts only to see them resurface some months or years later. They updated dilapidated fixtures but subsequent inspections nearly always turned up other structures that had since fallen into disrepair. High turnover rates in jail administration added to the uncertainty of what inspectors might find on any given visit. Individual jail ratings edged up a point or two, only to fall once more the following year. So long as the Federal Bureau of Prisons was limited in both its ability to coerce compliance, all it could do was to reiterate its standards and offer its assistance to officials who welcomed the help.

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Subtlety, caution, and uncertainty characterized all aspects of federal policy toward state and local prisons save one – convict labor. When it came to employment of inmates, or more precisely, the products of their toil, the federal government moved with far more conviction and far less deference to local concerns. In just ten years, Congress effectively brought an end to the industrial prison model that prevailed across much of the United States. In 1929, Congress enabled states to regulate the sale of convict goods within their borders, and in 1940, it prohibited entirely the interstate shipment of prison-made goods. Without access to interstate markets, private contractors pulled out of the nation's prisons, leaving local administrators to find other ways of occupying the inmates

under their supervision. In light of the Prison Bureau's inability to ensure even the safe custody of federal inmates in local jails, federal prison labor legislation appears to be a substantial departure from the status quo. Yet Congressional action is puzzling only so long as the statutes are conceived of as prison policy. In reality, the three acts had little to do with the fate of local inmates and everything to do with that of free laborers whose wages were depressed through competition with prison-made goods. The most decisive federal intervention in the day to day administration of state and local jails resulted from demands placed on the national government by those who worked outside prison walls. It reflected the strength of labor unions, not the legislature's desire to meddle in local prison affairs. Subsequent New Deal programs to help states adjust to the sudden shift in the prison production regime followed a more predictable path, focused on voluntary initiatives and federal grants-in-aid – programs which relied almost entirely on the good will of local administrators for their success.

The 1929 Hawes-Cooper Act followed decades of agitation for stricter regulation of convict-made goods. Contractual prison labor – whereby private business interests leased convicts for factory work – first developed in New York in the 1820s and, by the mid-nineteenth century, had replaced an earlier "penitentiary" model based on quiet repentance and solitary craft production across the Northeast. In the South, a similar, though far more brutal, convict lease system emerged during Reconstruction as an alternative to chattel slavery, which had been eradicated with Northern victory in the Civil War. By the 1880s, however, industrial prisons and their Southern counterparts faced increasingly harsh criticism from reformers, labor unions, and of course, the

prisoners themselves, who staged numerous strikes, riots and demonstrations in protest of the systems' most pernicious attributes. As Rebecca McLennan notes, "reports of beatings, shock treatments, and chronically overworked and underfed prisoners that invariably accompanied news of a prison rebellion contradicted one of the contractors' key claims – that their system was firm but humane."[28] Unions, meanwhile, staged boycotts in protest of competition from prison-made goods and the use of convict laborers as strikebreakers during labor disputes. Across the South, farmers rallied against large proprietors who gained an unfair advantage by turning to prison labor. By the turn of the century, more than a dozen states had enacted legislation to abolish contract labor or convict lease.

At the national level, Congress prohibited the practice of leasing out federal prisoners in 1887 and in 1890, approved funds for the construction of three federal penitentiaries. In the North, a number of states assumed control of prison production, eliminating private contractors and setting restrictions on the sale of convict-made goods. New York, Massachusetts, and Pennsylvania shifted almost entirely toward state-use, reorganizing their prisons accordingly. All three states introduced comprehensive classification systems, training programs, and diversified industrial production in order to accommodate the new regime. In the South, Mississippi, Louisiana, and Tennessee abolished their systems of convict lease, putting prisoners to work instead in factories and plantations under state supervision. These state-run operations mitigated some of the worst abuses of convict lease but as numerous scholars have documented, the new system was nevertheless deeply inequitable and unparalleled in its brutality – what historian

[28] Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (New York: Cambridge University Press, 2008), 149.

David Oshinsky rightly describes as "the closest thing to slavery that survived the Civil War."[29] Across much of the region, penal farms continued to sell their goods on the open market in competition with free labor, and would continue to do so well into the twentieth century.

In the mid-1920s, a loose coalition of workers, free manufacturers, and reformers precipitated a new wave of prison labor reforms aimed this time around at securing federal legislation to limit the interstate sale of convict-made goods. While all but seventeen states had abolished the contract system, industrial states in the Northeast were alone in prohibiting open-market distribution. Moreover, even these states could not insulate their markets from goods produced in other parts of the country, which were subject to national, rather than state, authority. In 1928, both the Democratic and Republican party platforms endorsed federal legislation to constrain or eliminate outright the interstate market of products manufactured in the nation's prisons and jails, and in 1929, Congress enacted the Hawes-Cooper Act, divesting such goods of their interstate character, leaving them subject to state regulation.

In both form and intent, Hawes-Cooper targeted the sale of prison made goods, not the fundamental assumption that prisoners should be made to work. Indeed, opponents and supporters of the legislation alike endowed prison labor with the redemptive potential to transform the listless delinquent into a productive member of society. Echoing claims made by wardens and prison officials since the nineteenth century, prison reformers cast "enforced idleness" as inherently degrading and cruel, relegating convicts to a life of boredom and mischief.

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[29] David M. Oshinsky, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press Paperbacks, 1996), 2

But as many opponents of the Act had predicted, the consequences of Hawes-Cooper extended beyond marketing alone. By 1933, one year before the law was to take effect, twenty-one states had enacted enabling legislation, closing off their markets to prison contractors. While larger states and states whose prison industries did not depend on interstate markets were unaffected by the new regime, small states across the North and Midwest struggled to adjust. Kentucky, which mandated the labeling of prison goods but placed no restriction upon their sale, was hardest hit. In 1931, 3,100 of the state's 3,742 prisoners were employed, producing work shirts, brooms, chairs, and harness pieces for private industry. Within four years, prison contracts shriveled to just 5 percent of former levels, leaving fully seventy percent of the state's prisoners completely idle. The rest were sporadically employed on prison maintenance projects and in a handful of shops producing clothing, license plates, and furniture for state use.

Worse still, for every state whose prison industries were devastated by Hawes-Cooper, there were also states, like Tennessee, where contractors continued to churn out convict-made goods. Some of the products were sold in-state or to states without enabling legislation; others were dumped on states that prohibited prison-made goods. Tennessee's stove foundries, for example, employed a mix of free and convict labor, making it nearly impossible for regulators to distinguish a stove made at the penitentiary from one produced beyond prison walls. The state's garment manufacturers were organized in much the same way. While shipping convict-made goods without proper labeling violated Ashurst-Sumner, such violations were nearly impossible to prove. The divergent outcomes in Kentucky and Tennessee likely depended on the nature of individual contractors who operated in the state, as well as the ultimate markets for convict goods.

State legislation also played a role, as Kentucky mandated the labeling of prison made goods while Tennessee did not. Work shirts produced in Tennessee's garment factories could more easily be disposed of out of state.

By 1935, then, Kentucky's convicts sat idly in their cells while, just across the border to the south, Tennessee's garment workers continued to face competition from the state penitentiary, which produced 100,000 work shirts for sale each year. The wardens and reformers of the American Prison Association were primarily concerned with the former; the lawyers and workers of the American Federation of Labor, the latter. On both fronts, progress at the state level had effectively stalled. States that had yet to enact prison labor legislation were unlikely to do so, particularly in view of Kentucky's difficulties in adjusting to the new regime. Increasingly, prison administrators, unions, and reform groups looked once more to federal intervention in order to alleviate the strains on prison management and push the nation as a whole entirely to state use. The Prison Industries Reorganization Administration (PIRA), established by executive order in September of 1935, promised to address both groups' concerns.

The original proposal for a federal agency to address the prison labor problem grew out of a National Recovery Administration committee established to investigate the complaints by the cotton-garments industry that prison contractors conducted their business in violation of NRA codes. The three members of the so-called Ulman Committee – Judge Joseph Ulman, economist Frank Tannenbaum, and statistician Jett Lauck – concluded that states should, and inevitably would, remove convict-made goods from the open market. In the meantime, the federal government must do everything in its power to ease the transition by offering advice, expertise, and above-all, financial

support. When the Supreme Court struck down the NIRA in 1935, the Ulman Committee was reconstituted as an independent federal agency that could implement the committee's report.

Roosevelt's original executive order assigned two primary functions to the new Administration: to conduct surveys of prison industries in the several states and to recommend for federal loans and grants those projects that could ease competition between free and convict labor. The PIRA was then to supervise those projects to ensure their compliance with federal standards and the provisions of national prison labor legislation.[30] State participation in the program was entirely voluntary; the PIRA required a formal invitation from the state's governor in order to proceed. To oversee the program, Roosevelt appointed a five-member Board under the chairmanship of Joseph Ulman. The remaining four members – James Davis, Linton Collins, Louis Robinson, and Gustav Peck – had extensive experience on the prison labor question from their work at the National Recovery Administration or in the states, though Robinson alone "came close to representing the view of prison officials" with whom the committee would conduct its work.[31]

Like the dozens of minor agencies and advisory boards that sprouted up across the New Deal bureaucracy, the PIRA lacked the organizational structure, authority, and support networks of more established federal institutions. Its independence – or isolation – was by design. From the beginning, PIRA board members had insisted that their agency remain separate from the Prison Bureau and the Department of Justice. Theirs was an

[30] Executive Order 7194, reprinted in U.S. Prison Industries Reorganization Administration, *Progress Report*, May 15, 1937 (Washington: Prison Industries Reorganization Administration, 1937), 5.
[31] Frank T. Flynn, "The Federal Government and the Prison-Labor Problem in the States. II. The Prison Industries Reorganization Administration," in *The Social Service Review*, Vol. 24, No. 2 (Jun., 1950), 216.

organization modeled similarly autonomous committees, study groups, and bureaus which reported directly to the president or were nominally linked to larger departments whose missions were separate from their own. In the farm sector alone, the Agricultural Adjustment Administration, the Commodity Credit Corporation, the Farm Credit Administration, the Farm Security Administration, the Resettlement Administration, the Rural Electrification Administration, and the Tennessee Valley Authority all dealt at one time or another with the economic crisis in rural communities. Until 1939, the United States Office of Education was formally housed in the Department of Interior but operated independently of its parent organization. Responsible primarily for conducting education surveys and administering federal grants to state colleges and vocational training programs, it had few strictly national responsibilities. And within the Department of Justice, the Attorney General's Advisory Committee on Crime, established in 1935, argued consistently for a comprehensive federal-state law enforcement initiative that would remain separate from the FBI. As the PIRA's early funding battles suggest, there were considerable drawbacks to such an approach, which only exacerbated the already tenuous proposition of shaping state correctional policy through federal grants.

Proponents of the PIRA had initially assumed that the agency's influence would stem from its ability to extend federal grants to programs that conformed to PIRA objectives. While Roosevelt's executive order made no specific mention of grant appropriations, Board members appeared certain that the funds would be forthcoming. In the NRA years, the Ulman Committee, had broadly advertised the federal government's commitment to appropriating some $50 million for state-use prison industries, a figure

that likely remained in Board members' minds as they developed their agenda.[32] At early meetings, Board members treated their grant-making authority as a given: "If we lent or gave any money to the states," Robinson declared at one point, "it would have to be for a state use project." The issue for Robinson was the type of project to be funded, not his organization's ability to fund projects at will.

The Board's expectations proved far off the mark. In April of 1936, Roosevelt rejected Robinson's request for $10 million in grants and loans to projects in Kentucky, Maryland, and West Virginia, explaining that existing relief appropriations did not grant him the authority to earmark funds for specific purposes. The President suggested instead that the PIRA appeal to either the Public Works Administration (PWA) or the Works Progress Administration (WPA) for aid. He cautioned that PIRA projects would of course have to be revised to comply with these agencies' requirements.[33] In particular, reliance on the two relief administrations would mean that prison labor could not be used in any phase of construction – a requirement that made sense in the context of work relief, but which hindered prison administrators' ability to quickly put prisoners to work on building their own workshops and facilities.

Without a separate funding base, the agency was left even more dependent on the voluntary cooperation of state administrators than its charter would suggest. The PIRA could still help states navigate a complex federal bureaucracy by bringing projects

[32] Flynn, 223. Early PIRA reports were very ambitious in their proposed reforms – ambitions that likewise point to confidence in federal support. In early discussions prior to the establishment of the PIRA, soon-to-be board members likewise agreed that a PIRA-style agency would only be worthwhile if funds could be earmarked for its use. See for example: Memorandum, July 1, 1935 in RG 209, Entry 2, Box 14, Folder: "Various NRA Materials – File 4"

[33] Franklin D. Roosevelt to Louis N. Robinson, April 28, 1936, RG 209, Entry 4, Box 8, Folder: White House.

directly to Roosevelt's attention.[34] Yet there is little to suggest that, absent a handful of specific instances, the PIRA proved decisive in the grant-making process. The Administration's involvement was helpful but by no means necessary to secure federal aid. Before the PIRA ever entered the fray, Missouri had already secured over $2 million in grants for prison construction. Georgia, too, received more than $1.5 million in loans and grants toward a new state prison at Reidsville. By 1937, federal relief agencies had also allotted an additional $20 million in smaller grants for construction projects in jails across the United States.[35] Occasionally, both the WPA and the PWA called on the Prison Industries Reorganization Administration to pass on the desirability of state prison projects. In 1937, Congress formalized the review process by mandating that subsequent federal funds be used to promote only those projects which did not increase competition between free and convict labor.

In practice, however, this limited control over federal expenditures had little impact on the PIRA's influence or effectiveness. Where construction projects succeeded in alleviating some of the worst ills of prison administration, they likely would have done so even without federal aid. Where state projects veered off course or were hamstrung by poor planning or execution, even the prospect of losing federal support did little to alter the course of events. The PIRA's experience in California, a state which offered perhaps the most promising opportunity for federal intervention, demonstrated instead the fundamental limits of shaping prison policy through federal grants in aid.

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[34] In 1937, the PIRA helped Kentucky renegotiate its PWA contract for a new state reformatory in Eddysville. Originally, the PWA had promised only to provide relief labor for the project, its contribution amounting to little more than $200,000, or just five percent of the project's projected cost. The PIRA intervened on Kentucky's behalf, securing a PWA grant of $1.8 million to the state.

[35] As of June 1, 1937, the federal government had spent a total of $24,430,045 for state and local prison construction projects. Another $28,283,453 in loans and grants were pending at the time. See United States Congress, Senate, *Emergency Relief Appropriation, Hearings before the Committee on Appropriations*, 75th Cong., 1st Sess. (Washington, D.C.: Government Printing Office, 1937), 206- 216.

With respect to organization and underlying philosophy, California already had one of the more progressive prison systems in the United States. In 1882, the legislature abolished contract labor, substituting in its place a system of production for state use. Only jute bags and a handful of minor articles could be sold on the open market at regulated rates. By the mid-1930s, California also operated six minimum security road camps where "reformed" prisoners were sent to serve out the remainder of their sentence. Much as the PIRA advocated in its many reports, California's prison labor system was designed with rehabilitation in mind. A typical prisoner might begin in the jute mill before transitioning to a more desirable post in the tailor shop, shoe shop, laundry, or clerk's office. After demonstrating his responsibility within prison walls, he would then be sent to a road camp where, in addition to lax supervision and plentiful sunshine, he could earn a modest wage. In practice, factors such as race and class shaped who was deemed capable of reform – but in design, the system offered the possibility of redemption through labor and good behavior.[36]

At San Quentin, which housed more than half of the state's 8,400 prisoners, inmates also had access to an elaborate education and training program with 189 separate courses from which to choose. These included "local correspondence courses, university extension courses and classes in typewriting, shorthand, marine engineering, woodworking and machine shop. The illiterates [were] taught to read and write in a special course," and men without a high school diploma could work toward completing their degree. An inmate expressing interest in training was first evaluated by an

[36] See in particular, Ethan Van Blue, "Hard Time in the New Deal: Racial Formation and the Cultures of Punishment in Texas and California in the 1930s" (Ph.D. Dissertation, University of Texas at Austin, 2004).

educational director, who administered "a series of tests designed to show his I.Q., his natural interest and a great many other things which make it possible to obtain a fair estimate as to where [he] might be fitted into the educational scheme."[37] In both employment and training, then, California's prison system promised the kind of individualized attention that the PIRA advocated across the United States.

In reality, overcrowding at Folsom and San Quentin as well as administrative squabbles between officials at various levels in the penal bureaucracy resulted in a sharp divergence between theory and practice. San Quentin housed over five thousand inmates in a prison built for thirty-five hundred at most; Folsom housed nearly three thousand in a facility built for just over two thousand men. Poor planning led to widespread idleness at both institutions. Though virtually all prisoners were listed as productively employed, 3,223 men produced just $849,000 worth of goods in 1936, or just $263 per inmate. Conditions in many of the state's factories, particularly the jute mill, were far from ideal. Clearly, California's prison facilities and industries would both need to expand – tasks with which the PIRA was well suited to help.

Unlike a number of states which had already received large federal grants prior to PIRA involvement, public works agencies had funded just two minor projects in California – a city hall and jail in Mill Valley, and a county jail in Santa Cruz. The governor had requested up to $7 million in federal loans and grants toward a state reformatory in Southern California, but delays in finding an appropriate site meant that the project had yet to come up for review. In 1935, the California legislature appropriated $2 million to finance the Southern California prison, intended to be a "farm-type institution" for the "segregation of prisoners 'capable of moral rehabilitation and

[37] Burton Oppenheim to Carol Brainerd, August 31, 1936, in RG 209, Entry 1, Box 1, Folder: "California"

restoration to good citizenship.'"[38] The state then looked to Washington to supply matching grants.

As a result, the PIRA's study of California prisons could not have been better timed. Nor could the PIRA have expected a more receptive audience for its concrete proposals for the development of California's prison industries and the new reformatory in Chino. Recognizing the potential importance of the California survey, the PIRA Board went out of its way to secure an invitation from Governor Frank Merriam, a Republican who Board members feared might be wary of wary of "Federal 'interference.'"[39] The Board hoped to "forestall any immediate action on the part of the State" until the PIRA had a chance to undertake its own survey and offer constructive suggestions on the Chino prison. Working through the architect selected to oversee construction, the PIRA secured a meeting with the state planning board, which in turn recommended a PIRA study for the governor's approval.

Once the PIRA obtained Merriam's formal request for a federal survey, the Board found itself working just as hard to see that its recommendations were incorporated in the state's construction plans before the grant proposals received formal approval from the PWA and WPA. Initially, the study proceeded as planned. Burton Oppenheim, the PIRA's chief field agent, relayed in glowing terms the degree of cooperation he received from prison authorities in the state. Louis N. Robinson wrote that the PIRA "brought to them facts and ideas and crystallized their program and we are absolutely in accord and

[38] California, Legislature, *Report of Joint Legislative Fact-Finding Committee on the Southern California Prison at Chino* (Sacramento: State Printing Office, 1941), 16.
[39] "Excerpt from letter Jan. 24 – Judge Ulman from Dr. Peck re: California," in RG 209, Entry 1, Box 1, Folder: "California"

parted with what seemed to me real and genuine respect for one another."[40] The first hints that the PIRA and the California Prison Board had different goals in mind for the new Chino reformatory came in mid-1937, when the PWA requested a PIRA assessment of the state's grant application. The plans California had submitted to the PWA envisioned a 2,700-person facility with just 1,000 spaces reserved for medium-security prisoners in a dormitory setting. The rest of the prison's 1,700 inmates would be housed in maximum-security cells not unlike those already found in Folsom and San Quentin. The entire compound was to be surrounded by stone walls with armed guards posted on strategically-placed observation decks. As Louis N. Robinson lamented, it was to be "simply another prison of the usual type."[41]

By this point, California's PWA and WPA applications had been "approved all the way up the line," and Board members were justifiably concerned that the plan would go forward without their approval. While both relief agencies had agreed to put the project on hold, Gustav Peck concluded that "it is up to us to act quickly…All of our summer plans may have to be altered in the light of this development; but it seems to me that it would be just too bad if we permitted this opportunity to go by."[42] Peck's note is a candid admission of the Board's limited influence. The PIRA had been granted a seat at the table, but both the California Prison Board and the PWA could just as easily have done without its input. If the PIRA had to drop everything at a moment's notice just to have its opinion heard, it opinion likely mattered very little, if at all. The uncertainty of the Board's position was further evident in internal deliberations over the proper reaction

[40] Louis N. Robinson to Alfred Hopkins, December 7, 1936, in RG 209, Entry 4, Box 8, Folder: "Louis N. Robinson"
[41] Louis N. Robinson to John Ellis, June 4, 1937, in RG 209, Entry 1, Box 1, Folder: "California"
[42] Gustav Peck to Louis N. Robinson, July 20, 1937, in RG 209, Entry 1, Box 1, Folder: "California"

to California's drastic departure from the PIRA plan.[43] In particular, Robinson wondered whether it was "wise for us to insist that the new institution be for a selected class of prisoners" and that it "abide by the recommendation of the American Prison Association that the maximum limit on the number of prisoners [in any one institution] be fixed at 1,200?"[44] In effect, he wondered how strong of a stance the PIRA could afford to take.

Ultimately, the PIRA opted to stick to its original assessment of California's prison needs and recommend that plans be altered to more closely resemble a "medium-minimum" security institution. Writing to Governor Merriam, Robinson insisted that the facility be designed "to house selected prisoners clearly capable of reformation and rehabilitation," with "opportunities for farm and industrial work and training. There would be no need for a prison wall around such an institution."[45] To Colonel C. K. Yeager of the WPA, Robinson laid out a more concrete proposal to scrap almost entirely the maximum security wing, leaving a facility to house 800 prisoners in dorm-style accommodations, and another 400 in medium-security cell-blocks.[46] The following month, PIRA Director James Davis flew to California to personally bring the agency's suggestions to the attention of the Governor and the California Prison Board. While there is no record of the discussion that took place, Davis apparently left assured that California would bring its plans "more nearly in harmony with the correctional needs of the state."[47] Governor Merriam too declared some months later that "the recommendations made by the Federal government are in line with ideas for prison

[43] This particular exchange took place after the PIRA had verbally delivered its recommendations to the Governor, but prior to the publication of the PIRA's final report, due out in the fall.
[44] Ibid.
[45] Robinson to Merriam, June 16, 1937, in RG 209, Entry 1, Box 1, Folder: "California"
[46] Louis N. Robinson to Colonel Yeager, July 2, 1937, in RG 209, Entry 1, Box 1, Folder: "California"
[47] Gregory Peck to Dr. Dort, relaying James P. Davis wire, August 2, 1937, RG 209, Entry 1, Box 1, Folder: "California"

reform" currently being implemented by the state. Specifically, he announced that "we plan to put into effect in [the Southern California Prison] a rehabilitation and educational program that will fulfill one of the recommendations contained in the report of the Prison Industries Reorganization Administration."[48]

Neither statement, however, reflected the reality on the ground. California's plans for its Chino reformatory had changed little from the original proposals submitted to the PWA. In August, the board voted in favor of a 2,000-bed medium security facility with "a certain number of maximum security" cells. An architect's sketch of the prison reprinted in the *Los Angeles Times* shows a prison compound surrounded on all sides by 12-foot stone walls, overseen by a towering observatory. The maximum and medium security wings – five sprawling buildings in all – dwarf the three dormitories planned for minimum security inmates, those for whom the institution was supposedly designed. Whatever the governor and state prison board had agreed to in meetings with the PIRA, they retained the view that a more open facility would constitute "a clubhouse instead of a prison." As a member of the California board continued to insist as late as 1940, regardless of "what kind of prison you have… you have to have gun towers around."[49] Subsequent hearings revealed that at the time, the Board had given "little consideration" to PIRA views.[50]

Eventually, this divergence between federal expectations and state plans cost California nearly $1.5 million in federal aid – the entire $800,000 promised by the PWA and the unexpended balance of the state's $1.2 million WPA appropriation. In a rare

[48] Governor Merriam, quoted in "State's Prison Programs in Line with Federal Aims," *Los Angeles Times*, December 28, 1937, p. 6.
[49] *Report of Joint Legislative Fact-Finding Committee*, 51-52.
[50] *Report of Joint Legislative Fact-Finding Committee*, 18.

example of decisiveness, first the PWA and later the WPA withdrew their support from the project. In November of 1938, the regional director of the PWA submitted to the state board a scathing three-page critique of submitted plans, accompanied by a formal rejection of PWA funding. Drafted most likely by James Bennett of the Federal Bureau of Prisons, who intervened in the matter in mid-1938, the report notes the preponderance of maximum and medium security cell blocks and the inadequacy of proposed classification and hospital facilities. It points also to a lack of "school facilities, vocational training shops, an auditorium," or "a sufficient number of industrial buildings."[51] Faced with an $800,000 budget gap, members of the state Prison Board rushed to Washington to salvage the situation. After more than two days of conferences with the Federal Prison Bureau and the PWA, the Board agreed to revisit its plans once more. But by the time California revised its proposal for federal aid, the PWA had been incorporated into a new Federal Works Agency and was no longer accepting new projects for review. Construction continued at Chino according to the Board's original design.

In the end, California established the kind of minimum-medium security institution at Chino that the PIRA had proposed back in 1937. But when it did, it was in response to local rather than national demands. In March of 1939, a hunger strike broke out at San Quentin, prompting recently elected Governor Olson to investigate in more detail the activities of the state's prison board. The investigation led eventually to the Board's resignation, and ultimately, to yet another round of revisions to Chino plans. Finally, in mid-1940, a new Board halted ongoing construction of the maximum security

[51] J. W. Bournier to Donald Kolts, November 8, 1938, reprinted in *Report of Joint Legislative Fact-Finding Committee*, 74-77.

wing and insisted on a simple chain-link fence to delineate the perimeter of the facility. When the new prison opened the following year, loosely-supervised youthful offenders played handball against the walls and towers built contrary to PIRA plans.

California's reforms proceeded at the state's own pace, driven not by the availability of federal funds but by the internal politics of prison administration. The state legislature's initial resolution in support of a Chino reformatory passed before the PIRA came into existence, and the ultimate decision to bring the prison back in line with the legislators' intent followed the PIRA's demise. With the exception of WPA labor used in 1938, the entire structure was built with state rather than federal funds. Once state officials finally took the initiative in establishing a genuine reformatory, the legislature came through with funds to make up for the loss of federal support.

To be sure, a savvier, better funded PIRA – perhaps an administration with grant-making authority of its own – may have had more success in coaxing California administrators to accept its views at an earlier date. Certainly if the Board had overseen prison construction projects directly, the Chino reformatory would never have deviated so dramatically from its intended goals. But as it stood, the PIRA struggled to gain Congressional support for even the narrow advisory functions it assumed. In 1938, Congress struck the PIRA's meager appropriation of $120,000 from that year's relief bill. For the next two years, the agency continued in an unofficial capacity under the PWA, all the while trying in vain to restore its formal status. Though Roosevelt personally saw to the agency's creation, his administration never extended the kind of political support that would have been necessary to ensure its long-term survival. Finally, in September of

1940, the last of the staff vacated their offices. The PIRA, which held such promise in 1935, proved disappointingly short-lived.

In its four years, the Prison Industries Reorganization Administration completed surveys of twenty-three states, plus the District of Columbia. All but Vermont were located outside the Northeast, and all but Florida, California, and Texas were small states with underdeveloped penal administrations. The twenty-four surveys were completed on a budget of less than $150,000 per year, and in eleven states, PIRA plans served as the basis for proposed legislative reforms.[52] On paper, then, the PIRA initiative differed little from the FBI's police training drive or the Bureau of Prisons' inspection service – nimble federal programs designed to improve state and local law enforcement administration with minimal expenditures at the national level. But unlike the programs of more established federal Bureaus, the PIRA's efforts enjoyed little success and fizzled out long before World War II brought an end to Roosevelt's New Deal.

On one level, the story of the PIRA's lackluster record and swift decline is one of administrative miscalculation and political naiveté. The Board's desire to work independently of the Bureau of Prisons proved especially shortsighted. In early discussions, Board members had rejected a WPA suggestion that part of the PIRA's work be conducted in conjunction with the Bureau of Prisons, which had recently received a WPA grant for a survey of prison and parole policies in the various states. Assistant Executive Director Burton E. Oppenheim argued that "the Administration was set up in order to work independently with the states and thus allay the suspicion that we were part of the Department of Justice, with which we understand they are not willing to cooperate

[52] United States Congress, Senate, "Report No. 1348, Senate Committee on the Judiciary," 76th Cong., 3rd Sess., March 28, 1940.

in the matter."[53] The basis for Oppenheim's belief is not entirely clear, though it likely developed at least in part from conversations with Howard Gill, chairman of an organization representing the prison associations of the various states. Perhaps in an effort to solidify his role as interloper between state and federal authorities, Gill stressed time and again that the states were wary of federal involvement and had agreed to PIRA surveys with "their tongues in their cheeks."[54] Whatever its origin, this notion that the PIRA alone should deal cooperatively with the states continued to inform the Board's policies. In 1937, then-chairman Louis N. Robinson wrote to FDR opposing a BOP proposal for a new federal grant program, arguing that "it is not a good thing to combine the administrative work of the Federal Prison Bureau with this work of advising and cajoling the states into doing something."[55] As late as 1940, Chairman James Davis insisted that the Bureau of Prisons, which "is fully occupied with its own affairs," was ill-suited to adopt the functions of the PIRA.[56]

Yet so long as the PIRA remained unmoored from the permanent federal law enforcement bureaucracy, it opened itself to attacks from critics of the New Deal. As one of several dozen "alphabet agencies" – and one whose entire budget went toward administrative expenses rather than relief – the PIRA was a particularly appealing target. Even Roosevelt's supporters found the Administration difficult to stomach. During a

[53] Burton E. Oppenheim to PIRA Board, November 8, 1935, in RG 209, Entry 2, Box 1, Folder 1.
[54] Ibid.
[55] Robinson to FDR, January 29, 1937, in RG 209, Entry 4, Box 8, Folder: "Louis M. Robinson."
[56] The relationship between the Prison Bureau and the PIRA had grown increasingly hostile. As the PIRA expanded the scope of its studies to include prison administration, classification, construction, and parole, Bates warned the Board not to lose sight of its rather narrow mandate and inadvertently encroach on parallel projects launched by the Attorney General. At the 1937 meeting of the American Prison Association, he criticized the PIRA for failing to deliver on the promise of federal aid. He subtly played down the importance of PIRA reports, arguing that "the real action needed from the Federal government is to make funds available" to the states. Members of the PIRA, for their part, had failed to recognize the danger of a turf war with the established and well-respected Bureau, and continued to challenge the Bureau's efforts to shape conditions in state and local jails.

floor debate over the 1937 relief bill, Wyoming Senator Joseph O'Mahoney predicted that "there is not a Member of this body who can state to the Senate now what the Prison Industries Reorganization Administration actually does."[57] Colorado's Alva Adams, who appeared to have at least a vague notion of the PIRA's responsibilities, nevertheless insisted that its appropriation be stripped from the relief bill. "Not one cent of the money" spent by the PIRA, he observed, "went to feed the hungry or clothe the naked."[58] In 1938, Senator Byrnes of South Carolina continued to hammer the PIRA along the same lines, adding that the PIRA's advisory services were entirely superfluous. "There is not a secretary in the office of any Representative or Senator who could not" advise states on filing applications for PWA aid. And as far as the prison labor problem was concerned, a permanent federal agency was hardly necessary. States, he insisted, could handle their prison problems on their own.[59]

The Bureau of Prisons faced no such criticism, even as it proudly championed its outreach efforts and expanded its inspection service. Neither did the Federal Bureau of Investigation, which carried out a parallel cooperative program with state and local police departments – a program it successfully defended as a legitimate extension of its federal responsibilities. If anything, the FBI experience had demonstrated conclusively that a proven track record of professionalism and efficiency at the national level actually strengthened an agency's hand in dealing with cities and states. Contrary to Robinson's assertion that administration and intergovernmental cooperation were separate functions to be performed by separate agencies, the FBI had demonstrated that the two complemented each other well.

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[57] Senator O'Mahoney, *Congressional Record*, LXXXI (June 21,1937), 6049-51, quoted in Flynn, 229.
[58] Senator Alva Adams, quoted in Ibid.
[59] Senator James Byrnes, in Ibid., 231.

Yet there is another dimension to the setbacks encountered by the PIRA which had little to do with bureaucratic maneuvering and New Deal politics, and which speaks to the broader limits of reform through federal grants-in-aid. In 1937, political scientist V.O. Key conducted a survey of grant administration, intended as a guide for policy makers at the emerging Social Security Administration. After an exhaustive review of more than a dozen federal agencies involved in administrating federal grants to the states, he noted several instances where "federal officials [were], in fact, largely dominated by state officials" and where "control [ran] from the state to the federal agency rather than the other way. Under these circumstances, the degree of federal administrative supervision [was] determined largely by state officials."[60] In particular, he stressed that federal inspection and oversight, even when linked to grants that far exceeded what the PIRA ever hoped to provide, rarely succeeded in improving the standards of state-level administration when state objectives or priorities deviated substantially from federal goals. Only in cases where federal and state officials shared mutual interests and where state administrators welcomed federal inspectors' input and expertise, did standards of administration markedly improve.

With respect to prison management, the degree of consensus over the objectives and conditions of incarceration varied tremendously across the different regions and even across individual prisons and jails. Under such circumstances, it is no surprise that the degree and pace of reform was determined by the philosophy and commitment of administrators and politicians at the state and local level. In practice, federal leadership

[60] Joseph P. Harris, in a forward to V. O. Key, *The Administration of Federal Grants to States* (Chicago: Public Administration Service, 1937), xii.

on the prison labor question meant state initiative and implementation, augmented by federal assistance and expertise.

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Nearly a decade of federal intervention in Georgia's prison system – under the Works Progress Administration, Prison Industries Administration, and finally, the Bureau of Prisons – underscores further the potential and the limits of federal leadership in penal administration at a time when administrators necessarily relied on voluntary and financial mechanisms to spur reform.

Georgia's prison situation was, by all accounts, particularly dire. The state itself had few prisoners under its direct control. Roughly one thousand prisoners were confined at the Milledgeville Prison Farm, used primarily to house female felons and those deemed unfit for hard labor. Another eighty prisoners worked the state's prison farm in Tattnall County. Georgia's remaining felons – some three and a half thousand in 1937 – were sent to road camps, or "chain gangs" operated by 115 counties across the state. Each county was entitled to a portion of the state's prisoners free of charge. In exchange for housing, clothing, and feeding the inmates, the county secured their labor, wrung out over long days on public works and ways. In theory, the Prison Commission retained supervisory authority over county camps, establishing standards for "types of buildings, hospitalization, diet, punishment and hours of work."[61] In practice, "the real control and management [were] vested in the individual counties," resulting in dramatic disparities

[61] Prison Industries Reorganization Administration, *The Prison Labor Problem in Georgia* (Washington, D.C.: Government Printing Office, 1937), 26.

between the various camps.[62] At the worst of the facilities, prisoners lived in eight-by-twenty-two-foot steel cages, mounted on flatbed trucks.

Georgia's correctional facilities, like the prison systems across much of the Deep South, were profoundly shaped by the legacies of slavery and the region's prevailing racial order. In 1936, just over three quarters of the state's prisoners were black; the vast majority were unskilled laborers and agricultural workers.[63] Prisoners were strictly segregated by race within, and sometimes across, institutions. Several of Georgia's worst road camps – the steel cage relics from an earlier era – housed black convicts alone. Segregation of inmates was by no means confined to the Jim Crow South. Inmates across the country were subdivided by race, though rarely with the same degree of formality and rigidity. Federal prisoners were likewise kept segregated well into the 1950s, with little objection from top Bureau officials. In 1943, Bennet blasted "the efforts of some of the extremist conscientious objectors" confined in federal prisons "to force us to permit indiscriminate intermingling of the white and colored groups."[64] In the South, however, the deep ideological and institutional links between race and punishment stymied efforts to reform facilities for all prisoners, white as well as black. State officials in Mississippi, for example, refused to build a church for white inmates "on the grounds that the blacks would demand a church of their own."[65] Mississippi, Arkansas, Louisiana, Texas, and Florida all retained whipping as an official form of punishment in its prisons long after its use was formally abolished elsewhere. Officially, Georgia's recalcitrant prisoners could

[62] PIRA, *Prison Labor Problem in Georgia*, 25.
[63] PIRA, *Prison Labor Problem in Georgia*, 17-19. The report does not break up its tally of prisoners' occupations by race, but 68 percent of all of Georgia's prisoners were unskilled laborers.
[64] Paul W. Keve, *Prisons and the American Conscience: A History of U.S. Federal Corrections* (Carbondale, Ill.: Southern Illinois University Press, 1991), 206.
[65] Oshinsky, 152.

only be shackled or removed to solitary confinement, but the culture and practice of physical punishment prevailed across the vast majority of its road camps, against all of the state's prisoners. And as Oshinsky documents at Mississippi's Parchman Farm, whites were generally subjected to many of the same brutal and degrading conditions as their black counterparts.

The deplorable conditions in Georgia's road camps first attracted national attention in 1932 with the publication of Robert Elliot Burns' *I am a Fugitive from a Georgia Chain Gang*. Sentenced for six-to-ten years' hard labor following a botched burglary attempt at an Atlanta produce mart, Burns successfully broke free – twice. He eventually made his way to New Jersey, and from there, he published a sensational account of his road camp days. While he may have embellished parts of his stomach-turning tale, the overall picture he presented conformed to the basic fixtures of convict life – the twenty-pound chains permanently riveted to inmates' ankles; the worm-infested cowpeas and corn pone that comprised their daily meals; the nightly use of the lash on those who failed to keep up with the crushing pace of road camp work. Initially, Georgians deeply resented the publication and popular reception of Burns' book. As the *Constitution* observed, "the people of Georgia were outraged at being held up to the contempt of the nation which, according to their information, did not exist in the state's prison camps." But once subsequent inspection reports, investigations, and exposés confirmed a number of Burns' allegations, it was no longer "possible for the people of Georgia to be as positive in their stand." Still defensive in the face of national scrutiny, Georgians were nevertheless ready for reform.

Between 1933 and 1937, Georgia received more than $2.5 million in grants from the WPA and PWA toward improvements at thirteen of the state's road camps and a brand new prison in Reidsville. Unlike the Southern California reformatory, which had been intended as a joint federal-state venture, Reidsville's Tattnall Prison was built entirely with federal funds, and was thus constructed according to prevailing national standards. When the first prisoners arrived at Tattnall in 1937, the state greeted its new facility as the beginning of "Georgia's new deal for convicts" – a brand new start for a penal administration long plagued by disarray.[66] Reporters championed the "swank" new prison, a "gleaming white" structure which, when "viewed at certain angles reminds one of the better hotels of the Riviera." In painstaking detail, they described the "light, airy" maximum security cells, made reassuringly escape-proof by "tool proof" steel bars; the "modern hospital such as to gladden the heart of the most fastidious paying patient;" and the extensive network of guards' tunnels modeled on systems employed by the secret service.[67] It was, declared one prison commissioner, the "beginning of an evolution of the Georgia penal system from its present state into an industrial system."[68] The consensus was clear – with Tattnall, Georgia had finally turned away from its humiliating chain-gang days.

In February of the same year, Governor Rivers submitted a formal request for a PIRA survey of Georgia's entire prison system, including the state's 131 county work camps. With Tattnall already built, the PIRA could do little more than advise the state on

[66] Lee Fuhrman, "Georgia's Prison Reforms are Told in Trans-Atlantic Talk," *Atlanta Constitution,* February 16, 1938, p. 4.
[67] "Georgia Acting on Prison Reforms to Eliminate Chain Gang Fugitives," *Atlanta Constitution,* May 30, 1937, p. 5A. "Only Important Prisoners to Rate Place in Cells of Swank Tattnall," *Atlanta Constitution,* July 4, 1937, p. A7.
[68] "Johns Hails Start of New Penal Idea in Tattnall Prison," *Atlanta Constitution,* September 6, 1937, p. 5.

how best to make use of its new facility to initiate state-wide reform. The effects of its study were, by extension, still more limited. Like the governor and the press, the PIRA Board envisioned Tattnall "as the hub of the prison system." It would operate first and foremost as a receiving station where new inmates could be evaluated to determine suitable placement. The more dangerous or escape-prone inmates would remain at Tattnall. Only the "rehabilitative group" – "men with good prospects for successful adjustment after release" – would be sent to the camps. Once freed from supervising an undifferentiated mass of Georgia's inmates, road camp wardens could provide work and housing for minimum-security inmates without resorting to shackles and chains. By removing nearly two-thousand prisoners from county supervision, a new and more powerful state prison board could also begin the process of closing the smaller, obsolete camps. In glowing terms, the final PIRA report praised the governor and the legislature for their "liberal and progressive attitude" toward penal administration and their willingness to move forward with substantive change.[69]

In reality, cracks in Georgia's reform program had manifested themselves from the very beginning. Six months before the administration released its study, Oppenheim cautioned Robinson that "the real political power in the State lies with the counties" and that "these counties…will be extremely loath to give up State prisoners for incarceration in the new prison."[70] He also observed with some dismay that the state legislature had yet to provide adequate appropriations for maintaining the jail. Indeed, both publicly and privately, prison officials and state legislators had boasted that the new prison would be entirely self-sufficient. Newly-appointed Warden George Fisher predicted that profits

[69] PIRA, *Prison Labor Problem in Georgia*, i.
[70] Oppenheim to Robinson, April 16, 1937 in RG 209, Entry 2, Box 5, Folder: "Georgia – File 1."

from prison labor would cover not only the costs of upkeep but provide the $18,000 in annual payments to the federal government. A state senator told reporters that "Tattnall Prison industries…should be able to make enough profit to completely liquidate the state's indebtedness for the prison establishment within a few years."[71] Oppenheim dismissed such estimates as "entirely erroneous" but cautioned that brining the matter up "will require further painstaking work."[72] Contrary to these privately-expressed doubts, the public report was uncharacteristically upbeat, even for the PIRA, whose dependence on state cooperation typically blunted the force of its conclusions.

After a promising few months, Governor Rivers' ambitious agenda likewise fell short of its goals. In early 1938, the Georgia legislature enacted a series of reforms, formally centralizing penal administrative authority with a newly constituted Prison and Parole Commission. At its first meeting, the five-member board prohibited the use of corporal punishment and or the so-called "sweat box" at all state correctional facilities and county camps. But the prison commissions had issued similar restrictions before, and would do so again in 1943. Without adequate oversight, the commission's directives carried little weight. In 1941, a black prisoner died at the Rising Fawn work camp in Dade County, Georgia after he and twenty-two fellow prisoners were jammed into a sweatbox for eleven hours. State officials came to hear of the death largely by accident after a prison inspector "just luckily got a tip" of a mysterious death while visiting a nearby facility.[73] The resulting investigation led to the warden's arrest and conviction for manslaughter, and to another round of legislative studies, again to little effect.

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[71] Jack Tubbs, "New Penal Board Abolishes Lash and "Sweat Box," *Atlanta Constitution*, February 16, 1938, p. 1.
[72] Ibid.
[73] "'Sweat Box' Death is Charged to Warden,'" *Atlanta Daily World*, August 15, 1941, p. 1.

Throughout 1942 and 1943, prisoners continued to complain of brutal treatment and inadequate provisions at Georgia's deteriorating county camps.

Nor did Georgia get very far in implementing the PIRA's recommendations for state-use industries at Tattnall. The PIRA estimated that roughly five-hundred prisoners could be productively employed across ten small prison shops, including a textile mill, printing plant, and clothing factory. The Board suggested a start-up cost of $350,000 for the purchase of necessary equipment. By 1940, Georgia reported that 138 of the state's prisoners were employed in manufacturing. But of these, 47 worked at a woodworking facility that produced just $6,200 worth of goods, or just $132 per man, per year. Another twenty men manufactured license plates for the state, just as they had prior to the PIRA study.[74] In sum, Georgia added only seventy full-time manufacturing jobs in the three years after the PIRA submitted its recommendations – hardly an impressive achievement, and one the state could have managed without federal support.

The biggest blow to Georgia's reform program came in 1941, when firebrand Eugene Talmadge defeated New Deal Democrat E.D. Rivers and rode once more into the Governor's mansion. During his previous term in office in the mid-1930s, Talmadge had established a track record of using the powers of the governorship to impose his will on public agencies, going so far as to impose martial law during a showdown with the highway department. Though nominally independent, the state's prison commission was particularly subject to political pressures. All three members were elected to office; it was up to the governor to choose one member to serve as chairman of the board. As it stood, two of the members were sympathetic to the Talmadge machine, giving the governor free

[74] United States Department of Labor, Bureau of Labor Statistics, *Prison Labor in the United States, 1940* (Washington, D.C.: Government Printing Office, 1941), 79-80.

reign over the state's prison administration. Within days of taking office, Talmadge replaced Tattnall Warden George Fisher with Rolly Lawrence, the governor's cousin. Shortly thereafter, Lawrence banned reporters from prison grounds. It would be another two years before a baffled public learned of the subsequent turn of events at Tattnall.

On April 16, 1943, twenty-five prisoners, including two of Georgia's most notorious convicts, overpowered Tattnall's guards and took control of the facility. Armed with riot guns and pistols from the prison armory, the men cut the phone lines, feasted on a "midnight snack," gathered several days' worth of provisions, and drove to freedom. As panic spread throughout the surrounding communities, reporters converged on Tattnall seeking answers. When the besieged Warden called the Governor for help, the recently-elected Ellis Arnall overruled the orders of his prison commission and reportedly exclaimed, "Let them in. Let them see everything… Let them have the run of the prison… I have nothing to hide."[75] As Georgia's sheriffs scoured the countryside for armed fugitives, reporters wandered through the halls of Tattnall to see for the first time what had become of their "Alcatraz of the Piney Woods."

In the weeks that followed, reporters, senators, grand jurors and prison commissioners assembled an increasingly grim portrait of life at Tattnall. Inmates testified to a robust underground economy through which the well-off could acquire such privileges as leaving the grounds for extended "vacations."[76] They could also purchase moonshine distilled right on the premises. The milky fluid, which gave off an odor of "gasoline and ether," flowed freely from a 50-gallon still at the prison's canning plant and a second 20-gallon still tucked away in the basement. Both, it seems, had been

[75] Lamar Ball, "Reform and Rebirth Forecast for State Prison System," *Atlanta Constitution*, April 19, 1943, p. 10.
[76] Ibid.

operated for some time. Inmates also ran a counterfeiting operation, stamping half-dollar coins using machinery stolen from defunct prison shops. A former inmate's scrapbook, turned over to the *Constitution*, revealed intimate snapshots of a softer side of life at Tattnall. In the photos, swim-suit clad female inmates leaned seductively against prison walls; male and female convicts embraced outside their cells or strolled hand in hand through downtown Reidsville. In a handful of photos, a graying male guard posed for the camera surrounded by female inmates. The caption in the scrapbook read – "A Good Man Gone Wrong."[77]

Of course lax discipline carried a steep cost. Fights and beatings were common. Disaffected prisoners who fell out of the guards' favor vented their frustration on the "trusties" and the favored few, who generally retaliated in kind. Inmate "Peg" Bolton, Warden Lawrence's right hand man, described frequent assaults, "cell blocks where cutting scrapes and murders were so general at night that even Lawrence's paid guards were afraid to enter certain dormitories."[78] For the uninitiated, Tattnall offered a particularly harsh introduction to prison life. Juveniles, poorly segregated and generally unsupervised, especially suffered in the chaotic regime.

The lack of oversight took its toll on the physical plant as well. After the break, Arnall appointee W. R. Duvall found dozens of cells with bars filed down at the base, easily giving way to a swift blow.[79] When federal inspectors entered the jail some months later, they found that "much of the major equipment had been destroyed, damaged, removed, or rendered unserviceable. Locking devices [had] been rendered useless by

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[77] Lamar Ball, "Girl Ex-Convict Recalls Happy Days at Tattnall," *Atlanta Constitution*, April 28, 1943, p. 1, 4.
[78] Lamar Ball, "Counterfeiting within Tattnall Cells Revealed to U.S. Agents by Ex-Convict," *Atlanta Constitution*, April 29, 1943, p .1, 7.
[79] Report on Georgia Prison Service, in RG 129, A-1, Entry 15, Box 2, Folder: "Georgia Prison Survey."

locks being wrecked" or "completely ripped out…. Not a single fire hose or extinguisher was found intact… The main grill door locks to the maximum security cell blocks were being opened with a spoon handle." Much of the equipment, including "including heating units and motors," had been removed from the prison entirely. Prisoners spent their days surrounded by unimaginable filth. "Refuse, infected and decayed waste was piled up" throughout the facility – in the laundry and kitchen, "in living quarters, and even in corridors…. On the yards were piles of refuse, cinders, ashes, empty cans and even garbage from the kitchen. Some of these piles were eight and ten feet high," arranged to serve as a sort of makeshift fortress where prison toughs gathered during the day.[80] Only from a distance – the white walls still gleaming in the Georgia sun – did the prison offer a hint of the modern facility erected by the WPA a mere seven years prior.

If the deterioration of Tatnall underscores the limits of national policy-making through grants-in-aid, the prison's reconstruction and rebirth in the mid-1940s demonstrates the potential of federal-state cooperation as conceived of by the FBI and gradually adopted by the Federal Prison Bureau. Faced with a crumbling prison and a decided absence of skilled administrators who could turn the situation around, Governor Ellis Arnall turned to Director James Bennett of the BOP. By the time reform began in earnest, the entire facility was effectively placed under federal management and control.

In the fall of 1943, Warden Joseph Sanford of the Atlanta Federal Penitentiary dispatched members of his staff to survey conditions at Tattnall. Initially, federal involvement was to be limited to providing "technical advice, survey reports and

[80] General Report, State Prison, Reidsville, December 30, 1943, in RG 129, A-1, Entry 15, Box 2, Folder: "Georgia Prison Survey."

recommendatory assistance to the state."[81] But as Sanford detailed in a series of dispatches to the Director, Atlanta officials found an "absolute lack of capacity" on the part of Tattnall personnel. Even basic administrative tasks had to be carried out by federal officials or not at all, thereby drawing in an ever-wider circle of Atlanta personnel into the process. Sanford observed that "we have almost taken over the Georgia prison at Tattnall," with the governor's wholehearted support.[82]

This was a new degree of involvement for the Bureau and at first, Bennett was skeptical of such an extensive commitment of Bureau resources. He warned Sanford that "the more people we detail and the more we take over the harder it will be to let go and pull our people out."[83] He frankly urged Arnall to "find someone in whose hands you can confidently place responsibility for carrying out your ideas and thus relieve…our organization of detailed administrative duties."[84] The Director's letters are a telling admission of his Bureau's yet-uncertain role in relation to the states. Throughout the 1930s, the BOP had gradually expanded its advisory functions both in the context of the inspection program and on an as needed basis when invited by state officials. But in Georgia, the Bureau would have to play a far more expansive role. Part of Bennett's reluctance was purely financial. Unlike the FBI, the BOP played only a minor role in national defense and as a result, was forced to make substantial cuts to accommodate the war effort. Bennett could thus ill afford to devote the man-hours required to undo the damage done by chronic staffing shortages and years of infrastructural decay. Yet

[81] Bennett to Arnall, March 17, 1944, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey."
[82] Sanford to Bennett, January 4, 1944, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey."
[83] Telegram, Bennett to Sanford, December 23, 1943, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey"
[84] Bennett to Arnall, January 4, 1944, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey"

Bennet's letters also demonstrate a sense of ambivalence as to how far the Bureau should extend its reach.

Still, the number of Bureau staff dispatched to Tattnall continued to grow. Sanford in particular lobbied for the project. "These people are helpless," he wrote, "we are all working [night] and day on it. I don't know what for, but it seems to be the thing to do."[85] Bennett, too, conceded the importance of the task. But the terms on which he and Sanford justified the Bureau's role show few hints of a desire to bring Georgia's prison system in line with standards developed at the national level and across much of the industrial north. Georgia's officials were "helpless," the prisoners "pathetic" in their willingness to work with anyone who showed a modicum of interest in their care.[86] These were terms of charity, not leadership. The Bureau stepped in because it was the only organization that could. It was leadership by default, and at each turn, the impetus for expanding still further the Bureau's involvement at Tattnall came from the governor and from state officials who depended on federal support.

Ultimately, sixteen federal prison officials worked either full or part time on the project, some for a matter of days, others for several months. They hired staff, requisitioned supplies, and oversaw the enormous task of restoring the physical plant. Bureau officials set new rules for the facility, planned menus, and established the beginnings of a viable prison workshop. They introduced a new filing system and began the painstaking task of classifying each of the prisoners based on his prior record and prospects for reform. Given the paucity of resources at both the state and national level, they improvised at every turn. Neither guards nor inmates had adequate uniforms, making

[85] Telegram, Sanford to Bennett, December 23, 1943, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey." Punctuation added for clarity.
[86] Bennett to Francis Biddle, January 4, 1944, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey"

it nearly impossible to distinguish between the two. As a temporary solution, the Bureau secured "a limited supply of uniforms being discarded by the Plant Protection Units" of a nearby mill.[87] Atlanta's League of Women Voters donated reading materials and recreational equipment to the women's wing, which had likewise fallen into disrepair. Whenever possible, the inmates themselves pitched in, particularly when it came to hauling away the heaps of refuse that had spread across the facility. Though Bennett was already anxious to recall his staff in January of 1944, the reconstruction effort took another three months. When the Bureau withdrew in April, it left Georgia's correctional system in the hands of two former Justice Department officials – A.C. Aderhold of the Bureau of Prisons and Francis Hammack of the FBI.[88]

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In some respects, the Georgia project was a moment of transition for the Prison Bureau, which gradually came to appreciate the "good will" and "prestige" that the agency had accrued through its efforts.[89] In subsequent years, the Bureau of Prisons devoted far more resources to cooperative programs than it had prior to the war. In 1945, the governors of Maryland, Washington, New Hampshire, North Carolina, Florida, and Oregon invited the BOP to conduct extensive surveys of prison conditions in their respective states. The following year, Arizona, West Virginia, and Missouri likewise appealed for federal aid. The Prison Bureau also advised on specific projects in Ohio, Louisiana, Puerto Rico, California, and Texas. In May of 1948, the BOP conducted a

[87] Sanford to Bennett, January 28, 1944, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey"
[88] Aderhold came out of retirement to take the job. He had previously served as warden of the Atlanta Federal Penitentiary. Hammack had, until January of 1944, served as the Special Agent in Charge of the Atlanta regional office of the FBI. He left his post shortly before he was to be transferred to head up the Mississippi office, and accepted the offer from Governor Arnall a month later.
[89] Bennett to Sanford, April 26, 1944, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey"

five-day Institute for Jailers in Texas, extending formal training to more than fifty jailers from across the state. Publicly, the Bureau likewise advocated a more extensive federal presence, arguing that federal involvement in prison administration should mirror national assistance programs "to the blind, to the aged, and to dependent children." Specifically, Bennett proposed a "stand-by" fee to state and local institutions that reserved space for federal prisoners and lived up to Bureau standards. Without such funds, local communities lacked both the resources and incentives to improve conditions in their jails. An annual appropriation of "perhaps ten million dollars," he argued, would serve as a "constructive stimulus to every agency engaged in the field of preventing and curbing crime."[90]

Yet Bennett continued to insist that "the Federal Government cannot, even if it were constitutional, provide a system of law enforcement and correctional institutions completely paralleling State and local agencies. Nor can it impose its own methods and standards upon the sovereign States."[91] This notion that the federal government could only assist, not compel, continued to inform federal policy toward state and local jails well into the 1960s. This constraint – of ideology, primarily, but also of institutional mechanisms through which to act – placed substantial limits on federal leadership in the postwar decades. Without enforced mandates and direct federal intervention in state correctional practices, the priorities and prejudices of state officials, as well as the relative strength of local interest groups, determined the pace and direction of prison reform.

[90] United States Department of Justice, Bureau of Prisons, *Federal Prisons* (Leavenworth, Kansas: United States Penitentiary, 1947), 32.
[91] Ibid.

The fate of Georgia's prisons in the years after the Prison Bureau's intensive overhaul at Tattnall is case in point. Without a doubt, the nearly five months of federal guidance and control transformed the day to day experience of prison life. There were marked improvements in sanitation, in the quality of hospitalization facilities, and in the proper segregation of inmates with communicable diseases. Officials installed superior fencing around the facility, and replaced all of the locks that had been left in disrepair. The total number of staff members increased from 75 to 120, though this still fell far short of the 174 recommended by the BOP. Farming and dairying operations had likewise improved, as had safety provisions at the prison's industrial workshops. But as of 1947 when the Bureau conducted a follow-up study, the "prisoners' count, transfer and location record system," established by the BOP in 1944, was "not functioning properly, due largely to lack of adequate personnel."[92] Perhaps of greatest concern, "the practice of self-mutilation," which had long been a problem in the state's work-intensive camps, was "more prevalent [in 1947] than it [had been] in 1944."[93] To avoid the brutal pace of road camp work, prisoners severed their Achilles tendons, rendering themselves unable to work. More recently, juveniles had taken to injecting gasoline into their insteps – a practice that resulted in festering sores and prolonged hospitalizations. Thirty inmates were undergoing treatment for self-inflicted injuries when Bureau inspectors toured the state's prison hospital in 1947. By extending its manpower rather than simply its knowledge and expertise, the Federal Prison Bureau had enjoyed more success than had the PIRA. But without federal mandates and continued oversight, conditions in Georgia's

[92] "Inspection – Georgia State Prison," August 26, 1947, in RG 129, A1, Entry 15, Box 2, Folder: "Georgia Survey"
[93] Ibid.

prisons and work camps remained subject to the willpower, resources, and governing philosophy of officials in the state.

Ultimately, it would take federal pressure to transform Georgia's prisons. It would take another twenty-five years, and in the end, the initiative would come not from bureaucratic agencies but from the federal courts, in response to cases launched by civil rights litigators across the South. Beginning in 1970, District Courts in more than a dozen states issued injunctions requiring wholesale reform and reorganization of correctional practices. In an Arkansas class-action suit filed on behalf of inmates at the state's prison farms, the District Court ruled that prevailing labor and disciplinary practices discriminated on the basis of race and constituted cruel and unusual punishment.[94] In 1972, the Southern District Court of Georgia handed down a similar ruling with respect to conditions at Tattnall. For the next thirteen years, Tattnall operated under the supervision of a federal district court, which oversaw the long and often trying process of reform.[95] In a 1991 study of the case, Bradley Stewart Chilton found that "the inhuman practices and conditions" at Tattnall "no longer exist. The reign of terror against inmates has ended. Today, guards do not routinely beat, mace, and shoot inmates. Inmates and guards no longer die from a lack of safety and protection."[96]

Throughout the 1970s and 1980s, inmates' lawyers brought similar cases across the United States, ultimately bringing the vast majority of American prisons in line with standards established at the national level several decades prior. But by this point, the entire balance of power between federal and local law enforcement had been transformed

[94] Holt v. Sarver, 309 F. Supp., 362, 365-366 (E.D. Ark. 1970), affirmed in 442 F.2d 304 (8th Cir. 1971)
[95] Guthrie v. Evans, No. 3068 (S.D.Ga.1972), see also Guthrie v. Evans, 93 F.D.R. 390 (S.D. Ga. 1981)
[96] Chilton, quoted in Margo Schlanger, "Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders," 81 N.Y.U.L. Rev. 550 (2006), 561.

by the civil rights movement and the federal government's eventual commitment to protecting the rights of southern blacks. It was a process that began in the 1930s with a series of landmark due process cases and continued in the 1940s with the first Justice Department investigations of police brutality. But as the following chapter suggests, it was a process hamstrung by a deep-seated commitment to the prevailing federalist order and the practical reality of federal law enforcement and correctional policy established by the Bureau of Prisons and the Federal Bureau of Investigation in the Roosevelt years.

Chapter 5: "Lawlessness in Law Enforcement": Federal Investigations of Police Brutality

As Sheriff Evan's car slowed at a clearing in the woods, Lillie May Hendon began to holler loudly for help. It was August 9, 1942. For three days, the thirty-eight-year-old black cook had been confined in the sweltering heat of Alabama's Macon County jail, accused of stealing $154 from her deadbeat cousin. That morning, Sheriff Edwin Evans and Deputy Henry Faucett had slapped Hendon around so as to get her to confess. Though she had not taken the money, she led them back to her house, praying that someone would notice the dark swelling around her eyes and intervene. But now she was alone with the two officers, several miles south of Tuskegee along a deserted country road. "It won't do you any damn good to holler," Evans warned. While Faucett gripped her firmly by the neck, the sheriff struck Lillie May repeatedly across the back and hips with a study cane. Blow followed heavy blow until the entire length of her back was "blistered and bloody" and her hips "looked like battered liver." "I was beaten until I knew nothing," she recalled. Hendon came to, back in the county jail, barely able to move.[1]

Just five months prior, Evans and Faucett had strung forty-one-year-old Eugene Brown up to a tree until his feet barely touched the ground, and beat him mercilessly with tree limbs and blackjacks before carrying him, barely conscious, back to the jail. Like Hendon, Brown had been accused of minor theft – stealing a couple of tires from the filling station where he worked. That June, the two officers shot and later bludgeoned to death another black suspect who fled from them in the course of an arrest. Throughout 1942, dozens of black Tuskegee residents reported similar abuses at the hands of the

[1] FBI Report, December 23, 1942, in RG 60, 144-2-3: Section 1.

Macon County sheriff. Their cases echoed the ordeals of thousands of African Americans across the South who had similarly been terrorized by police officers charged with upholding Jim Crow.

Born of nighttime floggings and ritualized lynchings, of marauding mobs and urban riots, Jim Crow persisted across the South on the memory of post-Reconstruction vigilantism and the ever-present threat of its resurgence.[2] While popular violence against African Americans was not uncommon in the interwar decades, it was most prevalent at the hands of Southern lawmen, who "felt more privileged than most whites" in resorting to force.[3] Evans' so-called "interrogations" – the victims dragged into the woods, tied up, and beaten with branches and whips – echoed the methods of Klansmen both in their tactics and in their intent to reinforce the prevailing racial hierarchy. Throughout the 1940s and in the postwar decades, this institutionalization of violence in the office of the county sheriff proved an intractable roadblock to federal efforts to protect the civil rights of Southern blacks.

Since 1939, a fledgling Civil Rights Section in the Department of Justice had been investigating reports of police brutality and related outrages across the Jim Crow South. In 1943, a federal grand jury in the Middle District of Alabama returned criminal indictments alleging that Evans and Faucett, under the color of law, had willfully deprived Hendon and twelve other Tuskegee blacks of their due process rights. Federal jurisdiction in the case rested on one of the two sections of the Enforcement Act of 1870

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[2] See in particular, Edward Ayers, *Vengeance and Justice: Crime and Punishment in the 19th Century American South* (New York: Oxford University Press, 1984), Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), Steven Hahn, *A Nation under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (Cambridge: Harvard University Press, 2005).

[3] Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 269.

to survive at least in part the post-Reconstruction assault on the federal protection of civil rights. In 1870 as in 1943, the federal government had taken steps to intervene in a Southern legal system that "appeared more interested in disciplining the black population and forcing it in to labor than in dispensing justice."[4] In 1870 as in 1943, a small corps of Justice Department attorneys had made the case to Southern juries that public and private acts of violence and intimidation constituted violations of federal law. In both periods, these cases tested the limits of federal power and the willingness of the national state to protect the security and liberty of Southern blacks.

Congress enacted the first federal civil rights statutes during the tumultuous years of Reconstruction in response to attempts by the Southern states to restore through law and popular violence what they had lost through defeat in the Civil War. Between 1865 and 1866, the former Confederate states had instituted the so-called "Black Codes" whose sweeping vagrancy and labor provisions forced freedmen once more into exploitative employment arrangements. Southern planters, long accustomed to extracting labor through physical force, continued liberally to apply the lash when freedmen challenged their authority. To observers in the North, these attempts by a defeated South to reinstate slavery in all but name made mockery of emancipation and the protracted battles of the Civil War. While Republicans were deeply divided on the political rights owed to Southern blacks, most judged "equality in civil rights—equal treatment by the courts and civil and criminal laws" essential to preserving freedmen's gains.[5] With the Civil Rights Act of 1866, passed over Andrew Johnson's ill-considered veto, Congress

[4] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper Collins, 1988), 205.
[5] Ibid., 231.

took its first steps toward direct federal intervention into the administration of state and local law.[6] The Act extended full citizenship to all persons born in the United States and declared it a misdemeanor to deprive an individual "under color of any law, statute…or custom… of any right secured or protected by this act."[7] The Act omitted the more contentious rights to vote or to hold office, but extended to all inhabitants the rights to make and enforce contracts, own and dispose of property, and enjoy equal protection under the law.[8] As Eric Foner observes, the 1866 Act "honored the traditional presumption that the primary responsibility for law enforcement lay with the states, while creating a latent federal presence, to be triggered by discriminatory state laws."[9] This latent federal presence in the administration of justice and the protection of individual rights was given constitutional backing with the Fourteenth Amendment, drafted that same year and ratified in 1868.

Ultimately, the more pernicious threat to the viability of Reconstruction emerged not from state action but rather from state inaction, particularly the inability or unwillingness of state governments to curb the private vigilantism that lay beyond the reach of federal law. The 1870 Civil Rights Act, or Enforcement Act, established for the first time national penalties against private conspiracies to deprive individuals of their constitutional and statutory rights. It also reaffirmed and strengthened the 1866 Act's ban on discrimination "under color of law."[10] In defending the 1870 Act and the even more forceful Ku Klux Klan Act of 1871, Benjamin Butler posed a rhetorical question that

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[6] 14 Stat. 27 (1866)
[7] 14 Stat. 27, §§ 1, 2 (1866). "Indians not taxed" were excluded from the provisions of the Act.
[8] Ibid., §1
[9] Foner, *Reconstruction*, 245.
[10] 16 Stat. 140, §§ 6, 17 (1870). The Act also extended protection to voting rights by establishing penalties for discrimination on account of race in the administration of elections, as well as penalties for voter intimidation, bribery and fraud. These sections did not survive into the twentieth century.

would echo through the debates over federalism and civil rights well into the twentieth century: "If the Federal government cannot pass laws to protect the rights, liberty, and lives of citizens of the United States in the States, why were guarantees of those fundamental rights put in the Constitution at all?"[11] In 1871 United States Attorneys, backed by a fledgling Department of Justice, a modest force of U.S. Marshalls, and the remaining 6,000 troops still stationed in the South, instituted some 1,173 criminal cases against members of the Klan. While most received suspended sentences, the worst of the offenders were sent to serve out lengthy prison terms in the North. By 1872, federal power had succeeded in breaking the back of the Ku Klux Klan and in reestablishing a modicum of order across South.[12]

Yet the apparent lessons of this national assault on state-sanctioned lawlessness evaded politicians in the North who, along with the Northern public, soon tired of the entire federal project to protect emancipated slaves. When Southern whites doubled down on vigilante violence in the years that followed, the North did little to respond. Beginning in 1873, the Supreme Court cast doubt on federal civil rights enforcement when it narrowed dramatically the provisions of the Fourteenth Amendment. First in the *Slaughterhouse Cases* (1873) and then in *Cruikshank* (1875), the Court declared that the amendment pertained only to the handful of rights "which owe their existence to the Federal government."[13] The rights to speech and peaceable assembly, the judges declared, are fundamental rights that "existed long before the adoption of the

[11] Benjamin F. Butler, quoted in Foner, 455.
[12] On the success of the Department of Justice in curbing Klan activity, see: Foner, 457-459; Stephen Cresswell, *Mormons & Cowboys, Moonshiners & Klansmen: Federal Law Enforcement in the South & West, 1870-1893* (Tuscaloosa: University of Alabama Press, 1991), 28-29; Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (New York: Fordham University Press, 2005), 107.
[13] 83 U.S. 36, 79 (1873)

Constitution" and thus could not be secured through federal law.[14] By 1877, the last of the federal troops withdrew from the South, leaving blacks to navigate as best they could the emerging legal and political order built on white supremacy. That year, writes Foner, "marked a decisive retreat from the idea…of a powerful national state protecting the fundamental rights of American citizens."[15]

Three quarters of a century later, this same idea of national citizenship and nationally protected rights animated a cautious yet determined assault on the largely unchecked power of the county sheriff over the security and property of African Americans in the South. It drew on the same legal foundation as the cases of the 1870s, and followed a similar logic in challenging the primacy of violence in upholding the region's racial order. Once again, Justice Department attorneys encountered many of the same political and institutional limits on federal action that had constrained prosecutors in the previous century. Congressional oversight of the budgetary process put severe limits on the resources available to investigate and try cases of police misconduct. Victims were reluctant to come forward for fear of retribution. Witnesses at times agreed to speak to federal authorities only on the condition of anonymity. Defendants in these cases were leading members of their community. At best, their accusers were simply black and poor. Often, they had committed illegal acts themselves. Juries were loath to convict white law enforcement officers for mistreating black suspects and prisoners. To chastise a sheriff who abused the lash, some argued, would make impossible the task of keeping black Southerners "in their place."[16]

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[14] 92 U.S. 542 (1875)
[15] Foner, 582.
[16] This is an argument that appeared time and again in FBI interviews conducted in the course of police brutality investigations in the 1940s.

Yet for all it borrowed from its Reconstruction Era antecedent Justice Department action on police brutality was novel both in its approach and in the context within which it took place. While Title 18, Section 52 of the U.S. Code, which made possible the prosecution of law enforcement officers, owed its existence to the 1866 and 1870 Civil Rights Acts, the statute had not been put to use in any systematic way during Reconstruction. Private, unofficial violence – particularly the vigilantism of the Ku Klux Klan – preoccupied federal prosecutors in those years. Section 52 remained on the books as an enforcement mechanism for the Fourteenth Amendment, but with both the legal and political retreat from the principles of national citizenship and national rights, it had essentially remained dead letter. The problems its use might pose to the balance of power between national and local law enforcement had thus gone unexamined until the Justice Department breathed new life into the statute with its first indictments in the early 1940s.

By this point the political context had shifted as well. The South of 1940 was no longer the defeated South of Reconstruction – a South characterized by ravaged cities and barren fields; a South in which three out of every five white men of military age had gone off to battle, and one out of four had not returned; a South in which planters now faced as political equals the men and women they had previously held as slaves. By 1940, those who experienced slavery first hand – as masters or as slaves – had largely passed from the political scene. Southerners now in their thirties and forties had come of age after upheavals of Reconstruction and Redemption. For many in this generation, the primacy of violence, both real and implied, served as a source of profound unease. It stood in stark contrast to the paternalistic myth of racial harmony, the notion, however misguided, that Jim Crow patterns of segregation endured for the benefit of blacks as well as whites. It

made visible what Swedish economist Gunnar Myrdal described as the "American Dilemma" – the "ever-raging conflict" between American ideals of justice and equality and the brutal reality of institutional racism.[17] In his penetrating 1944 study of race relations in the United States, Myrdal stressed the extent to which white Southerners in particular strove to cover as much as possible the "volcanic ground of doubt, disagreement, concern, and even anxiety" over the status and treatment of their black neighbors.[18] Lynchings, floggings, and instances of police misconduct forced Southerners to confront the persistence of racial antagonism and threatened to unravel the region's fragile social order.

These anxieties were only amplified by the onset of World War II. Far more than the previous campaign to "make the world safe for democracy," the nation's war against the Third Reich forced whites to reexamine their own attitude toward racial and religious minorities. Acts of brutality perpetrated by Southern lawmen made more difficult attempts to draw distinction between racism abroad and racism at home. Blacks, too, refused to leave unstated the contradictions between American ideals and practice. In speeches and editorials, in national campaigns and subtle acts of defiance, African Americans insisted that local and national leaders live up to the promise of the Allied cause. Their outspokenness was made possible both by the deeply moral dimension of the nation's war effort, and by the economic and social upheaval unleashed by mobilization. Nearly one million African Americans enlisted in the army, navy, air corps and marines. Two million more took jobs in defense plants, and another two million in the civil service. The prospect of better paid and more appealing work drew rural blacks into the

[17] Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Row, 20th anniversary edition, 1962), lxxi.
[18] Ibid., 31.

cities or out of the South entirely, slackening the economic hold of white landowners and employers. No longer able to rely on a desperate and captive labor force, no longer quite so certain of perpetual black subservience, whites across the South became increasingly alert to potential threats to racial stability. Many recognized the dangers of unchecked institutional violence, creating an opening for the Justice Department to press its case.

In other ways, too, the political climate of the 1930s and 1940s encouraged attorneys to experiment with novel interpretations of existing law. The expansion of federal power in the New Deal years had upended existing assumptions about the proper scope of national authority. For the first time, Americans looked to the central state to ensure the security and welfare of the poor and the unemployed, of the aged and the infirm. Federal legislation had upheld workers' rights to organize and challenged the unregulated power of corporate and financial monopolies. Moreover, shifts in the Democratic coalition made possible for the first time in decades a change in national policy on civil rights. "The votes of the South in the electoral college," notes Harvard Sitkoff, "dropped from 90 percent of the [Democratic] party total in 1920 and 1924 to 74 percent in 1928; to 26 percent in 1932; and finally to 23 percent in 1936. They were dispensable."[19] Meanwhile, black voters in the North had signaled their willingness to break with the Party of Lincoln and join Democratic ranks. Prompted by growing assertiveness on the part of black leaders, the increasing importance of black voters, and the international ramifications of domestic inequality, Roosevelt grew more assertive in the latter part of his presidency in challenging the Southern wing of his party on questions of race. In 1938 Roosevelt came out publicly in favor of abolishing the poll tax,

[19] Howard Sitkoff, *A New Deal for Blacks* (New York: Oxford University Press, 30th anniversary ed., 2004), 83.

though admittedly, remained on the sidelines as the legislation stalled first in the House, then in the Senate.[20] In 1942, faced with A. Phillip Randolph's impending March on Washington, Roosevelt issued Executive Order 8802 prohibiting discrimination in defense industries and establishing a Committee on Fair Employment Practices (FEPC) to "receive and investigate complains" of violations.[21] Preferring whenever possible to circumvent the Southern interests in the House and Senate, the President likewise supported Justice Department efforts in the late 1930s and 1940s to chip away at racial inequality through the federal courts.

Yet in many respects, the 1940s proved far less hospitable to a reformulation of American federalism than had the tumultuous years of what historians have described as the Second American Revolution. In the early years of Reconstruction, Republicans in the triumphant North had moved assertively to uphold the principle of national supremacy in the Thirteenth, Fourteenth, and Fifteenth Amendments, and in the Civil Rights Acts. When Klan violence threatened in 1870 to unravel the Union's gains, the Justice Department responded with an unparalleled resolve. Attorney General Amos T. Ackerman insisted that "nothing is more idle than to attempt to conciliate by kindness that portion of the southern people who are still malcontent…It appears impossible for the Government to win their affection. But it can command their respect by the exercise of its powers. It is the business of a judge to terrify evil doers, not to coax them." He instructed U.S. Attorneys to specifically target Klansmen of high standing and "make special efforts to subject them to the vengeance of the law."[22] Such sentiments were in

[20] Sitkoff, 103.
[21] Executive Order 8802, June 25, 1941, in Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt*, 1941 vol. (New York: Harper & Brothers, 1950), 234.
[22] Amos Ackerman, quoted in Robert J. Kaczorowski, *The Politics of Judicial Interpretation*, 66.

keeping with the times, and in proportion to the brutality of the Klansmen's campaign. But they held little sway in the Depression Era United States. National retreat from Reconstruction had reaffirmed the principle of federalism to the point that it became a sort of dogma for Democrats and Republicans alike, particularly in the context of law enforcement and civil rights. Violence against blacks – now largely the province of Southern lawmen – was no longer widely perceived as a flagrant challenge to national authority.

This commitment to preserving the local character of American law enforcement had shaped, and was in turn reinforced by, the rhetoric and policies of the Justice Department toward local police in the Roosevelt years. Throughout the 1930s, J. Edgar Hoover's ability to assert federal leadership without alienating local law enforcement had depended on a carefully choreographed performance that placed emphasis local policing, voluntarism, and mutual exchange. Both he and Attorney General Homer Cummings framed federal policing in narrow terms and disavowed any desire to infringe on the autonomy or jurisdiction of local police. For more than a decade, the FBI director had cultivated strong ties with local officers, a process that accelerated dramatically with the "war on crime." As he extended his Bureau's reach, he did so in a way that drew extensively on the resources of local law enforcement. Field agents paid regular visits to the principal departments in their respective districts, and maintained telephone contact on a weekly, sometimes daily basis. Police officers provided tips, local knowledge, and manpower in countless federal investigations, including some of the Bureau's most celebrated cases. The Bureau's effective capacity to enforce federal law depended in large part on these ties to local agencies, an arrangement that tempered the Justice

Department's willingness to challenge the authority and jurisdiction of law enforcement officers in the Jim Crow South. When Justice Department attorneys asserted national authority to check local abuses, they were thus cognizant of the extraordinary limitations – both practical and ideological – on federal policing.

This chapter traces the origins and development of Justice Department efforts to curb police brutality and related offenses in the Jim Crow South. It opens with Homer Cummings, whose focus on the national crime war and on law enforcement cooperation forestalled both substantive and symbolic action on behalf of Southern blacks. It explores how early civil rights policies and objectives were defined under Frank Murphy and the newly formed Civil Rights Section of the Criminal Division. And finally, it traces four police brutality cases in Mississippi, Alabama, South Carolina, and Georgia, from the initial investigations through their ultimate resolutions in federal court. It argues that two parallel conceptions of federalism shaped the course and effectiveness of federal civil rights enforcement. In the local context where the cases played out, appeals to federalism and "states' rights" served primarily as proxies for a defense of white privilege. In one case after another, prosecutors were forced to contend with claims that federal action on behalf of the accused would undermine the foundations of Jim Crow. At the national level – within the Justice Department and in the courts – a similar language of federalism and local control reflected a more nuanced set of ideological and practical commitments to preserving the local character of American law enforcement and the integrity of the prevailing federalist order. Throughout the 1940s, Department attorneys saw their challenge as one of asserting federal jurisdiction over civil liberties without relieving

state and local governments of their primary responsibility to protect individual rights. This unwillingness to nationalize civil rights enforcement constrained the reach of Justice Department policy in the Roosevelt years.[23]

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The very idea of federal intervention to protect the rights of black suspects appeared highly improbable from the vantage point of 1933, when Franklin D. Roosevelt assumed the presidency. Despite his northern, progressive credentials, Roosevelt had shown little inclination to deviate from his party's traditional stance on matters of race. A self-proclaimed "adopted son of Georgia," Roosevelt seemed genuinely unperturbed by the regions "segregated folkways."[24] In 1929, he had objected vehemently to rumors "that he had entertained a large number of Negroes at a public luncheon."[25] His views were, in short, entirely conventional for his time – born of privilege and of unfamiliarity with the problems of American blacks. Practical considerations only reinforced the new president's inclination to avoid broaching the issues of social and racial equality. Rising to prominence in a Democratic Party dominated by the "Solid South," Roosevelt, much

[23] Legal historians writing on the early years of the Civil Rights Section have focused on early litigation primarily as a forerunner to more extensive intervention in the 1950s and 1960s. While most have considered briefly the investigations of police brutality discussed here, none have emphasized the limits that existing conceptions of federalism posed to these prosecutions. Indeed, as Michal Belknap notes in his compelling *Federal Law and Southern Order*, few scholars have dealt with "the crisis in federalism" posed by the civil rights movement and "the judicial proceedings to which that crisis gave rise." On the general history of the Civil Rights Section in its early years, see in particular: Robert Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca: Cornell University Press, 1947); John T. Elliff, *The United States Department of Justice and Individual Rights, 1937-1962* (New York: Garland Publishing, 1987); Glenn Feldman, ed., *Before Brown: Civil Rights and White Backlash in the Modern South* (Tuscaloosa: University of Alabama Press, 2004), Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2007), Brian K. Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (Lawrence: University Press of Kansas, 1997).

[24] Sitkoff, 31.

[25] Arthur M. Schlessinger, *The Age of Roosevelt: The Politics of Upheaval, 1935-1936* (Boston: Houghton Mifflin Company, 1960), 430.

like his Texan running mate John Nance Garner, "believed that party unity necessitated placating…Dixie on all issues of race."[26]

Nor could African Americans hold out much hope that the Republican Party would stand up in any appreciable way for black rights. Since the late 1920s, Republicans had systematically retreated from their support for even modest racial reforms in the hopes of finally making inroads into South. In 1928, a number of prominent black leaders, including Walter White of the NAACP, campaigned actively for Democrat Al Smith, arguing that African American's stalwart allegiance to the Party of Lincoln undermined efforts to put pressure on national politicians. White made the same argument in 1932, but in the end, few blacks were willing to take a chance on the Democratic candidate. In 1932, African Americans voted for Hoover by a two-to-one margin. Theirs was the view voiced by the *Chicago Defender*. "The future of the black man," the paper argued, "so far as his civil rights are concerned, is at least safe in the hands of the Republican Party."[27]

The first recovery initiatives of the Roosevelt administration proved disappointing to African Americans, particularly in the South. Officially, New Deal programs prohibited discrimination in the distribution of relief. Practically, the administration made little effort in its first years to bridge ideals and reality. The National Recovery Administration, dubbed by some black leaders as the "Negro Removal Act" or "Negro Robbed Again" perpetuated Southern wage differentials and reinforced the lower status

[26] Sitkoff, 32
[27] *The Crisis*, October 22, 1932; and "Hoover or Roosevelt – Which?" *The Chicago Defender*, October 22, 1932, p. 14, both cited in Sitkoff, *A New Deal for Blacks*, 30.

of black workers.[28] In some industries, occupational classifications made possible the exclusion of blacks from its benefits entirely. On paper, the Agricultural Adjustment Administration provided that crop reduction payments be equitably distributed to tenant farmers. In practice, white land owners pocketed the cash while evicting thousands of already destitute black tenants – a process one historian describes as "a kind of American enclosure movement."[29] Federal Emergency Relief Administration benefits, overseen by local boards, likewise discriminated against poor blacks both in the availability and generosity of payments. In its first months of operation, the Civilian Conservation Corps in Mississippi enrolled just forty-six black youths by June of 1933, less than two percent of the state's allotment. The Federal Housing Authority accelerated the pace of residential segregation by redlining black or racially mixed communities, and by refusing to underwrite loans on home purchases that augmented existing racial patterns.[30]

Yet significantly, even these inequitable benefits signaled a notable departure from the status quo. While blacks received lower benefits, they were nevertheless included. And while some cabinet members – most notably Agriculture Secretary Henry Wallace – were steadfastly indifferent to black concerns, others were genuinely committed to alleviating the inequalities that plagued the early New Deal. Most notable among the latter group was Harold Ickes, Secretary of the Interior and director of the Project Works Administration. A former president of the Chicago NAACP, Ickes

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[28] Quoted in Nancy J. Weiss, *Farewell to the Party of Lincoln: Black Politics in the Age of F.D.R.* (Princeton: Princeton University Press, 1983), 56.
[29] David M. Kennedy, *Freedom From Fear*, 209
[30] On the limits of early New Deal programs, see in particular: Weiss, *Farewell to the Party of Lincoln*, 34-61; Sitkoff, *A New Deal for Blacks*, 34-57; Adam Gordon, "The Creation of Home Ownership: How New Deal Changes in Banking Regulation Simultaneously Made Home Ownership Accessible to Whites and Out of Reach for Blacks," *Yale Law Journal*, Vol. 115, No. 1 (Oct., 2005), 186-226; Kenneth T. Jackson, *The Crabgrass Frontier: The Suburbanization of the United States* (New York: Oxford University Press, 1985), 190-218; Mary Poole, *The Segregated Origins of Social Security: African Americans and the Welfare State* (Chapel Hill: University of North Carolina Press, 2006).

incorporated a strict nondiscrimination clause into all PWA contracts and was generally successful in ensuring its enforcement.

The Roosevelt administration also deviated from past administrations in its more symbolic gestures toward the black community. Roosevelt's inaugural ceremony featured a black Boy Scout in the honor guard; black musicians, most notably the Tuskegee Choir, performed for the President and the First Lady; and for the first time, the President of Haiti visited the White House and, notes Weiss, "was treated like any other chief of state."[31] Black policy makers began to appear in more prominent posts within the administration, and in 1936, the roughly forty-five African Americans across the various cabinet departments formed the Federal Council on Negro Affairs, known colloquially as the Black Cabinet.[32] At Interior, Ickes "let it be known officially that segregation…was a thing of the past," integrating the department's facilities and insisting that his subordinates work collegially with blacks.[33] Of course the President's greatest asset in this regard was first lady Eleanor Roosevelt. Outspoken, exceedingly comfortable around blacks and whites alike, the first lady lent both financial support and the power of her office to a range of initiatives toward the advancement of black rights. Weiss notes that "whether or not Eleanor Roosevelt was able to affect policy, she projected a sense of genuine concern that had a real impact on the way black Americans perceived the New Deal."[34]

By contrast, Roosevelt's first and longest-serving attorney general, Connecticut lawyer and politician Homer Cummings, proved a far more consistent disappointment in

[31] Weiss, 40-41.
[32] See especially, Sitkoff, 58-60.
[33] Sitkoff, 50
[34]Weiss, 135

terms of both actual and symbolic support for black rights. A former chairman of the Democratic National Commission, Cummings struck African American leaders "as a poor choice for the top post in the Justice Department because of his excessive partisanship."[35] The issues that would cross the Attorney General's desk were far more politically loaded than questions of economic equity and relief appropriations. Black leaders, writes Sitkoff, "did not want the department to calculate its position on lynching and disfranchisement solely on the basis of whether the Democrats stood to gain or lose political advantages."[36]

Cummings' partisanship, in the end, proved less of a concern than his own departmental agenda – the national "war on crime" – launched just months after Roosevelt took office. Prompted by a spate of sensational bank robberies and jail breaks, and at least in part by his desire to join in the exuberant activism of the early New Deal, Cummings declared in June of 1933 that the federal government would confront directly the interstate bandits and racketeers who had thus far evaded state and local police. One year later, Congress enacted the Attorney General's "Twelve Point Program" to extend federal jurisdiction over racketeering, bank robbery, extortion and major theft, and to streamline the administration of federal justice. Cummings' ability to get Dixie senators on board with his plan to expand federal policing responsibilities depended in large part on his keeping the Justice Department out of the peculiar law enforcement problems of the Jim Crow South.

Noticeably absent from the final crime package was the Costigan-Wagner Bill to establish federal jurisdiction over lynching in instances where state and local officials

[35] Sitkoff, 33.
[36] Sitkoff, 33.

refused to act. Senate bill 1798 would have allowed the federal government to prosecute lynchers after thirty days of state inaction; to press charges against law enforcement officers who failed to stop mob action or protect prisoners in their care; and to levy a fine of $10,000 on the county in which the crime took place as restitution to the victim's family. In its formulation, the bill was based on the same principles that would later inform Justice Department action against local police – that federal law could be used to punish officials for shirking their responsibility to preserve individual rights. Reported favorably out of the Judiciary Committee, the bill languished before the full Senate, its supporters unable to bring the measure up for a vote. Cummings objected to the bill on both political and constitutional grounds. Roosevelt gave the measure only tepid support, publicly urging sponsors "to go ahead and try to get a vote on it in the Senate" but refraining from providing presidential backing in negotiations.[37] As he explained to Walter White, "I did not choose the tools with which I must work. Had I been permitted to choose them I would have selected quite different ones. But I've got to get legislation passed by Congress to save America…If I come out for the anti-lynching bill now," powerful Southerners in the House and Senate "will block every bill I ask Congress to pass to keep America from collapsing."[38] While of little solace to proponents of the bill, it was a realistic estimation of the limits under which he labored, particularly in his early years.

But whereas Roosevelt and other members of the administration made subtle overtures in areas that did not require Congressional approval, Cummings was unwilling to take executive action, even on a purely symbolic level, to address the resurgence of

[37] Roosevelt, quoted in Sitkoff, 213.
[38] Roosevelt to Walter White, quoted in Phillip Dray, *At The Hands of Persons Unknown: The Lynching of Black America* (New York: Random House, 2003), 357.

lynching in the Depression-stricken South. In December 1934, Cummings convened a national conference of judges, criminologists, politicians, and law enforcement professionals to establish the contours of the national crime program and to develop strategies for enforcement and cooperation. Pressed to include lynching among the topics of discussion, Cummings demurred. The Attorney General later argued that the conference "dealt with crime and not with crimes," and that kidnapping and racketeering were also not explicitly addressed.[39] Yet on a program with panels on commercial racketeering, firearms, narcotics, vagrancy, and gangland warfare, lynching would hardly have stood out as unduly specific or overly concrete.[40] Rather, the inclusion of lynching risked injecting a politically-thorny issue into a conference aimed at fostering state and local cooperation with the federal crime program. The subject was thus left off the agenda.

No episode better illustrates Cummings' indifferent approach to civil rights than his Department's response to the lynching of Claude Neal, a farm hand arrested on the Florida panhandle for the brutal rape and murder of nineteen-year-old Lola Cannidy. Around one o'clock in the morning of October 26, 1934, a mob of some one hundred local townsmen whisked Neal away from the jail where he was being held. Alerted to the impending lynching by newspaper and radio reports throughout the day, an unruly crowd of several thousand converged on the Cannidy farm to witness the event. Faced with the prospect of popular unrest, leaders of the original "lynching committee" opted instead for a more intimate gathering deep in the woods behind the Cannidy home. Strung up to a

[39] Homer Cummings, "Memorandum for Mr. Stanley," February 15, 1935, Cummings Papers, Box 125, Folder: "Lynching, Anti-Lynching Bills, 1935 Feb. – 1937 Apr."
[40] Program, The Attorney General's Conference on Crime, December 10 to December 13, 1934, in Cummings Papers, Box 182, Folder: "Crime Suppression and the FBI, 1933 Jun. – 1935 Dec."

tree, Neal was first castrated and made to eat his genitals. In the hours that followed, the men prodded Neal's body with red-hot pokers, carved away at his torso, and methodically removed one by one his fingers and toes. Periodically, they tensed up the rope around his neck until Neal passed out, only to revive him and proceed with their sadistic assault. When Neal finally succumbed to his injuries, the mob dragged his corpse past what was left of the assembled crowd. As Neal's lifeless body tumbled down the street, children jabbed at his flesh with sharpened sticks, taking part, at least in some small way, in the spectacle they had hoped to see firsthand.[41]

While the haunting brutality of the affair drew widespread attention, what truly distinguished the lynching of Claude Neal was its interstate character. To retrieve its victim, the lynch mob had crossed into Alabama, where local Sheriffs had deposited him for safekeeping. As the caravan made its way back across state lines, the party violated the national Kidnapping Act, which prohibited the interstate transport of persons kidnapped and held "for ransom or reward or otherwise."[42] The words "or otherwise" had been added to the original 1932 Act several months earlier at the urging of the Attorney General. At the time, Cummings explained that "the object of the addition of the word 'otherwise' is to extend the jurisdiction of this Act to persons who have been kidnapped and held, not only for reward, but for any other reason." Cummings underscored that "this amendment should clear up border line cases, justifying federal investigation in

[41] Phillip Dray, *At The Hands of Persons Unknown: The Lynching of Black America* (New York: Random House, 2003), 344-355; James McGovern, *Anatomy of a Lynching: The Killing of Claude Neal* (Baton Rouge: Louisiana State University Press, 1992), 67-94; Sitkoff, *New Deal for Blacks*, 286-296.
[42] Ch. 301, 48 Stat. 781 (May 18, 1934)

most of such cases and assuring the validity of federal prosecution in numerous instances in which such prosecution would be questionable under the present form of this Act."[43]

When pressed to intervene in the lynching of Claude Neal, Cummings offered a far more conservative reading of the Act. He insisted that the words "or otherwise" were meant not to enlarge markedly the scope of the law but to make possible federal intervention in cases involving kidnapping for other forms of personal gain – to keep, for example, a witness from testifying in court. An internal Department memo stressed that "it is a general rule of statutory construction that where general words follow an enumeration of persons or things by words of…a specific meaning, such general words are not to be construed in their widest extent but are held to apply only to persons or things of the general kind or class as those specifically mentioned."[44] Moreover, the Attorney General found it "difficult… to believe that Congress inadvertently passed an anti-lynching statute where kidnapping and Interstate Commerce were involved."[45] While a plausible reading of federal law, this interpretation was hardly satisfying to African Americans and their liberal supporters eager to see the federal government take a stronger stand on mob violence. As one editorial writer observed, "the mob members could have incurred the wrath of the Federal Government had they held him alive and unharmed, demanding that his family pay $100… But since the mob tortured him, hanged him and

[43] Homer Cummings, "Comments on Various Bills Sponsored by the Attorney General of the United States," April 11, 1934. Original quote has kidnapped spelled "kidnaped" – it has been amended here for the sake of clarity and consistency.
[44] Angus MacLean, Memorandum for the Attorney General, November 14, 1934, in Cummings Papers, Box 169, Folder: "A.B. Young – Slayden, Mississippi"
[45] Homer Cummings, Memorandum for Angus MacClean, November 28, 1934, in Cummings Papers, Box 169, Folder: "A.B. Young – Slayden, Mississippi"

ghoulishly mutilated… his body, they purged themselves of any violation of the Federal law."[46]

There were other reasons to view Cummings' narrow reading of the statute with some suspicion. While the act pertained only to interstate kidnappings and technically required a waiting period of seven days before interstate transport could be assumed, the FBI had made it a policy to intervene immediately in all kidnapping cases to at least investigate the possibility that a victim had been carried across state lines. Hoover even went as far as to install a kidnapping hotline so that victims' families could immediately report cases to the Bureau. Walter White of the NAACP repeatedly hammered the Attorney General on the contradiction between his refusal to investigate the lynching of Claude Neal and his willingness to grant the FBI hospitable scope in cases involving white victims. In December 1936, he wrote Cummings to "commend the Department of Justice for its very prompt action in sending eight agents to take over the Mattson kidnapping case at Tacoma, Washington, as soon as the kidnapping was [reported] to local police." He inquired, however, "as to what authority there is for the prompt action in this type of case where there is no evidence of the crossing of state lines." Tacoma, he stressed, "is geographically a considerable distance from the state border. It appears to be about 130 miles from the northern border, 140 miles from the southern border and almost

[46] "Is This Kidnapping Illegal?" Date and publication unknown, in Cummings Papers, Box 169, Folder: "A.B. Young – Slayden, Mississippi." In 1952, the Department of Justice prosecuted its first case under the Lindbergh Kidnapping Act against Klan activities in the Carolinas. The case involved two victims who were kidnapped from their homes in North Carolina, driven over the border into South Carolina, and flogged. The defendants were all convicted, and on appeal, the Fourth Circuit upheld the conviction, taking the expansive view of the Lindbergh Act urged by Walter White all along. United States v. Brooks, 199 F.2d 336 (4th Cir. 1952), cited and discussed at length in John T. Elliff, *The United States Department of Justice and Individual Rights, 1937-1962* (New York: Garland Publishing, 1987), 302-303.

300 miles from the eastern border of Washington."[47] White followed a week later with a similarly wry assessment of the Department's priorities: "We have read with interest…that you ordered the [FBI]… to find a cloak which Mrs. Campbell Prichett lost at a party given by you and Mrs. Cummings. Has the Bureau found Mrs. Prichett's cloak yet? If so, may we inquire if it would not be possible for you to assign the operatives thus freed by the completion of that job to investigate the interstate kidnapping and subsequent lynching of Claude Neal?"[48]

Cummings' refusal to intervene in the Neal case, and his subsequent refusal to investigate the 1935 kidnapping and lynching of A.B. Young, reflected more than simply his fear of losing Congressional support. Like many of his contemporaries, he viewed Justice Department actions during Reconstruction, however well-intentioned, as an object lesson in government overreach.[49] In his 1937 history of the Department of Justice, Cummings lamented that "balanced sentiments" had been "drowned by clamorous charges of outrage, murder, torture, [and] arson" and that only "one side of the story… was brought to the Attorney General in the flood of complaints." It was "no easy matter," he observed, "to reconcile and harmonize, in *a short time*, the race prejudices of two distinct races." The North had failed to "comprehend that forebearance should be the guiding principle of a reconciliation based on ties of blood and shared political traditions."[50] As Attorney General, Cummings heeded closely his own advice. While he

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[47] Walter White to Homer Cummings, December 29, 1936, reprinted in Christopher Waldrep, ed., *Lynching in America: A History in Documents* (New York: New York University Press, 2006), 232.
[48] Walter White to Homer Cummings, January 5, 1937, reprinted in Ibid., 234.
[49] See in particular the interpretations of Reconstruction put forth by the so-called "Dunning school": Claude G. Bowers, *The Tragic Era* (Cambridge: Houghton Mifflin, 1929); E. Merton Coulter, *The South During Reconstruction, 1865-1877* (Baton Rouge: Louisiana State University Press, 1947); William A. Dunning, *Reconstruction, Political and Economic 1865-1877* (New York: Harper, 1907).
[50] Homer Cummings and Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (New York: MacMillan Company, 1937), 232, 249. Emphasis his.

at times advocated bold executive action – launching the national "war on crime" and spearheading Roosevelt's dubious plan to pack the Supreme Court – Cummings steadfastly refused to take similarly creative measures to signal federal support for black Americans' civil rights.

* * * *

The turning point in Justice Department civil rights policy came in 1939, when Michigan Governor Frank Murphy replaced Homer Cummings as Attorney General. Murphy, writes biographer Sidney Fine, had "established himself in his various public offices as one of the nation's foremost civil libertarians, the darling of the American Civil Liberties Union."[51] As Mayor of Detroit through the depths of the Great Depression, Murphy spearheaded a variety of relief efforts and social justice initiatives, including a Legal Aid Subcommittee to provide counsel to indigent clients. And as Governor of Michigan, Murphy had famously refrained from enforcing a court order against a United Auto Worker sit-down strike at the General Motors plant in Flint. When Murphy was appointed Attorney General, a friend predicted that he would be "a rock…in the maintenance…of Civil Rights."[52] One of his first acts as Attorney General was to request a study "in order to determine whether the Department of Justice ought to have a special division devoted to the preservation of civil liberties."[53] A little more than two weeks

[51] Sidney Fine, *Frank Murphy: The Washington Years* (Ann Arbor: University of Michigan Press, 1984), 76.
[52] Quoted in Fine, 76.
[53] Frank Murphy, quoted in Elliff, 94

after his Senate confirmation, Murphy issued Order No. 3204, formally establishing the Civil Liberties Unit within the Department of Justice.[54]

At the time, neither Murphy nor Henry Schweinhaut, the attorney he selected to oversee the new unit, were entirely certain of either the scope of federal authority or the ultimate direction of federal action. A study of existing federal law pointed to a handful of specific statutes to address cases of race-based juror disqualification, voter intimidation, peonage, unlawful search and seizure, and witness intimidation.[55] Outside these specific violations, the Civil Liberties Unit would have to rely on two general civil rights statutes, Sections 51 and 52 of the criminal code, enacted as part of the Enforcement Act of 1870.[56]

One of the few Reconstruction Era statutes to survive Supreme Court scrutiny, Section 51 had long been thought to be of limited use. The statute prohibited two or more individuals from conspiring to "injure, oppress, threaten, or intimidate any citizen in the free exercise" of his statutory or constitutional rights. Most constitutional rights, however, shielded individuals from official, not private, action. To illustrate, Justice Department officials typically pointed to the difference between the Thirteenth Amendment, which establishes that "neither slavery nor involuntary servitude… shall exist within the United States," and the Fourteenth Amendment, which mandates that "*no state* shall…. deprive any person of life, liberty, or property, without due process."[57]

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[54] Frank Murphy, Order No. 3204, February 3, 1939, in RG 60, Entry 132, Box 22, Folder: "Civil Liberties"

[55] 8 U.S.C. §44 (1940), 18 U.S.C. §61 (1940); 18 U.S.C. §§443, 444 (1940); 18 U.S.C. §§ 53(a), 630, 631 (1940); 18 U.S.C. §§241(a), 242 (1940). Voter and witness intimidation statutes covered only instances of interference in federal elections and suits. For a discussion of the statutes and how the civil liberties section interpreted them at the time, see O. John Rogge, "Circular No. 3356, Supplement No. 1," May 21, 1940, OF 1581, Folder: "Civil Liberties, 1933-1945."

[56] 18 U.S.C. §§51, 52 (1940). 16 Stat. 140, §§ 6, 17 (1870).

[57] U.S. Const., amend. XIII §1; U.S. Const., amend XIV, §1, emphasis mine.

While Section 51 could be used to enforce the antislavery provisions of the Thirteenth Amendment, it could not be used to prosecute a lynch mob that deprived a victim of his right to a fair trial. Due process rights could be protected from state action alone.[58]

Its companion statute, Section 52, established that "whoever, under color of any law, statute…or custom, willfully" deprives an individual of statutory or constitutional rights, would be guilty of a misdemeanor.[59] Since Section 52 expressly targeted state action, it could be used to prosecute a far greater range of offenses. Recent Supreme Court decisions had expanded substantially the scope of the due process and privileges and immunities clauses of the Fourteenth Amendment, establishing protections against "depriving of a fair trial, infringing on the freedom of speech or press, [and] discriminating on grounds of race or religion."[60] The principal objection to Section 52 was that it had been used in just two reported cases prior to 1939, leaving serious doubts as to how it might be construed by the federal courts.[61] The modest penalties provided under the act – a fine of up to $1,000 or imprisonment of up to one year – suggested that the primary effect of Section 52 cases would be symbolic rather than punitive.

While the Civil Liberties Unit worked out a statutory basis for federal action, Murphy and key attorneys within the unit worked to define the direction and scope of the unit's agenda. At the outset, Murphy stressed the need for federal leadership to reawaken public awareness of civil liberties and to help ensure the maintenance of democratic

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[58] Since federal labor legislation established a statutory right to organize, Section 51 could also be used to prosecute two or more individuals engaged in a conspiracy to thwart labor organization.
[59] 18 U.S.C. §52 (1950).
[60] O. John Rogge, "Circular No. 3356, Supplement No. 1," May 21, 1940, OF 1581, Folder: "Civil Liberties, 1933-1945," 17.
[61] Robert Carr, who wrote the first comprehensive history of the Civil Rights Section in 1947, notes just two reported Section 52 prosecutions: United States v. Buntin, 10 Fed. 730 (S.D. Ohio, 1882), and United States v. Stone, 188 Fed. 836 (D. Md. 1911). See: Robert Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca: Cornell University Press, 1947), 105.

principles as the nation prepared itself for the possibility of war. In early speeches the Attorney general spoke broadly of protecting the right of "that unknown fellow, mounted on his soap-box…speaking his piece;" the right of "that little group of Mennonites or Mormons or Quakers" to "[worship] in their own churches."[62] Where he singled out a specific issue of concern, he focused on the rights of workers to select representatives of their own choosing, not the social and political rights of Southern blacks.[63] In March of 1939, Criminal Division Chief Brien McMahon laid out "eighteen types of legal situations in which the Civil Liberties Unit may act" against public officials. These included instances of police brutality, false imprisonment, and failure to protect from mob violence, but the list tilted overwhelmingly toward interference with the rights of labor to organize. He suggested the Unit might intervene when officers "break up meetings," "prevent meetings," "break up picket lines," or "prohibit picket lines from forming."[64] His replacement, O. John Rogge, likewise emphasized labor's rights in an address before the American Bar Association. He emphasized that "one of the types of situation which the civil unit will watch closely concerns labor… we propose to enforce the 1870 law to the fullest extent, to the end that labor may organize and secure the power of collective bargaining and all other rights."[65]

Murphy, McMahon, and Rogge were hardly alone in identifying the struggle between labor and capital as the foremost challenge to civil liberties in the 1930s. Roger Baldwin of the ACLU argued that "however important or significant may be the struggle

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[62] Frank Murphy, "Civil Liberties and the Cities, May 15, 1939, in RG 60, Entry 132, Box 7.
[63] See for example, Frank Murphy, "Civil Liberties," March 27, 1939, in RG 60, Entry 132, Box 7.
[64] Brien McMahon, "Memorandum for the Attorney General," March 4, 1939, in Murphy Papers, Reel 114, Box 59. See also Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2007), 115-116.
[65] Lewis Wood, "Attacks Bar Group for Fight on Hague," *New York Times*, July 14, 1939, 3. Also quoted in Goluboff, 117.

for the political rights of fifteen million Negroes; however important or significant the defense of religions liberties; of academic freedom… these are on the whole trifling in national effect compared with the fight for the rights of labor to organize."[66] Both Congress and the Roosevelt administration had taken active steps to promote workers' rights – directly, with the enactment of the National Labor Relations Act, and indirectly through a myriad of New Deal programs designed to promote economic welfare. Yet for all the government's efforts, labor's rights were far from secure. Senate hearings under Wisconsin's Robert La Follette Jr. had revealed widespread instances of employer sabotage, espionage, and violence. Specifically, the hearings drew attention to the "reign of terror" against miners in Kentucky's Harlan County, including instances of "intimidation, coercion, beatings, and murder."[67] Under Cummings, the Justice Department had filed suit against twenty-two corporations and forty-seven individuals in Harlan County under Section 51, charging that their actions infringed on the miners' right to organize, protected by the 1935 National Labor Relations Act. The Department had also opened investigations of Mayor Frank Hague's intimidation campaign against CIO organizers in Newark, and of a landowner campaign to crush interracial agricultural worker organization efforts in Missouri.[68] Lastly, Department attorneys had secured

[66] Quoted in Goluboff, 27.
[67] 1935 Denhardt Commission Report, quoted in John W. Hevener, *Which Side are you On?: The Harlan County Coal Miners, 1931-1939* (Urbana: University of Illinois Press, 1978), 114; Jerold S. Auerbach, "The La Follette Committee: Labor and Civil Liberties in the New Deal," *Journal of American History*, Vol. 51, No. 3 (Dec., 1964), 435-459.
[68] None of the three investigations resulted in a conviction. The government's prosecution in Harlan County ended in a mistrial after the jury declared itself unable to reach a verdict. The federal investigation and the threat of a second trial, however, gave the United Mine Workers Union the leverage it needed to secure a collective bargaining agreement from each of the corporate defendants. Unable to get an indictment against the Hague machine, the government dropped its inquiry in 1939. By that point, however, the Supreme Court had struck down the offending local ordinances in a suit launched by the CIO under the civil counterpart to Section 52 – Part 14 of Section 24 of the Judicial Code. The Department ultimately insisted that the Missouri case did not present any violations of federal law, though its report sided with the Missouri farm workers. See: Goluboff, *The Lost Promise of Civil Rights*, 117-118.

convictions in three flagrant cases of debt peonage in the South, under the 1867 Peonage Act.[69] Under Murphy, the newly-formed Civil Liberties Unit initially followed a similar trajectory, focusing first and foremost on violations of workers' rights.

But within two months after Murphy announced the new unit, the Justice Department had already received several hundred complaints alleging possible violations of federal law, many of which had little or nothing to do with labor organization. Individuals wrote in complaining of "lynchings…the use of the third degree by the police, deportation of persons from a community or state… unlawful searches and seizures, [and] cases where officers break up picket lines or prohibit picket lines from forming."[70] The prevalence of complaints against officers of the law – particularly the shocking instances of outright cruelty – probably determined as much as anything the course of federal action and forced Department officials to confront directly the problem of police brutality. That the vast majority of complaints came from African Americans in the South forced the Department to confront the problem within the legal and customary context of Jim Crow.

By the 1940s, a broad consensus had emerged around the need to curb police brutality and improve the administration of criminal justice. In 1930, the National Commission on Law Observance and Enforcement, known popularly as the Wickersham Commission, had released a damning report on the use of harsh interrogation methods by the nation's police. Drawing on legal cases and personal interviews, investigators cataloged a litany of abuses ranging from prolonged interrogation to outright torture

[69] See Goluboff, 119.
[70] Gordon Dean to Leigh Danenberg, March 6, 1939 in RG 60, Entry 132, Box 22, Folder: "Civil Liberties"

including the application of the "water cure."[71] The report galvanized concerted campaigns at the state and local level to introduce strict guidelines for processing and interrogating suspects, and to establish greater oversight by police commissions and independent review boards. Local chapters of the NAACP and the ACLU worked to secure the release of prisoners whose confessions were secured through brutal treatment. The NAACP's national publication, *The Crisis*, raised awareness of the issue by regularly featuring stories of flagrant abuse. At the national level, J. Edgar Hoover saw in the Wickersham report an opportunity to stress once again the value of forensic methods and training for modern police. Throughout the 1930s he championed his Bureau of Investigation as a model of professional policing, offering up the Bureau's services to help raise standards in police departments across the country.

During this same period, the Supreme Court handed down a series of decisions that established in principle if not in practice a set of federal guidelines for the rights of the accused. The first two cases, *Powell v. Alabama* (1932) and *Norris v. Alabama* (1935), involved the trial of the Scottsboro Boys, nine black youths accused of raping two white women aboard a train.[72] Tried before an all-white jury while armed National Guardsmen struggled to keep the mob gathered outside from overrunning the

[71] The report detailed at least two instances of water torture, both in Mississippi. Other cases of outright brutality cataloged in the report included severe beatings with the whip, razor strap or rubber hose; prolonged confinement in excessively hot or cold jail cells; starvation and sleep deprivation. Owing largely to practical considerations the Wickersham Commission limited its study of police brutality to major metropolitan centers located primarily in North and West. Of the fifteen cities investigated, just were located west of the Mississippi, and Dallas and El Paso were the closest the Commission came to investigating the police problems of the American South. The report on the use of the third degree did incorporate anecdotal references to conditions in several Southern states, and researchers drew on the history of police brutality litigation, particularly in Texas, in compiling their overall assessment. The city-level studies, however, contain by far the most comprehensive analysis and comprise the bulk of the report. In this section, brief studies of Dallas and El Paso offer the only hints as to the particular problems of Southern police. The cities investigated were: New York, Buffalo, Boston, Newark, Philadelphia, Cincinnati, Cleveland, Detroit, Chicago, Dallas, El Paso, Denver, Los Angeles, San Francisco, and Seattle.
[72] Powell v. Alabama, 287 U.S. 45 (1932); Norris v. Alabama, 294 U.S. 587 (1935). See also Patterson v. Alabama, 294 U.S. 600 (1935).

proceedings, all nine youths were swiftly convicted, and all but one were sentenced to hang. Twice the International Labor Defense brought the boys' case up on appeal to the Supreme Court, and both times the Court overturned their convictions. In *Powell*, the justices held seven-to-two that the defendants had been denied adequate representation, establishing a guaranteed right to counsel in a capital trial. In *Norris*, the justices ruled unanimously that race discrimination in jury selection had once again denied the nine defendants their due process rights.[73] In a third case, *Brown v. Mississippi* (1936), the Supreme Court overturned the murder conviction of three black tenant farmers whose confessions had been secured through brutal torture.[74] In 1940 and 1941, the Court threw out four more state convictions resulting from involuntary confessions, thus firmly establishing the principle of federal oversight of state judicial procedure.[75]

But as Michael Klarman notes, these decisions had little effect on the day to day administration of criminal justice in the South. Officials found little difficulty in getting around requirements that blacks be allowed to serve on jury rolls. Court-appointed attorneys rarely afforded their clients anything but token representation. And even before *Brown*, convictions secured through torture had technically been inadmissible in state courts. As the Wickersham Commission observed in 1930, "no new laws could make [the abuses of the third degree] more illegal than they are."[76] Where brutal interrogation practices endured, black defendants were generally powerless to assert their rights. The

[73] McReynolds did not participate in the latter decision. The Scottsboro Boys were again tried and convicted, each serving between five and twenty years in prison. Convictions affirmed in Patterson v. State, 175 So. 371 (Ala. 1937); Norris v. State, 182 So. 69 (Ala. 1938); Weems v. State, 182 So. 3 (Ala. 1938).
[74] Brown v. Mississippi, 297 U.S. 278 (1936).
[75] Chambers v. Florida, 309 U.S. 227 (1940); White v. Texas, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941); and Vernon v. Alabama, 313 U.S. 547 (1941). For a more comprehensive discussion of these latter cases, see Klarman, 225-228.
[76] National Commission on Law Observance and Enforcement, *Lawlessness in Law Enforcement* (Washington, D.C.: Government Printing Office, 1931), 11.

vast majority of black defendants could ill-afford the expense of protracted appeals. "Their fate," writes Klarman, "lay with less-sympathetic state judges, who did not necessarily agree with the constitutional rights identified by the justices."[77] Prior to 1940, federal courts had thus served primarily as a "negative safeguard" for due process rights, affording relief only to the select few petitioners able to mount a successful appeal. In establishing the Civil Liberties Unit – soon renamed the Civil Rights Section – Murphy announced a commitment to using the federal courts as a positive weapon for civil rights enforcement.

Like the authors of the Wickersham report, who saw public awareness as the most powerful antidote against police misconduct, Murphy acknowledged that "the great protector of civil liberty, the final source of its enforcement... is the invincible power of public opinion." No court, he cautioned, can "review every denial of civil rights that may occur in our midst. Year by year since the Constitution was adopted, it has become more and more obvious that tolerance cannot be enforced by law." [78] But he refused to see this fundamental limitation as a bulwark against positive action. "Public opinion crystalizes slowly," he argued, and "until public opinion <u>does</u> reach the point where it will not tolerate violation of civil liberties, there can and will be such violation – <u>unless government takes a hand and refuses to permit it.</u>"[79] Echoing the sentiments of Radical Republicans at the height of Reconstruction, he insisted that where states proved unwilling or unable to act, the federal government had the duty to step in lest "the seeds

[77] Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York, Oxford University Press, 2004), 155.
[78] Frank Murphy, "Civil Liberties," Radio Address, March 27, 1939, in RG 60, Entry 132, Box 7
[79] Frank Murphy, "Civil Liberties and the Cities, May 15, 1939, in RG 60, Entry 132, Box 7, <u>emphasis his.</u>

of barbarism" that "have been sown among us… sprout and grow."[80] In late 1939, the Civil Rights Section (CRS) of the Department of Justice opened its first major investigations of police brutality, focused, of necessity, on police departments in the Jim Crow South.

The decision to take proactive steps to protect the rights of the accused provoked sharp debate within the Justice Department over the limits of federal power. Matthew McGuire of the Attorney General's office argued that police brutality, while "atrocious and abhorrent," is a "problem… that local authorities should deal with." If the "right not to be beaten" were secured under the Constitution, he insisted "every police officer on each occasion that he hits a prisoner with a club would be subject to prosecution in the Federal court." [81] Alexander Holtzoff, who had argued previously that "no official should encroach on the functions of another official," continued throughout the 1940s to view CRS claims to jurisdiction in police brutality cases as "a little farfetched."[82]

The division's other investigations, particularly with respect to labor and debt peonage, provoked few of these same concerns. The labor cases of the late 1930s served merely to enforce through the threat of criminal sanction what Congress and later the Supreme Court acknowledged to be a federally protected right to organize. The cases differed in form but not in function from the administrative hearings and injunctive proceedings initiated by the National Labor Relations Board since its creation in 1935. Investigations of peonage in the South, which comprised a large fraction of the CRS case load, likewise drew on long established traditions of federal action. Since the early 1900s,

[80] Ibid.
[81] McGuire to Rogge, September 30, 1940, in RG 60, 144-19-5.
[82] Alexander Holtzoff to James Rowe, February 13, 1942, in RG 60, 144-19-5.

the Justice Department had – with varying degrees of success – carved away at a range of formal and informal practices that sprang up to take the place of chattel slavery in the postbellum South. The renewed emphasis on these cases in the late 1930s and 1940s was novel primarily in its breadth. In dozens of cases, CRS attorneys challenged a range of institutional arrangements that had the effect of trapping black sharecroppers and workers in exploitative labor contracts. But in doing so, the Justice Department was merely extending the federal government's explicit commitment to eradicate involuntary servitude and stand up for workers' rights.

Federal investigations of police brutality involved a substantial reformulation of existing assumptions about the relative autonomy of state and local police. In practice, the roughly four-dozen investigations instituted between 1940 and 1945 had little effect on the day to day administration of criminal justice and the respective duties of federal and local law enforcement. The national "war on crime" and the accompanying expansion of FBI programs for state and local police officers had a far more dramatic effect on the relationship between national and local authorities. Nonetheless, there was a fundamental difference between the expansion of federal jurisdiction to cover new offenses, and the enforcement of federal law against officials at the state and local level who were likewise tasked with preserving the peace. When Bureau agents swept in to local communities to "take charge" of an investigation, they enjoyed formal authority only over the case itself, not the police officials who shared concurrent jurisdiction. If local officers continued to investigate the matter under FBI leadership, they did so voluntarily or under the order of their local superiors, not by virtue of any inherent oversight power vested in the FBI. When Roosevelt assigned the FBI primary

responsibility for civilian defense in 1939, his official directive pertained only to the balance of power between rival federal agencies. With respect to state and local police, the President issued a "request" that officers relay all national security leads to the FBI, but his action carried no legal weight. Its efficacy depended on local agencies' willingness to cooperate with Bureau agents.[83]

Federal investigations of police brutality shattered the notion that national and local officers were equal partners in the war against crime. No matter how cordial or deferential in their approach, Bureau agents could not avoid the impression that they were bringing the full power of the federal government to bear on police officials dealing with what had traditionally been purely local affairs. In the course of a federal investigation officers were interviewed, or interrogated, by Bureau agents. If indicted, they were placed under arrest by federal marshals and put on trial in federal courts. But while treated like any other criminal in the federal system, they were charged not as private citizens but as officers of the law. It was for action taken in their official capacity, "under color of law," that they became the subject of federal proceedings. These same actions, taken as private citizens, would not have fallen under federal jurisdiction.

On more than one occasion, the Bureau's field agents expressed misgivings over investigating officers in departments that had a long history of cooperating with the FBI. A heated debate broke out between the Bureau and the Department of Justice over a 1939 case involving a police officer in the Atlanta Police Department accused of burning a fifteen-year-old suspect with a tacking iron to secure a confession. The U.S. Attorney in charge of the case asked the Bureau to investigate prevailing interrogation practices

[83] Franklin D. Roosevelt, "The Federal Bureau of Investigation is Placed in Charge of Espionage Investigation," September 6, 1939, in Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt,* 1939 vol. (New York: Macmillan Company, 1941), 478.

within the Atlanta Police Department to determine if the officer's actions conformed to a broader pattern. The FBI bitterly objected to the proposed inquiry, insisting that it would impugn the integrity of the entire department and provoke a "complete break" between the two agencies.[84] Agents likewise balked at investigating a complaint against the notoriously aloof Texas Rangers, noting that "at the present time, no Federal investigative unit except the FBI is able to secure any cooperation" from the Rangers or their parent Department of Public Safety.[85] The Bureau was similarly hesitant to investigate officers in Beaumont, Texas, members of a smaller department but one that was nevertheless on excellent terms with the FBI.[86]

The agents were not alone in questioning the wisdom of pursuing an enforcement agenda against state and local authorities, particularly at a time when national defense preparations required their full support. In August of 1940, Attorney General Robert Jackson rebuked Criminal Division attorneys for raising the issue of civil liberties at the Federal-State Conference on Law Enforcement Problems of National Defense. During a panel discussion on espionage, sedition, mob violence and civil liberties, "Southern state representatives called for recognition of the states' responsibilities for protecting civil liberties. Doubting their sincerity, [Albert] Arent [of the Civil Liberties Unit] called attention to the federal civil rights enforcement efforts," aimed at state and local officials who were at times responsible for civil liberties violations. Arent described the debate that followed as "'red hot," with Southern representatives taking turns denouncing federal intervention into local affairs. In the end, Jackson sided at least in spirit with the Southern delegation, chastising Arent and Rogge for provoking discord at a conference aimed at

[84] R.G. Danner to J. Edgar Hoover, August 10, 1940, in RG 65, 44-330, Section 2.
[85] P.J. Hayes to Rosen, July 17, 1943, RG 65, 44-829.
[86] J. K. Mumford, Memo for Mr. Ladd, August 14, 1942, in RG 65, 44-623.

forging stronger ties with local officials.[87] The panel's final report, submitted by Alabama Governor Frank Dixon, "recognized that the protection of civil liberties and the prevention of mob violence is primarily the responsibility of state and local governments."[88]

For both practical and ideological reasons, the Justice Department established a narrow objective for federal enforcement, one that conformed to the basic principle of local control over law enforcement matters: "to encourage the states and local communities to take a greater interest in civil liberties and to be more active in their protection."[89] Instructions to U.S. Attorneys and formal policy pronouncements stressed time and again the importance of seeking local solutions wherever and whenever possible. Attorneys were "directed to employ every facility available…to secure the cooperation of state and local officials to prevent and rectify situations constituting a threat to…Federally secured civil rights."[90] Officials cautioned that "prosecutive action should be reserved for those cases where that remains the only means of alleviating the situation."[91]

Where states agreed to act, even if the penalties imposed paled in comparison to the severity of the offense, the Department generally refused to intervene. In 1941, a Dallas policeman viciously beat a nineteen-year-old black youth for inadvertently attempting to board a bus without letting the white passengers on first. Since the officer

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[87] The account of the proceedings and the ensuing conflict is drawn from John T. Elliff, *The Department of Justice and Individual Rights*, 115-116.
[88] Proceedings, Federal State Conference on Law Enforcement Problems of National Defense, August 5-6, 1940 (Leavenworth, Kansas: Federal Prisoner Industries, Inc. Press, 1940), 37.
[89] Francis Biddle, as paraphrased by Robert Carr who interviewed Biddle for his 1947 book, in Carr, 202.
[90] Francis Biddle, "Circular No. 3356, Supplement No. 2," April 4, 1942, OF 1581, Folder: "Civil Liberties, 1933-1945"
[91] Tom C. Clark, "Circular No. 3356, Supplement No. 3, to All United States Attorneys," November 3, 1943, reprinted in Michal R. Belknap, ed. *Justice Department Civil Rights Policies Prior to 1960: Crucial Documents from the Files of Arthur Brann Caldwell* (New York: Garland Publishing, 1991), 96.

in question received a thirty-day suspension, the Justice Department deemed the manner adequately handled and declined to pursue the case. A night policeman in Ocean Springs, Mississippi was the target of two federal investigations for excessive force against British sailors. Following the second incident, the town mayor agreed to remove the marshal from night duty, thus bringing the federal case to a close.[92] In instances of a less aggravated nature, the mere promise to refrain from repeating alleged offenses generally sufficed.

This eagerness to settle for local action, however modest, reflected in part the limited resources at the Department's disposal and the desire to put them to use where they could have the greatest effect. Yet it also demonstrated concretely what Attorney General Robert Jackson established in 1940 as the basic premise of Justice Department civil rights policy: that "any Federal intervention, even if appropriate, would be a temporary expedient. Permanent solution must be locally found and locally applied."[93]

* * * *

Justice Department officials were unwilling to relieve local officials of their duty to protect individual rights. But with minor exceptions they were unable to persuade state and local governments to live up to their moral and constitutional responsibilities. Even Murphy's more modest ambition of awakening public awareness of civil liberties evaded Department attorneys in cases against police officers across the South. Three 1942 cases,

[92] RG 65, 44-478 and 44-705. See also 44-363, 44-763, 44-831, 44-921, 44-1042 and 44-1288.
[93] Robert Jackson, "Message to the Bill of Rights Review," *The Bill of Rights Review*, Vol. 1 (Summer, 1940), 36. Paradoxically, the Justice Department's emphasis on local action meant that it rarely intervened in police brutality cases outside the South. Across much of the North and West, departments had since the 1930 Wickersham report instituted procedures for dealing with police abuse. While the FBI occasionally received cases from places like Chicago, Newark and Cincinnati, the Civil Rights Section generally left these cases to local authorities. While roughly twenty percent of complaints in Bureau central files came from outside the South, the South accounted for more than ninety-five percent of investigations that made it past the preliminary stages.

in Alabama, Mississippi, and South Carolina, illustrate the range of countervailing forces that blunted the effect of federal intervention.

It was common knowledge in Tuskegee that County Sheriff Edwin Evans had been "treating the Negroes with a high and rough hand" since he took office.[94] The beatings of Lillie Mae Hendon and Eugene Brown, and the shooting death of Walter Gunn were but the latest in a string of brutal attacks on Macon County blacks. When the county commissioner and the city council met with Evans in mid-1942 to discuss his conduct, the Sheriff "readily admitted the allegations." The commissioner concluded that "the whippings [were] in line and not beyond the general practice in that section."[95] The Chief of Police in Tuskegee, meanwhile, admitted that Evans "had the reputation of beating negroes unnecessarily" but cautioned that "should the white people take sides against Sheriff Evans and his officers and boost him out of office... the negroes would give more trouble in the future than they had ever given."[96]

Not everyone shared the police chief's views. Unable to challenge Evans locally, Tuskegee Mayor Frank Carr and other community leaders asked Alabama Governor Frank Dixon to intervene. "Were it not for these two officers," they explained, the black and white residents of Tuskegee could "live…very harmoniously."[97] As it stood, Evans' actions threatened to exacerbate further the tensions provoked by war and mobilization. Dixon ordered his private investigator, Earl Cole, to Tuskegee with an eye toward instituting impeachment proceedings against the offending officers. Cole returned to Montgomery convinced that at least several cases presented "conclusive" evidence of

[94] FBI Report, December 23, 1942, RG 60, 144-2-3: Section 1, 77.
[95] FBI Report, April 9, 1943, RG 60, 144-2-3: Section 2, 100.
[96] FBI Report, December 23, 1942, RG 60, 144-2-3: Section 1, 46.
[97] FBI Report, December 23, 1942, RG 60, 144-2-3: Section 1, 5.

abuse. But by that point Evans had won the Democratic primary in the sheriff's race and was thus all but certain to return to office in January. Dixon reasoned that there was little he could hope to gain by confronting Evans directly. Instead, staunch segregationist Frank Dixon, who had fulminated against New Deal intervention into Southern affairs and blasted proposed federal anti-lynching legislation as an intolerable assault on states' rights, instructed Cole to place a call to his contact at the Birmingham field office of the FBI and pass the Evans case along to federal authorities.[98]

Some two hundred and fifty miles away in Anderson, South Carolina, residents told FBI agents much the same story. Shortly after Sheriff W.J. Erskine took office, "a leather strap about two feet long, two or three inches wide," appeared in the Sheriff's office.[99] Soon, a state trooper who occasionally spent the night in the jail's residential quarters began "[hearing] negroes screaming and yelling" as though "they were being whipped."[100] A former dietician at the jail acknowledged hearing "a lot about prisoners being beaten" though he suspected "it was done at night or while he was away."[101] Few in the surrounding community could claim to have been entirely oblivious to the goings on. Some saw the victim's injuries first hand, others heard rumors from fellow residents whose tenants, neighbors, or employees returned from the jail with visible knots around their eyes and scars along their backs and thighs.

In Anderson, county solicitor Rufus Fant finally decided to take action against Sheriff Erskine after the latter viciously beat four black teens accused of petty theft, the

[98] While the FBI files do not specifically indicate that Cole's call came at Dixon's request, it's unlikely the call was made without his knowledge, and more than likely, specific instruction. The governor turned all of Cole's investigation files to the FBI, and both he and the state attorney general supplied extensive information to FBI agents in the early months of the federal investigation.
[99] FBI Report, May 19, 1943, RG 60, 144-68-9, 33.
[100] Ibid.
[101] Ibid., 41.

youngest a boy just thirteen years of age. Unwilling to challenge the Sheriff directly, Fant decided instead to present the case against the four boys to the Grand Jury and "let them indict the negroes if possible… so that the case could be tried in open court." It was a strikingly roundabout and ultimately fruitless attempt to draw public attention to Erskine's abuse of prisoners at the county jail. Upon hearing of a possible indictment, one of the Deputy Sheriffs "confidentially contacted members of the Grand Jury and explained to them the position of the officers in the case." To "save the Sheriff a lot of embarrassment," the Grand Jury declined to return an indictment, thereby hushing up the entire affair.[102]

The people of Laurel, Mississippi reacted to the lynching of Howard Wash with a similar mixture of condemnation and complacency. On the afternoon of his death, Wash had been convicted of murdering Clint Welborn, his white employer, and sentenced to life in prison. On the eve of trial, the Welborns had made it known "to practically everyone in Jones County" that they would "sanction" a jury trial only if Wash were sentenced to hang.[103] Shortly after midnight, a crowd of several dozen gathered at the supposedly "mob proof" jail in downtown Laurel. With "suspicious ease" the men gained access to the second floor and removed Wash from his cell.[104] None wore disguises. All were residents of Laurel or nearby Shady Grove. Swiftly, with little fanfare, they drove Wash to the outskirts of the Welborns' farm, tied a noose around his neck, and threw him off the side of Welborn Bridge.

The following morning, Jones County Sheriff J. Press Reddoch was "particularly anxious" to take immediate action. Whether genuinely humiliated by his failure to

[102] F.B.I. Report, May 19, 1943 in RG 60, 144-68-9, 14-15.
[103] FBI Report, December 31, 1942, RG 60, 144-41-8: Section 1, 7, 5.
[104] "Races: Unusual and Different Punishment," *Time*, vol. 41, no. 4 (January 25, 1943), 24.

prevent mob violence or simply chastened by the presence of state troopers in his rural county, the Sheriff claimed "he knew practically every person… and believed he could name the majority of the men in the crowd who took Wash from the jail." Asked if he wished to present his case to a grand jury or "make immediate arrests," Reddoch insisted on immediately apprehending the guilty parties and charging them with murder. As Reddoch and the troopers made their way through the town, the sheriff arrested first one, then another of the men he recognized from the previous night. He sent his deputy to pick up two other members of the mob, including one of the alleged "ring leaders." But then the sheriff appeared to lose his nerve. A group of local businessmen approached him late that morning, urging him to "go slow on this." When the troopers returned that afternoon to make further arrests, the sheriff informed them that he would "wait and see what the Grand Jury would do." [105]

Upon hearing rumors that a new mob was forming to break the arrested conspirators out of jail, the local district attorney lowered the charges to "intimidating an officer" and released the men on bond. No indictments were ever handed down. The "better class of citizens" in Laurel condemned the lynching as "a reprehensible and degrading act" perpetrated by the more "hot-headed" sort from Shady Grove.[106] Having thus distanced themselves from the brutality, the people of Laurel preferred, it seems, to simply let the matter pass. The special investigator sent by Governor Paul Johnson to look into the affair returned to Jackson empty handed. The Governor declared that "I have done everything I can do. If the federal government, acting within its constitutional

[105] FBI Report, November 14, 1942, RG 60, 144-41-8: Section 1, 4-5.
[106] FBI Report, December 31, 1942, RG 60, 144-41-8: Section 1, 6, 7.

powers, can be of assistance to the state I shall welcome any investigation it wishes to make."[107]

In all three cases, local officials took tentative steps to address the volatile situations that had developed, but quickly retreated when it became apparent that they lacked popular support. Their actions underscore the extent to which the legal and political institutions of the South, particularly the rural communities where the crimes took place, were geared not toward securing justice but toward upholding white control. In Mississippi, the sheriff and district attorney simplified the local grand jury's task by offering scant evidence on which to indict. In South Carolina, grand jurors conspired directly with the sheriff's office to conceal evidence of misconduct. And in Alabama, both local and state officials recognized that Evans had exceeded his authority, but feared the ramifications of confronting a white policeman far more than they feared the social unrest that his abuses might provoke.

Unwilling to take direct action, local officials thus welcomed federal intervention as an opportunity to address their grievances in a more discreet manner. In all three counties, agents found little difficulty in putting together compelling cases against one or more of the individuals involved. Local and state police officers friendly with Bureau agents suggested possible witnesses and offered background information on local political alliances and kinship ties. In Alabama, the state's governor and attorney general both served as confidential informants throughout the federal investigation, as did a local councilmember and businessman. Private citizens, many of whom insisted that their names be kept secret, were equally forthcoming. In Laurel, confidential informants

[107] "Lynching Probe by FBI Welcomed, Governor States," *Clarion Ledger*, October 21, 1942, in RG 65, 44-661.

included two local attorneys, a former sheriff, and a manager at the local Coca-Cola bottling plant.

Indeed, it was on the basis of state and local cooperation that the Justice Department secured its first federal indictment in a lynching case under Section 52. The FBI had launched its investigation of the Wash lynching within days of the crime, acting on Roosevelt's recent request that the Justice Department investigate each lynching with an eye toward possible violation of federal law.[108] Interviews with Governor Johnson's private investigator and local police directed the Bureau's attention to the actions of sheriff's deputy and resident jailer Luther Holder, who handed the prisoner over to the mob. All emphasized that Holder's was a recently constructed, reinforced concrete jail, designed specifically to prevent unlawful entry by unruly mobs. Had Holder simply locked himself behind the heavy steel door leading to the prisoners' quarters upstairs, he could have waited out the mob in peace. Bit by bit, witnesses tore apart Holder's defense that he had done all he could to protect the prisoner in his charge. Detectives at the Laurel Police Department, located just across the street from the jail, advised that they had offered their services to the jailer after seeing a mob milling around outside. Holder informed them that "he was getting along all right and did not think he needed any help."[109] Others noted that Holder had been ill-disposed toward the victim from the beginning, intimating at one point that had he been on the jury, "it would not be very healthy for Wash."[110] One observer noted that "any white officer should know that no

[108] Francis Biddle notes the request took place during the July 17, 1942 cabinet meeting. Biddle Papers, Box 1, Folder: "Cabinet Meetings, July-December 1942." The first such investigation involved the lynching of Cleo Wright in Sikeston, Missouri. In that case, a federal grand jury failed to return an indictment. By far the best account of the Wright case is Dominic J. Capeci, Jr., *The Lynching of Cleo Wright* (Lexington: University Press of Kentucky, 1998).
[109] FBI Report, November 4, 1942, in RG 60, 144-41-8: Section 1, 36.
[110] FBI Report, December 31, 1942, in RG 60, 144-41-8: Section 1, 8.

mob… would kill a white man to obtain a negro."[111] Virtually all officials interviewed were unanimous in their insistence that Holder had been inexcusably negligent in his handling of the case. Privately, the Attorney General of Mississippi suggested that a federal indictment would "have a fine moral effect in Mississippi," though he declined of course to "make that statement publicly."[112]

In 1943, a federal grand jury in Jackson, Mississippi returned an indictment against Holder under Sections 52, charging that his willful inaction at the jailhouse deprived Wash of his due process rights to petition the federal court and to file an appeal. The jury also returned Section 51 charges against Holder and four members of the mob for conspiring to deprive Wash of his constitutional rights.[113] That same year, a grand jury in Alabama returned indictments against Evans and Faucett on fifteen counts of violating Section 52, charging abuses against thirteen black residents of Macon County.[114] The U.S. Attorney in South Carolina chose to proceed against Erskine by information, fearing that prolonged grand jury proceedings would put witnesses in danger. Since Section 52 was a misdemeanor charge, he needed only the judge's approval, not a grand jury indictment, to initiate the case.[115]

As prosecutors prepared for trial, local officials hostile to the government's case – often the same individuals who had successfully forestalled local proceedings – worked

[111] Ibid., 10.
[112] William Watkins to Frank Coleman, January 27, 1943, in RG 60, 144-41-8: Section 1.
[113] The grand jury also returned Section 52 indictments against the four members of the lynch mob for conspiring to induce an officer to violate an individual's rights under color of law, and under Section 88, a general conspiracy charge which carried an additional penalty of two years jail time.
[114] United States v. Edwin Eugene Evans and Henry Franklin Faucett, No. 1297 (M.D. Ala., 1943); United States v. Edwin Eugene Evans, No. 1299 (M.D. Ala., 1943); United States v. Henry Franklin Faucett, No. 1300 (M.D. Ala., 1943), available in RG 60, 144-2-3, Section 2.
[115] Since Section 52 was a federal misdemeanor with a maximum penalty of one year in prison, U.S. Attorneys could file charges with the approval of a judge without initiating grand jury proceedings. Initially the Justice Department had urged against this procedure, deeming grand jury support essential to establish the legitimacy of the prosecution. By 1942, however, criminal division chief Wendell Berge relaxed Department policy and left the decision up to U.S. Attorneys' discretion.

to construct alternative narratives of each of the three cases, taking attention away from the crimes at hand and stressing instead the novelty and danger of the federal assault on local institutions. The Alabama Sheriff's Association rallied around Evans, insisting that if he were convicted, "every peace officer would be at the mercy of the word of convicted criminals."[116] FBI agents reported that Evans's friends warned potential witnesses that "the white people of Macon County, Alabama will have to move" if the federal government succeeds in trying its case.[117] The U.S. Attorney complained of the "prejudicial slant" from which every article in the *Tuskegee News* reported on the pending trial.[118] In Mississippi, the *Jackson Daily News* put the blame for the Wash lynching on the "chicken-hearted jury" that "had failed to give the criminal a death sentence." The paper decried the Governor's support for a federal inquiry, arguing that the rest of the state is "not yet ready to surrender her sovereignty."[119] Speaking from Washington, Mississippi Congressman John E. Rankin condemned the "Gestapo practices" of the Department of Justice, an organization well on its way toward becoming a vehicle for "the persecution of white people throughout the South."[120] And in Anderson County, the *Independent* worked diligently to poison the proceedings, reporting news of Erskine's arrest alongside stories of black criminals attacking local whites. As in Tuskegee, prominent local residents helped pay the sheriff's bond, further undermining the force of the government's case.

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[116] Quoted in "Macon County Sheriff, Deputy, are Acquitted," *Montgomery Advertiser*, June 25, 1943, in RG 65, 44-668: Section 2.
[117] Quoted in Robert J. Norrell, *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* (New York: Knopf, 1985), 54.
[118] Hartwell Davis to Attorney General, June 7, 1943, in RG 60, 144-2-3: Section 2.
[119] Quoted in Hoover, memorandum to Berge, October 28, 1942, in RG 65, 44-661.
[120] John E. Rankin, March 24, 1943, quoted in a memo from Hoover to the Attorney General, March 30, 1943, in RG 60, 144-41-8: Section 2.

The trials themselves offered still further opportunities to rationalize the officials' actions and reframe the issue as one of federal interference in local affairs. In Montgomery, defense attorneys and the local press focused their ire on Lillie May Hendon and on alleged links between the Tuskegee Civic Association – a local civil rights organization – and the federal case. Evans testified that he slapped Lillie May just once, after she had propositioned him.[121] The Montgomery *Advertiser* dismissed Hendon as "a glamour negress," a characterization one of the defense attorneys reinforced at trial, telling her to "Pull down your skirt, Lillie May."[122] The same attorney cynically implied that the Tuskegee Civic Association had secretly funded the entire case.[123] The *Advertiser* too speculated that "the real power behind the prosecution was… a national organization of negroes with a powerful Washington friend, Mrs. Eleanor Roosevelt."[124] In summarizing the case, the paper observed that "one negro after another, most of them brought to the trial by deputy wardens of penitentiaries" had been discredited by "prominent white citizens of Macon County."[125] Few were thus surprised when the jury voted to acquit Evans and Faucett of all charges against them.

The trial of Deputy Luther Holder and two members of the lynch mob proved an equally disappointing farce, particularly in light of early support for federal

[121] "Blanket Denial Made by Evans," *Alabama Journal*, June 23, 1943, in RG 65, 44-668: Section 2.
[122] Both quoted in Robert J. Norrell, *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* (New York: Knopf, 1985), 54.
[123] "Witnesses Parade Against Macon Sheriff in U.S. Trial," *Montgomery Advertiser*, June 22, 1943, in RG 65, 44-668: Section 2.
[124] "Macon County Sheriff, Deputy, are Acquitted," *Montgomery Advertiser*, June 25, 1943, in RG 65, 44-668: Section 2.
[125] "U.S. Witnesses under Fire By Evans Defense," *Montgomery Advertiser*, June 23, 1943, in RG 65, 44-668: Section 2.

involvement.[126] On paper, the government's case should not have been a difficult one to win, particularly since one of the defendants had confessed to actively participating in the events of that night. In a signed statement taken by Bureau agents, Allen Pryor admitted to using a pick axe to break through the screen door leading into the sheriff's quarters; to personally taking Wash from his cell; to riding along in the car that whisked Wash over to Welborn Bridge; and to standing guard while another member of the mob tied a noose around the victim's neck.[127] None of that mattered, of course, in a case that was no longer about the lynching of Howard Wash, but about state sovereignty and white control. In his closing arguments, the defense attorney dismissed the trial as "just another effort on the part of the crack-brained interests within the political party of our forefathers to see how much further we of the South will permit invasion of states' rights….The cause of white supremacy has been indicted." He warned that "if the precedent is established by this jury giving sanction to this abortive attempt to deprive us of our rights… we can then expect many more prosecutions when it meets the pleasure of those who seek to further centralize power in Washington."[128] Members of the jury nodded in assent. As jurors came back into court to deliver their verdict, several "were observed winking knowingly at the defense counsel, who returned the winks."[129] A number of the jurors later admitted to newspaper reporters that "states' rights was the determining factor" in their decision to acquit all three defendants.[130]

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[126] The judge had previously dismissed charges against two other indicted defendants because the government lacked evidence directly implicating them in the lynching. The judge upheld the indictment against Holder and two of the participants, and thus the case went to trial.
[127] Statement of Allen Welborn Pryor, November 25, 1942, as transcribed in F.B.I. Report, December 1, 1942, RG 60, 144-41-8: Section 1, 7-9.
[128] Quoted in Carr, *Federal Protection of Civil Rights*, 140-141.
[129] Carr, 141.
[130] Ibid., 140.

Only in South Carolina did the U.S. Attorney secure a modest victory. There, the government owed its success to the arrogance of the county sheriff on trial and the determination of the federal judge not to let the jury make a mockery of the proceedings. On cross examination, Erskine admitted to striking several of the government's witnesses. He acknowledged further that in at least one instance, a prisoner confessed only after being beaten. Even still, members of the jury were unable to agree on a verdict. Frustrated, District Court Judge C.C. Wyche called jurors back into the court room, reminding them that Erskine had confessed under oath. It was therefore their duty, he insisted, to convict on at least one of the counts. The jury did exactly that – returned a verdict of guilty on one of six counts, acquitting Erskine on the other five. Wyche sentenced Erskine to serve sixty days in prison and to pay a fine of five hundred dollars. Erskine's supporters across the county immediately rallied to pay the sum on his behalf, though as one paper lamented, they were unable to serve out his prison term for him as well. A local hotel manager who orchestrated the fundraiser insisted that "the issue involved is states rights." Southerners were not about to "sit idly by while the federal government arrests, prosecutes, fines and sends to jail our high sheriff."[131]

Having rationalized away the sheriffs' actions and taken refuge in the far more comfortable narratives of Washington interference and states' rights, the residents of Anderson, Macon, and Jones Counties quietly put to rest the events of 1942 and 1943. In Tuskegee, voters reelected Evans in 1946 by an overwhelming margin, thereby reaffirming the jury's verdict of three years' prior. Francis Biddle urged Mississippi Governor Johnson to reopen the state's case in the Wash lynching, particularly since the FBI had obtained a signed confession from one of the assailants, but Johnson demurred.

[131] "County Citizens Pay Erskine Fine," undated, in RG 60, 144-68-9.

Deputy Holder retained his post for two more years and in 1948, Jones County voters elected him to serve as sheriff. And in Anderson, Erskine returned to office after serving out his 60-day prison term. The Governor of South Carolina chose not to use his power to remove him from office. Erskine won reelection in 1944 and again in 1957.

Even in the most promising of cases, where local residents cooperated with Bureau agents and where local leaders acknowledged that officers had overstepped their bounds, federal intervention failed to produce the intended results. Nationally, the cases prosecuted by the Justice Department reinforced the notion that local abuses did not reflect national policy, and that the federal government had a role to play in enforcing civil rights. In the communities where the crimes took place, the trials offered instead an opportunity to rewrite the history of the events that had transpired and absolve the local officers of blame. Once the verdicts were handed down, spectators could walk away content that their communities had thwarted federal meddling in local affairs and upheld the legitimacy of Jim Crow.

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White Southerners were not alone in insisting that the police brutality cases posed a challenge to local control. The Supreme Court's 1945 ruling in *Screws v. United States*, which narrowed substantially the scope of Section 52, suggests that a majority of justices were similarly preoccupied with preserving the prevailing federalist order. The jurists were unmoved by appeals to white privilege or to the prerogatives of Southern lawmen. Theirs was a view expressed by Alexander Holtzoff and Matthew McGuire in early Justice Department debates – that local policing was a matter for local authorities, and that federal intervention threatened to enervate local initiative and expand unduly the

powers and responsibilities of the national state. It was a view that differed in both substance and motivation from the appeals made by defense attorneys in police brutality cases across the South, but it was one that nonetheless constrained the federal enforcement of civil rights.

The *Screws* case began with a request from U.S. Attorney T. Hoyt Davis to investigate the death of Robert Hall, a black mechanic killed by Baker County Sheriff Claude Screws and Newton policeman Frank Jones.[132] Initial reports suggested that Screws and Hall had been involved in a dispute over Hall's right to carry a pistol in the glove compartment of his car, and that Hall had secured the services of a local attorney. Just before midnight on January 29, 1943, Screws and Jones, accompanied by Deputy Jim Kelly, arrested Hall, "administered a severe beating," and dumped his bloodied body in the local jail. Screws eventually called for an ambulance to take Hall away but the victim never regained consciousness. He died in the hospital later that night.

The Justice Department "made every effort to persuade the State of Georgia to prosecute" Screws for murder.[133] The progressive administration of Governor Ellis Arnall offered a unique opportunity to finally push state rather than federal authorities to try a major rights abuse case. Just four months prior, the thirty-five year old "boy wonder of Georgia politics" had defeated the fiercely racist New Deal critic, Eugene Talmadge, on a promise to reform the state's institutions "so that Georgia may no longer be the laughing stock of the nation."[134] But while Arnall offered the Department "all possible aid and

[132] Wendell Berge, Memorandum for the Director, Federal Bureau of Investigation, February 12, 1943, in RG 65, 44-746, Section 1.
[133] Francis Biddle, *In Brief Authority* (Garden City: Doubleday, 1961), 157
[134] "U.S. At War: Exit Gene Talmadge" *Time*, vol. 40, no. 12 (September 21, 1942), 21.

cooperation" he declined to take state action in the case.[135] The local states' attorney claimed to be powerless in the matter: "I am an attorney, I am not a detective, and I depend on evidence that is available.… The sheriffs and other peace officers of the community" – in this case the defendants themselves – "generally get the evidence, and I act as the attorney for the state."[136] It was a discouraging and, to some degree, disingenuous response. Biddle had offered the state full access to Bureau files which contained overwhelming evidence of deliberate homicide. And if state's attorneys were indeed hamstrung by their reliance on local officials, what hope was there for state action against police misconduct?

In light of Arnall's reluctance to proceed with state charges, the Department of Justice authorized a full investigation. As with previous cases of an aggravated nature, FBI agents had little trouble finding respected white residents willing to cooperate with the federal inquiry and to fill in the missing details on the hours leading up to Hall's death. Mamie White, wife of a local filling station operator, recalled that by about 9 p.m. that evening, Screws was already "drunk or crazy. His hair was hanging down his face, his shirt was out of his pants, and his pistol and blackjack were pulling his pants down." Cursing loudly, Screws had exclaimed that "I'm going after a negro, he's lived too long." A local barroom operator confirmed that Screws, Kelly and Jones continued drinking heavily in the hours that followed, and had announced their plans to "get the negro" later that night.[137]

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[135] Quoted in Elliff, 163.
[136] Screws v. United States, 325 U.S. 91 (1945), Transcript of Record, 42, in *U.S. Supreme Court Records and Briefs, 1832-1978*, Gale, Cengage Learning Online Database.
[137] FBI Report, March 6, 1943, in RG 65, 44-746, Section 1.

Bess Ledbetter, whose house faced the main town square, awoke sometime after midnight to the sound of loud cursing outside. Through her window she could see three men standing over a fourth, hitting him repeatedly. One of the men exclaimed, "Hit him again, hit him again." Ollie Jernigan told agents that the three men were pounding Hall "so hard it sounded like someone opening and shutting a car door." Two prisoners confined to the county jail recalled seeing Frank Jones and another man drag Hall into the jail and drop him on the floor: "At the time he had handcuffs on his wrists. Everywhere he moved he left a pool of blood. After he was moved into the cell the negro crawled around on his hands and knees and was breathing very hard." Two police officers from neighboring Dougherty County, who saw Hall's body at the funeral home later that night, testified to the extent of his injuries. Both observed pronounced circles around Hall's wrists indicating he had been cuffed tightly for a prolonged period of time, negating the defendant's claims that they were acting in self defense. Multiple witnesses drew attention to the smeared trail of blood they saw the following morning, leading across the square and up the courthouse steps. This vivid symbol of the yawning chasm between the ideals and the reality of Southern justice was, it seems, seared permanently in their minds.

Two months after the assault, a Federal Grand Jury returned indictments against all three officers under Sections 51, 52 and 88, the latter a general conspiracy charge that carried an additional penalty of two years in prison.[138] The trial was postponed while District Court Judge Bascom S. Weaver considered the defendants' motion to quash the indictment, a motion he eventually sustained on the Section 51 charge, leaving the U.S.

[138] Jim Kelly, who was not an officer of the law, was indicted on sections 51, 88 and 550, a general accessory statute.

Attorney to proceed under the remaining two counts.[139] Over the course of a two-day trial, the federal prosecutor called thirty-seven witnesses, all but five of whom were white, to corroborate various elements of the government's case. One of the witnesses, a close friend of Frank Jones, was even brought in on a stretcher, having just recently been released from the hospital. He testified that Jones had all but admitted that he and Screws beat Hall to death for "[acting] so damn smart" in trying to retrieve his gun.[140]

In the face of overwhelming evidence, the defense attorney made a feeble appeal to racial prejudice, warning jurors that "if you find these defendants guilty, you might go home and tell your wives and daughters that they do not have any protection any more."[141] But after nearly six hours of deliberation, the all white jury returned verdicts of guilty against the defendants. On October 7, 1943, just three days after the trial began, Judge Deaver sentenced Screws, Jones and Kelley to three years in federal prison, and ordered each to pay a one thousand dollar fine. Three months later, the Fifth Circuit Court of appeals upheld the conviction, prompting the defendants to appeal their case to the Supreme Court.

In a dramatic reversal, the Supreme Court overturned the conviction against the three defendants and ordered a new trial. In the process, the court upheld but narrowed substantially the provisions of Section 52. The four separate opinions, delivered nearly seven months after oral arguments, reveal the depth of uncertainty over the proper scope of federal power in the protection of civil rights.

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[139] It is unclear on what basis the judge sustained he demurrer on the first count, but the Department of Justice chose not to appeal his ruling.
[140] Screws v. United States, Transcript of Record, 120
[141] Screws v. United States, Transcript of Record, 206.

William O. Douglas, joined by Harlan Fiske Stone, Hugo Black and Stanley Reed, delivered the opinion of the court. "This case," the court declared, "involves a shocking and revolting episode in law enforcement." But to interpret Section 52 as prohibiting all actions under the color of law which deprive individuals of their right to due process, would leave the statute without an "ascertainable standard of guilt." Due process, writes Douglas, is a term so vague as to "cast law enforcement agencies loose at their own risk on a vast uncharted sea" and expand immeasurably the federal government's powers.[142] Yet the four justices hesitated to strike down Section 52 entirely, for to do so would have suggested that congress "did a vain thing" when it sought "to protect the important rights of the individual guaranteed by the Fourteenth amendment."[143] An officer who "persists in enforcing a type of ordinance" deemed unconstitutional, or an official who "continues to select juries in a manner which flies in the teeth of decisions of the court" should be liable for his actions under federal law. To preserve the spirit of Section 52 while still maintaining "the traditional balance between the States and the national government in law enforcement," the justices found a possible compromise in the term "willfully," added to the statute in 1909. To convict an individual under Section 52, writes Douglas, the jury must find that the defendants "had the purpose to deprive the prisoner of a constitutional right."[144] Or, writes historian Peter Irons, "the jury must find that the defendants had in mind the due process rights of their victim when they bludgeoned him to death."[145] Backing away from the extreme implications of this interpretation, Douglas acknowledges at the end that "such a purpose need not be

[142] 325 U.S. 91, 92, 97-98 (1945).
[143] 325 U.S. 91, 100 (1945).
[144] Ibid., 105, 107.
[145] Peter Irons, "Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties," *Washington Law Review*, vol. 59 (1984), 709.

expressed; it may at times be reasonably inferred from all the circumstances attendant on the act."[146] But since this question of intent was not specifically presented to the jury for consideration, the Supreme Court ordered that the case be retried.

The decision revealed the Court's profound ambivalence over the reach of federal power, ambivalence made more pronounced by Rutledge's reluctant concurrence, and the other four justices' impassioned dissents. Felix Frankfurter, joined by Owen Roberts and former Attorney General Robert Jackson, rejected entirely the government's interpretation of Section 52, a statute that was "born of that vengeful spirit which to no small degree envenomed the Reconstruction era."[147] Their dissent raised explicitly the question of states' rights and states' responsibilities. The officers' "brutal misconduct," writes Frankfurter, "rendered [them] guilty of manslaughter, if not murder, under Georgia law. Instead of leaving this misdeed to vindication by Georgia law, the United States deflected Georgia's responsibility by instituting a federal prosecution….The United States could not prosecute the petitioners for taking a life. Instead, a prosecution was brought and the conviction… obtained" under a law that, until recently, "has remained a dead letter."[148]

For the three dissenting justices, the government's action presented a practical consideration that could not be ignored: "whether the States should be relieved from responsibility to bring their law officers to book for homicide by allowing prosecutions in the federal courts for a relatively minor offense."[149] Time and again, the minority opinion emphasizes the danger of enervating state and local institutions by "tempting reliance on

[146] Screws v. United States, 325 U.S. 91, 106 (1945).
[147] Ibid., 140. The author of the dissenting opinion is not listed in the printed version, but historians have since determined that Frankfurter was in fact its author. See on this point Elliff, 170.
[148] 325 U.S. 91, 138-9.
[149] Ibid., 139.

federal authority for an occasional unpleasant task of local enforcement." The actions of the three officers, they note, were explicitly prohibited by the State of Georgia. If acting illegally, the officers could not possibly be acting "under color of law." In a rhetorical turn that ignores entirely the practical reality of Southern justice, Frankfurter writes that "if it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed."[150]

Only Rutledge and Murphy believed that the jury's verdict should be upheld. To avoid a stalemate, Rutledge voted with the majority, whose lukewarm support for Section 52 was at least "more nearly in accord" with his own.[151] In separate opinions, Rutledge and Murphy both hammer the minority and majority opinions for raising the specters of federal overreach and vague construction when the case at hand presents no ambiguity as to the officers' willful disregard of Hall's fundamental rights. "Knowledge of a comprehensive law library," writes Murphy, "is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is unrecognized in this nation. No appreciable amount of intelligence or conjecture on the part of the lowliest state official is needed for him to realize… that the Constitution protects persons from his reckless disregard of human life."[152] Without explicitly addressing Frankfurter's concerns over the balance of state and national power, Murphy articulates the underlying premise of his own campaign as attorney general to protect civil rights: "where, as here, the states are unwilling for some reason to prosecute such crimes, the federal government must step in unless constitutional guarantees are to become atrophied."[153]

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[150] Ibid., 149, 160.
[151] Ibid., 134.
[152] Ibid., 136-137.
[153] Ibid., 138.

But even on a court composed almost entirely of Roosevelt appointees, Rutledge and Murphy were in the minority.[154] The remaining seven justices all expressed to some degree their discomfort with the broad application of federal power to curb the excesses of local law enforcement. Indeed, the arguments of both the majority and minority opinions turn in part on the fact that the police power is, with minor exceptions, delegated specifically to the states. In *Classic*, Frankfurter, Roberts, Reed and Stone had all sided with the majority in holding that the right to have one's vote counted in a primary election is protected by the Constitution, and that officials acting "under color of law" to interfere with those rights could be prosecuted under Section 52.[155] Since *Classic* involved the process of selecting federal officials, the judges did not focus on whether their decision would upend in any meaningful way the traditional balance of power between the national government and the states.

But what appeared in *Classic* as unproblematic seemed now, in the context of *Screws*, to pose a dangerous threat to the existing order. Frankfurter admits as much, writing that Section 52 "is now here for the first time on full consideration as to its meaning and its constitutionality, unembarrassed by preoccupation both on the part of counsel and Court with the more compelling issue of the power of Congress to control state procedure for the election of federal officers."[156] When viewed in light of the administration of criminal justice, Section 52 now struck the minority as "a revolutionary break with the past" and a "dislocation in our federal system."[157] The majority decision

[154] Nominated by Herbert Hoover in 1930, Owen Roberts was the only member of the court not appointed by FDR.
[155] United States v. Classic, 313 U.S. 299 (1941). Jackson, still Attorney General at the time, had not yet been named to the Court.
[156] 325 U.S. 91, 141 (1945).
[157] Ibid., 144.

makes the same point, albeit to a lesser extent. "The fact that a prisoner is assaulted, injured, or even murdered by state officials," writes Douglas, "does not necessarily mean that he is deprived of any [federal] right…. Under our federal system, the administration of criminal justice rests with the States."[158]

In his celebrated history of the Supreme Court, Michael Klarman argues that "because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times." While judges "occupy an elite subculture… characterized by grater education and relative affluence," they are nevertheless "part of contemporary culture, and they rarely hold views that deviate far from dominant public opinion."[159] As the minority opinion makes clear, at least three of the justices were unwilling in 1945 to acknowledge that local authorities could not be made to respect the rights of citizens without direct federal intervention. And while the majority decision recognizes that there is a danger in curtailing as well as extending unnecessarily the power of the central state, it nevertheless signals a deep-seated reluctance to expand too drastically the powers of the federal government in the administration of criminal justice.

Delivered on the same day that the German high command surrendered unconditionally to Allied forces, the Court's opinion attracted little comment at the time. Both the *Washington Post* and *Chicago Tribune* commented on the "sweeping powers of prosecution… now placed in the hands of the Department of Justice" rather than on the

[158] Ibid., 109.
[159] Klarman, *From Jim Crow to Civil Rights*, 5. Barry Friedman makes this point as well in *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009).

narrow terms on which Section 52 had been sustained.[160] The Supreme Court Judges concerns were not, it seems, too far out of step with the broader currents of the times.

The Court's decision in *Screws* left open a broad field of federal activity in civil rights enforcement, including continued prosecutions of police brutality in cases where officers intentionally deprived victims of their rights. Nevertheless, the decision raised doubts about the scope of federal authority and the limits of litigation in bringing about substantive change. More concretely, the *Screws* case and its aftermath prompted J. Edgar Hoover to make explicit his mounting concerns over the precise objectives of the dozens of civil rights investigations assigned each year to agents of the FBI.

In three 1946 memoranda for Attorney General Tom Clark, Hoover no longer insisted that federal investigations of local police officers undercut the Bureau's emphasis on law enforcement cooperation. Years of experience had demonstrated even to Hoover's satisfaction that such cases rarely resulted in anything but temporary resentment. Rather, the Director argued that federal investigations, which rarely resulted in criminal prosecution, absolved state officials of their responsibilities and threatened to undermine Bureau prestige:

> [At] the present time the Bureau is expending a considerable amount of manpower investigating murders, lynchings and assaults, particularly in the Southern states in which there cannot conceivably be any violation of a Federal Statute.… I appreciate the fact that many complaints alleging a violation of civil rights do not contain sufficient facts upon which to determine whether or not a Federal violation is involved. I wish to point out, however, that once inquiries are instituted by the Bureau whether they are preliminary in nature or part of a complete and thorough investigation,

[160] "Due Process Again," *Washington Post*, May 10, 1945, p. 8; see also "The 14th Amendment Rediscovered," *Chicago Daily Tribune,* May 15, 1945, p. 10. The *Tribune* took a slightly more favorable position on the ruling than did the *Post*, which quoted extensively from the minority opinion emphasizing the dangers of the broad new federal powers upheld in the court's ruling.

> the majority of the public and the press are given the impression that we have actively [entered] and are investigating the case. Local law enforcement officers likewise gain the impression that by our inquiries we have assumed jurisdiction and as a result they withdraw from any investigation they may be conducting.

When cases are then almost inevitably closed without proceeding to trial, "there is a feeling and belief that the Bureau has failed to 'solve' many cases into which it has entered and the resulting feeling that the Department of Justice has been inadequate to the occasion." Hoover urged a "thorough and prompt" review of existing civil rights statutes and a clear public statement of federal responsibilities in the enforcement of civil rights.[161]

Hoover's objections cannot, of course, be taken at face value. In particular, his own racial attitudes no doubt contributed to his reluctance to see the Bureau's resources spent on symbolic affirmations of black rights. His outlook reflected the values of Seward Square, the tree-lined, middle-class neighborhood in Washington D.C. where Hoover spent his formative years. "Southern, white, Christian, small-town, turn-of-the-century Washington," writes biographer Richard Gid Powers, had instilled in Hoover an unquestioning faith in white superiority.[162] While at the Radical Division – tasked ferreting out subversives and carrying out the infamous Palmer Raids after World War I – Hoover "had been concerned with black civil rights organizations almost exclusively in terms of their potential as targets for Communist infiltration. His condescending attitude toward black intelligence," Powers notes, "made him inclined to see these organizations

[161] J. Edgar Hoover to Tom Clark, September 12, 1946 and October 2, 1946, reprinted in, Michal R. Belknap, ed. *Justice Department Civil Rights Policies Prior to 1960: Crucial Documents from the Files of Arthur Brann Caldwell* (New York: Garland Publishing, 1991), 99, 106.
[162] Richard Gid Powers, *Secrecy and Power*: *The Life of J. Edgar Hoover* (New York: The Free Press, 1987), 6.

as easy prey for the skilled propagandists and agitators of the Communist party."[163] Indeed, the first of Hoover's 1946 memos explicitly blames "the aggressiveness of pressure groups" – a thinly veiled reference to the NAACP – for the number of cases referred for Bureau action.[164] Yet despite his questionable motives, his point is not without merit. Federal law, particularly in the wake of *Screws*, was in fact "an inadequate weapon for efficient enforcement." And six years of federal action in cases of police misconduct had served to widen further the gap between public expectations of federal action and the department's limited ability to deliver satisfactory results.

The limits of federal civil rights enforcement are demonstrated all too clearly by the subsequent history of the federal government's case against Claude Screws. Not long after the Court's decision, the Department of Justice moved to retry the three defendants, this time taking pains to ensure that the judge's instructions to the jury conformed to the more narrow interpretation of Section 52. But by then, the passage of time had erased from potential juror's minds their initial horror at the Sheriff's crimes. Circumstances in Southern Georgia had likewise changed since 1943. "In the last two years," notes the U.S. Attorney, "more and more of the Negroes have left the farms, either for higher wages in defense industries or, in some instances, to enjoy spending in leisure the dependency benefits coming to them from members of the family in the Armed Forces. We have reason to say that it will be much harder to find a jury which will not be influenced by prejudice against Negroes because of the conduct of some of the Negroes in recent years."[165] Increasingly alarmed over the prospect of black economic and social mobility, and faced with the uncertain task of determining Screws' specific intent, the

[163] Ibid., 324.
[164] Ibid., 99.
[165] John P. Cowart to the Attorney General, August 21, 1945, reprinted in Elliff, 213.

jury acquitted the defendants on both counts. Tellingly, Baker County voters reelected Screws to the sheriff's office by overwhelming margins in 1946 and 1948. Ten years later, voters sent Screws to the Georgia State Senate. The brief window of opportunity created by the political imperatives of World War II, the progressive administration of Governor Arnall, and the sheer brutality of the sheriff's crimes had, by 1945, once again closed. The history of Baker County in the decade and a half that followed charted a course indistinguishable from that of comparable rural communities across the region. And as Screws settled into his new post in Georgia's legislature, the Civil Rights Division of the Department of Justice still struggled to define its role in checking the power and excesses of police officers across the Jim Crow South.

Conclusion

Much to the chagrin of former Attorney General William Mitchell, the Department of Justice outgrew the Pennsylvania Avenue building less than a decade after its completion. By 1941, every office in the 1.2 million square foot edifice had been filled to capacity. Lower-level officials doubled and tripled up in cramped quarters. Secretaries moved to makeshift work stations in their supervisors' offices. Antitrust chief Thurman Arnold emptied his division's library into the building's hallways to make room for twenty-five new members of his staff. The Federal Bureau of Investigation spilled out of its Justice Department headquarters into several area buildings, including a Dupont Avenue hotel and the Armory of the D.C. National Guard.[1] With Hoover's war on crime, Arnold's antitrust crusade, and the myriad major and minor enforcement initiatives spurred by Roosevelt's New Deal, the Justice Department expanded beyond what Mitchell could have possibly imagined when he spoke at the dedication ceremony in 1933. Yet his prediction – that "local self-government and local initiative" would be "subverted" by the Department's growth – proved off the mark. If anything, the history of the Roosevelt-era Department of Justice demonstrates the remarkable resilience of local control, particularly in the case of law enforcement, where federal agencies augmented and drew upon, but rarely supplanted, the efforts of local police.

From the FBI's evolving relationship with state and local police departments, to the BOP's and PIRA's feeble reform initiatives, to the still more uncertain police

[1] "Defense Plan Jams U.S. Offices," *The Washington Post*, July 25, 1940, p. 17; Jerry Kluttz, "The Federal Diary," *The Washington Post*, June 30, 1941, p. 15; "House Probe of Dupont 'Affair' Due," *The Washington Post*, July 16, 1941, p. 13; "Site for FBI Building Up for Action," *The Washington Post*, November 13, 1941, p. 19; U.S. Congress, House, *Hearings before the Subcommittee of the Committee on Appropriations on the Department of Justice Appropriation Bill for 1945*, 78th Cong., 1st Sess. (Washington: Government Printing Office, 1943), 209.

brutality investigations of the Civil Rights Section, the stories in the preceding chapters present a Department of Justice deeply conflicted as to the legitimate boundaries of federal policing. This tendency to defer to local interests reflected both necessity and strategy, both the practical reality of the prevailing federalist order and the accompanying ideological grip of decentralization and states' rights. An investigative force without the power of arrest, the early Bureau of Investigation depended on the assistance and manpower of local police. But this cooperative model of Bureau development persisted long after agents were freed from such statutory limitations – the Bureau's ability to draw upon the resources of local law enforcement allowed the agency to increase its effective capacity beyond what its budget allowed. Adding to these practical considerations was a deep-seated ideological commitment to decentralization, which both shaped and was in turn reinforced by the course of Bureau expansion in the Roosevelt years. Sanford Bates, James Bennett, and the prison reformers of the PIRA were similarly constrained by the practical reality on the ground. Lacking a clear mandate and mechanisms of enforcement, both the BOP and the PIRA could do little more than gently coax state officials along the path toward substantive reform. The Civil Rights Section attorneys who prosecuted the early police brutality cases were in turn hamstrung by a federal court system that was not entirely federal in character, its juries and judges drawn from the local area and subject to many of the same prejudices that underpinned Jim Crow. They were also constrained by the reluctance on the part of their superiors and of the federal courts to nationalize the responsibility for protecting individual rights. In the course of the Supreme Court's prolonged deliberations over *Screws v. United States*, former Attorney General Robert Jackson echoed Mitchell's warning of 1933, insisting repeatedly that upholding the police

officer's conviction would enervate local responsibility and encourage state officials to "[lie] down on the job."[2] For all the "revolutions" of the 1930s – in commerce clause jurisprudence, in the composition of the Democratic coalition, and in the public's conception of the role of the national state – there was no comparable revolution in the decentralized character of law enforcement in the Roosevelt years.

Thurman Arnold's antitrust campaign faced few of these same ideological limits on bold federal initiative. Indeed, what is striking about the Antitrust Division in the 1930s is the confidence with which attorneys pressed their cases – confidence that theirs was a superior model of motion picture distribution and exhibition; that a division chief without firsthand experience in labor organization could dictate legitimate union objectives and deploy the antitrust laws to curb labor's abuses without unraveling labor's hard-fought gains. The energy of the Antitrust Division in the late 1930s was fueled by the nature of its leadership, but only up to a point. It also reflected the broader climate of the New Deal years, which made possible the vigorous application of federal power in new areas of economic life. Across the federal bureaucracy, administrators instituted programs to regulate industry, fix agricultural production and prices, and develop local infrastructure. While conceived of with far different goals in mind, the antitrust program mirrored in its ambition campaigns to revitalize the Tennessee Valley, or to establish planned "greenbelt" suburbs.

What distinguished these bold interventions from the reform initiatives of the Justice Department's law enforcement branches, were their intended targets. The most ambitious programs of the Roosevelt years were aimed at private individuals and

[2] Jackson, quoted in Sidney Fine, *Frank Murphy: The Washington Years* (Ann Arbor: University of Michigan Press, 1984), 398.

organizations – corporations and unions; workers and retirees; the poor and the unemployed – both as beneficiaries of federal aid and as the objects of coercive federal power. Increasingly, private individuals looked to the federal government rather than to the cities and states for social welfare and economic justice. In this respect, the federal system was indeed transformed by the Roosevelt years and the "constitutional revolution" of 1937. But across the federal bureaucracy – even in the case of relief programs at the heart of the New Deal agenda – administrators were exceedingly cautious in dealing with officials at the state and local levels. They coaxed, prodded, but rarely dictated to the local officials charged with distributing federal aid. As V. O. Key observed in 1937, there were numerous instances where "federal officials [were], in fact, largely dominated by state officials" and where "control [ran] from the state to the federal agency rather than the other way."[3]

But ultimately, this distinction between the private and public targets of federal action is just part of the story of the Justice Department in the Roosevelt years. For what unifies the experience of officials across the Department is their success in broadening their missions and expanding their capacity to uphold federal law. What the New Deal offered first and foremost was an expressed faith in government action. It may not have legitimized the "religion of government" that Arnold advocated in *Folklore of Capitalism,* but it nevertheless created a space to expand government institutions to more effectively meet the problems of contemporary social and economic life – to strengthen, across the board, the machinery of the central state.[4] In particular, it offered an opportunity for administrators like J. Edgar Hoover, Sanford Bates, and Thurman Arnold

[3] Joseph P. Harris, in a forward to V. O. Key, *The Administration of Federal Grants to States* (Chicago: Public Administration Service, 1937), xii.
[4] Thurman W. Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937), 389.

to promote greater standardization, professionalization, and bureaucratization of their own departments, and to encourage the same reforms, however cautiously, at the local level. In his second inaugural, Roosevelt explicitly articulated the statist assumption underpinning the New Deal, which he characterized as an attempt "to find through government the instrument of our united purpose to solve for the individual the ever-rising problems of a complex civilization." The previous four years, he continued, had demonstrated that "government within communities, government within the separate States, and government of the United States can do the things the times require." [5]

Thurman Arnold and J. Edgar Hoover are rarely portrayed as emblematic of the New Deal. Neither earns more than passing mention in leading histories of the Roosevelt years.[6] Arnold's antitrust crusade, particularly his campaign against labor unions, left him increasingly isolated from the post-war liberal establishment. J. Edgar Hoover's law enforcement initiatives were marginal to the economic thrust of New Deal reform; he himself was deeply suspicious of the liberal economists and Democratic activists who shaped the administration's agenda. But ultimately, both men were quintessential New Dealers, latching on to a moment of crisis to establish strong national organizations that continued to expand in both scope and function throughout the postwar decades.

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[5] Franklin D. Roosevelt, "Second Inaugural Address," January 20, 1937, in Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt*, 1937 vol. (New York: The Macmillan Company, 1941), 1-2.

[6] See for example: Anthony J. Badger, *The New Deal: The Depression Years, 1933-1940* (Chicago: Ivan R. Dee, 2002); David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929-1945* (New York: Oxford University Press, 1999); William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* (New York: Harper & Row, 1963). Hoover appears in all three accounts just briefly, and only in the context of World War II counterespionage activities and politically-motivated Bureau investigations. Both Kennedy and Leuchtenburg refer to Arnold's *Symbols of Government* and *Folklore of Capitalism* as key examples of New Deal thought, but neither affords more than a few paragraphs to Arnold's antimonopoly campaign. Badger, too, addresses the antitrust cases only briefly. Alan Brinkley, both in published articles and in *The End of Reform*, devotes considerable attention to Arnold and his program, though he is, in this respect, an exception to the rule.

Guide to Abbreviations

Arnold Papers	Thurman Arnold Papers, American Heritage Center, University of Wyoming, Laramie, WY
Berge Papers	Wendell Berge Papers, Library of Congress, Washington, DC
Biddle Papers	Francis Biddle Papers, Franklin D. Roosevelt Presidential Library, Hyde Park, NY
Hopkins Papers	Harry Hopkins Papers, Franklin D. Roosevelt Presidential Library, Hyde Park, NY
Jackson Papers	Robert Jackson Papers, Library of Congress, Washington, DC
Murphy Papers	Frank Murphy Papers, Bentley Historical Library, University of Michigan, Ann Arbor, MI
OF	Official File, Franklin D. Roosevelt Presidential Library, Hyde Park, NY
PPF	President's Personal File, Franklin D. Roosevelt Presidential Library, Hyde Park, NY
PSF	President's Secretary's File, Franklin D. Roosevelt Presidential Library, Hyde Park, NY
RG 9	Record Group 9, Records of the National Recovery Administration, National Archives, College Park, MD
RG 60	Record Group 60, Records of the Department of Justice, National Archives, College Park, MD
RG 65	Record Group 65, Records of the Federal Bureau of Investigation, National Archives, College Park, MD
RG 129	Record Group 129, Records of the Federal Bureau of Prisons, National Archives, College Park, MD
RG 209	Record Group 209, Records of the Prison Industries Reorganization Administration, National Archives, College Park, MD

Bibliography

Archival Sources:

American Heritage Center, Laramie, WY

Thurman Arnold Papers

Bentley Historical Library, University of Michigan, Ann Arbor, MI

Frank Murphy Papers

Franklin D. Roosevelt Presidential Library, Hyde Park, NY

Adolph Berle Papers
Francis Biddle Papers
Oscar Cox Papers
Mordecai Ezekiel Papers
Charles Fahy Papers
Leon Henderson Papers
Harry L. Hopkins Papers
Louis M. Howe Papers
Gardiner Means Papers
Lowell Mellett Papers
Printed Materials Collection
Eleanor Roosevelt Papers
Franklin D. Roosevelt Papers
    Official File
    President's Personal File
    President's Secretary's File
James Rowe Papers
Henry Wallace Papers

Library of Congress, Washington, DC

Robert Jackson Papers
Wendell Berge Papers

National Archives, College Park, MD

RG 9: National Recovery Administration
RG 51: Office of Management and Budget
RG 60: Department of Justice
RG 65: Federal Bureau of Investigation
RG 129: Bureau of Prisons
RG 144: Temporary National Economic Commission
RG 209: Prison Industries Reorganization Administration

National Archives, Washington, DC

RG 46: United States Senate
RG 233: United States House of Representatives
RG 267: United States Supreme Court

University of Virginia Library, Charlottesville, VA

Homer Cummings Papers

Legal Cases:

Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899)
American Column & Lumber Co. v. United States, 257 U.S. 377 (1921)
American Medical Association v. United States, 317 U.S. 519 (1943)
American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184 (1921)
Appalachian Coals v. United States, 288 U.S. 344 (1933)
Associated Press v. United States, 326 U.S. 1 (1945).
Brown v. Mississippi, 297 U.S. 278 (1936)
Chambers v. Florida, 309 U.S. 227 (1940)
Dr. Miles Medical Co., v. Park & Sons Co., 220 U.S. 373 (1911)
Federal Trade Commission v. Paramount Famous-Lasky Corporation et. al., 57 F.2d 152 (C.C.A. 2d, 1932).
First National Pictures v. Robinson, 72 F.2d 37 (C.C.A. 9th, 1934)
Guthrie v. Evans, 93 F.D.R. 390 (S.D. Ga. 1981)
Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); 442 F.2d 304 (8th Cir. 1971)
In re: Debs,, 158 U.S. 564, 600 (1895)
Loewe v. Lawlor, 208 U.S. 274, 305 (1908)
Lomax v. Texas, 313 U.S. 544 (1941)
Louis Brandeis dissent in Bedford Cut Stone Co. v. Stone Cutters' Assn., 274 U.S. 37 (1927)
N.L.R.B. v. Star Publishing Co., 97 F .2d 465 (C.C.A. 9th, 1938)
Norris v. Alabama, 294 U.S. 587 (1935)
Norris v. State, 182 So. 69 (Ala. 1938)
Paramount Famous Lasky Corporation et. al. v. United States, 282 U.S. 30 (1930)
Patterson v. Alabama, 294 U.S. 600 (1935)
Patterson v. State, 175 So. 371 (Ala. 1937)
Powell v. Alabama, 287 U.S. 45 (1932)
Schine Chain Theatres, v. United States, 334 U.S. 110 (1948)
Screws v. United States, 325 U.S. 91 (1945)
Slaughterhouse Cases, 83 U.S. 36, 79 (1873)
United States v. Balaban & Katz Corp., 4 Fed. Tr. Reg. Service ¶ 4221 (N.D. Ill., April 6, 1932)
United States v. Borden Co., 308 U.S. 188 (1939)
United States v. Building & Construction Trades Council et. al., 313 U.S. 539 (1941).
United States v. Buntin, 10 Fed. 730 (S.D. Ohio, 1882)
United States v. Classic, 313 U.S. 299 (1941)

United States v. Crescent Amusement Co, 323 U.S. 173 (1944)
United States v. Crescent Amusement Co., 323 U.S. 173 (1944)
United States v. Cruikshank, 92 U.S. 542 (1875)
United States v. Griffith, 334 U.S. 100 (1948)
United States v. Hutcheson, 312 U.S. 219 (1941)
United States v. International Hod Carriers & Common Laborers' District Council et. al., 313 U.S. 539 (1941)
United States v. International Longshoremen's Ass'n, No. 106-448 (S.D.N.Y. 1940)
United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, 315 U.S. 521 (1942)
United States v. Masonite Corp., 316 U.S. 265 (1942)
United States v. Motion Picture Patents Company, 225 F. 800 (E.D. Pa., 1915)
United States v. Paramount Famous Lasky Corporation et. al., 34 F.2d 984 (1929)
United States v. Paramount, 334 U.S. 131 (1948)
United States v. Pullman Company, 55 F. Supp. 985 (1944).
United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio, 1935)
United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940)
United States v. South Eastern Underwriters Association, 322 U.S. 533 (1944)
United States v. Standard Oil Co. of New Jersey, 47 F.2d 288 (E.D. Mo., 1931)
United States v. Stone, 188 Fed. 836 (D. Md. 1911)
United States v. Trans-Missouri Freight, 166 U.S. 290 (1897)
United States v. Trenton Potteries Co., 273 U.S. 392 (1927)
United States v. United Shoe Machinery Co., 247 U.S. 32 (1918)
United States v. United States Gypsum Co., 333 U. S. 364 (1948)
United States v. United States Steel Corp., 251 U.S. 417 (1920)
United States v. United States Steel Corp., 251 U.S. 417 (1920)
United States v. West Coast Theaters, Inc., 4 Fed. Trade Reg. Service ¶ 4206 (S.D. Cal., August 21, 1930)
United States v. Wheeling Tile Company Et Al., Criminal Indictment, No. 25537 (E.D. Mich., 1939)
Vernon v. Alabama, 313 U.S. 547 (1941)
Weems v. State, 182 So. 3 (Ala. 1938)
White v. Texas, 310 U.S. 530 (1940)

Periodicals:

Alabama Journal
Atlanta Constitution
Atlanta Daily World
Box Office
Chicago Daily Tribune
Chicago Defender
Clarion Ledger
Cosmopolitan
Crisis

Fortune
Forum
Harper's Magazine
Liberty Magazine
Los Angeles Times
McClure's Magazine
Montgomery Advertiser
New York Times
Saturday Evening Post
Scientific American
Time
Variety
Wall Street Journal
Washington Post

Published Government Documents, Hearings, Reports, and Serials:

California, Legislature, *Report of Joint Legislative Fact-Finding Committee on the Southern California Prison at Chino* (Sacramento: State Printing Office, 1941)

Federal Bureau of Investigation, *Uniform Crime Reports*, (Washington: Government Printing Office, 1933-1945).

———, *The Science of Fingerprints: Classification and Uses* (Washington, D.C.: Government Printing Office, 1977).

National Commission on Law Observance and Enforcement, *Lawlessness in Law Enforcement* (Washington, D.C.: Government Printing Office, 1931).

———, *Report on Police*, vol. 14 (Washington: Government Printing Office, 1931)

National Recovery Administration, Division of Review, *Evidence Study No. 25 of the Motion Picture Industry*, prepared by Daniel Bertrand, November 1935, 40.

President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Police* (Washington: Government Printing Office, 1967).

Prison Industries Reorganization Administration, *The Prison Labor Problem in Georgia* (Washington, D.C.: Government Printing Office, 1937)

Proceedings, Federal State Conference on Law Enforcement Problems of National Defense, August 5-6, 1940 (Leavenworth, Kansas: Federal Prisoner Industries, Inc. Press, 1940).

Temporary National Economic Committee, *Antitrust in Action*, Monograph No. 16 (Washington: Government Printing Office, 1940).

———, *The Motion Picture Industry – A Pattern of Control*, Monograph No. 43 (Washington: Government Printing Office, 1941).

United States Congress, *Congressional Record*.

United States Congress, House, *Constriction Site Picketing, Hearings before the Subcommittee on Labor-Management Relations*, 86th Congress, 2nd Session (Washington, D.C.: Government Printing Office, 1960).

———, *Delays in National Defense Preparations, Hearings before the Committee on Judiciary, Part I*, 77th Cong., 1st Sess. (Washington: Government Printing Office, 1941).

———, *Delays in National Defense Preparations, Hearings before the Committee on Judiciary*, 77th Cong., 1st Sess. (Washington: Government Printing Office, 1941).

———, *Hearings before the Subcommittee of the Committee on Appropriations on the Department of Justice Appropriation Bill for 1943*, 77th Cong., 2nd Sess. (Washington: Government Printing Office, 1942), 114.

———, *Motion-Picture Films (Compulsory Block Booking and Blind Selling)*, 76th Cong., 3rd Sess. (Washington: Government Printing Office, 1940).

———, *Motion-Picture Films*, 74th Cong., 2nd Sess. (Washington: Government Printing Office, 1936)

———, *Proposed Amendments to the National Labor Relations Act, Hearings before the Committee on Labor*, Vol. 6, 76th Cong., 1st Sess. (Washington: Government Printing Office, 1939).

———, *Proposed Amendments to the National Labor Relations Act, Hearings before the Committee on Labor*, Vol. 2, 76th Cong., 1st Sess. (Washington, D.C.: Government Printing Office, 1939).

———, *Registration of Labor Organizations, Business and Trade Associations, Hearings before Subcommittee No. 3 of the Committee on the Judiciary*, 77th Cong., 2nd Sess. (Washington, D.C.: Government Printing Office, 1942)

United States Congress, Senate, "Report No. 1348, Senate Committee on the Judiciary," 76th Cong., 3rd Sess., March 28, 1940.

———, *Anti-"Block-Booking" and "Blind Selling" in the Leasing of Motion Picture Films*, 76th Cong., 1st Sess. (Washington: Government Printing Office, 1939).

———, *Compulsory Block-Booking and Blind Selling in the Motion-Picture Industry*, 74th Cong., 2nd Sess. (Washington: Government Printing Office, 1936).

———, *Department of State, Justice and Commerce Appropriation Bill for 1940*, 76th Cong., 1st Sess. (Washington: Government Printing Office, 1939).

———, *Emergency Relief Appropriation, Hearings before the Committee on Appropriations*, 75th Cong., 1st Sess. (Washington, D.C.: Government Printing Office, 1937)

———, *Farmer Cooperatives, Hearings before the Subcommittee on Agricultural Production, Marketing, and Stabilization of Prices*, 86th Cong., 1st Sess. (Washington: Government Printing Office, 1959)

———, *Hearings on S. 3735 re: Motion Picture Theatre Divorcement*, 76th Cong., 3rd Sess. (Washington, D.C.: Charles A. Brown, 1940)

———, *Investigation of the National Recovery Administration*, 74th Cong., 1st Sess. (Washington: Government Printing Office, 1935).

———, *Investigation of the So-Called "Rackets," Hearings before a Subcommittee of the Committee on Commerce*,

———, *Motion Picture Films*, 70th Cong., 1st Sess. (Washington: Government Printing Office, 1928)

United States Department of Justice, Bureau of Prisons, *Federal Offenders* (Fort Leavenworth: United States Penitentiary Annex Press, 1930-1940)

United States Department of Labor, Bureau of Labor Statistics, *Prison Labor in the United States, 1940* (Washington, D.C.: Government Printing Office, 1941)

Unpublished Dissertations:

Ethan Van Blue, "Hard Time in the New Deal: Racial Formation and the Cultures of Punishment in Texas and California in the 1930s" (Ph.D. Dissertation, University of Texas at Austin, 2004).

Articles and Essays:

Walter Adams, "Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust," *Indiana Law Journal*, Vol. 27 (1951), 1-37.

"AHR Forum: The Debate over the Constitutional Revolution of 1937," *American Historical Review*, Vol. 11, No. 4 (October 2005), 1046-1115.

William Akin, "Arbitration and Labor Conflict: The Middle Class Panacea, 1886-1900," *The Historian*, Vol. 29, No. 4 (August 1967), 565-583.

Thurman Arnold, "Antitrust Law Enforcement, Past and Future," *Law and Contemporary Problems*, Vol. 7, No. 1 (Winter, 1940), 5-23.

Jerold S. Auerbach, "The La Follette Committee: Labor and Civil Liberties in the New Deal," *Journal of American History*, Vol. 51, No. 3 (Dec., 1964), 435-459.

Douglas Ayer, "In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period," *Stanford Law Review*, Vol. 23, No. 6 (June 1971), 1049-1086.

Solomon Barkin, "Collective Bargaining and Section 7 (B) of Nira," *Annals of the American Academy of Political and Social Science*, Vol. 184 (March 1936), 169-175.

Francis Biddle, "Civil Rights and the Federal Law," in *Safeguarding Civil Liberty Today* (New York: Peter Smith, 1945).

Robert Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," *The University of Chicago Law Review*, Vol. 22 (Autumn 1954), 157-201.

Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold," *Journal of American History*, Vol. 80, No. 2 (Sep., 1993), 557-579.

———, "Richard Hofstadter's the Age of Reform: A Reconsideration," *Reviews in American History*, Vol. 13, No. 3 (1985), 462-280.

Donald R. Colvin, "Comment: Jurisdictional Disputes," *Washington Law Review and State Bar Journal*, Vol. 20, No. 4 (1945).

Daniel R. Ernst, "Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943," *Law and History Review*, Vol. 11, No. 1 (Spring, 1993), 59-100.

Frank T. Flynn, "The Federal Government and the Prison-Labor Problem in the States. II. The Prison Industries Reorganization Administration," *The Social Service Review*, Vol. 24, No. 2 (Jun., 1950), 213-236.

John J. Flynn, "Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals," *Iowa Law Review*, Vol. 53 (1967), 983-983.

Alexandra Gil, "Breaking the Studios: Antitrust and the Motion Picture Industry," *N.Y.U. Journal of Law and Liberty*, Vol. 3 (2008), 83-123.

Adam Gordon, "The Creation of Home Ownership: How New Deal Changes in Banking Regulation Simultaneously Made Home Ownership Accessible to Whites and out of Reach for Blacks," *Yale Law Journal*, Vol. 115, No. 1 (Oct. 2005), 186-226.

Colin Gordon, "Rethinking the New Deal," *Columbia Law Review*, Vol. 98, No. 8 (Dec., 1998), 2029-2054.

Gene M. Gressley, "Thurman Arnold, Antitrust, and the New Deal," *The Business History Review*, Vol. 38, No. 2 (Summer, 1964), 214-231.

Alonzo N. Hamby, "The New Deal - Avenues for Reconsideration," *Polity*, Vol. 31, No. 4 (Summer, 1999), 665-681.

Richard Hofstadter, "Antitrust in America," *Commentary*, Vol. 38, No. 2 (Aug., 1964), 47-53.

Herbert Hovenkamp, "The Sherman Act and the Classical Theory of Competition," *Iowa Law Review*, Vol. 74, No. 5 (July 1989), 1019-1066.

Mae D. Huettig, "The Motion Picture Industry Today," in *The American Film Industry*, ed. Tino Balio (Madison: University of Wisconsin Press, 1976).

Peter Irons, "Politics and Principle: An Assessment of the Roosevelt Reocrd on Civil Rights and Liberties," *Washington Law Review*, Vol. 59 (1984), 693-722.

Maxwell S. Isenbergh and Seymour J. Rubin, "Antitrust Enforcement through Consent Decrees," *Harvard Law Review*, Vol. 53 (1939), 386-386.

Robert Jackson, "Message to the Bill of Rights Review," *The Bill of Rights Review*, Vol. 1 (Summer, 1940), 34-36.

Louis L. Jaffe, "Inter-Union Disputes in Search of a Forum," *Yale Law Journal*, Vol. 49, No. 3 (1939), 424-460.

Laura Kalman, "Law, Politics and the New Deal(s)," *The Yale Law Journal*, Vol. 108, No. 8 (Jun., 1999), 2165-2213.

Morton Keller, "Looking at the State: An American Perspective," *American Historical Review*, Vol. 106, No. 1 (Feb., 2001), 114-118.

Sheldon Kimmel, "How and Why the Per Se Rule against Price-Fixing Went Wrong," in *EAG Discussion Papers, No. 200607,* March 2006), Antitrust Division, Department of Justice. http://www.justice.gov/atr/public/eag/221879.pdf

William E. Leuchtenburg, "The Achievement of the New Deal," in *Fifty Years Later: The New Deal Evaluated*, ed. Harvard Sitkoff (New York: McGraw-Hill, 1985).

Richard Maltby, "The Production Code and the Hays Office," in *Grand Design: Hollywood as a Modern Business Enterprise, 1930-1939*, ed. Tino Balio (New York: Charles Scribner's Sons, 1993), 37-72.

Edward H. Miller, "Antitrust Labor Problems: Law and Policy," *Law and Contemporary Problems*, Vol. 7, No. 1 (Winter, 1940), 82-89.

Katz Milton, "The Consent Decree in Antitrust Administration," *Harvard Law Review*, Vol. 53, No. 3 (1940), 415-447.

Wilson D. Miscamble, "Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal," *The Business History Review*, Vol. 56, No. 1 (Spring, 1982), 1-15.

"The New Personnel and Policies of the National Labor Relations Board," *Harvard Law Review*, Vol. LIV, No. 7 (May, 1941), 269-279.

William R. Peterson, "Consent Decrees: A Weapon of Anti-Trust Enforcement," *University of Kansas City Law Review*, Vol. 18(1949), 34-34.

Charles F. Phillips, Jr., "The Consent Decree in Antitrust Enforcement," *Washington and Lee Law Review*, Vol. 18(1961), 39-56.

Richard Gid Powers, "One G-Man's Family: Popular Entertainment Formulas and J. Edgar Hoover's F.B.I.," *American Quarterly*, Vol. 30, No. 4 (Autumn, 1978), 471-492.

Gerda W. Ray, "From Cossack to Trooper: Manliness, Police Reform, and the State," *Journal of Social History*, Vol. 28, No. 3 (Spring 1995), 565-586.

Albert J. Reiss, Jr., "Police Organization in the Twentieth Century," *Crime and Justice*, Vol. 15(1992), 51-97.

Edgardo Rotman, "The Failure of Reform: The United States, 1865-1965," in *The Oxford History of the Prison: The Practice of Punishment in Western Society*, ed. Norval Morris and David J. Rothman (New York: Oxford University Press, 1995), 169-197.

Margo Schlanger, "Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders," *New York University Law Review*, Vol. 81(2006), 550-630.

William E. Kovacic and Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking," *Journal of Economic Perspectives*, Vol. 14, No. 1 (Winter, 2000), 43-60.

"The Sherman Act and the Motion Picture Industry," *The University of Chicago Law Review*, Vol. 13, No. 3 (April 1946), 346-361.

George J. Stigler, "The Origin of the Sherman Act," *The Journal of Legal Studies*, Vol. 14, No. 1 (Jan., 1985), 1-12.

Philip Taft, "Jurisdictional Disputes," *Annals of the American Academy of Political and Social Science*, Vol. 248(Nov., 1946), 37-43.

Stephen Vaughn, "Morality and Entertainment: The Origins of the Motion Picture Production Code," *Journal of American History*, Vol. 77, No. 1 (Jun., 1990), 39-65.

Books:

Thurman Arnold, *The Bottlenecks of Business* (New York: Reynal & Hitchcock, 1940).

———, *Fair Fights and Foul: A Dissenting Lawyer's Life* (New York: Harcourt, Brace & World, 1951).

———, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937).

———, *Symbols of Government* (New Haven: Yale University Press, 1935).

Edward Ayers, *Vengeance and Justice: Crime and Punishment in the 19th Century American South* (New York: Oxford University Press, 1984).

Nancy V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990* (Lawrence: University Press of Kansas, 1992).

Tino Balio, *Hollywood as a Modern Business Enterprise, 1930-1939* (Berkeley: University of California Press, 1995).

Raymond J. Batvinis, *The Origins of FBI Counterintelligence* (Lawrence: University Press of Kansas, 2007).

David Bayley, *Forces of Order: Police Behavior in Japan and the United States* (Berkeley: University of California Press, 1976).

Jonathan Bean, *Beyond the Broker State: Federal Policies toward Small Business, 1936-1961* (Chapel Hill: University of North Carolina Press, 1996).

H. Kenneth Bechtel, *State Police in the United States* (Westport, Conn.: Greenwood Press, 1995).

Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, Connecticut: Greenwood Press, 1977).

———, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post*-Brown *South* (Athens: University of Georgia Press, 1987).

———, ed. *Justice Department Civil Rights Policies Prior to 1960: Crucial Documents from the Files of Arthur Brann Caldwell* (New York: Garland Publishing, 1991).

Edward Berman, *Labor and the Sherman Act* (New York: Russell & Russell, 1969).

Barton J. Bernstein, ed. *Towards a New Past: Dissenting Essays in American History* (New York: Random House, 1968).

Francis Biddle, *In Brief Authority* (Garden City: Doubleday, 1961).

Gregory D. Black, *Hollywood Censored: Morality Codes, Catholics, and the Movies* (New York: Cambridge University Press, 1994).

William J. Bopp, *"O.W.": O.W. Wilson and the Search for a Police Profession* (Port Washington, N.Y.: Kennikat Press, 1977).

Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Vintage Books, 1996).

———, *Voices of Protest: Huey Long, Father Coughlin, and the Great Depression* (New York: Vintage Books, 1983).

David Brody, *Labor Embattled: History, Power, Rights* (Urbana: University of Illinois Press, 2005).

———, *Workers in Industrial America: Essays on the Twentieth Century Struggle* (New York: Oxford University Press, 1980).

Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (Chicago: University of Chicago Press, 1950).

David Burnham, *Above the Law: Secret Deals, Political Fixes and Other Misadventures of the U.S. Department of Justice* (New York: Scribner, 1996).

Brian Burrough, *Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933-1934* (New York: Penguin Press, 2004).

Dominic J. Jr. Capeci, *The Lynching of Cleo Wright* (Lexington: University Press of Kentucky, 1998).

Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008).

Robert K. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca: Cornell University Press, 1947).

Gene E. Carte and Elaine H. Carte, *Police Reform in the United States: The Era of August Vollmer, 1905-1932* (Berkeley: University of California Press, 1975).

Ralph Cassady Jr., *Monopoly in Motion Picture Production and Distribution: 1908-1915* (Los Angeles: Bureau of Business and Economic Research, 1959).

James Chadbourn, *Lynching and the Law* (Chapel Hill: The University of North Carolina Press, 1970).

Robert A. Christie, *Empire in Wood: A History of the Carpenters' Union* (Ithaca, NY: Cornell University Press, 1956).

Cornell W. Clayton, *The Politics of Justice: The Attorney General and the Making of Legal Policy* (Armonk, NY: M.E. Sharpe, 1992).

Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (Cambridge: Cambridge University Press, 1990).

Miles L. Colean, *American Housing: Problems and Prospects* (New York: Twentieth Century Fund, 1944).

Michael Conant, *Antitrust in the Motion Picture Industry* (Berkeley: University of California Press, 1960).

Bernard A. Cook and James R. Watson, *Louisiana Labor: From Slavery To "Right-to-Work"* (Lanham, NY: University Press of America, 1985).

Athan G. Theoharis and John Stuart Cox, *The Boss: J. Edgar Hoover and the Great American Inquisition* (Philadelphia: Temple University Press, 1988).

Stephen Cresswell, *Mormons & Cowboys, Moonshiners & Klansmen: Federal Law Enforcement in the South & West, 1870-1893* (Tuscaloosa: University of Alabama Press, 1991).

Homer Cummings and Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (New York: Macmillan Company, 1937).

Pete Daniel, *The Shadow of Slavery: Peonage in the South* (Urbana: University of Illinois Press, 1972).

Carl N. Degler, *Out of Our Past: The Forces That Shaped Modern America* (New York: Harper & Brothers, 1959).

Phillip Dray, *At the Hands of Persons Unknown: The Lynching of Black America* (New York: Random House, 2003).

Melvyn Dubofsky, *The State and Labor in Modern America* (Chapel Hill: University of North Carolina Press, 1994).

———, ed. *American Labor since the New Deal* (Chicago: Quadrangle Books, 1971).

Melvyn Dubofsky and Rhea Dulles, *Labor in America: A History* (Wheeling, Il.: Harlan Davidson, 2004).

John T. Elliff, *The United States Department of Justice and Individual Rights, 1937-1962* (New York: Garland Publishing, 1987).

Daniel R. Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (Urbana: University of Illinois Press, 1995).

Glenn Feldman, ed. *Before Brown: Civil Rights and White Backlash in the Modern South* (Tuscaloosa: University of Alabama Press, 2004).

Sidney Fine, *Frank Murphy: The Washington Years* (Ann Arbor: University of Michigan Press, 1984).

Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper Collins, 1988).

Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009).

Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993).

John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (White Plains, New York: M. E. Sharpe, 1980, rev. ed.).

Walter Galenson, *The CIO Challenge to the AFL: A History of the American Labor Movement, 1935-1941* (Cambridge: Harvard University Press, 1960).

———, *Rival Unionism in the United States* (New York: American Council on Public Affairs, 1940).

———, *The United Brotherhood of Carpenters: The First Hundred Years* (Cambridge: Harvard University Press, 1983).

Eugene Gerhart, *Robert H. Jackson: America's Advocate* (Indianapolis: Bobbs-Merrill, 1958).

Steve Fraser and Gary Gerstle, *The Rise and Fall of the New Deal Order, 1930-1980* (Princeton: Princeton University Press, 1989).

Russell G. Girardin, et. al., *Dillinger: The Untold Story* (Bloomington Indiana University Press, 1994).

Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2007).

Colin Gordon, *New Deals: Business, Labor, and Politics in America, 1920-1935* (New York: Cambridge University Press, 1994).

Jack Greenberg, *Crusaders in the Courts: Legal Battles of the Civil Rights Movement* (New York: Twelve Tables Press, 2004).

Gene M. Gressley, ed. *Voltaire and the Cowboy: The Letters of Thurman Arnold* (Boulder: Colorado Associated University Press, 1977).

Morton Grodzins, ed. *The American System: A New View of Government in the United States*, Edited by Daniel J. Elazar (Chicago: Rand McNally and Company, 1966).

James A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law* (Albany: State University of New York Press, 1974).

———, *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937-1947* (Albany: State University of New York Press, 1981).

Steven Hahn, *A Nation under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (Cambridge: Harvard University Press, 2005).

Alonzo Hamby, *Liberalism and Its Challengers* (New York: Oxford University Press, 1992).

Eric Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton: Princeton University Press, 1966).

John W. Hevener, *Which Side Are You On?: The Harlan County Coal Miners, 1931-1939* (Urbana: University of Illinois Press, 1978).

Robert F. Himmelberg, *The New Deal and Corporate Power: Antitrust Regulatory Policies During the Thirties and World War II* (New York: Garland Publishing, 1994).

———, *The Origins of the National Recovery Administration: Business, Government, and the Trade Association* (New York: Fordham University Press, 1993).

Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Vintage Books, 1955).

United States Commerce Clearing House, *The Federal Antitrust Laws, with a Summary of Cases Instituted by the United States, 1890-1951* (Chicago: Commerce Clearing House, 1952).

Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge: Harvard University Press, 2005).

———, *Enterprise and American Law, 1836-1937* (Cambridge: Harvard University Press, 1991).

Luther A. Huston, *The Department of Justice* (New York: Frederick A. Praeger, 1967).

Harold L. Ickes, *The Secret Diary of Harold L. Ickes: The First Thousand Days, 1933-1936*. Vol. 1 (New York: Simon and Schuster, 1953).

Peter H. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1993).

Kenneth T. Jackson, *The Crabgrass Frontier: The Suburbanization of the United States* (New York: Oxford University Press, 1985).

Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt*, ed. John Q. Barrett and William E. Leuchtenburg (New York: Oxford University Press, 2004).

Rhodri Jeffreys-Jones, *The FBI: A History* (New Haven: Yale University Press, 2007).

Jordan D. Jones, *The First Century: A History of the Wichita Police Department* (Wichita, Kan.: Wichita Police Department, 1980).

Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (New York: Fordham University Press, 2005).

Barry Dean Karl, *The Uneasy State: The United States from 1915 to 1945* (Chicago: University of Chicago Press, 1985).

Edward N. Kearney, *Thurman Arnold, Social Critic: The Satirical Challenge to Orthodoxy* (Albuquerque: University of New Mexico Press, 1970).

David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929-1945* (New York: Oxford University Press, 1999).

———, *Over Here: The First World War and American Society* (New York: Oxford University Press, 1980).

Paul W. Keve, *Prisons and the American Conscience: A History of U.S. Federal Corrections* (Carbondale, Ill.: Southern Illinois University Press, 1991).

V. O. Key, *The Administration of Federal Grants to the States* (Chicago: Public Administration Service, 1937).

Jeffrey S. King, *The Life and Death of Pretty Boy Floyd* (Kent, Ohio: Kent State University Press, 1998).

Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004).

Theodore Kovaleff, *The Antitrust Impulse* (Armonk, N.Y.: M.E. Sharpe, 1994).

American Federation of Labor, *Report of Proceedings of the Twenty-Second Annual Convention of the American Federation of Labor* (Washington, D.C.: Law Reporter Company, 1902).

James Landis, *The Administrative Process* (New Haven: Yale University Press, 1938).

Brian K. Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (Lawrence: University Press of Kansas, 1997).

William Leiserson, *Right and Wrong in Labor Relations* (Berkeley: University of California Press, 1937).

William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

———, ed. *Franklin D. Roosevelt and the New Deal, 1932-1940* (New York: Harper & Row, 1963).

Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton: Princeton University Press, 2002).

Elias Lieberman, *Unions before the Bar: Historic Trials Showing the Evolution of Labor Rights in the United States* (New York: Harper and Brothers, 1950).

Max Lowenthal, *The Federal Bureau of Investigation* (London: Turnstile Press, 1951).

Paul Maccabee, *John Dillinger Slept Here: A Crooks' Tour of Crime and Corruption in St. Paul* (St. Paul: Minnesota Historical Society, 1995).

Francis MacDonnell, *Insidious Foes: The Axis Fifth Column and the American Home Front* (New York: Oxford University Press, 1995).

Burke Marshall, *Federalism and Civil Rights* (New York: Columbia University Press, 1964).

George Martin, *Madam Secretary: Frances Perkins* (Boston: Houghton Mifflin Company, 1976).

Alpheus T. Mason, *Organized Labor and the Law* (Durham: Duke University Press, 1925).

Thomas McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge: Belknap Press of Harvard University, 1984).

James McGovern, *Anatomy of a Lynching: The Killing of Claude Neal* (Baton Rouge: Louisiana State University Press, 1992).

Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (New York: Cambridge University Press, 2008).

Kevin McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2004).

Kim McQuaid, *Big Business and Presidential Power: From FDR to Reagan* (New York: William and Morrow, 1982).

Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (Chicago: University of Chicago Press, 1950).

Harry A. Millis and Royal E. Montgomery, *Organized Labor* (New York: McGraw-Hill Book Company, 1945).

Giuliana Muscio, *Hollywood's New Deal* (Philadelphia: Temple University Press, 1996).

Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Row, 20th anniversary edition, 1962).

Robert J. Norrell, *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* (New York: Knopf, 1985).

David M. Oshinsky, *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press Paperbacks, 1996).

Christian Parenti, *The Soft Cage: Surveillance in America from Slavery to the War on Terror* (New York: Basic Books, 2004).

James T. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton: Princeton University Press, 1969).

Rudolph J. R. Peritz, *Competition Policy in America, 1888-1992: History, Rhetoric, Law* (New York: Oxford University Press, 1996).

Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence: University Press of Kansas, 2000).

Mary Poole, *The Segregated Origins of Social Security: African Americans and the Welfare State* (Chapel Hill: University of North Carolina Press, 2006).

Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (New Brunswick: Rutgers University Press, 1998).

Richard Gid Powers, *Broken: The Troubled Past and Uncertain Future of the FBI* (New York: Free Press, 2004).

———, *G-Men: Hoover's FBI in American Popular Culture* (Carbondale: Southern Illinois University Press, 1983).

———, *Secrecy and Power: The Life of J. Edgar Hoover* (New York: The Free Press, 1987).

William Preston Jr., *Aliens and Dissenters: Federal Suppression of Radicals, 1903-1933* (Urbana: University of Illinois Press, 1963).

George C. Rable, *But There Was No Peace: The Role of Violence in the Politics of Reconstruction* (Athens: University of Georgia Press, 1984).

James D. Richardson, ed. *A Compilation of the Messages and Papers of the Presidents*. Vol. XI (New York: Bureau of National Literature, 1897).

Samuel I. Rosenman, ed. *The Public Papers and Addresses of Franklin D. Roosevelt* (New York: Harper & Brothers, 1950).

Robert A. Goldwin and William A. Schambra, ed. *How Federal Is the Constitution?* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1987).

Thomas Schatz, *Boom and Bust: American Cinema in the 1940s* (Berkeley: University of California Press, 1997).

———, *The Genius of the System: Hollywood Filmmaking in the Studio Era* (Minneapolis: University of Minnesota Press, 2010, rev. ed.).

Arthur M. Schlesinger, Jr *The Age of Roosevelt, Volume I: The Crisis of the Old Order, 1919-1933* (Boston: Houghton Mifflin Company, 1957).

———, *The Age of Roosevelt, Volume II: The Coming of the New Deal, 1933-1935* (Boston: Houghton Mifflin Company, 1958).

———, *The Age of Roosevelt, Volume III: The Politics of Upheaval, 1935-1936* (Boston: Houghton Mifflin Company, 1960).

Bruce Schulman, *From Cotton Belt to Sunbelt: Federal Policy, Economic Development, and the Transformation of the South, 1938-1980* (New York: Oxford University Press, 1991).

William Marston Seabury, *The Public and the Motion Picture Industry* (New York: The Macmillan Co., 1926).

Colin Shindler, *Hollywood in Crisis: Cinema and American Society* (New York: Routledge, 1996).

Howard Sitkoff, *A New Deal for Blacks* (New York: Oxford University Press, 30th anniversary ed., 2004).

Harvard Sitkoff, *Fifty Years Later: The New Deal Evaluated* (New York: McGraw-Hill, 1985).

Kenneth Finegold and Theda Skocpol, *State and Party in America's New Deal* (Madison: University of Wisonsin Press, 1995).

Bruce Smith, *Police Systems in the United States* (New York: Harper, 1960).

Kenneth T. Strand, *Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB* (Pullman: Washington State University Press, 1961).

Leonard Ray Teel, *Ralph Emerson Mcgill: Voice of Southern Conscience* (Knoxville: University of Tennessee Press, 2001).

Athan G. Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978).

John Toland, *The Dillinger Days* (New York: Random House, 1963).

Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (New York: Cambridge University Press, 1985).

Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (New York: Oxford University Press, 1994).

Mark Twain, *The Tragedy of Pudd'nhead Wilson and the Comedy of Those Extraordinary Twins* (Hartford, Conn.: American Publishing Company, 1900).

Stanley Vittoz, *New Deal Labor Policy and the American Industrial Economy* (Chapel Hill: University of North Carolina Press, 1987).

Christopher Waldrep, ed. *Lynching in America: A History in Documents* (New York: New York University Press, 2006).

Spencer Weber Waller, *Thurman Arnold: A Biography* (New York: New York University Press, 2005).

Sidney Webb and Beatrice Potter Webb, *Industrial Democracy* (New York: Longmans, Green and Co., 1902, rev. ed.).

Nancy J. Weiss, *Farewell to the Party of Lincoln: Black Politics in the Age of F.D.R.* (Princeton: Princeton University Press, 1983).

Wyatt C. Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2002).

James Q. Wilson, *The Investigators: Managing FBI and Narcotics Agents* (New York: Basic Books, 1978).

David Witwer, *Corruption and Reform in the Teamsters Union* (Urbana: University of Illinois Press, 2008).

———, *Shadow of the Racketeer: Scandal in Organized Labor* (Urbana: University of Illinois Press, 2009).

Robert Zangrando, *The NAACP Crusade against Lynching, 1909-1950* (Philadelphia: Temple University Press, 1980).

Robert H. Zieger, *American Workers, American Unions* (Baltimore: Johns Hopkins University Press, 1994, 2nd ed.).

Howard Zinn, *New Deal Thought* (Indianapolis: Bobbs-Merrill Company, 1966).