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The Travel Act at Fifty: Reflections on the Robert F. Kennedy Justice Department and Modern Federal Criminal Law Enforcement at Middle Age

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Cover Page Footnote

Professor of Law, Howard University School of Law. BA, J.D, University of California, Los Angeles. I thank Howard University School of Law for providing research funding for this article. I also thank my Howard University School of Law research assistants, Ashley Joyner, J.D., 2012; Janelle Christian, J.D. Candidate 2014; Justin Bell, J.D. Candidate 2014; and Aubrey Cunningham, J.D. Candidate 2013, and the library staff of Howard University School of Law. Lastly, I thank my dear friend Professor J. Gordon Hylton for his thoughtful comments and criticisms of earlier drafts of this article. Any errors and omissions are solely my responsibility.

THE TRAVEL ACT AT FIFTY: REFLECTIONS ON
THE ROBERT F. KENNEDY JUSTICE DEPARTMENT
AND MODERN FEDERAL CRIMINAL LAW
ENFORCEMENT AT MIDDLE AGE

Adam Harris Kurland⁺

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It seems to me imperative that we reinsert in ourselves the toughness and idealism that guided the nation in the past. The paramount interest in self . . . must be replaced by an actual, not just a vocal, interest in our country, by a spirit of adventure, a will to fight what is evil, and a desire to serve. It is up to us as citizens to take the initiative as it has been taken before in our history, to reach out boldly but with honesty to do the things that need to be done.

Robert F. Kennedy¹

The world of crime had changed. So too, it became plain, would law enforcement have to change. Individual [local and violent street] crimes...still occurred, always would, and should be prosecuted. But that is not what [Robert Kennedy's Justice Department] was to devote their main energies to. The local police could deal with isolated [local] criminal acts, and the FBI was good at solving bank robberies, kidnapping, and auto thefts. The overarching crime problem was changing in ways law enforcement had not fully comprehended nor coped with adequately.

Ronald Goldfarb²

"May he live in interesting times."

Purported Chinese curse, as quoted by Robert F. Kennedy³

1. ROBERT F. KENNEDY, *THE ENEMY WITHIN* 325 (1960).
 2. RONALD GOLDFARB, *PERFECT VILLAINS, IMPERFECT HEROES: ROBERT F. KENNEDY'S WAR AGAINST ORGANIZED CRIME* 41 (1995).
 3. Robert F. Kennedy, U.S. Senator, Address of Senator Robert F. Kennedy, Day of Affirmation, University of Capetown (June 6, 1966), available at <http://research.archives.gov/description/194041>. The website *Phrasefinder* suggests that the curse is really a post-WWII English saying, that RFK ironically popularized in his Day of Affirmation speech. Gary Martin, *May You Live In Interesting Times*, PHRASE FINDER, <http://phrases.org.uk/meanings/may-you-live-in-interesting-times.html> (last visited Oct. 31, 2013). It is likely not of ancient Chinese origin. *Id.*

The Travel Act, the legislative centerpiece of Attorney General Robert F. Kennedy's newly minted federal war on organized crime, was swiftly enacted in September of 1961.⁴ The fiftieth anniversary of its enactment passed quietly and without significant fanfare in late 2011.⁵

A larger celebration was certainly in order.⁶ A half-century later, the enactment of the Travel Act—if evaluated in conjunction with the Kennedy administration's aggressive pursuit of other progressive federal criminal law enforcement initiatives—can be seen as a seminal moment in the evolution of modern federal criminal law enforcement.

4. Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498 (1961) (codified as amended at 18 U.S.C. § 1952 (2006)). As originally enacted, the Travel Act provided, in relevant part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section “unlawful activity” means (1) any business enterprise involving gambling, liquor . . . narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

§ 1952(a)–(b), 75 Stat. at 498–99.

The Travel Act has undergone a few modifications in the last fifty years, most notably the expansion of the underlying predicate offenses in subsection (b) to include arson. Act of July 7, 1965, Pub. L. No. 89-68, 79 Stat. 212 (codified at 18 U.S.C. § 1952(b)(2)). In 1990, Congress expanded the jurisdictional requirements in subsection (a) and reconfigured the mail alternative to read “[w]hoever travels in interstate commerce or uses the mail or any facility in interstate commerce.” Crime Control Act of 1990, Pub. L. No. 101-647, § 1064, 104 Stat. 4789, 4843 (1990) (codified at 18 U.S.C. § 1952(a)). For a detailed analysis of the intricacies of a Travel Act prosecution, see Barry Breen, *The Travel Act: Prosecution of Interstate Acts in Aid of Racketeering*, 24 AM. CRIM. L. REV. 125, 145 (1986).

5. See, e.g., WASH. POST, Sept. 13, 2011 (making no mention of the anniversary of the enactment of the Travel Act).

6. The fiftieth anniversaries of other noteworthy events of the Kennedy administration prompted new books offering a half-century perspective. See, e.g., DAVID COLEMAN, *THE FOURTEENTH DAY: JFK AND THE AFTERMATH OF THE CUBAN MISSILE CRISIS* (2012). On January 21, 2011 the Department of Justice commemorated the fiftieth anniversary of RFK's swearing-in as attorney general with a dignified two-hour program. Press Release, Dep't of Justice (Jan 21, 2011), available at www.justice.gov/opa/pr/2011/January/11-ag-088.html. Of course, in November of 2013, the fiftieth anniversary of President Kennedy's assassination will be commemorated and heavily publicized. See, e.g., Advertisement, WASH. POST, Jan. 25, 2013, at Weekend 25 (advertising the premier of the film “March to Justice,” an event “part of Newseum's year-long exploration of John F. Kennedy's presidency . . . to mark the 50th anniversary of his assassination”).

Robert F. Kennedy (RFK) proved prescient with his above-cited “interesting times” curse,⁷ as his comment could have just as easily been directed at the myriad of challenges facing contemporary federal criminal law enforcement. This Article examines the RFK Justice Department’s fundamental role as a catalyst in the development of modern federal criminal law enforcement. Modern federal criminal law is extremely broad, powerfully equipped with specific law enforcement techniques, heavily involved in public corruption prosecutions of state and local officials, and necessarily dependent on the broad exercise of prosecutorial discretion in determining which cases warrant federal prosecution.⁸ The Article also discusses how modern federal criminal law enforcement has fared as it reaches middle age, particularly in light of the “New Federalism”; in the last few decades, critics have increasingly and relentlessly challenged the expansion of federal authority, including federal criminal law authority, on both constitutional and policy grounds.⁹

RFK is the subject of numerous biographies and books, not surprising given his position as one of the princes of America’s premier political family.¹⁰ RFK’s relatively brief but profound tenure as attorney general is chronicled in several books devoted to the subject.¹¹ In 2001, the Department of Justice Main Building in Washington, D.C. was dedicated in his name.¹² No other attorney general has been the subject of such intense scrutiny and showered with such honor.¹³

However, none of the earlier RFK scholarship was specifically designed to offer a half-century retrospective on his tenure as attorney general. The books written specifically about RFK as attorney general and the tumultuous times he faced—most written at least a decade ago—were, by definition, not designed to offer a retrospective, viewed from the lens of history a half century later, of how his attorney generalship influenced the development of modern federal criminal law enforcement. The previous scholarship also was not designed to offer an

7. See *supra* note 3 and accompanying text.

8. See Sara Sun Beale, *Reporter’s Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1303 (1995) (discussing the breadth of federal criminal law and prosecutorial discretion); Mila Sohoni, *The Idea of “Too Much Law,”* 80 FORDHAM L. REV. 1585, 1606–24 (2012) (exploring the arguments against expansive federal criminal law).

9. See, e.g., Sohoni, *supra* note 8, at 1610–12.

10. See, e.g., ARTHUR M. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* (1978); HARRIS WOFFORD, *OF KENNEDYS AND KINGS: MAKING SENSE OF THE SIXTIES* (1980).

11. See, e.g., GOLDFARB, *supra* note 2; BURTON HERSH, *BOBBY AND J. EDGAR: THE HISTORIC FACE-OFF BETWEEN THE KENNEDYS AND J. EDGAR HOOVER THAT TRANSFORMED AMERICA* (2007); VICTOR S. NAVASKY, *KENNEDY JUSTICE* (1971).

12. Press Release, The White House, President Dedicates Robert F. Kennedy Justice Building (Nov. 20, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011120-15.html>.

13. See *id.* (noting that no other attorney general is “more fondly remembered” than RFK).

object lesson on how RFK's efforts influence today's federal criminal law enforcement challenges.

In the last twenty-five years, much academic literature has condemned the expansion of federal law as unfaithful to the Constitution and the originalist principles of a limited federal government.¹⁴ This movement began with a reinvigorated focus on the "original intent" or "original meaning" of the framers and gained a foothold with the election of Ronald Regan in 1980.¹⁵ More recently, these efforts have only intensified, to the point at which "Tea Party" philosophy has now rendered plausible the serious consideration of proposals to significantly cut back the reach of federal jurisdiction, including federal criminal law jurisdiction.¹⁶

This Article analyzes the historical context of the RFK Justice Department and its vital role in the development of modern federal criminal law enforcement. RFK's intimate involvement in transforming federal criminal law is not nearly as ingrained in the nation's collective memory as is his role in the tense civil rights conflicts or in the Cuban Missile Crisis, signature events of the Kennedy administration that occupy near hallowed status in our national consciousness. A new generation should benefit greatly from a contemporary reexamination of RFK's influence on the development of federal criminal law.

The Article asserts that modern federal criminal law enforcement effectively began with RFK's attorney generalship, principally embodied in the Travel Act and a handful of accompanying legislative efforts. Understanding the historical context and the attendant practical realities is vital for meaningful evaluation of the appropriate role of federal criminal law enforcement today. In order for federal criminal law enforcement to remain an effective tool for addressing significant national criminal justice issues, federal criminal law jurisdiction should not be curtailed in any significant way. If federal criminal law jurisdiction is perceived as "too much" today, it is worth remembering the problems facing the nation in 1961, which necessitated the RFK Justice Department's long-overdue expansion. Many of those problems could resurface if jurisdiction were significantly curtailed.

14. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 147 (2001) (asserting that "those who have claimed that the original meaning of the Commerce Clause was narrow are right and their critics are wrong"); Sohoni, *supra* note 8, at 1610–12.

15. See Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Question for Original Meaning*, 52 UCLA L. REV. 217, 233 (2004) (noting that the 1980s saw "the rise of the modern originalists" and that "the debate over originalism dominated not only the academic literature but also political debates").

16. See Sohoni, *supra* note 8, at 1588–89 ("[T]he Tea Party either produced, or was a product of, an increase in rhetoric about government intrusiveness.").

I. THE GRADUAL EVOLUTION OF FEDERAL CRIMINAL LAW JURISDICTION¹⁷

The RFK Justice Department laid the essential groundwork for the necessary modern expansion of federal criminal jurisdiction. RFK was one of the first high-profile public officials in a quarter-century to state—candidly and emphatically—that modern criminality had outpaced the state and local governments’ ability to deal effectively with the problem.¹⁸ To appreciate the RFK Justice Department’s influence on the development of modern federal criminal law, it is helpful to briefly review the evolution of federal criminal law from its inception to 1961, when RFK was confirmed as attorney general.¹⁹ This brief overview demonstrates the somewhat archaic state of federal criminal law in 1961.

A. *The Revenue Acts of 1789 and the First Federal Criminal Code of 1790*

The first federal criminal laws closely tracked the few specific grants of federal criminal law authority set forth in the Constitution. However, even the original Revenue Act of 1789 and the first Federal Criminal Code of 1790 contained a handful of provisions that extended beyond the narrow constitutional grants of express federal criminal law authority.²⁰

Most notable was the prompt enactment of revenue offenses. Although the Constitution does not expressly mention this authority, the members of the first Congress—many of whom were signatories of the Constitution²¹—recognized the importance of providing an effective vehicle for enforcing the vital revenue

17. This is not intended to be an exhaustive analysis, but merely intended to provide a brief contextual framework delineating the general phases of federal criminal law jurisdictional expansion. For a comprehensive, in-depth analysis of the first thirty years of federal criminal law enforcement, see DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF CRIMINAL LAW, 1801–1829 (1985); see also HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE (1937) (providing a detailed analysis through 1937, including the creation of the Department of Justice). For a concise overview, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 261–76 (1993); Beale, *supra* note 8, at 1278–82.

18. See GOLDFARB, *supra* note 2, at 37 (noting RFK’s desire to reform and enforce federal criminal law).

19. See Press Release, Dep’t of Justice, *supra* note 6 (commemorating in 2011 the fiftieth anniversary of RFK’s swearing-in as attorney general).

20. Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 55–61 (1996) (discussing the birth of federal criminal law, which primarily, but not exclusively, closely tracked the specific constitutional grants of federal criminal authority).

21. Of the fifty-five men who signed the Constitution, eighteen served in the First Congress; ten as Senators, eight as members of the House. See BARRY ADAMSON, FREEDOM OF RELIGION, THE FIRST AMENDMENT, AND THE SUPREME COURT 207–08 (2008). See generally THORTON ANDERSON, CREATING THE CONSTITUTION (1993) (discussing the writing of the Constitution); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 777 (1994) (detailing the members of the constitutional convention).

laws.²² Even Anti-Federalist-leaning St. George Tucker, who was the author of the first comprehensive treatise on the American Constitution and otherwise took a very narrow view of federal criminal law jurisdiction, conceded that federal authority must provide a mechanism by which to enforce revenue offenses as a matter of the sovereign's "inherent right of self-protection."²³

Still, at its inception, federal criminal law was rudimentary and scant. There was no Justice Department—it would not be formed until 1870—the existence of lower federal courts was uncertain, and the attorney generalship, which at the time did not confer authority over the presidentially appointed U.S. attorneys in each judicial district, was not considered a particularly prestigious appointment.²⁴ In fact, President Washington had to persuade his close personal friend, Edmund Randolph, to become the first attorney general.²⁵ Randolph reluctantly accepted only after he learned that he could still expect to derive most of his income from private practice.²⁶

B. Modest Growth Until the Civil War

After the creation of the Solicitor of the Treasury in 1830, the Department of the Treasury oversaw U.S. attorneys handling civil litigation concerning the United States.²⁷ For criminal matters, these presidentially appointed and Senate-confirmed "district" attorneys—as they were called at the time—remained "all but completely independent."²⁸ Given the relative dearth of substantive federal criminal law and the critical importance of federal revenue collection efforts, the emphasis on pursuing prosecution of federal revenue offenses is not surprising.

22. See Currie, *supra* note 21, at 780–81 (discussing the House debate on revenue offenses and the subsequent enactment of laws to enforce them).

23. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. at 420 (1803); see also Kurland, *supra* note 20, at 26 n.84 (discussing narrow views of constitutional federal criminal law authority while also recognizing the sovereign's "inherent right of self-protection," even without express constitutional authority); L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROBS. 64, 66–70 (1948) (discussing the inherent self-protective principle). For recognition of Tucker's Anti-Federalist sentiments, see JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788, at 224 (1974); Barnett, *supra* note 14, at 135–36.

24. CUMMINGS & MCFARLAND, *supra* note 17, at 20 (listing the few duties of the attorney general because of the dearth of federal criminal law).

25. *Id.* at 19.

26. *Id.* at 13, 19.

27. *Id.* at 123, 143–44, 218. The Treasury Department organized the Secret Service in 1865 to fight a major counterfeiting problem. HERBERT A. JOHNSON, NANCY TRAVIS WOLFE & MARK JONES, HISTORY OF CRIMINAL JUSTICE 253 (4th ed. 2008). In 1867, Congress gave the Secret Service statutory authority to investigate fraud against the United States. *Id.*

28. CUMMINGS & MCFARLAND, *supra* note 17, at 218.

C. Post Civil War: The First Major Recodification Effort

The scope of federal criminal law remained quite small until the Civil War. The War greatly expanded the operations of the federal government, which created a commensurate need for more federal criminal regulation to protect the relevant sovereign interests.²⁹ In 1866, Congress authorized a commission to analyze, revise, identify, and eliminate redundant or obsolete provisions to consolidate the various federal criminal statutes passed since 1789.³⁰ This commission completed this effort in 1877, which resulted in the Revised Statutes of the United States.³¹ This was the beginning of what eventually became Title 18 of the United States Code.³² The federal crimes were arranged alphabetically, a simplistic organizational principle still utilized by the current Federal Criminal Code.

The Department of Justice, placed under the control of the attorney general, was formed in 1870.³³ U.S. attorneys had been removed from the Department of the Treasury and placed under the auspices of the attorney general in 1861.³⁴ This change reflected the realities of the expansion of the federal government, particularly federal prosecutions, which slowly expanded beyond counterfeiting and other revenue offenses.³⁵ However, revenue offenses were still important, and the Department of Justice allocated federal investigative resources for the investigation cases of fraud against the government.³⁶ These changes addressed the relatively new problem of fraud in connection with government contracts and procurements, which had grown exponentially as a result of the profiteering opportunities that arose from supplying the federal government's war effort.³⁷

Congress enacted the first federal mail fraud statute in 1872, although its significance may not have been fully recognized at the time.³⁸ For the first time,

29. See Beale, *supra* note 8, at 1278–82.

30. See CUMMINGS & MCFARLAND, *supra* note 17, at 469.

31. *Id.*

32. *Id.* at 469–74.

33. NORMAN ABRAMS, SARA SUN BEALE & SUSAN KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 5 (5th ed. 2010).

34. DANIEL MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 6 (1980); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning there was Pragmatism*, 1989 DUKE L.J. 561, 567 (1989) (noting that the attorney general had little authority over district attorneys under the Judiciary Act). However, the Department of Justice apparently did not formally consolidate criminal prosecution within the Department until the issuance of Executive Order 6166 in 1933. See Schwartz, *supra* note 23, at 83–84.

35. See JOHNSON, WOLFE & JONES, *supra* note 27, at 251–53.

36. See *id.* at 253 (discussing the Secret Service's role in investigating cases of counterfeiting).

37. *Id.* at 251–53.

38. Act of June 8, 1872, ch. 355, § 301, 17 Stat. 283, 323 (codified as amended at 18 U.S.C. § 1341 (2006)). The statute has undergone several revisions as Congress recognized the utility of a flexible statute criminalizing a broad range of fraudulent conduct that only required a tenuous connection with the use of the mails. An 1889 revision made it unlawful to be involved in, inter

a federal criminal statute was directed toward crimes of which the United States government was not the direct victim, and the statute opened the door to the federal prosecution of criminal conduct that had previously been prosecuted almost exclusively by the states.

D. Modern Federal Criminal Law Enforcement: The First Wave

1. 1890-1933

The rapidly expanding national economy and accompanying technological advancements that increased national mobility in the late nineteenth and early twentieth centuries made local law enforcement more difficult.³⁹ This state of affairs created issues of national dimension requiring a federal response. For example, as part of Progressive Era impulses, Congress passed the Sherman Antitrust Act in 1890, which was aimed at cabining monopolistic tendencies.⁴⁰ These economic competition regulatory laws contained federal criminal sanctions.⁴¹ Additionally, in 1909, Congress reorganized the federal criminal code.⁴² And the ratification of the Sixteenth Amendment in 1913, which authorized the federal income tax, set the stage for the enactment of federal tax crimes.⁴³ Federal income tax offenses became the nascent federal white collar crime statutes.⁴⁴ Finally, the era saw the rise and fall of Prohibition, and with it, an expanded—although initially fruitless—federal law enforcement role,⁴⁵ federal regulation of food and drugs, a significant expansion of nationwide organized crime, the birth of the FBI, and the development of modern forensic techniques that would revolutionize the investigation and prosecution of crime.⁴⁶

alia, any scheme to obtain money by or through correspondence concerning “what is commonly called ‘saw dust swindle,’ or ‘green articles,’ ‘green coin,’ . . . or ‘green cigars.’” 18 U.S.C. § 1341. The colorful period piece language was eventually repealed in 1949 as the superfluous “obsolete argot of the underworld.” Revision note to 1948 revision, Act of June 25, 1948, ch. 645, 62 Stat. 763. (codified as amended at 18 U.S.C. §§ 1341, 1346 (2006 & Supp. 2012)).

39. JOHNSON, WOLFE & JONES, *supra* note 27, at 252.

40. *See id.* (describing the effect of the Sherman Antitrust Act).

41. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 2 (2006 & Supp. 2012)).

42. *See* CUMMINGS & MCFARLAND, *supra* note 17, at 473 (describing the adoption of a federal criminal code).

43. *See* FRIEDMAN, *supra* note 17, at 264.

44. *See id.* (noting that the IRS arrests a substantial number of “prominent people”).

45. For a comprehensive analysis of Prohibition’s influence on the development of several important federal criminal law doctrines that survive today, see KENNETH M. MURCHISON, *FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION* (1994).

46. The advancement of scientific forensic techniques was notable in aiding criminal investigation and prosecution. *See* DEBORAH BLUM, *THE POISONER’S HANDBOOK: MURDER AND THE BIRTH OF FORENSIC MEDICINE IN JAZZ AGE NEW YORK* 1–4 (2010) (chronicling advancements in forensics to help in determining if a victim was intentionally poisoned or died from low-quality illegal alcohol manufactured during Prohibition); JOHNSON, WOLFE & JONES,

The era also ushered in a myriad of new federal criminal laws. In addition to the Sherman Act, Congress enacted an array of federal criminal statutes under the Commerce Clause. Predictably, most of these federal statutes criminalized conduct that also involved the most simple and clear form of interstate activity: the physical crossing of a state line or shipment of an article across state lines.⁴⁷ Some movement from one state to another was deemed necessary, both as a requisite to withstand a constitutional challenge and as a statutory element of the offense.⁴⁸ These statutes included the Federal Lottery Act in 1895,⁴⁹ the Mann Act in 1910 (transportation of women across state lines for immoral purposes),⁵⁰ and the Dyer Act in 1919 (knowing transportation of stolen vehicle across state lines).⁵¹

Even this modest doctrinal expansion of federal criminal authority was controversial at the time. Southern legislators, who were suspicious of a strong federal government and many of whom harbored racist tendencies, strongly resisted the new legislation.⁵² Ironically, appeals to blatant racism helped overcome the resistance of some Southern legislators, and thus were instrumental in passing the Mann Act.⁵³ Nevertheless, for the most part, the Southern states' rights' potential opposition to the expansion of federal law enforcement became an entrenched and recurring feature of the federal criminal law debate until well into the 1960s.⁵⁴

supra note 27, at 302 (detailing FBI expertise in developing the most advanced scientific techniques to solve crimes, such as fingerprinting and handwriting analysis).

47. See Beale, *supra* note 17, at 1278–80.

48. *Id.*

49. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (codified as amended at 39 U.S.C. § 259 (2006)). In *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903), the Court upheld the constitutionality of the statute. This holding served as the constitutional foundation for the Court to subsequently uphold a myriad of Commerce Clause-based statutes utilizing similar jurisdictional formulas.

50. White Slave Traffic (Mann) Act, Pub. L. No. 277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24 (2006)).

51. National Motor Vehicle Theft Act, Pub. L. No. 70, 41 Stat. 324 (1919) (codified as amended at 18 U.S.C. § 2313 (2006)).

52. See H. Scott Wallace, *The Drive to Federalize is the Road to Ruin*, CRIM. JUST., Fall 1993, at 8, 10 (noting the South's resistance to any intrusion on states' rights).

53. See *id.* at 10–11 (citing relevant congressional floor debates).

54. See IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND ORIGINS OF OUR TIME 141–46 (2013). Although Southern Democratic legislators largely supported President Roosevelt's New Deal policies, this support was based on a devil's bargain of sorts, in which the Southern legislators supported broad expansion of federal intervention in the economy only if it was linked with local—as opposed to federal—program administration and if expansion of federal power would not affect segregation. *Id.* at 144–45. Thus, expansion of the federal police power, particularly in areas concerning proposed anti-lynching legislation, was met with particularly hostile Southern opposition in Congress. *Id.* at 143–44.

2. 1934-1950

Beginning around the turn of the century and extending until around 1934, Congress enacted a spate of federal criminal statutes that focused on the physical crossing of a state line. Prohibition, the New Deal, and expanding notions of the commerce power reshaped the scope of both federal power in general and of federal criminal law specifically,⁵⁵ which had outgrown its adolescence following the expansion of the federal government after the Civil War.⁵⁶ The modern phase of federal criminal law enforcement began with the enactment of Commerce Clause-based statutes, but these statutes were somewhat simplistic and one-dimensional.

In 1934, largely in response to the depression-era upsurge in violent bank robberies, Congress enacted a series of criminal laws, including the National Stolen Property Act,⁵⁷ and the Federal Bank Robbery Act, which made bank robbery a federal crime if the bank was a federally chartered bank or a state bank that was part of the Federal Reserve System.⁵⁸ Congress also passed the first federal criminal firearms legislation during this period,⁵⁹ as well as the Federal Kidnapping Act, which made the transportation of an abducted person across a state line a federal offense.⁶⁰ At the time, this flurry of federal criminal legislation was considered the high water mark of the expansion of federal criminal jurisdiction.

However, in the roughly quarter-century between 1934 and 1960, not much changed on the federal criminal law enforcement front.⁶¹ Although the expansiveness and utility of the Commerce Clause was no longer truly novel, federal law enforcement remained largely reactive, parochial, and was hampered by obsolete procedural limitations that made complex investigations and prosecutions problematic.

55. See JOHNSON, WOLFE & JONES, *supra* note 27, at 252–57; FRIEDMAN, *supra* note 17, at 264–67.

56. See JOHNSON, WOLFE & JONES, *supra* note 27, at 251–52; see also History of the Criminal Code, in HR 3160, Apr. 24, 1947 at 440 (noting that the “Civil War and Reconstruction period . . . gave a new impetus to federal criminal legislation during decade of the 1860s”).

57. National Stolen Property Act, ch. 333, 48 Stat. 794 (1934) (codified at 18 U.S.C. §§ 2314–15 (2006)).

58. Act of May 18, 1934, ch. 304, 48 Stat. 78 (1934) (codified at 18 U.S.C. § 2113 (2006)).

59. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified at 18 U.S.C. §§ 921–50 (2006 & Supp. 2009)).

60. Act of June 22, 1932, ch. 271, 47 Stat. 326 (codified at 18 U.S.C. § 1201 (2006)). This statute was enacted in response to the infamous Lindbergh baby kidnapping case. See Barry Cushman, *Headline Kidnappings and the Origins of the Lindbergh Law*, 55 U. ST. LOUIS L. REV. 1293, 1307 (2011). Ironically, had the statute been in effect before the Lindbergh baby kidnapping, federal prosecution under the statute would not have been possible because the baby was found four miles from home and no state line had been crossed. *Id.* at 1316.

61. See KENNEDY, *supra* note 1, at 263 (noting that, in 1960, federal law enforcement was still fighting modern crime with twenty-five-year-old tools that were used to fight Al Capone).

Several objective markers further illustrate the quaint state of federal criminal law in this era. The Federal Rules of Criminal Procedure would not be promulgated until 1940 and would not take effect until 1946.⁶² Before the enactment of the federal rules, federal criminal procedure was an inconsistent hodgepodge of local customs, state law derivations, and a patchwork of judicial rulemaking emanating from the Judiciary Act of 1789.⁶³ Perhaps more remarkably, the Federal Rules of Evidence would not become law until 1975.⁶⁴ Additionally, the number of federal prosecutions was still relatively small and the FBI—the federal government’s main criminal investigative arm—was still in its relative adolescence and was generally reluctant to acknowledge the existence of nationwide organized crime and its ties to local public corruption.⁶⁵ Consequently, federal public corruption prosecutions of state and local officials were largely nonexistent.⁶⁶

Prohibition ended in 1933.⁶⁷ The Prohibition experience created an environment that fostered national coordination of organized criminal activities, from bootlegging to distribution.⁶⁸ This environment also encouraged rampant local public corruption when local prosecution of corruption was exposed as largely ineffective.⁶⁹ At the same time, the Great Depression also cultivated a criminal cadre of desperados, some of whom briefly caught the national imagination and even popular support as mythic Robin Hood figures striking back against financial institutions and other perceived oppressors of the common man.⁷⁰

62. Act of June 29, 1940, ch. 445, 54 Stat. 688 (codified in 18 U.S.C. app.). The Supreme Court adopted the Rules in 1944, and the Rules took effect on March 21, 1946. 1 CHARLES ALAN WRIGHT & ANDREW D. LEOPOLD, *FEDERAL PRACTICE AND PROCEDURE* § 1 (4th ed. 2012).

63. See George H. Dession, *The New Federal Rules of Criminal Procedure*, 55 *YALE L.J.* 694, 700 (1946) (describing the state of federal criminal procedure before 1946 as “chaotic”). Some procedure matters were governed by “piecemeal legislation enacted at different times.” *Id.* Other matters were governed by common law. *Id.*

64. Act of Jan. 2, 1975, Pub. Law No. 93-595, 88 Stat. 1926, 1948–49 (1975) (codified as amended at 28 U.S.C. app. (2006 & Supp. V. 2012)).

65. See GOLDFARB, *supra* note 2, at 31 (explaining that, even though the Department of Justice created an organized crime section in 1954, “individual members of the federal law enforcement establishment, particularly the FBI’s J. Edgar Hoover, scoffed at the idea that anything like a mafia existed in this country”).

66. See *id.* at 30.

67. U.S. CONST. amend. XXI (repealing Prohibition).

68. See Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 *WHITTIER L. REV.* 613, 622–24 (1994) (noting that Prohibition forced gangs “to collaborate to transport alcohol across state lines”).

69. See, e.g., JOHNSON, WOLFE & JONES, *supra* note 17, at 298 (explaining that local “police departments were drawn into the circle of criminal activity” and, because they “were encouraged to condone activities that violated prohibition laws, they took the expedient step and accepted bribes to cooperate fully with the underworld”).

70. See Jonathan Simon, *Wechsler’s Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government*, 7 *BUFF. CRIM. L. REV.* 247, 254 (2003) (explaining that,

In addition, advancements in automotive technology and the advent of the Thompson submachine gun provided an advantage to criminals, who, for a brief and chaotic time period between 1934 and 1936, outgunned and overwhelmed local law enforcement.⁷¹ However, local bank robberies and murders, in which the culprits were able to escape across state lines, were still viewed largely as problems for local law enforcement to solve.⁷² Nascent state extradition procedures and statewide criminal law enforcement apparatus were ineffective, and many local sheriffs were either bribed or were otherwise reluctant to assist law enforcement in other jurisdictions long as the criminal suspects broke no local laws while “laying low” in a sheriff’s particular jurisdiction.⁷³

The Hoover administration belatedly acknowledged this desperate state of affairs.⁷⁴ This situation, coupled with the Prohibition legacy that spurred development of nationwide organized crime syndicates, was a disturbing new frontier for local law enforcement, as well as a challenge for the fledgling modern federal criminal law.

This period was also marked by the FBI’s denial that there was a nationwide organized crime problem,⁷⁵ coupled with the still-prevailing notion that this type

in the 1930s, “bank robbers like John Dillinger and Bonnie and Clyde emerged as national crime celebrities with broad and largely fawning national followings”).

71. BRYAN BURROUGH, *PUBLIC ENEMIES: AMERICA’S GREATEST CRIME WAVE AND THE BIRTH OF THE FBI 16–17* (2004) (explaining that the increase in bank robberies in this era was a case of technology outstripping legal system; criminals were equipped with faster and more powerful weapons and cars powered with the newly developed V-8 engine, while local law enforcement was often left to respond with old inadequate weaponry and outdated hand-cranked Model A automobiles).

72. See Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 AM. J. COMP. L. 671, 677 (2006) (asserting that Congress viewed crime as a problem for the states to solve).

73. See BURROUGH, *supra* note 71, at 206–07 (acknowledging significant turf battles and practical complexities in extraditing John Dillinger from Arizona to Indiana in 1934); GOLDFARB, *supra* note 2, at 35 (describing situations in which organized crime executives lived outside of the jurisdictions in which their criminal organizations operated so as to stymie local law enforcement). Attorney General RFK touched on related matters during his 1961 congressional testimony. See *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings Before the S. Comm. on the Judiciary*, 87th Cong. 5 (1961) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

74. See FRIEDMAN, *supra* note 17, at 273 (noting that, in 1929, President Hoover “was the one to break the long silence” concerning the increase in crime).

75. See HERSH, *supra* note 11, at 42 (noting that FBI Director J. Edgar Hoover “would flatfootedly deny that there was anything like organized crime out there”). The FBI was still relatively new and heavily dependent on reporting favorable statistics in order to receive increased funding, and similarly heavily dependent on the assistance of local law enforcement to catch criminals. *Id.*; SCHLESINGER, *supra* note 10, at 265. Consequently, the FBI was reluctant to acknowledge a national organized crime problem for several decades. See JOHNSON, WOLFE & JONES, *supra* note 27, at 299–300. The FBI was similarly reluctant to assert jurisdiction over the notorious gangsters of the era. See SCHLESINGER, *supra* note 10, at 265. In succeeding decades, J. Edgar Hoover declined to investigate organized crime because he understood that such scrutiny would inevitably expose massive public corruption at the state and local level, which, in turn, would

of criminal activity was the responsibility of local law enforcement and thus outside of federal jurisdiction.⁷⁶ It took John Dillinger's brazen criminal antics—which included murder, bank robbery, and escape from a supposedly “escape-proof” local jail⁷⁷—to finally attract presidential attention, which, in turn, finally spurred the FBI into action.⁷⁸ FBI agents eventually killed Dillinger in Chicago in July of 1934, but only after the FBI reluctantly asserted jurisdiction, ostensibly because Dillinger violated the Dyer Act by driving a stolen car across state lines.⁷⁹

Bonnie and Clyde, two other notorious criminals of the era, also engaged in a brief but violent interstate robbery and murder spree that similarly did not attract much more than rhetorical federal interest.⁸⁰ A Texas Ranger and a deputized posse tracked down Bonnie and Clyde in neighboring Louisiana, and eventually ambushed and killed them in a hail of gunfire; apparently the Texas Rangers did not feel constitutionally hamstrung by the crossing of state lines and other quaint notions of states' rights and federalism that were in vogue at the time.⁸¹

compromise the assistance of local law enforcement. See HERSH, *supra* note 11, at 42; SCHLESINGER, *supra* note 10, at 264–65, 950.

76. Even before the founding of the Republic, crime and public safety were core responsibilities of state and local governments. See, e.g., THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter ed. 1961) (arguing that powers reserved to the states “extend to all the objects which . . . concern the lives, liberties, and properties of the people, and the internal order . . . of the State”). When Franklin Roosevelt was elected in 1932, many critics of the New Deal voiced classic Anti-Federalist objections, in addition to racist sentiments. BURROUGH, *supra* note 71, at 14. Some even went beyond classic Anti-Federalist principles and “viewed federal policing as the first step toward an American Gestapo.” *Id.*; see also Bradley, *supra* note 72, at 677 (discussing the 1933 Senate hearings in which “the overwhelming sentiment of the witnesses, federal and state officials . . . [thought that] crime should be dealt with by state, not federal authorities”); BURROUGH, *supra* note 71, at 59 (discussing role of expansive federal law enforcement to support New Deal policies).

77. HERSH, *supra* note 11, at 46–47.

78. BURROUGH, *supra* note 71, at 247–49.

79. See BURROUGH, *supra* note 71, at 249, 401–12 (discussing FBI's eventual involvement in pursuit of Dillinger). The Dyer Act prohibits the knowing transportation of a stolen vehicle across state lines. 18 U.S.C. § 2311 (2006). Dillinger is generally thought to have participated in the robbery of at least two banks in Ohio and Indiana in the time between the enactment of the statute and his death two months later; however, he was never indicted by the federal government for those crimes. See ELLIOT J. GORN, DILLINGER'S WILD RIDE 120–21 (2009); *John Dillinger*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases-john-dillinger> (last visited Oct. 31, 2013).

80. BURROUGH, *supra* note 71, at 347 (asserting that Hoover “allowed an agent or two to track sightings of Bonnie and Clyde, but never treated the case seriously”).

81. *Id.* at 347–61. Huge crowds attended Bonnie's and Clyde's funerals, which were held at separate locations. *Id.* at 360. The criminal duo achieved an even greater place in popular culture when heartthrobs Faye Dunaway and Warren Beatty portrayed them in the groundbreaking 1967 film *Bonnie and Clyde* (Warner Bros. 1967). Largely because of Dunaway's portrayal, a seductive fascination with Bonnie Parker still exists. See Rob Hunter, *Hilary Duff to Reimagine 'Bonnie and Clyde' For Big Screen*, FILM SCHOOL REJECTS (Jan. 27, 2009), <http://www.filmschoolrejects.com/news/hilary-duff-to-reimagine-bonnie-and-clyde-on-the-big-screen.php> (reporting that Hilary Duff is “[t]o [r]eimagine” the role of Bonnie Parker in a new adaptation of the story of Bonnie and Clyde); Kiran Pahwa, *Miley Cyrus May Play Famous*

As part of its New Deal policies to expand the role of the federal government, the Roosevelt administration devoted some energy to a federal war on crime.⁸² However, during this period, many of the most successful prosecutions of organized crime figures were undertaken at the state level. For example, New York prosecutor Thomas Dewey took advantage of then-novel state joinder provisions to convict the notorious Lucky Luciano and other underworld figures in 1936.⁸³

The most high-profile federal “gangster” prosecution of this era was that of the notorious Al Capone. Capone was convicted on federal tax evasion charges in 1931.⁸⁴ Criminal enforcement of the federal income tax laws served, essentially by default, as a main federal strategy to root out complex crime at a time when, owing to then-prevailing notions of federalism, federal prosecution of organized crime and public corruption was virtually non-existent.⁸⁵ The enactment of the Anti-Racketeering Act of 1934 does not suggest a contrary result.⁸⁶ This statute, a precursor to the current Hobbs Act, was also passed as part of Congress’ reaction to the wave of violent crime of the early 1930s.⁸⁷ However, the Act was aimed largely at gangsters who, with the end of Prohibition, engaged in violent robberies of interstate shipments of goods and extorted from legitimate businesses.⁸⁸

Criminal Bonnie Parker in New TV Miniseries, TOPNEWS (Oct. 1, 2012 12:31AM), <http://www.topnews.in/light/miley-cyrus-may-play-famous-criminal-bonnie-parker-new-tv-miniseries-256865> (reporting that Miley Cyrus is in talks to play the role of Bonnie Parker in a proposed miniseries). Recently, Parker’s .38 caliber Detective Special “that she had taped to her thigh when she was killed in 1934 sold for \$264,000.” *Bonnie and Clyde’s Guns Fetch Big Bucks*, WASH. POST, Oct. 1, 2012, at A2.

82. BURROUGH, *supra* note 71, at 14, 410.

83. See Lawrence Fleischer, *Thomas E. Dewey and Earl Warren: The Rise of the Twentieth Century Urban Prosecutor*, 28 CAL. W. L. REV. 1, 16–20 (1991) (discussing N.Y. District Attorney Thomas Dewey’s pivotal role in promulgating novel liberal joinder provisions, which were used to successfully prosecute Luciano and other members of the New York Mafia on broad conspiracy charges in 1936).

84. See JAY ALBANESE, ORGANIZED CRIME IN OUR TIMES 257–59 (6th ed. 2011); SCHLESINGER, *supra* note 10, at 283–85 (discussing the use of federal tax laws to convict Capone and noting that prosecutors used these tactics again in the 1960s).

85. See SCHLESINGER, *supra* note 10, at 283–85 (characterizing the prosecution of Al Capone for federal tax law violations as a major success of the Hoover administration). Additionally:

In early 1932, a large contingent of Treasury Department agents, acting on instructions from President Hoover, had been sent to Louisiana to investigate possible federal income tax violations by several members of the . . . administration [of Governor Huey Long].

In this nascent “intangible rights” era, the common federal wisdom of the day was that local corruption, by itself, was not a federal crime.

Adam H. Kurland, *The Guarantee Clause As a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 447 (1989).

86. Act of June 18, 1934, ch. 569, 48 Stat. 979, 979–80 (codified as amended at 18 U.S.C. § 420e–1 (2006)).

87. See John S. Gawey, Note, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 NOTRE DAME L. REV. 383, 389 (2011).

88. See Bradley, *supra* note 72, at 676; Gawey, *supra* note 87, at 391.

The statute contained cryptic “under color of official right” language that, decades later, would be relied on to authorize federal prosecution of state and local political corruption.⁸⁹ Arguably, this language suggests that an avant-garde Seventy-Third Congress passed the statute to reach local political corruption and bribery. However, this was almost certainly not the case. Notably, in 1943, Representative Hobbs, the bill’s sponsor, indicated that the language was intended to reach the conduct of someone who coerced payment by impersonating a law enforcement officer.⁹⁰ This conduct was a common form of extortion for “shaking down” shopkeepers and local merchants; a legislative justification a far cry from expanding federal criminal law jurisdiction to encompass more complex local political corruption and bribery.⁹¹ Indeed, the Hobbs Act would not be used to prosecute political corruption for more than three decades.⁹²

3. *The Fifties: Prelude to RFK*

In much the same way the 1950s—often portrayed as a placid, post-war lull between the end of World War II and the tumultuous sixties—was a necessary precursor for the transformative decade to come; specifically, the development of federal criminal law in the 1950s was a precursor to modern federal criminal law.⁹³

Although federal criminal law was still “behind the times” by the end of the 1950s, some of the more fundamental changes to federal law enforcement practices began during this decade. The Kefauver and McClellan Committee hearings brought organized crime into the national spotlight.⁹⁴ The Kefauver Committee hearings transformed criminal justice into a national issue and, through television and modern media, exposed the limitations of state and local law enforcement in dealing effectively with the problem.⁹⁵ As a result, in 1954, the Department of Justice formed an Organized Crime section.⁹⁶ The Kefauver Committee reported that “a sinister criminal organization . . . [was] operating throughout the country” and that local law enforcement was ill equipped to fight organized interstate crime.⁹⁷

89. § 2, 48 Stat. at 980.

90. See Gawey, *supra* note 87, at 389–90 (explaining that Representative Hobbs intended the statute to include situations in which “you pretend to be a police officer, you pretend to be a deputy sheriff, but you are not”).

91. See *id.* (noting that the Hobbs Act was not used to prosecute political corruption for the first thirty years after its enactment).

92. See *id.* at 398–99.

93. See generally DAVID HALBERSTAM, *THE FIFTIES* ix (1993) (theorizing that, while pace of fifties often seemed “languid,” “social ferment was beginning, just beneath the surface”).

94. See GOLDFARB, *supra* note 2, at 30 (describing the hearings as “publicized”).

95. *Id.*

96. *Id.* (noting that the Justice Department’s first section devoted to organized crime was “small and ineffective”).

97. *Id.*

At its inception, the Organized Crime section was small, reactive, inadequate, and lacking in essential coordination efforts, but it was a start.⁹⁸ However, it was also emblematic of the Eisenhower administration's ultimate lack of genuine commitment to pursue aggressively organized crime and political corruption as federal prosecutorial priorities, as well as indicative of a lack of imagination to conceive of a broader and more effective federal criminal jurisdiction.⁹⁹

In 1957, the McClellan, or Rackets, Committee hearings—of which newly minted attorney Robert F. Kennedy played a prominent role as chief counsel—further exposed corruption and organized crime ties to organized labor and emphasized the inherent inadequacy of state law enforcement efforts.¹⁰⁰ This resulted in passage of some federal anti-labor union corruption legislation.¹⁰¹

In November of 1957, in Apalachin, New York, law enforcement inadvertently stumbled upon a large meeting of crime syndicate figures from all over the country.¹⁰² Although all of the federal conspiracy convictions arising out of the Apalachin events were ultimately reversed on appeal,¹⁰³ even a reluctant FBI director J. Edgar Hoover could no longer credibly maintain his flat denial of the existence of “organized crime.”¹⁰⁴

In 1957, the Civil Rights Division was created within the Department of Justice.¹⁰⁵ At the same time, President Eisenhower appointed federal judges within the Fifth Circuit who were tasked with the trench warfare-like judicial

98. *Id.* at 30–31 (describing the job of the members of the Special Group on Organized Crime as “unenviable”).

99. In the last year of the Eisenhower administration, Attorney General William Rogers wrote a self-laudatory article in *Parade Magazine* entitled “The New War on Organized Crime,” which was entered into the Congressional Record by Republican Senator Keating of New York on February 8, 1960. 106 CONG. REC. 2159–60 (1960) (statement of Sen. Keating). However, even Senator Keating acknowledged that, despite the work of the Justice Department, “we are losing ground in the war against crime because of our failure to up-date the existing laws in the field. We have been attempting to cope with 20th century criminal techniques with the backward methods and obsolete laws of yesteryear.” *Id.* at 2159.

100. GOLDFARB, *supra* note 11, at 163 (explaining that RFK’s efforts to combat corruption prompted local authorities in some areas to do the same); HERSH, *supra* note 11, at 147 (describing RFK’s attempt to expose corruption); SCHLESINGER, *supra* note 10, at 168–69 (emphasizing RFK’s role in the hearings).

101. See SCHLESINGER, *supra* note 10, at 183–85 (detailing labor legislation passed as a result of the Rackets Committee’s work).

102. See ALBANESE, *supra* note 84, at 141–44. The prosecution’s theory of the case to support the “conspiracy to obstruct justice” charges was based on the attendees’ failure to disclose the purpose of the meeting. *Id.*

103. *Id.*

104. JOHNSON, WOLFE & JONES, *supra* note 27, at 299–300; see also HERSH, *supra* note 11, at 198–99 (discussing Hoover’s “Top Hoodlum Program”); SCHLESINGER, *supra* note 10, at 264 (mentioning Hoover’s initial “indifference to organized crime”).

105. Peyton McCrary, *How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005*, 57 S.C. L. REV. 785, 787 (2006) (noting that the Civil Rights Division had the authority to “bring constitutional challenge to barriers on minority voting”).

implementation of the desegregation of southern schools in the aftermath of the *Brown v. Board of Education* decision in 1954.¹⁰⁶

Nevertheless, as the decade came to a close, “crime” had not yet become a common and perennial political issue on the national stage, even after the increased public attention as a result of the sensational televised Rackets hearings.¹⁰⁷ The entrenched structure of congressional power at the time served to reinforce this state of affairs. Autocratic and largely segregationist Southern Democrats dominated Congress, and they, by virtue of the power of seniority and the committee system, routinely blocked progressive legislation in the name of states’ rights, including some legislation seeking to expand the federal police power.¹⁰⁸ This states’ rights federalism and correlative rhetorical fear of a national police force was as old as the Republic, and it hindered the modern evolution of federal criminal law enforcement.¹⁰⁹ This was the lay of the land when John F. Kennedy narrowly won the presidency in 1960.

106. See DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 18–24* (1988).

107. In 1964, Barry Goldwater briefly alluded to crime as a looming national issue in his acceptance speech at the Republican National Convention. See FRIEDMAN, *supra* note 17, at 274. However, it was left to Richard Nixon to transform a “war on crime” into a national political issue in his 1968 presidential campaign. See RICK PERLSTEIN, *NIXONLAND 202* (Scribner ed. 2009). Nixon focused on a perceived breakdown of law and order reflected by unbridled physical violence and riots in the streets and he further claimed that the Supreme Court favored criminals. *Id.* In a 1968 article, Nixon and his speechwriters noted that “the symptoms are everywhere and manifest: in the public attitude toward police, in the mounting traffic in illicit drugs, in the volume of teenage-arrests, in campus disorders and the growth of white collar crime. . . . Far from becoming a great society, ours is becoming a lawless society.” *Id.* (internal citations and quotation marks omitted). Narcotics offenses and white collar and public corruption cases would dominated federal criminal dockets in the following decades. *Id.* at 266.

108. See *THE CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 288–89* (Michael Kazin ed. 2011) (discussing the dominance of Southern Democrats in the congressional committee system from New Deal through the 1960s); see also KATZNELSON, *supra* note 54, at 193–94 (explaining the complex relationship where Southern Democratic legislators would support the progressive policies of New Deal only if it did not affect racial segregation).

109. See JOHNSON, WOLFE & JONES, *supra* note 27, at 254 (“[F]rom its inception as a nation, many Americans had opposed the creation of a national police force, fearing that such a centralization of in the hands of the federal government would lead to the sort of abuses perpetrated by European monarchies and dictatorships.”); see also HERSH, *supra* note 11, at 81 (noting the growth of FBI under President Roosevelt and the accompanying fear that FBI would “morph into a National Police Force”). These concerns were still present during the 1970s and 1980s as various comprehensive federal criminal law reform efforts were ultimately unsuccessful. See Kurland, *supra* note 85, at 419 n.189, 421 n.199 (citing sources that discuss the recurring theme of the fear of a national police force as undermining reform efforts to modernize Federal Criminal Code).

II. THE RFK JUSTICE DEPARTMENT AND THE CONTEMPORARY WAVE OF MODERN FEDERAL CRIMINAL LAW ENFORCEMENT

A. President Kennedy Appoints RFK as Attorney General

President Kennedy's appointment of his thirty-five-year-old brother as attorney general was controversial on several fronts. Despite RFK's experience as a chief counsel in the federal Rackets Committee hearings in the 1950s, RFK was criticized for his lack of legal experience.¹¹⁰ Indeed, the only senator to oppose his nomination lambasted his professional inexperience, including that he had never litigated a civil case.¹¹¹ Some critics also condemned the appointment as blatant nepotism.¹¹²

When RFK was confirmed as attorney general in early 1961, federal criminal law was not in its infancy. Nonetheless, RFK took office at a time at which the relationship between federal and state criminal law authority mirrored the tumultuous and transformative times of the civil rights movement. As the decade unfolded, the relationship between federal authority and the states changed fundamentally and ushered in the modern reordering structure that exists today. However, at the dawn of the decade, evolving federal and national priorities were, in many ways, generally not recognized or were otherwise ignored. Local mores and customs—whether in the form of racial discrimination or in the acquiescence in actions or inactions of local public officials, both related and unrelated to organized crime—often seriously impeded efforts to create and implement federal policy.¹¹³

The presidential election of 1960 foreshadowed much of this tension between the federal government and the states. By most calculations, President Kennedy narrowly won the majority of the popular vote over Richard Nixon, but won a comfortable majority in the Electoral College.¹¹⁴ Segregationist Southern

110. See 107 CONG. REC. 1027, 1028–30 (1961) (statement of Sen. Allot) (criticizing RFK for his youth and inexperience).

111. *Id.* at 1029.

112. See SCHLESINGER, *supra* note 10, at 229–30.

113. See, e.g., GOLDFARB, *supra* note 2, at 34 (discussing public disillusionment and cynicism where citizenry realizes that the criminal “syndicate’s tentacles inevitably [have] reached public officials who [are] . . . co-opted from enforcing the laws in order for [the] syndicates to operate flagrantly”); SCHLESINGER, *supra* note 10, at 294–95 (noting that the white South ignored the Supreme Court’s decision 1960 to desegregate train and bus terminals).

114. Kennedy won the electoral vote over Richard Nixon by 303 to 219; the remaining votes were for segregationist Senator Harry F. Byrd of Virginia. THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT 1960*, at 350 (1961). Determining Kennedy’s popular vote total was problematic because Alabama listed only the names of the individual electors, not the presidential candidates, on the ballot. EDWARD F. KALLINA, JR., *KENNEDY V. NIXON: THE PRESIDENTIAL ELECTION OF 1960*, at 192–93 (2010). The Democratic elector with greatest number of votes did not support Kennedy, and it is therefore generally considered impossible to accurately determine Kennedy’s statewide vote total in Alabama. *Id.* The Democratic slate in Alabama split their electoral votes: Kennedy received five electoral votes, and Harry F. Bird received six electoral votes. *Id.* at 188.

Democrats, who had opposed the civil rights planks in the Democratic Party's platform, assembled "independent" slates of electors in some states who were not pledged to support Kennedy.¹¹⁵ Several of these "irregular" electors were victorious in Mississippi and Alabama, and ultimately cast their Electoral College votes for segregationist Senator Harry F. Byrd.¹¹⁶

President Kennedy supported the strong civil rights plank in the 1960 Democratic Party platform.¹¹⁷ Nevertheless, after the Kennedy administration took office in 1961, RFK's Justice Department was not initially a primary catalyst of the civil rights movement.¹¹⁸ However, as events unfolded outside of the administration's control, RFK's Department ultimately played a significant role in what would become America's "Second Reconstruction,"¹¹⁹ which included sending in federal troops to assure the enrollment of James Meredith at the University of Mississippi.¹²⁰ Although the RFK Justice Department's role in the civil rights movement was not wholly unrelated to the expansion of federal criminal law enforcement in this era, for present purposes, it is sufficient to recognize that the assertion of federal authority—backed by force where necessary—coupled with the sober recognition that education and public acceptance of federal jurisdiction was essential, paved the way for greater and more effective enforcement of and compliance with federal law.¹²¹

B. Segregation and Racism in the South Foster States' Rights Ideology

The brothers Kennedy understood the eye of the tumultuous storm into which they were sailing. As the sixties dawned, many of the segregationist states' rights forces that controlled Congress had spent the better part of seven decades impeding the development of a more modern, expansive, and centralized federal government, which included strong suspicion and frequent opposition to the

Accordingly, Nixon may have actually won the popular vote because the nationwide vote total was so close. *Id.* at 192–93 & 253 n.37–38.

115. See KALLINA, *supra* note 114, at 188.

116. KALLINA, *supra* note 114, at 188 (noting that, in what was generally considered an upset, an entire independent slate of electors won in Mississippi, and all eight cast their electoral votes for Senator Byrd). Although the "Solid Democratic South" had eroded with the Eisenhower landslides of 1952 and 1956, Democratic presidential candidates still relied on support from the states of the old Confederacy. *Id.* at 11.

117. KALLINA, *supra* note 114, at 139–40; SCHLESINGER, *supra* note 10, at 215–16 (noting RFK's enthusiasm with regard to the strong civil rights plank).

118. SCHLESINGER, *supra* note 10, at 286–89.

119. Acclaimed Southern historian C. Vann Woodward first coined the term "Second Reconstruction." C. VANN WOODWARD, *THE STRANGE HISTORY OF JIM CROW* 8–10 (commemorative ed. 2002). "Second Reconstruction" refers to the time period spanning from the end of World War II to the 1960s. See generally MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA* (3d. ed. 2007) (tracking the major civil rights movements that made up the Second Reconstruction).

120. SCHLESINGER, *supra* note 10, at 317–27.

121. For a discussion of the relationship between the civil rights movement and the modernization of federal criminal law, see SCHLESINGER, *supra* note 10, at 293–95.

expansion of federal criminal law enforcement.¹²² The virulent and largely Southern opposition to an expanded federal police power and to the Kennedy administration itself was, not surprisingly, most starkly exemplified in the area of civil rights enforcement.¹²³

Arguably, RFK had built up a reservoir of political good will with the white South after his Rackets Committee performance.¹²⁴ However, any carry-over effect was uncertain at best. The political opposition to modernization efforts—particularly new initiatives to expand federal criminal jurisdiction—consisted of, in not insubstantial part, powerful conservative Southern Democrats who, with civil rights issues moving to the forefront, no longer constituted a reliable so-called “Solid Democratic South.”¹²⁵

On May 17, 1961, RFK left his office at the Department of Justice building at 950 Pennsylvania Avenue and headed eastward for the short one-mile trip to the United States Capitol to testify before Congress in support of his anti-crime package.¹²⁶ On that pleasant spring day, RFK stepped out into a city that lacked home rule and was governed, in effect, by the white Southern congressmen who controlled the House Committee on the District of Columbia.¹²⁷ Additionally, although the situation had marginally improved under the Eisenhower administration, the District of Columbia was still, in many ways, a typical, segregated Southern city of the era.¹²⁸

Glancing northeastward from the Main Justice Department Building, slightly more than two miles in the distance, sat old Griffith Stadium, now the present

122. Wallace, *supra* note 52, at 8 (explaining that, although the South generally opposed the expansion of criminal law because of segregationist ideology, the same racist policy was responsible for Southern support of the Mann Act and several federal drug crime statutes); *see also* BURROUGH, *supra* note 71, at 14 (discussing the nexus between Southern racism and the fear of federal law enforcement expansion); DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 42–43 (1909) (noting that the Southern opposition to the Mann Act was based on states’ rights grounds); WOFFORD, *supra* note 10, at 94 (noting that the Kennedy administration immediately recognized the challenges of working with Senator Eastland of Mississippi, Chairman of the Senate Judiciary Committee).

123. NAVASKY, *supra* note 11, at 165–91 (reproducing several transcripts of conversations between Governor Barnett of Mississippi and RFK concerning efforts to enroll James Meredith at the University of Mississippi). At times, Governor Barnett refused to acknowledge the authority of federal court orders and suggested that Mississippi was not part of the United States. *Id.* at 188–90. Earlier, Governor Barnett appeared on statewide television and proclaimed that “[w]e will not surrender to the evil and illegal forces of tyranny.” SCHLESINGER, *supra* note 10, at 318.

124. SCHLESINGER, *supra* note 10, at 188.

125. *See* KALLINA, *supra* note 114, at 188.

126. *See* GOLDFARB, *supra* note 2, at 45 (noting that RFK testified before Congress on May 17, 1961 in support of comprehensive federal criminal law legislation).

127. *See* THOMAS G. SMITH, SHOWDOWN: JFK AND THE INTEGRATION OF THE WASHINGTON REDSKINS 134–39 (2011) (reviewing the local governance of Washington, D.C. in 1960).

128. *See id.* at 139 (noting that D.C. had persistent *de facto* segregation problems in 1960, including continued illegal invocation of racial housing covenants, racial exclusions at elite private clubs, exclusion of black participants from an event at the Mayflower Hotel, and few black policemen or firemen).

site of Howard University Hospital. A few weeks earlier, President Kennedy had thrown out the first ball at Griffith Stadium as part of the new Washington Senators' 1961 Opening Day festivities.¹²⁹ The original Senators franchise, a charter member of the American League dating back to 1903, had moved to Minnesota after the 1960 season. Their owner was an avowed racist who later proudly acknowledged that he moved his club to Minnesota "when [he] found out [Minnesota] only had 15,000 black people here."¹³⁰

Two miles directly behind the Capitol Building, a modern sports stadium to house the local professional baseball and football teams was under construction. The local professional football scene, on both the racial and competitive fronts, was not much different. The Washington Redskins of the National Football League, like the old Senators, were one of the worst teams in their league.¹³¹ In addition, Redskins' owner George Preston Marshall was another avowed racist and the last NFL owner to integrate his team in 1962.¹³²

These geographical and sociopolitical sports factoids could not have escaped RFK, and, in fact, were of considerable consequence to the new administration.¹³³ For example, the Redskins integrated only after Secretary of the Interior Stewart Udall, in March, 1961, just months after President Kennedy's inauguration, threatened to prevent Marshall from moving his team into the new publically owned stadium until Marshall integrated his team.¹³⁴

129. BRAD SNYDER, *BEYOND THE SHADOW OF THE SENATORS: THE UNTOLD STORY OF THE HOMESTEAD GRAYS AND THE INTEGRATION OF BASEBALL* 288 (2003).

130. *See id.* at 288–89.

131. The Redskins had not participated in an NFL championship game since 1945, had not had a winning season since 1955, and were coming off a 1-9-2 season in 1960. *SPORTS ILLUSTRATED ALMANAC* 2013 115–16 (NFL standings from 1956–1960). The Redskins would follow up with a league worst 1-12-1 record in 1961. *Id.*

132. *See, e.g.*, SMITH, *supra* note 127, at 1, 127 (describing Marshall as a "bigoted Southerner" and a "racist and a scourge on the game").

133. *See id.* at 160; *infra* note 134 and accompanying text (noting JFK and RFK supported Interior Secretary's Udall's position to bar Redskins from playing in new stadium unless team integrated). This was not an entirely new situation for RFK. While playing varsity football at Harvard in 1947, RFK agreed with a prospective team boycott against playing a scheduled game against the University of Virginia in Charlottesville, Virginia. Virginia had voiced objections about whether Chester Pierce, an African American tackle on the Harvard team, could participate in the game. No black player had ever played against a Southern university in the South. The entire Harvard team agreed to not play unless every player received equal treatment. SCHLESINGER, *supra* note 10, at 68. With all hands on deck, Harvard lost the game 47-0. *See* EZRA E. H. GRIFFITH, *RACE AND EXCELLENCE* 32 (1998). The University of Virginia would not integrate its intercollegiate football team until 1970. CHARLES MARTIN, *BENCHING JIM CROW: THE RISE AND FALL OF THE COLOR LINE IN SOUTHERN COLLEGE SPORTS, 1890–1990*, at 148 (2010).

134. *See* SMITH, *supra* note 127, at vii–viii, 149–71; SNYDER, *supra* note 129, at 198–99. The new Stadium was christened "D.C. Stadium" but was later renamed "RFK Stadium." *Id.*

Although Major League Baseball had been integrated in 1947, the integration process proceeded slowly. In October 1964, less than a year after President Kennedy's assassination, the World Series featured a clash of the two baseball cultures: the predominantly white New York Yankees, teetering at the end of their dynasty, and the upstart St. Louis Cardinals, representing the new era, who

Udall's Interior Department had jurisdiction over the new stadium because it was built on federal land in the District of Columbia. It was a small, but significant principled stand for proactive federal involvement. The new administration would take an even more profound stand for proactive federal involvement in the area of federal criminal law.

C. RFK Advocates for the Expansion of Federal Criminal Law

On May 25, 1961, the United States entered the space age when President Kennedy addressed Congress to garner support for a national commitment to land "a man on the moon and return[] him safely to the earth" before the end of the decade.¹³⁵ Eight days earlier, Attorney General RFK had presented his organized crime package to Congress.¹³⁶ The juxtaposition of the administration's two significant challenges was striking, as they were literally worlds apart.

When President Kennedy took office, federal criminal law was still shockingly rudimentary and inadequate. However, several forces were already in motion that would make significant change possible. It took a visionary, energetic, and impatient attorney general to shape and usher in the new era, especially with regard to organized crime, public corruption, and the expansion of federal criminal jurisdiction.

1. Proposals to Modernize Federal Criminal Law

As attorney general, RFK sought to aggressively take advantage of the tools already at his disposal, such as utilizing violations of the federal tax laws to prosecute organized crime figures.¹³⁷ However, tax prosecutions were not

featured black stars such as Bob Gibson, Lou Brock, and Curt Flood. For a thorough analysis, see DAVID HALBERSTAM, *OCTOBER 1964* (1995). In Baltimore, less than forty miles up Interstate 95 from Washington, D.C., similar social themes continued to resonate on and off the field. The socially schizophrenic nature of Baltimore has been evident since at least Civil War times, when President Lincoln had to send Union troops to the city help ensure that Maryland did not secede from the Union. The "paradoxical" nature of the city is aptly described by my colleague Professor Harold McDougall, who has noted that Baltimore is the "southernmost city of the North, and the northernmost city of the South." HAROLD MCDUGALL, *BLACK BALTIMORE I* (1993). In 1966, black superstar Frank Robinson won the Triple Crown and led the Baltimore Orioles to their first World Series title. However, Robinson, a widely recognized and largely idolized sports hero who had been traded to Baltimore before the 1966 season, was unable to obtain suitable housing in the Baltimore suburbs. See TOM ADELMAN, *BLACK AND BLUE: SANDY KOUFAX, THE ROBINSON BOYS, AND THE WORLD SERIES THAT STUNNED AMERICA II* (2006).

135. John F. Kennedy, President of the United States, Special Message to the Congress on Urgent National Needs (May 25, 1961), available at <http://www.presidency.ucsb.edu/ws/?pid=8151#axzz2jLwdv5RI>.

136. See GOLDFARB, *supra* note 2, at 45 (describing RFK's testimony in support of his anti-crime package before the House Judiciary Committee on May 17, 1961).

137. See *id.* at 48 (discussing the role of the IRS in criminal investigations and prosecuting organized crime).

nearly enough. RFK recognized that broad new strategies were essential. In *The Enemy Within*, he explained:

The methods of our law enforcement agencies have not kept pace with the improved techniques of today's criminals. We are still trying to fight the modern Al Capone with the weapons that we used twenty-five years ago, they simply are not effective. And the result is that within ten years our whole economy will be drastically affected. I think that there are steps that can and should be taken to deal with the problem.¹³⁸

Now he would get his chance. RFK and his aides rapidly constructed a key crime package—with eight substantive and procedural proposals—to modernize federal criminal law enforcement.¹³⁹ RFK arrived at the Capitol on that May morning in 1961 to personally argue in support of his department's proposed legislation.

RFK's ambitious crime proposals evinced his interest in transforming federal criminal law enforcement into a tool through which to prosecute all aspects of organized crime, as well as to adapt federal criminal law enforcement to modern realities of white collar crime, corporate crime, and public corruption.¹⁴⁰ Undoubtedly, RFK's intense personal interest derived, in part, from his obsession with prosecuting and convicting Teamster's leader Jimmy Hoffa.¹⁴¹ Indeed, RFK assembled an informal "get Hoffa" squad within the Justice Department and cherry-picked trusted criminal investigators from other federal agencies, as an end run around recalcitrant FBI Director J. Edgar Hoover.¹⁴²

The RFK Justice Department focused on the larger picture as well. RFK was not afraid to expressly acknowledge that local authorities could not successfully prosecute many aspects of modern crime, given its complexities and interstate nature. He made clear that he intended to do something to rectify this untenable situation.¹⁴³ Despite the bravado of the televised Rackets Hearings of the prior decade, the modernization of federal criminal law had been largely ignored for more than a quarter-century.

This changed with the proposal of the Travel Act and several other federal criminal law and procedure proposals to modernize federal criminal law

138. KENNEDY, *supra* note 1, at 263–64.

139. See GOLDFARB, *supra* note 2, at 45 (describing RFK's proposed legislation); SCHLESINGER, *supra* note 10, at 268 (same).

140. See, e.g., Gawey, *supra* note 87, at 398–99 & n.96 (recognizing RFK's vigorous trail-blazing efforts to prosecute local organized crime and corruption in the early 1960s); see also GOLDFARB, *supra* note 2, at 40 (noting RFK's willingness to advocate for additional laws when needed).

141. See GOLDFARB, *supra* note 2, at 55 (describing RFK's disdain for "crooked unions" and his belief that Hoffa was a "thug").

142. See *id.* at 65; see also HERSH, *supra* note 11, at 213–14, 258–59.

143. See GOLDFARB, *supra* note 2, at 37 (noting RFK's desire to reform and enforce federal criminal law).

enforcement. The RFK Justice Department proposed new legislation to prohibit interstate travel in aid of racketeering (the Travel Act),¹⁴⁴ expand the fugitive felon law,¹⁴⁵ prohibit the use of interstate facilities and interstate shipment of materials for gambling purposes,¹⁴⁶ expand federal immunity provisions to cover labor investigations,¹⁴⁷ in addition to various witness protection proposals.¹⁴⁸ With the exception of the immunity and witness protection proposals, all were enacted in substantially the same form as the Justice Department proposals.¹⁴⁹

The two most significant proposals were the Travel Act, which was new, and the immunity provisions, which modified earlier proposals by the Eisenhower administration.¹⁵⁰ These two proposals exemplify the modern thrust of the RFK Justice Department. The Travel Act was the most significant because it sought to expand substantially the reach of federal criminal jurisdiction and placed the prosecution of local political corruption within the ambit of federal law enforcement.

The proposed crime package was considered to have bipartisan support because the previous Republican administration had endorsed many of the provisions.¹⁵¹ However, the proposals that sought to recast the scope of federal jurisdiction were troublesome at the outset. Even before RFK had uttered his first word before Congress, critics and supporters alike were concerned about the potential problems of legislation that created federal crimes that substantially overlapped with state criminal jurisdiction.¹⁵²

144. S. 1653, 87th Cong. (1st Sess. 1961) (original version of the Travel Act); Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498 (1961) (codified as amended at 18 U.S.C. § 1952 (2006)) (enacting the Travel Act).

145. Act of Oct. 4, 1961, Pub. L. No. 87-368, 75 Stat. 795 (codified at 18 U.S.C. § 1073 (2006)).

146. Act of Sept. 13, 1961, Pub. L. No. 87-216, 75 Stat. 491 (codified at 18 U.S.C. § 1084 (2006)).

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

148. *Id.*

149. For a comprehensive and critical view of the federal government's "spurious" expansion of federal criminal law enforcement in these matters, see Bradley, *supra* note 76, at 681.

150. See *Legislation Relating to Organized Crime: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 200-01 (statement of Rep. Herbert Zelenko) (discussing the incorporation of legislation originally introduced in 1954).

151. *Id.* at 5 (statement of Rep. McCulloch) (predicting bipartisan support).

152. For example, House Subcommittee Chairman Emanuel Celler ominously intoned that: Wherever there is an expansion of Federal criminal jurisdiction as an auxiliary to State law enforcement a studied and deliberate approach to such expansion is most necessary. . . . Many of these organized crimes are local problems and, thus, to expand Federal jurisdiction over them would create many new difficulties. . . . Federal administrative problems may arise. There may be a tendency to weaken local enforcement efforts due to Federal intervention. There is the serious problem also of the anomalies arising out of dual jurisdiction, such as dual prosecution-Federal and State-for the same crime, the question of immunity, the filing of detainers, the disparity of sentencing.

a. *The Travel Act*

The Travel Act was the centerpiece of the RFK Justice Department's criminal law proposals. In support of the Travel Act, RFK testified that "hoodlums and racketeers . . . in many instances have become so rich and so powerful that they have outgrown local authorities."¹⁵³ He also noted that the main crimes encompassed in the Act, "gambling, liquor violations, narcotics, bribery and corruption of local officials and labor racketeering and extortion go hand in hand," and that the huge profits from these activities could be used to bribe public officials on seemingly unrelated matters.¹⁵⁴ Additionally, RFK recognized that the proposed law, applied in conjunction with federal aiding and abetting principles, provided a potent new weapon to reach kingpins of organized crime who often lived far from the scene and otherwise may have not committed any crime in the state where they lived.¹⁵⁵

A few weeks later, RFK testified before the Senate Judiciary committee that "[o]ur investigations . . . have made it quite clear that only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials."¹⁵⁶ He further emphasized that "federal legislation was needed to aid state and local governments which were no longer able to cope with the increasingly complex and interstate nature of large scale multi-party crime."¹⁵⁷

RFK's assertion that some types of crime generally thought to be the province of state and local law enforcement could not be prosecuted effectively by state and local authorities was the most significant recognition of the state of criminal law by a high ranking administration official in more than a quarter century.¹⁵⁸ RFK recognized that the federal government had the responsibility to use its' power to regulate interstate commerce aggressively and creatively.¹⁵⁹

Id. at 3 (statement of Rep. Celler). Celler was a Democrat from New York, who also expressed concerns that the above practical problems would be eclipsed by even more serious civil liberties concerns. *See id.*

153. *Id.* at 19 (statement of Attorney General Kennedy).

154. *Id.* at 19–20 (statement of Attorney General Kennedy).

155. *Id.* at 21–22.

156. *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the Comm. on the Judiciary*, 87th Cong. 16 (1961) (statement of Attorney General Kennedy).

157. *Id.* at 11 (statement of Attorney General Kennedy).

158. President Herbert Hoover noted "crime is increasing" in his 1929 inaugural address and subsequently proposed a federal commission to study the problem. FRIEDMAN, *supra* note 17, at 273. As noted above, FDR recognized a war on crime as part and parcel of his New Deal policies to expand the federal government's role in economic regulation to combat the Great Depression. However, virtually all of the law enforcement community felt the issue was a local matter. *See* Bradley, *supra* note 76, at 677 & n.41.

159. *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the Comm. on the Judiciary*, 87th Cong. 16 (1961) (statement of Attorney General Kennedy).

Contemporary law enforcement challenges were far more complex than the mere crossing of a state line, and simply addressing some of the underlying problems—such as the speed of automobiles used to cross state lines during the commission of a crime—was no longer an adequate response.

The Travel Act still “safely” used the “crossing of a state line statutory formula,”¹⁶⁰ but it was far more innovative, subtle, complex, and far reaching.¹⁶¹ Professor Craig Bradley has recognized that the Travel Act “was the most significant both in terms of expansion of federal jurisdiction and subsequent use by the [federal] government as a prosecutorial tool.”¹⁶² Likewise, in their leading contemporary Federal Criminal Law casebook, Professors Abrams, Beale, and Klein observe:

The Travel Act, enacted in 1961, was innovative in a number of respects. It relied on the commerce power to make criminal not just one but a number of major categories of crime heretofore only made criminal under state law. It utilized for the first time the technique of incorporating state crimes directly into a specific federal criminal statute where the conduct had some link to commerce. It adopted an expansive approach to the type of crime-related deeds to be covered by the Act. It also adopted an expansive approach to the commerce connection, requiring interstate movement but covering all forms thereof, including the absorption of the use of the mails into the commerce base.

The Travel Act can be viewed as the direct forerunner of the modern complex and organizational crime statutes: RICO, the illegal gambling business statute, and the continuing criminal enterprise statute. It was

160. S. 1653, 87th Cong. (1st Sess. 1961) (original version of the Travel Act) (including the prefatory language “[w]hoever travels in interstate or foreign commerce with intent to” commit a certain act). For a discussion of the jurisdictional language added during legislative deliberation, see H.R. REP. 87-966 (1st Sess. 1961), *reprinted in* 1961 U.S.C.C.A.N. 2664.

161. Although the “use of the mails” language was not part of the original Department of Justice proposal, the Senate amended the bill to include provisions where interstate use of the mails or use of a facility interstate commerce was sufficient to trigger application of the statute. *See* S. 1653, 87th Cong. (1st Sess. 1961) (original version of the Travel Act). Some senators were concerned that the DOJ bill, as originally drafted, did not go far enough, and wager payments could easily avoid triggering the statute by sending the money in the mail. *See United States v. Riccardelli*, 794 F.2d 829, 831–32 (2d Cir. 1986) (setting out this legislative history). This broader language became part of the statute. As originally enacted, the statute arguably still did not reach *intrastate* mailings. *See Riccardelli*, 794 F.2d at 831 (interpreting an earlier version of the Travel Act to cover intrastate mailings and calling the concept of “intrastate mailings” an “oxymoronic juxtaposition”). *Riccardelli* was arguably an outlier case at the time, but apparently consistent with the current state of the law based on the 1990 amendment. *See Crime Control Act of 1990*, Pub. L. No. 101-647, sec. 1205, 104 Stat. 4789, 4830–31 (codified in scattered sections of 18 U.S.C.).

162. Bradley, *supra* note 76, at 681. Note the jurisdictional breadth of the statute works in two significant ways: (1) the underlying predicate violations broaden the substantive reach, and (2) the use of mails or an interstate facility confers federal jurisdiction even in the absence of actual physical interstate travel. *Id.*

the first federal criminal statute that contained the principle components of complex crime—that is, it expressly included multiple other crimes among its elements. Because the Travel Act incorporated into its terms crimes defined by reference to state law, the scope of the statute was to be determined in part by the breadth of interpretation given to such “state law” terms.¹⁶³

Significantly, the Travel Act expressly included both federal and state law bribery as an underlying predicate act element, so the statute had a clear nexus to local public corruption to a degree not previously found in any federal criminal statute.¹⁶⁴ Thus, the Travel Act was the critical step in positioning the federal government to effectively prosecute local political corruption and to pursue it as a substantial federal prosecutorial priority.

RFK himself recognized the significance of the Travel Act, frankly noting in his congressional testimony that the Act was “[t]he most controversial and certainly one of the most important” of the proposals in his crime package.¹⁶⁵ In addition, in his first Attorney General’s Annual Report to Congress for fiscal year 1961, coming on the heels of the passage of most of his crime package, RFK took the opportunity to proudly compare his legislative achievements against the classic 1934 benchmark. He noted that “more anti-crime legislation was enacted during [the past legislative session] than in any period since 1934,” and that the newly enacted Travel Act “proscribe[d] certain types of illicit activity never before governed by federal law.”¹⁶⁶ RFK further noted that “these laws are aimed at the nation-wide ramifications of crime which make it an extremely lucrative business . . . and that [t]he new statutes enable the federal

163. ABRAMS, BEALE & KLEIN, *supra* note 33, at 71.

164. Attorney General Kennedy understood that having the Travel Act reach federal and state law bribery without limitation was necessary to effectively prosecute local corruption. *See* Breen, *supra* note 4, at 16 (noting that the Travel Act is one of the only tools with which the federal government could reach “ordinary crime”). During the congressional deliberations concerning the Travel Act, Congress sought to limit the bribery provisions by requiring that bribery be connected to prostitution, gambling, liquor or narcotics. *See* H.R. REP. No. 87-966. This would have left the Travel Act far less effective in combatting public corruption. *Id.* The Department of Justice strongly objected, and the original, broad DOJ language was ultimately included in the law. *See* Breen, *supra* note 4, at 138 n.95; *see also* Gawey, *supra* note 87 at 389–90; Charles Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1172, 1174–75 & nn. 2, 10–14 (1977) (recognizing that Kennedy sponsored anti-racketeering laws in 1961 as “readily identifiable mileposts” in federal government’s ramped up efforts to prosecute state and local corruption and further asserting that the Hobbs Act’s eventual utility to prosecute local corruption was largely a judicial adaptation and not based on original legislative intent).

165. *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings Before the Comm. on the Judiciary*, 87th Cong. 15 (1961) (statement of Attorney General Kennedy).

166. U.S. DEPARTMENT OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL FOR THE FISCAL YEAR ENDED JUNE 30, 1961, at 9 (1961).

government to bring to bear on the social evil the highly coordinated and concentrated power of all of the Federal enforcement agencies.”¹⁶⁷

RFK’s comprehensive crime package served notice that federal criminal law enforcement was no longer reactive,¹⁶⁸ and would greatly increase the prosecutorial discretion of federal prosecutors.¹⁶⁹ This, in turn, would require the further promulgation, subject to constant review and revision, of detailed and publically available policy guidelines to aid federal prosecutors in exercising their broader discretion.¹⁷⁰ This begat the world of proactive federal prosecution we know today, with guidance in the form of publically available—but not judicially enforceable—comprehensive prosecutorial guidelines, including the “Principles of Federal Prosecution.”¹⁷¹

Similarly, because of the expanding overlap of criminal conduct under both state and federal law, the new federal criminal law framework would also require constant revision of the *Petite Policy*, which originally emanated from a brief 1959 press release from RFK’s immediate predecessor, William Rogers. The *Petite Policy* provides general guidance to federal prosecutors in determining whether a successive prosecution is warranted where substantial federal interests

167. See *id.* at 10. RFK also referenced the 1934 benchmark in his earlier congressional testimony. See *May 1961 House Hearings*, *supra* note 151, at 28–29 (statement of Attorney General Kennedy).

168. See GOLDFARB, *supra* note 2, at 48 (discussing RFK’s proactive model of action-oriented law enforcement led by prosecutors); *Robert F. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL MUSEUM AND LIBRARY, <http://www.jfklibrary.org/JFK/The-Kennedy-Family/Robert-F-Kennedy.aspx> (last visited Oct. 31, 2013) (noting the RFK Justice Department’s eight hundred percent increase in prosecutions and convictions of organized crime figures compared to previous the administration).

169. See Breen, *supra* note 4, at 125–30 (discussing the breadth of the Travel Act).

170. See Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 337–56 (1978); see also Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Schwartz, *supra* note 23, at 77 (noting the Department of Justice’s then-novel practice, circa 1948, of promulgating basic prosecutorial discretion “standing [i]nstructions” to all U.S. attorneys, which, at the time, were only circulated within the Department of Justice); Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. L. 532, 537–38 (1970) (lamenting past practices of largely unstructured prosecutor’s decision on when to prosecute and recognizing the need for promulgation of established standards on exercise of prosecutorial discretion). Notably, Professor LaFave cited favorably to *The President’s Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society* 1, 33–34 (1967), which, authored just a few years after the RFK transformation of federal criminal justice, strongly endorsed the promulgation of established prosecutorial standards.

171. U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.000 (1997) [hereinafter U.S.A.M. 1997] (discussing and advising on the principles of federal prosecution). The Principles of Federal Prosecution were originally promulgated by Attorney General Benjamin Civiletti in 1980. *Id.* Because the entire Manual “contains general policies and some procedures relevant to the work of [federal prosecutors],” the Freedom on Information Act required it to be “ma[de] available for public inspection and copying.” U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 3-17.280 (2009) [hereinafter U.S.A.M. 2009]; see also Beck, *supra* note 170, at 314 n. 10.

have been left demonstrably unvindicated by a prior prosecution covering the same conduct (either state or federal) and a second prosecution is not barred by the Double Jeopardy Clause.¹⁷²

b. Modernized Immunity Procedures

Although the expansion of federal criminal jurisdiction was transformative, substantial procedural reform was also necessary. The RFK Justice Department addressed this need for reform by modernizing federal immunity procedures, an essential ingredient of proactive law enforcement and effective prosecution of complex crime. Even though Congress had enacted dozens of federal immunity provisions—which covered certain types of offenses or applied in certain tribunals—since the mid-nineteenth century, in 1961, there was no general federal immunity statute.¹⁷³ Virtually all of these piecemeal immunity provisions conferred transaction immunity, which was thought to be constitutionally required to supplant the privilege against self-incrimination.¹⁷⁴ This created a difficult and often unworkable situation, which RFK observed first-hand during the Racketts Committee investigations, where organized crime figures repeatedly “pleaded the fifth,” with no federal mechanism to compel

172. The original press statement that evolved into the *Petite Policy* was issued in response to two 1959 Supreme Court decisions, *see Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959), which reiterated the dual sovereignty doctrine that two prosecutions by different sovereigns covering the same conduct were not prosecutions for the “same offense” and thus not barred by the Double Jeopardy Clause. *See Bartkus*, 359 U.S. at 150 (Black, J., dissenting). Attorney General Rogers’ brief April 5, 1959 press release set forth no specific discretionary policy, general or otherwise. *See* NORMAN ABRAMS AND SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 756–57 (2d ed. 1993). It simply noted that “those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area” and suggested that with “efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.” *Id.* (reprinting the original 1959 statement in its entirety). The present *Petite Policy*, which has been continually expanded and modified, sets forth the general guidance that a second prosecution is presumptively inappropriate unless a substantial federal interest has been demonstrably unvindicated. U.S.A.M. 2009, at § 3-17.280. The Policy then details several benchmarks to determine what constitutes a substantial federal interest and under what circumstances such interest could be determined to be demonstrably unvindicated. *Id.*

173. The “need” for immunity in federal criminal prosecutions did not often arise until the advent and explosive growth of regulatory offenses as an adjunct to the evolving regulatory state and a more complex economic environment. *See* Notes and Comments, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 *YALE L.J.* 1568 (1963) [hereinafter *The Federal Witness Immunity Acts*]. Whereas, in simpler times, accomplices to murder were unlikely to be candidates for immunity, parties possessing information necessary to vindicate governmental regulatory schemes but also facing criminal exposure presented a new and different challenge. *See id.* For a general discussion of the history of federal immunity written from a 1960s vantage point, *see id.*

174. *See* H.R. REP. NO. 91-1188, 91st Cong. 13–38 (1970) (listing the various federal transaction immunity statutes that existed in 1960, and which were ultimately replaced by a general use and derivative use immunity provision in the Crime Control Act of 1970).

their testimony.¹⁷⁵ Other federal immunity statutes conferred use immunity, but did not cover derivative use of the compelled testimony.¹⁷⁶ Those statutes were insufficient to supplant Fifth-Amendment protections, and thus were effectively toothless because they could not compel a witness to testify.¹⁷⁷

RFK recognized that the federal immunity issue had to be addressed in a comprehensive manner, and that the existing piecemeal approach was too haphazard and often ineffective.¹⁷⁸ However, RFK was hamstrung by then-existing legal doctrine that presupposed that only transaction immunity could constitutionally supplant the privilege against self-incrimination.¹⁷⁹ Although RFK favored a general comprehensive immunity statute that would apply both to grand jury proceedings and at trial, his Justice Department did not propose a general federal transaction immunity statute because of significant, multi-prong opposition.¹⁸⁰ Arguably, a broad immunity statute simply could result in an “immunity bath,” in which a clever criminal who was granted immunity for one offense would, while testifying, admit to other, more serious crimes that would be barred from prosecution.¹⁸¹ Civil liberties organizations strongly opposed the immunity legislation as well, contending that it was beneath the dignity of a democratic government to force citizens to provide “self-degrading” testimony.¹⁸²

RFK first proposed a slight modification to immunity legislation contemplated by the Eisenhower administration, which sought to expand

175. See GOLDFARB, *supra* note 11, at 46; SCHLESINGER, *supra* note 10, at 188–89. Shortly after Kennedy left the Justice Department, the government subpoenaed notorious crime boss Sam Giancana to testify before a federal grand jury. Giancana pled the Fifth Amendment and declined to testify. The government scrambled around and found a purportedly applicable statute which conferred immunity—the Federal Communications Act. Giancana still refused to testify and was briefly incarcerated for contempt of court. Upon his release, he moved to Mexico but still reportedly directed his criminal empire from abroad. See GOLDFARB, *supra* note 11, at 307.

176. See Note, *The Required Scope of Immunity Under the Fifth Amendment: Kastigar v. United States*, 58 VA. L. REV. 1099, 1105–06 (1972).

177. For a discussion of these concepts, see *id.* at 1106 (1972). See also William J. Bauer, *Symposium: The Granting of Witness Immunity*, 67 J. CRIM. L. & CRIMINOLOGY 143, 144–46 (1976).

178. See *The Federal Witness Immunity Acts*, *supra* note 173, at 1568–77.

179. See *id.* at 1576.

180. *Senate Hearings Before the Permanent Subcomm. On Investigations of the Comm. on Govt. Operations, Organized Crime and Illicit Trade in Narcotics*, 88th Cong. 18 (1st Sess. 1963) (testimony of Robert F. Kennedy, Attorney General of the United States).

181. For Senators Kefauver and Keating’s expression of concern over an “immunity bath,” see *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings Before the Comm. on the Judiciary*, 87th Cong. 55–56 (1961). For a general discussion of “immunity bath” concerns, see *The Federal Witness Immunity Acts*, *supra* note 173, at 1571–72; Adam H. Kurland, *A Debtor’s Prism: Immunity for Bankrupts Under the Bankruptcy Reform Act of 1978*, 55 AM. BANKR. L.J. 177, 186 & n.65 (1981) (citing sources).

182. *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings Before the Comm. on the Judiciary*, 87th Cong. 47 (1961) (statement of Lawrence Speiser, Director, Washington Office, American Civil Liberties Union).

transaction immunity to cover labor management racketeering offenses.¹⁸³ The legislation did not pass.¹⁸⁴ Not to be dissuaded, RFK proposed new immunity legislation the following year that covered a more specific list of crimes, including some public corruption offenses.¹⁸⁵

Congress did not enact either of RFK's immunity proposals.¹⁸⁶ The specter of unwittingly conferring "immunity baths" to a tawdry collection of hoodlums and racketeers must have seemed too high a price to pay. However, the RFK Justice Department made the case that prosecutions under these new statutes often required testimony from "insiders," and that conferring immunity might be the only avenue available to secure the necessary testimony.

Subsequent Supreme Court decisions rendered shortly after RFK's tenure as attorney general largely eliminated the "immunity bath" concerns. For example, in *Murphy v. Waterfront Commission*, the Supreme Court strongly intimated that "use and derivative use immunity" was sufficient to supplant the Fifth Amendment privilege against self-incrimination.¹⁸⁷ The consequences of *Murphy* were substantial. With a discretionary use and derivative use immunity statute, the government could compel testimony without having to grant the often unpalatable total transaction immunity; prosecutors could still charge witnesses testifying under use immunity if they established an independent source of evidence that in no way derived from the immunized testimony.¹⁸⁸

RFK's unrelenting and frank elucidation of the issue during his tenure as attorney general, coupled with the shifting constitutional landscape reflected in *Murphy*, led to the 1970 enactment of a general comprehensive federal use and derivative use immunity statute.¹⁸⁹ RFK greatly influenced the eventual adoption of this proactive prosecutorial tool essential for the successful investigation and prosecution of many white collar, organized crime, and

183. See Martin R. Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 BROOK. L. REV. 37, 54-55 (1962).

184. See *id.* (noting that legislation passed in the Senate, but received no action in the House).

185. *Senate Hearings Before the Permanent Subcomm. On Investigations of the Comm. on Govt. Operations, Organized Crime and Illicit Trade in Narcotics*, 88th Cong. 15, 18 (1st Sess. 1963) (statement of Robert F. Kennedy, Attorney General of the United States) (noting that proposed immunity legislation included a "bribery provision [that] could be used to advantage in our investigations of political corruption").

186. See Pollner, *supra* note 183, at 56.

187. 378 U.S. 52, 79 (1964).

188. See *United States v. North*, 920 F.2d 940, 942-45 (D.C. Cir. 1990) (outlining the application of use and derivative use immunity and the difficulty of establishing an independent source of evidence in which a witness testifies at a highly publicized congressional hearing under such a grant of immunity).

189. See 18 U.S.C. §§ 6001-05 (2006) (providing present federal use and derivative use immunity statutes which are discretionary and apply, *inter alia*, at trial, grand jury proceedings, congressional hearings, and administrative agencies). For a criticism of the statute as "far broader than any previously proposed," see Bradley, *supra* note 76, at 686 & n.135.

potential corruption cases, and further helped to usher federal criminal law into the modern age.¹⁹⁰

2. Congressional Reception of RFK's Crime Package

As noted above, most of the proposals in RFK's organized crime package passed fairly quickly, except for the immunity and witness protection proposals.¹⁹¹ However, the relatively quick passage did not mean that the Justice Department's proposals were enacted by a docile and compliant Congress. Contrary to the belief that the Travel Act breezed through Congress without significant scrutiny, the proposed legislation underwent considerable debate in both the House and the Senate.

The Travel Act ultimately passed in substantially the same form as the original RFK Justice Department proposal.¹⁹² Accordingly, RFK and his Department deserve much of the credit for the innovativeness of the statute, particularly the use of state law predicates that greatly expanded the reach of federal jurisdiction. However, the statute, as enacted, was not identical to the original proposal. Congress did not pass the Travel Act until the Department of Justice accepted a broadening amendment that added use of the mails and use of an interstate facility—in addition to interstate travel—as “jurisdictional hooks,” and agreed to add clarifying temporal language requiring an act be committed subsequent to the interstate “travel.”¹⁹³ Perhaps most importantly, the Justice Department successfully fought to remove an amendment that severely limited the bribery predicate. The offending provision was removed from the final bill in conference committee.¹⁹⁴

190. See Bradley, *supra* note 76, at 687–88 (federal immunity provisions “greatly enhance” federal government’s ability to investigate organized crime and public corruption cases). In *Kastigar v. United States*, the federal use and derivative use immunity statute was upheld as constitutionally extensive with the Fifth-Amendment privilege against self-incrimination. 406 U.S. 441, 462 (1972).

191. See Pollner, *supra* note 183.

192. See Bradley, *supra* note 76, at 71; see also Breen, *supra* note 4, at 126 n.13.

193. See *United States v. Riccardelli*, 794 F.2d 829, 831–32 (2d Cir. 1986) (looking to the legislative history of the Travel Act to determine what Congress meant by “mail” and “interstate facility”).

194. A common explanation for the lack of unified Southern states’ rights opposition and the prompt passage of a law that greatly increased the federal police power suggests that powerful Senate Judiciary Chairman James Eastland of Mississippi agreed to “ram” the legislation through in return for President Kennedy nominating Eastland’s bigoted roommate, Harold Cox, to a federal district court judgeship in Mississippi, within the United States Court of Appeals for the Fifth Circuit. HERSH, *supra* note 11, at 216; NAVASKY, *supra* note 11, at 48 (noting a popular, widespread rumor that Eastland’s assistance in insuring quick passage of anti-crime package was “the price” for appointing Cox). Cox, an otherwise undistinguished and ignoble jurist, appeared to be an unusually strong bargaining chip. Other rumors persisted that Eastland threatened to block Thurgood Marshall’s nomination to the Second Circuit unless President Kennedy nominated Cox. See SCHLESINGER, *supra* note 10, at 308. Judge Cox gained an infamy of sorts for his obstructionist behavior in failing to enforce a series of Fifth Circuit desegregation decrees arising out of the

Specifically, the original Justice Department proposal did not include the “thereafter” performance provision, which required that some “in furtherance” act actually take place after a state line had in some manner been crossed.¹⁹⁵ The House Judiciary Committee added this provision as a technical friendly amendment to the Senate bill after the Senate Judiciary Committee directed the Justice Department to add similar language out of concern that the proposed statute, as originally drafted, criminalized mere intent without any actual *actus reus* other than the mere crossing of a state line.¹⁹⁶ The Justice Department welcomed these changes.¹⁹⁷

In addition, the original RFK proposal included *all* state and federal law extortion and bribery offenses.¹⁹⁸ This was perhaps the most important and far-reaching provision because it opened the door for the federal government to prosecute state and local corruption by incorporating state law bribery offenses, at least in situations in which the federal jurisdictional element could be satisfied.¹⁹⁹

The House passed a version of the statute that would have severely limited its reach, covering only bribery related to gambling, liquor, narcotics or prostitution offenses.²⁰⁰ However, future Supreme Court Justice Byron White emphatically argued on behalf of the Justice Department that the original, broader language was essential to combat organized crime and local corruption.²⁰¹ As a result, Congress removed the limiting language and reinstated RFK’s original unrestricted language in the reconciliation bill that actually passed.²⁰² The

Freedom Rider litigation and other civil rights matters. See BARROW & WALKER, *supra* note 106, at 39.

195. See S. 1653, 87th Cong. § 2 (1st Sess. 1961).

196. See H.R. REP. NO. 87-966 (1st Sess. 1961), reprinted in 1961 U.S.C.C.A.N. 2664, 2667.

197. See *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearings Before the Comm. on the Judiciary*, 87th Cong. 262 (1961) (statement of Assistant Attorney General Herbert Miller).

198. See S. 1653, 87th Cong. § 2 (1st Sess. 1961).

199. Again, the statute had a superficial similarity with the earlier federal criminal statutes based on the Commerce Clause requiring the crossing of a state line, but this statute also utilized the mails and use of an interstate facility. Even the physical crossing of the state line element was more versatile because of the temporal disconnect between the crossing of the state line—by someone and the satisfaction of a “thereafter” performance element. Also, application of basic aiding and abetting principles further expanded the liability net. See Adam H. Kurland, *To “Aid, Abet, Counsel, Command, Induce or Procure the Commission of an Offense”: A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005).

200. 107 CONG. REC. 16, 540–43 (1961); H.R. REP. NO. 87-966. This was accomplished by amending subsection (b) of the proposed bill to read: “[a]s used in this section ‘unlawful activity’ means any business enterprise involving gambling, liquor, narcotics, or prostitution offenses, or extortion or bribery *in connection with such offenses* . . . (amended language italicized).” Pollner, *supra* note 183, at 41 & n.27.

201. See Letter from Byron R. White, Deputy Attorney General, to Emmanuel Celler, Chairman, House Judiciary Committee (August 7, 1961), reprinted in relevant part in Pollner, *supra* note 183, at 41; see also Breen *supra* note 4, at 138 n.95 (citing the same letter).

202. See Pollner, *supra* note 183, at 42.

reinstatement of the original language was critical in maintaining the Travel Act as an effective federal prosecutorial tool to combat state and local corruption, regardless of whether an organized crime nexus existed in a particular case.

Thus, the RFK Justice Department unabashedly recognized the connection between organized crime and local political corruption. At best, federal criminal law enforcement in the past had nibbled around the edges of local political corruption. In contrast, the RFK Justice Department focused on local corruption like never before, and consequently paved the way for the modern emphasis on the federal prosecution of state and local corruption, as well other complex “white collar crime” offenses.²⁰³ The genius of the Travel Act was that, by incorporating state law definitions of bribery and extortion into the requisite statutory elements, federal law could more easily reach local public corruption, even if the corruption lacked a demonstrable connection to racketeering or organized crime.

RFK and other members of his Justice Department may have been fueled by idealism, but they were not naïve. They understood that, in a democratic society, lasting change could not come from the end of a federal bayonet, but had to come from genuine support of the local community. Speaking at the University of Georgia during his tenure as attorney general, RFK observed that “the hardest problems of all in law enforcement are those involving conflict of law and local custom.”²⁰⁴ Kennedy understood the almost therapeutic role a criminal jury trial

203. See GOLDFARB, *supra* note 2, at 40–41 (noting RFK Justice Department’s focus on “white-collar crime because this was the evolving trend and it was becoming as pervasive as it was difficult to prove,” as well as “political corruption because it was the final impact of organized crime on society,” and further noting RFK’s personal observation that a “racketeer is at his most dangerous not with a machine gun in his hands but with public officials in his pocket”). In RFK’s later congressional testimony, he presciently noted the disturbing trend of the increase in insurance fraud, stock fraud, and bankruptcy fraud. *Senate Hearings Before the Permanent Subcomm. On Investigations of the Comm. on Govt. Operations, Organized Crime and Illicit Trade in Narcotics*, 88th Cong., 12–13 (1963) (statement of Robert F. Kennedy, Attorney General of the United States). In the following decades, these would subsequently evolve into significant federal prosecutorial priorities.

204. SCHLESINGER, *supra* note 10, at 294; GOLDFARB, *supra* note 11, at 34–37 (recognizing corrosive efforts of public corruption). The problem of “local custom” and the local citizenry’s reluctance to voice objection, remain disturbingly evident today. For example, in January, 2013 federal prosecutors in Philadelphia brought a seventy-seven count indictment against nine local traffic court judges, charging fraud and perjury in a traffic ticket fixing scheme for the politically and socially connected. Press Release, U.S. Attorney’s Office, Eastern District of Pennsylvania, Philadelphia Traffic Court Judges Indicted for Fraud (Jan. 31, 2013), *available at* <http://www.fbi.gov/philadelphia/press-releases/2013/philadelphia-traffic-court-judges-indicted-for-fraud>. U.S. Attorney Zane Memeger noted that “[t]he scheme kept unsafe drivers on the road and deprived the city and state of revenues.” MaryClaire Dale & Michael Rubinkam, *9 Judges Charged with Philadelphia Ticket Fixing*, ASSOCIATED PRESS (Jan. 31, 2013) <http://news.findlaw.com/apnews-lp>. Some of the defense lawyers countered that “their clients never took a dime, and simply did things the way they’ve been done for decades-and the way they were trained to do.” *Id.* Another lawyer added “I don’t think that’s fraud . . . [i]t’s just kind of the way it works.” *Id.*

could play. Criminal prosecutions, albeit brought by presidentially appointed federal prosecutors, which resulted in verdicts rendered by local—although federally empanelled—juries, played a critical role the local citizenry’s understanding and eventual acceptance of the increased role of modern federal law enforcement.²⁰⁵

D. RFK Takes Additional Measures to Modernize Federal Criminal Law

In addition to new legislative initiatives, the RFK Justice Department was creatively proactive in other ways, such as aggressive and innovative prosecution under existing statutes.²⁰⁶ A decade before the Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted, aggressive and imaginative Department of Justice lawyers like John C. Keeney—who would go on to become the longest serving federal prosecutor in history—helped the RFK Justice Department draft indictments that would “go after an entire enterprise and not simply after individuals for discrete crimes.”²⁰⁷ This was the beginning of another sea change in federal criminal law enforcement.²⁰⁸

To complement the aggressive attitude at Main Justice, President Kennedy appointed U.S. attorneys who innovatively reshaped federal criminal law enforcement in the field. For example, Robert Morgenthau—long before he served as the model for Adam Schiff, the venerable but cantankerous New York District Attorney in the long running NBC television drama *Law & Order*—was an aggressive and resourceful U.S. attorney for the high-profile Southern District of New York.²⁰⁹

Morgenthau is credited in some quarters for practically inventing modern white collar prosecutions by greatly expanding the manner in which his office prosecuted accountants and business executives for fraud.²¹⁰ This was a new

205. See GOLDFARB, *supra* note 2, at 35–36 (noting some public attitudes to ignore political corruption and the requisite need to “change the public perception through education as much as prosecution”).

206. See *id.* at 40 (stating that the Department of Justice staff was “exhorted to use every law [it] could find to pursue the most powerful, pervasive, and elusive mobsters”).

207. See Emily Langer, *Prosecutor’s Service Spanned 59 Years*, WASH. POST, Nov. 21, 2011, at B8 (Obituary of John C. Keeney).

208. The RFK Justice Department’s focus on the moneyed kingpins of organized crime and other defendants, both corporate and individual, with financial means also spurred another development—the creation of the large firm white collar litigation practice. See KENNETH MANN, *DEFENDING WHITE COLLAR CRIME* (1985). This aspect of large firm practice was virtually non-existent as late as 1980. *Id.* Now almost every large law firm has a high profile white collar litigation practice, although it is sometimes euphemistically referred to as a “corporate compliance” or “government investigations” practice group. See generally GOLDFARB, *supra* note 2, at 40–41 (detailing the DOJ’s focus on different types of crime and defendants, who were clever, well organized, massively rich and powerful). See also *infra* note 221 (concerning the transformation of the practice of federal criminal law under RFK).

209. See Terry Carter, *District Attorney Robert Morgenthau*, ABA J., June, 2010, at 34, 35–37.

210. *Id.* at 37.

species of federal white collar prosecutions that aggressively utilized creative theories of accessorial liability and general federal fraud statutes without relying primarily on Title 21 criminal tax violations.²¹¹ These cutting-edge prosecutorial theories were novel in 1961, have since become commonplace and have been uniformly accepted.²¹² Similarly, Notre Dame Law Professor Robert Blakey, an RFK Justice Department alumnus, recognized the larger lessons of the RFK Justice Department. Responding in 1994 to a question about RFK's "crusade" against organized crime, crooked labor unions, and political corruption, Blakey noted that "Kennedy's program . . . made all this [new focus and success] possible; without it none of these things would have happened."²¹³

After RFK left office, the federal criminal law snowball that his Justice Department created became an avalanche. In 1962, RFK proposed comprehensive wiretap legislation that became law later in the decade.²¹⁴ The "class of activities" approach to federal criminal jurisdiction, as reflected by congressional findings and the *Perez* doctrine,²¹⁵ became an established method by which to draft federal criminal legislation based on the Commerce Clause.²¹⁶ The palatability of this jurisdictional expansion was undoubtedly a result of the trailblazing efforts of the Travel Act.²¹⁷ Additionally, Congress enacted RICO along with several other key provisions in the Crime Control Act of 1970, including comprehensive wiretap legislation and a general federal immunity statute applicable to the entirety of federal criminal law.²¹⁸ Since 1970, the increase in the number of new federal offenses has been described as "explosive."²¹⁹ In 2006, a Federalist Society study calculated that, in the approximate twenty-five year period since 1980, the total number of federal

211. See, e.g., *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969).

212. See Carter, *supra* note 209, at 37–38.

213. GOLDFARB, *supra* note 2, at 311 (quoting a conversation with Professor Blakey).

214. See Bradley, *supra* note 76, at 682–83; see also SCHLESINGER, *supra* note 10, at 392–94.

215. For a provocative discussion of the *Perez* doctrine, see Robert L. Stern, *The Commerce Clause Revisited: The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973).

216. See Bradley *supra* note 76, at 684–86 (discussing the enactment of the Consumer Credit Protection Act, which, based on congressional findings, criminalized conduct without requiring proof that the particular conduct involved interstate commerce, and describing this development as a "new jurisdictional beachhead for the federal government").

217. During the Senate Hearings on the proposed Travel Act, Senator Carroll of Colorado presciently commented that "I think we ought to understand what we are doing—once we open the door in here [to the federal jurisdictional expansion] there is no reason why we cannot legislate in any area affecting interstate commerce." *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the Comm. on the Judiciary*, 87th Cong. 261 (1961).

218. See Bradley *supra* note 76, at 587–88.

219. See generally JOHN S. BAKER, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIMINAL LEGISLATION 3 (2006).

crimes increased by over one third, yielding over four thousand federal offenses.²²⁰

While RFK's Justice Department was not the sole catalyst for this transformation, his attorney generalship set the course that facilitated the impetus for the changes that would quickly come. As such, by the beginning of the next decade, the modernization and transformation of federal criminal law, procedure, and administration was apparent. The federal criminal law and federal criminal justice administration we recognize today was born in the RFK Justice Department a half-century ago.²²¹

Sadly, RFK's contribution to modern federal criminal law did not end when he resigned as attorney general. Rather, his contribution included a tragic and personal dimension. His assassination, along with the 1963 assassination of President John F. Kennedy, also fundamentally reshaped federal criminal law jurisdiction. The assassinations also influenced the enactment of federal gun control legislation in 1968²²² and were more directly responsible for the subsequent expansion of various federal homicide statutes.²²³

In 1968, RFK, then a United States Senator from New York, sought the Democratic presidential nomination.²²⁴ In June of 1968, he was assassinated in Los Angeles after winning the California primary election.²²⁵ At the time, the

220. *Id.*

221. The RFK Justice Department, and RFK himself, also played a pivotal role in transforming the practice of federal criminal law. *See* John Cleary, *Federal Defender Services: Serving the System or the Client?*, 58 L. & CONTEMP. PROBS. 65, 67 & n.14 (1995). RFK had significant input in the creation of the modern compensation system and the creation of Federal Public Defender services to provide competent counsel for indigent federal criminal defendants, and also played a role in the development of a modern and more humane federal penal system. *Id.* (noting that Attorney General RFK ordered the first comprehensive review of federal defender services, known as the "Allen Report," in 1963); *see also* NAVASKY, *supra* note 11, at 440–41 (noting RFK's pivotal role in the development of programs designed for the poor to obtain justice in the federal courts); SCHLESINGER, *supra* note 10, at 392–94 (discussing Allen Report, the creation of federal defender services, and also noting RFK's role in closing the "dungeons of Alcatraz").

In addition, RFK's focus on political corruption and "white collar" crime also ultimately created the financial opportunities that fundamentally transformed the private criminal defense bar. MANN, *supra* note 208. Eventually, large prestigious law firms, who had virtually nothing to do with criminal law practice as late as 1980, would come to embrace "white collar" and "government compliance" practice groups. *See, e.g., id.*; Charles Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1223–24 (2011) (noting that the emphasis on new federal crimes and new federal prosecution policies created enormous business opportunities for large law firms, and stigma against criminal practice largely evaporated).

222. *See* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 146–47 (1975). The assassination of Martin Luther King in April 1968, two months before RFK's assassination, also played a role. *Id.* at 146–48.

223. *See, e.g.,* Act of August 28, 1965, Pub. L. No. 89-141, 79 Stat. 580, 580–81 (codified at 18 U.S.C. § 1751 (2006)).

224. *People v. Sirhan*, 497 P.2d 1121, 1125 (Cal. 1972).

225. *Id.*

murder of a presidential candidate or a member of Congress was not a federal offense.²²⁶ As a result of the Kennedy assassinations, Congress passed legislation making the murder of the president, a member of Congress, and, eventually, a major candidate for president, a federal crime.²²⁷ Previous presidential assassinations and assassination attempts did not result in new federal criminal legislation, and the homicides were prosecuted as local crimes.²²⁸

226. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 351, 84 Stat. 1880, 1891 (codified at 18 U.S.C. 351 (2006)).

227. *See id.*; *see also* 79 Stat. at 580.

228. After President Kennedy was assassinated, suspect Lee Harvey Oswald was taken into local custody, where he was killed by Jack Ruby. *See Rubenstein v. State*, 407 S.W.2d 793, 794 (Tex. Crim. App. 1966). At the time, no federal presidential murder statute had been enacted, so the murder of the President was simply a state law homicide. VINCENT BUGLIOSI, *FOUR DAYS IN NOVEMBER: THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY* 356 (2007). The state of the law had not changed from the time of the last presidential assassination in New York in 1901, when President McKinley's assassin was tried in New York state court and was convicted and executed within fifty days of McKinley's death. *See* SCOTT MILLER, *THE PRESIDENT AND THE ASSASSIN: MCKINLEY, TERROR, AND THE EMPIRE AT THE DAWN OF THE AMERICAN CENTURY* (2011); LeRoy Parker, *The Trial of Anarchist Murderer Czolgosz*, 18 *YALE L.J.* 80 (1901). Secret Service protection of the President was added after McKinley's assassination. *See* H.R. REP. NO. 95-1828, at 256 (2d Sess. 1979). However, the murder of the President remained outside the reach of federal criminal jurisdiction.

Despite the absence of a presidential murder statute in the Federal Criminal Code, the other two presidential assassinations were not tried in "state" courts because of sui generis and jurisdictional anomalies. *See* EDWARD STEERS, JR., *THE LINCOLN ASSASSINATION ENCYCLOPEDIA* 373 (2010); Executive Order Creating Military Commission and Special Order 211, May 1 and 6, 1865 (appointing a Military Commission to meet in Washington D.C. to adjudicate conspiracy to assassinate President Lincoln and other officers of the United States, as such acts were viewed as acts of war), *reprinted in* EDWARD J. STEERS, JR., *THE TRIAL: THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS* 17 (2013). President Garfield's assassin, who committed his crime in the District of Columbia in 1881, was tried in the local courts of the District of Columbia. For an excellent account of the Garfield assassination, the resulting trial and the medical incompetence evident in Garfield's medical care, see Candice Millard, *DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE AND THE MURDER OF A PRESIDENT* (2011). Since Garfield lingered for several months before ultimately succumbing to his wounds after he had been transferred to New Jersey to convalesce, Garfield's assassin pursued several post trial remedies asserting the District of Columbia lacked jurisdiction because Garfield had died elsewhere. These legal challenges were ultimately unsuccessful.

During the 1972 presidential campaign, Alabama Governor George Wallace was shot while seeking the Democratic presidential nomination in advance of the Maryland primary. WILLARD M. OLIVER & NANCY MARION, *KILLING THE PRESIDENT: ASSASSINATIONS, ATTEMPTS AND RUMORED ATTEMPTS ON U.S. COMMANDERS IN CHIEF* 166 (2010). His assailant, Arthur Bremmer, was tried in Maryland state court because Wallace was not a federal officeholder. *Id.*; *see also* C. Benjamin Ford & Margie Hyslop, *The Wallace Shooting—40 Years Later*, *GAZETTE.NET* (May 11, 2012), <http://www.gazette.net/article/20120511/NEWS>

/705119655/1122/The-Wallace-shooting-40-years-later&template+gazette. As such, the 1971 enactment noted above did not confer federal jurisdiction over this offense. In 1986, section 351(a) was amended to include the murder or attempted murder of "a major" presidential candidate.

On a less grim but no less important note, President Kennedy's appointment of his brother as attorney general prompted the passage of anti-nepotism legislation in 1967, which barred close relatives of the president from serving in the cabinet.²²⁹ Never again would a sibling serve as attorney general in his sibling's presidential administration.²³⁰

Unlike many of the other federal criminal law developments of the last quarter-century, which are often seen as one-sided, pro-prosecution calibrations, RFK's Justice Department devoted energy to the entire holistic criminal justice enterprise and addressed indigent defense funding and incarceration concerns.²³¹ Any attorney who has ever received a dime for representing a federal defendant under the Criminal Justice Act owes a debt of gratitude to RFK. Had RFK not served as attorney general, the criminal justice system would have changed eventually. However, the pace and scope of change, as well as the consequences for the development of federal criminal law in the last fifty years, likely would have been much different.

Attorney General RFK put into place the critical building blocks of modern federal criminal law. In viewing the big picture—the modern complex and interdependent nationwide economy, more sophisticated crime, the growth of white collar fraud and political corruption crimes that could not be prosecuted successfully at the local level—RFK's contribution was necessary and essential to the creation of effective modern federal criminal law enforcement.

III. THE PRESENT-DAY CHALLENGES TO THE RFK JUSTICE DEPARTMENT LEGACY OF MODERN FEDERAL CRIMINAL LAW ENFORCEMENT AS IT REACHES MIDDLE AGE

Today, federal criminal law is very broad, includes conduct also criminalized under state law, and necessarily operates with substantial prosecutorial discretion guided by comprehensive, publicly available prosecutorial guidelines.²³² Despite a growing chorus of originalist rhetoric, modern federal

Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. 99-646, sec. 62(1), 100 Stat. 3592, 3614 (codified at 18 U.S.C. § 351(a)(2006)).

229. 5 U.S.C. § 3110 (2006 & Supp. 2012).

230. *Id.* (preventing a president from appointing his siblings to the cabinet).

231. See SCHLESINGER, *supra* note 10, at 392–94 (noting RFK's involvement in federal indigent defense funding proposals and in the closing of dungeon-like Alcatraz prison).

232. Department of Justice guidelines unequivocally state that they are for internal purposes only and confer no legally enforceable right on criminal defendants. See ABRAMS, BEALE & KLEIN, *supra* note 33, at 105, 112; see also *United States v. Caceres*, 440 U.S. 741, 754–55 (1979); *Sullivan v. United States*, 348 U.S. 170, 173 (1954). Although judicial review is unavailable, that does not mean all decisions are immune from all review. It is not uncommon for various federal prosecutorial policies and decisions to face congressional inquiry and intense media scrutiny. See, e.g., Danielle Douglas, *Senators Question Justice on Wall St. Penalties*, WASH. POST, Jan. 30, 2013, at A14 (describing Senators' complaints that penalties were disproportionately low and that there was a lack of charges against individuals fostered concerns that Wall Street enjoys favored status); Matt Taibbi, *Too Big to Jail*, ROLLING STONE, Feb. 28, 2013, at 51. In addition, some

criminal law has evolved to a point at which it governs a substantial amount complex criminal activity that, in many cases, cannot be prosecuted effectively by state law enforcement. The current state of affairs echoes many of the concerns RFK faced in 1961, although the shortcomings of contemporary state law enforcement may be articulated somewhat differently.²³³

Today, modern federal criminal law enforcement operates, to a degree, with some clouds on the horizon.²³⁴ Violent crime has decreased for the fifth straight

members of Congress recently questioned the charging decisions in the high profile internet piracy case of Aaron Swartz, a brash twenty-six-year-old internet entrepreneur and outspoken opponent of two internet-related censorship bills. He was charged with various cyber crimes, faced considerable prison time even if he pled guilty, and ultimately committed suicide while the charges were pending. The bipartisan letter to Attorney General Holder inquired, inter alia, whether Swartz's high profile opposition to the above noted bills was a factor in the prosecution's decision making process regarding plea offers and sentencing proposals. *Congress Weighs in on DOJ's Handling of Swartz Prosecution*, THE BLT: THE BLOG OF LEGAL TIMES (Jan. 29, 2013), <http://legaltimes.typepad.com/blt/2013/01>; see also David Amsden, *The Brilliant Life and Tragic Death of Aaron Swartz*, ROLLING STONE, Feb. 28, 2013, at 58; Stephanie Francis Ward, *Hacker's Hell: After Broad Prosecutions-and One Suicide-Many Want to Narrow Computer Fraud and Abuse Act*, ABA J., May, 15, 2013, at 15.

233. For example, a common rationale for "overfederalization" is the perceived overall failure of state criminal justice systems. See THIRD ATTORNEY GENERALS' FORUM (C-Span 1993), available at <http://www.c-spanvideo.org/videolibrary/mobilevideo.php?progie=42097> (noting the pressure to federalize based on perceived failure of state criminal justice system); see also *United States v. Panarella*, 277 F.3d 678, 694 (3d Cir. 2002) (noting "beneficial role" of federal public corruption prosecutions of state and local officials where state prosecutors are reluctant to prosecute political allies or superiors); Kurland, *First Principles*, supra note 20, at 1-3 (noting similar concerns); Kurland, *Guarantee Clause*, supra note 85, at 376-81 (noting systemic shortcomings in many state systems resulting the ineffective prosecution of local corruption and also noting many procedural advantages of federal prosecution).

For a slightly different conceptualization of the issue, see Norman Abrams, *The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role*, 42 LOY. U. CHI. L.J. 207 (2011). In addition, one state, Maryland, has created a permanent "Office of the Maryland State Prosecutor," which "takes on cases that are too politically sensitive for Maryland's elected state's attorneys or attorney general—and too small for federal prosecutors." Ann E. Marimow, *In Fighting Corruption, Tenacity With Conviction*, WASH. POST, Jan. 27, 2013, at C1, 5. However, the office is not viewed as a complete alternative or substitute for federal prosecution. *Id.* The office defers to the Maryland U.S. attorney's office on complex corruption cases. *Id.*

234. The past fifty years have also seen an increase in the politicization of attorney general nominations and a greater number of personal attacks on the attorney general, perhaps a sobering byproduct of the new federal criminal law frontier. See, e.g., Sara Horwitz, *A Gun-Running Sting Gone Fatally Wrong*, WASH. POST, Jul. 15, 2011, at A6-7 (reporting partisan attacks directed at Attorney General Holder); Pete Williams, *Investigation Finds No Evidence That AG Eric Holder Knew of 'Fast and Furious' Gun-Running Sting*, NBC NEWS (Sept. 19, 2012, 2:01 PM), http://investigations.nbcnews.com/_news/2012/09/19/13966068-investigation-finds-no-evidence-ag-eric-holder-knew-of-fast-and-furious-gun-running-sting?lite.

RFK was confirmed with only one dissenting vote. 107 CONG. REC. 1030-33 (1st Sess. 1961). Today, that consensus confirmation seems a relic of a bygone era. Although some subsequent attorney general confirmation votes have been unanimous or near unanimous, there has been a marked increase in confirmation votes since 1976 in which the nominee received at least twenty

year.²³⁵ However, white collar offenses, economic crimes, and public corruption have not decreased, and remain problems that require a substantial federal law enforcement response.²³⁶ It is imperative that these problems are dealt with in a responsible manner, and that politics and ideological rhetoric do not ultimately erode the vital advancements in federal criminal law enforcement and federal criminal jurisdiction that have developed in the half-century since RFK's attorney generalship. Broad federal criminal law is necessary to ensure effective law enforcement of complex crime with national dimensions.²³⁷ Likewise, federal corruption prosecutions of state and local officials are essential to ensure the integrity of our democratic institutions.²³⁸

More than fifteen years ago, Roger Pilon of the CATO Institute fired a rhetorical early warning shot, espousing classic Anti-Federalist thought, condemning much of modern federal criminal jurisdiction as unconstitutional, and advocating for narrow federal criminal law jurisdiction.²³⁹ The rightward pull of the debate has questioned the wisdom and the legitimacy of the broad federal criminal law doctrines that underlie most of the important advancements in the last fifty years.²⁴⁰ The Tea Party movement, in which rhetorical attacks

votes against confirmation. *See, e.g.*, 123 CONG. REC. 2214 (1st Sess. 1977) (confirming Griffin Bell, 75 to 21); 131 CONG. REC. 3339 (1st Sess. 1985) (confirming Edwin Meese, 63 to 31); 147 CONG. REC. 981 (1st Sess. 2001) (confirming John Ashcroft, 58 to 42); 151 CONG. REC. 923 (1st Sess. 2005) (confirming Alberto Gonzales, 60 to 36); 153 CONG. REC. 14-147 (1st Sess. 2007) (confirming Michael Mukasey, 53 to 40); 155 CONG. REC. 1266 (1st Sess. 2009) (confirming Eric Holder, 75 to 21).

235. Pete Yost, *FBI: Violent Crime Down for Fifth Straight Year*, WASH. POST, Oct. 30, 2012 at, A17. For a provocative discussion suggesting that the long-term decrease in crime has had a negative political impact on the Republican Party, see Charles Lane, *The Victims of Safer Streets*, WASH. POST, Nov. 27, 2012, at A15 (arguing that conservative crime doctrine remains dominant in Republican Party politics, and a decrease in crime has been a political disaster for the Republican Party).

236. *See* MANN, *supra* note 208, at 19–20 (noting the advancements made in the area of white collar crime).

237. *See, e.g.*, J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 468 n.18, 51–52 (2007) (asserting that the unsettled state of federal white collar crime over the last several decades has supplanted state law enforcement prerogatives and was further augmented by federal prosecutors' novel and creative use of new prosecutorial theories "to expand the boundaries of white collar criminal law").

238. *See* *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1962) ("[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.>").

239. Roger Pilon, *A Matter for the States*, WASH. POST, June 18, 1996, at A13.

240. Basic Tea Party philosophy is grounded in a rigid dual federalism and emphasizes that the federal government has limited powers and that, therefore, much of the expansive Commerce Clause jurisprudence of the last seventy years is illegitimate. *See, e.g.*, RAND PAUL, *THE TEA PARTY GOES TO WASHINGTON* 108–10, 117–28 (2011) (explaining basic Tea Party ideology). There is much academic and statistical literature noting the explosive growth of the number of federal crimes since 1970, much of which is based on broad interpretations of the Commerce Clause. *See, e.g.*, BAKER, *supra* note 219; *see also* AM. BAR ASS'N, *CRIMINAL JUSTICE SECTION*,

on an illegitimate leviathan federal government and criticism of broad federal power in general are in vogue, has succeeded in driving the Republican Party far to the right on many of these issues.²⁴¹

In this shifting political landscape, it is imperative that advocates of modern federal criminal law articulate sound legal and constitutional doctrinal bases to support a necessarily broad federal criminal law jurisdiction and contemporary criminal law enforcement.²⁴² Whatever proponents ultimately determine to be the source—the commerce clause, the “Constitution is not a suicide pact”

THE FEDERALIZATION OF CRIMINAL LAW 6–7 (1998). Even some less-fervently ideological entities, such as the Smart on Crime Coalition, have addressed the problem of over federalization as part of their proposed criminal justice agenda. *See, e.g.*, SMART ON CRIME COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE ADMINISTRATION AND CONGRESS 9–10 (2011) (recommending that Congress adopt rules and reporting requirements to stem over-criminalization and over-federalization).

The pace of conservative attacks on the scope of the federal police power seems to have accelerated. For example, respected conservative commentator George Will, perhaps emboldened by the increased public acceptance of these extreme positions, recently reemphasized that “[t]oday, Congress exercises police powers never granted by the Constitution.” George F. Will, *The Constitutional Cost of Morality ‘Wars’* WASH. POST, June 16, 2013, at A19. Earlier, Will approvingly quoted Senator Rand Paul, who had recently opined that “the proliferation of federal crimes undermine federalism.” George F. Will, *Sense on Sentencing*, WASH. POST, June 6, 2013, at A15. Senator Paul continues to move into the GOP mainstream as he appears to position himself for a presidential run, thus making his views on the federal police power more than a fringe curiosity. *See, e.g.*, Karen Tumulty, *Rand Paul Moving From Fringes Into Mainstream*, WASH. POST, June 20, 2013, at A1.

241. A few representative examples are illustrative. The conservative/libertarian CATO Institute took out large newspaper ads—entitled “Constitutional Authority”—noting that the 112th Congress imposed a new rule that requires Congress to cite specific constitutional authority when introducing new legislation. *See, e.g.*, Advertisement, *Constitutional Authority*, WASH. POST, Feb. 8, 2011, at A4. However, these advertisements warned that merely “reflexively citing the three most widely misunderstood clauses—the General Welfare, Commerce, and Necessary and Proper Clauses—they’ll violate the document they’ve sworn to uphold.” *Id.* During the 2012 Republican Primary Debates, the Tea Party rightward pull was evident, as the candidates repeatedly emphasized the call to repeal substantial amounts of federal regulatory legislation, many of which contain important federal criminal provisions. Amy Gardner, *GOP Candidates Exchange Views on Constitution and How U.S. Has Strayed*, WASH. POST, Sept. 6, 2011, at A5. A *Washington Post* editorial questioned whether “the GOP establishment [was] ever really serious about [Tea Party Initiatives] staging a ‘second American revolution’ or slashing the federal government back to what it was in 1789?” Eugene Robinson, *A Storm the GOP Didn’t Expect*, WASH. POST, Aug. 24, 2012, at A13.

242. For a thoughtful analysis concluding that the “‘overfederalization’ of criminal law is not a problem,” see Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 79–80 (2012); *see also* Susan R. Klein & Ingrid B. Grobey, *Overfederalization of Criminal Law? It’s a Myth*, 28 CRIM. JUST. 23, 28–30 (2013). It is noteworthy that the authors felt compelled to state that they “we[re] not apologists for federal prosecutors.” *Id.* at 32. For a critique on the supposed soundness of originalist doctrine, see Frank B. Cross, *THE FAILED PROMISE OF ORIGINALISM* 193–94 (2013).

formula,²⁴³ post-Civil War “tacit” postulates of federalism,²⁴⁴ the Guarantee Clause,²⁴⁵ Justice Stephen Breyer’s “pragmatic approach,”²⁴⁶ or some combination—the constitutional, legal, and policy justifications must be forcefully and persuasively articulated so that contemporary federal criminal law remains effective and relevant today and in the future.²⁴⁷ This is the principal

243. The famous rhetorical phrase, “the Constitution is not a suicide pact,” expresses the principle that constitutional interpretation must be undertaken in a manner that properly considers urgent and practical needs. See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (recognized as one of the first uses of the phrase); see also RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006). But see Irfam Khawaja, *Book Review*, *DEMOCRATIYA*, 8, 95, 99, Spring 2007 (reviewing RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY*) (arguing that Posner’s thesis—that Constitution is an eloquent but fundamentally out-of-touch document that does not allow judges to adequately address modern concerns—cannot be convincingly limited terrorism and national emergencies). As expressed in this book review, the main point of contention turns on the parameters of may be considered a dire national emergency. *Id.*

244. *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, C.J., dissenting) (discussing unstated constitutional principles inherent in the federalism structure of the Constitution).

245. See generally Kurland, *Guarantee Clause*, *supra* note 85 (noting that the Guarantee Clause is a source of federal authority to enact public corruption offenses criminalizing the conduct of state and local public officials).

246. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 71–73 (2010) (arguing that the public’s confidence in the Court cannot be taken for granted, so it is essential that the Court not adopt constitutional principles that prevent the federal government from addressing modern national concerns).

247. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (acknowledging that this was the first case in nearly sixty years in which the Court struck down a federal statute for exceeding the Commerce Clause). Despite the potentially transformative holding in *Lopez*, the Court has been much more circumspect in its modern delineation of the scope of the Commerce Clause. The Court clearly has not embarked on a suicide binge to kill modern federal criminal law. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (applying the *Perez* doctrine “class of activities” approach to uphold federal criminal narcotics statutes under the Commerce Clause without requiring a specific jurisdictional element in statute or proof of the individualized effect on commerce in each case); *United States v. Robertson*, 514 U.S. 669, 671 (1995) (sidestepping constitutional issue holding that gold mine was sufficiently engaged in interstate commerce); see also Kurland, *First Principles*, *supra* note 20, at 5 & n.14 (discussing and citing authorities debating whether *Lopez* represented a “constitutional moment” or “constitutional minute”). Nevertheless, the concerns expressed in this Article are not exaggerated or alarmist. For example, in the recent Obamacare decision, *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2591 (2012), after an unprecedented three days of oral argument, five Justices advocated a narrow view of federal authority under the Commerce Clause. *Id.* (Roberts, C.J., plurality opinion). This view could be problematic if applied to subsequent federal criminal jurisdictional challenges to statutes based on various broad permutations of the Commerce Clause, the taxing power, or the Necessary and Proper Clause. Compare Thai Phi Le, *Affordable Care Act and the Scope of Federal Power*, *WASH. LAWYER*, Jan. 2013, 20, 26 (“Whether or not the Court will use the [Obamacare decision] precedent’s far-reaching language evident in Justice Roberts’ opinion to seriously constrain congressional authority [in other subject-matter areas] in the future is a question that awaits resolution”), with Stern, *supra* note 217, at 285 & n.79 (noting that the Constitutional Convention of 1787 approved a resolution declaring that national legislature ought to legislate, *inter alia*, in those cases “where the states are separately incompetent”). For a thoughtful analysis of the

challenge facing modern federal criminal law enforcement and federal criminal jurisdiction at middle age.

Lastly, even some core federalism disputes thought to have been resolved in the Second Reconstruction have been resurrected. For example, problems with the 2000 presidential election²⁴⁸ and issues with recently enacted voting regulation laws²⁴⁹ have renewed tensions between the desirability of imposing uniform federal election standards and local laws that supposedly address particular local concerns. Political cries to “nullify” federal laws, from health care to proposed gun control initiatives, have increased, particularly in the South.²⁵⁰

With regard to federal criminal law enforcement, the current medical marijuana and state legalization initiatives conundrum also pits federal criminal law jurisdiction and the Supremacy Clause against states’ rights and state prerogatives.²⁵¹ Likewise, the current gun control debate in the wake of the

fractured Roberts Court, see Marica Coyle, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* (2013).

248. The Bush-Gore 2000 presidential election controversy concerned the vote count in Florida, and served to highlight the reality that a presidential election is really fifty-one separate elections, governed by fifty-one separate byzantine election procedures, plus a myriad of local election procedures. *See generally* CORRESPONDENTS OF THE NEW YORK TIMES, *36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS* (2001). In addition, a related issue gaining more steam concerns various state legislatures’ consideration of preliminary proposals to modify their respective electoral vote selection procedures—as is their constitutional prerogative. *See* U.S. CONST. art. II, § 1, cl. 2; *see also* Nia-Malika Henderson & Errin Haines, *GOP is Pushing Electoral Changes*, WASH. POST, Jan. 25, 2013, at A1 (highlighting that several states are currently wholly controlled by Republicans at the state level and voted for President Obama in the 2012 presidential election and that Virginia, Wisconsin, Michigan, Pennsylvania are considering changing electoral vote allocation laws from the present “winner take all” system to a system that awards electoral votes by congressional district); Albert Hunt, *Changing the Path to the Presidency*, N.Y. TIMES, Jan. 28, 2013, http://www.nytimes.com/2013/01/28/us/28iht-letter28.html?_r=0.

249. *See, e.g.*, Ethan Bonner, *Voter ID Rules Fail Court Tests Across Country*, N.Y. TIMES, Oct. 3, 2012, at A1 (highlighting state-level contentiousness regarding voter ID laws).

250. *See, e.g.*, Jeffrey Collins, *S. Carolina Seeks to Nullify Numerous Federal Initiatives*, WASH. POST, Jan. 20, 2013 at A14 (noting that “nullification” arguments “should have been settled after Abraham Lincoln’s vision of federal power won the Civil War”); Richard Simon, *Moves Afoot in Some States to Dodge New Federal Gun Laws*, WASH. POST, Feb. 18, 2013, at A17; *see also* Manny Fernandez, *White House Rejects Petitions to Secede, but Texans Fight On*, N.Y. TIMES, Jan. 15, 2013 (noting various southern state petitions to secede filed in wake of 2012 reelection of President Obama). These concerns over unpopular federal laws have also given rise to a proposed “Repeal [constitutional] Amendment,” which would authorize a repeal of federal legislation upon approval of such a resolution by two-thirds of the states. *See* Randy E. Barnett, *The Case for the Repeal Amendment*, 78 TENN. L. REV. 813, 816 (2011).

251. The Obama Justice Department has been mostly silent on these state marijuana initiatives, despite criticism from several past former DEA administrators that such silence effectively constitutes “tacit acceptance of these dangerous initiatives.” Sari Horwitz, *Justice Department Silent on Marijuana Initiatives: Measures in 3 States Would Legalize Sale of Drug for Recreational Use*, WASH. POST., Oct. 12, 2012, at A1; *see also* Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 811

Newtown and Navy Yard massacres had a certain rhetorical *déjà vu* quality. In a speech delivered in Minneapolis, Minnesota to garner support for the restoration of the ban on military-style assault weapons, President Obama evoked the Depression-era image of the proud but beleaguered constable, emphasizing that “[o]ur law enforcement officers should never be out-gunned on the streets.”²⁵² The common saying that “the more things change the more things remain the same”²⁵³ seems as equally apt as the subtle curse to consign one to “live in interesting times.”²⁵⁴ RFK would feel eerily right at home in confronting these challenges.

The influence of Tea Party thought, constant Tenth Amendment refrains in modern political discourse—including the “Obamacare” decision, with five Justice’s endorsing a limited view of the Commerce Clause—and recent comments by some federal legislators reveal an increased focus on Anti-Federalist themes and a narrow, literal construction view of constitutional interpretation as a modern limiting force on the role of the federal government.²⁵⁵ This goes far beyond academic debate of originalism, at least as

(2006) (noting contemporary circumstances in which state and local programs such as medical marijuana initiatives conflict with federal law, and further noting instances where conservative federal law makers seek to impose nationwide social restrictions that would trump state law); Tim Dickinson, *Are Voters Going to Pot?*, ROLLING STONE, Aug. 16, 2112 at 44, (discussing ballot measures that “could strike a dramatic blow against the federal War on Drugs”). Washington and Colorado voters passed initiatives legalizing the possession of small amounts of marijuana. *See generally* Brady Dennis, *Colorado Starts to Plot Course for Legal Pot*, WASH. POST Dec. 15, 2012, at A3; Charlie Savage, *Administration Weighs Legal Action Against States That Legalized Marijuana Use*, N.Y. TIMES, Dec 7, 2012, at A20. For a provocative analysis of the current conflict between federal and various state marijuana laws, see ROBERT A. MIKOS, CATO INST., ON THE LIMITS OF FEDERAL SUPREMACY WHEN STATES RELAX (OR ABANDON) MARIJUANA BANS (2012) (Policy Analysis No. 714). At the time this Article was completed, the Obama Justice Department finally issued a memorandum directed to all U.S. attorneys providing that the Department would defer its right to challenge the various state legalization laws at this time and, in effect, would not expend prosecutorial resources to prosecute conduct legal under state law, absent the existence of an important federal interest in a particular case. Memorandum from James M. Cole, Deputy Attorney General, to United States Attorneys (Aug. 29, 2013).

252. Press Release, The White House, Office of the Press Secretary, Remarks By the President on Preventing Gun Violence in Minneapolis, MN (Feb. 4, 2013, 1:46 PM), *available at* <http://www.whitehouse.gov/the-press-office/2013/02/04/remarks-president-preventing-gun-violence-minneapolis-mn>.

253. Translated from the original quote by Jean-Baptiste Alphonse Karr in *Les Guépes* (Jan. 1849).

254. *See supra* note 3.

255. For example, Republican Senator Tom Coburn of Oklahoma justified placing a Senate hold on bill to fund the District of Columbia Metro system on the ground that the Constitution does not mention local urban transit systems. Tom Coburn, *Why I Put a Hold on Metro Oversight Bill*, WASH. POST, Aug. 16, 2010, http://voices.washingtonpost.com/local-opinions/2010/08/why_i_put-a-hold-on-the-metro.html. Former Republican Congressman Roscoe Bartlett (R. Md.) stated his opposition to federal student loan programs, contending that he had carefully read the constitution and could find no evidence “that the federal government should be involved in education.” Ben Pershing, *Bartlett Says He Regrets Remark*, WASH. POST, Sept. 7, 2012, at B8. The comment received significant attention because of his follow-up comment that “once you start

far as federal law enforcement is concerned. This broadside constitutes a potential threat to the continuity of modern federal criminal law jurisdiction. This challenge cannot simply be ignored as extremist and trivial. Rather, it requires a thoughtful and comprehensive response that includes a focus, not merely on the issues in 1789, but also on recognition of the positive advancements in federal criminal law enforcement in the last fifty years and recognition of the practical limitations of state and local law enforcement. To remain effective, federal criminal must be interpreted and applied in a sound manner that provides national solutions to national problems, which the federal government can most effectively address.²⁵⁶

Remarkably, the Travel Act, which exists today in near identical form as its original enactment, remains important a half-century after its enactment. Indeed, the statute remains a useful tool in contemporary bribery and public corruption prosecutions.²⁵⁷ It also retains its creative flexibility. For example, the Travel Act served as the foundation of the federal prosecution of Michael Vick on dog fighting and gambling related charges.²⁵⁸ Furthermore, prosecutors often include Travel Act counts as important charges in Foreign Corrupt Practices Act prosecutions.²⁵⁹ Finally, modern federal criminal law enforcement would be substantially undermined without the immunity procedures that are in place today based, in significant part, on the RFK Justice Department's efforts.

down the slippery slope of relatively benign unconstitutional actions you may end up with the Holocaust." *Id.* For a general discussion, see Randy E. Barnett, Symposium, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011).

256. See Jeff Shesol, *Bashing the Supremes: Why Obama should leave the court alone this fall*, NEWSWEEK, June 25, 2012, at 13–14 (opining that in a second Obama Administration, the President "simply cannot keep mum as the five conservative justices [with a cramped constitutional vision] prevent the national government from solving national problems").

257. See, e.g., Robert G. Morvillo & Robert J. Anello, *Alternatives to Honest Services Fraud*, N.Y.L.J., Oct. 5, 2010 (highlighting Supreme Court decisions limiting mail fraud statutes to prosecute official corruption, "[u]ndoubtedly, the government will revisit other statutes, long in existence [including the Travel Act] to prosecute corruption"); Press Release, U.S. Attorney's, Eastern District of Arkansas, Four Crittendon County Men Charged With Conspiracy to Commit Election Fraud (Sept. 5, 2012), available at http://www.justice.gov/usao/are/news/2012/September/Hallumetal_electionfraud_Infoplea_090512.html (citing "the first known use of Travel Act to prosecute vote buying scheme concerning a purely local election").

258. See Adam H. Kurland, *The Prosecution of Michael Vick: Of Dogfighting, Depravity, Dual Sovereignty, and "A Clockwork Orange"*, 21 MARQ. SPORTS L. REV. 465, 476–78 (2011) (analyzing Vick's Travel Act conspiracy indictment arising out of dog fighting and illegal gambling allegations, and questioning whether federal prosecution was an appropriate exercise of prosecutorial discretion).

259. See U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION & U.S. SECURITIES AND EXCHANGE COMMISSION, ENFORCEMENT DIVISION, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> (noting that the Travel Act and other statutes may also apply to federal prosecutions of US companies doing business overseas); Thomas Fox, *Robert Kennedy, the Travel Act and the FCPA*, CORPORATE COMPLIANCE INSIGHTS (Feb. 22, 2010), <http://corporatecomplianceinsights.com/robert-kennedy-travel-act-fcpa> (summarizing the Travel Act and Discussing Its Contemporary Relevance).

IV. CONCLUSION

Robert F. Kennedy's tenure as attorney general was transcendent. Under his guidance, the Department of Justice expanded federal criminal law both substantively and procedurally to effectively create modern federal criminal law. These efforts were both necessary and appropriate.

RFK became attorney general less than a generation after it became apparent that state and local law enforcement could not keep up with complex modern crime, much of which included an interstate dimension. RFK understood this reality and forcefully and creatively shaped the federal police power in novel and expansive ways. By virtue of his position on the Rackets Committee, RFK brought a unique personal perspective, having observed firsthand the impotence of federal power that, in the middle of the twentieth century, was still largely shackled by quaint notions of eighteenth and nineteenth century federalism.

The Travel Act, acknowledged by RFK as his most controversial legislative proposal, was the signature achievement of his attorney generalship. Perhaps underappreciated at the time, the Travel Act's breadth permitted federal criminal law to reach a wide variety of criminal conduct previously not reachable under federal law, notably racketeering and local corruption offenses. This significantly transformed federal criminal law jurisdiction. A half-century later, the Travel Act is emblematic of the bold, aggressive, and expansive federal law enforcement that evolved from RFK's influence.

The fiftieth anniversary of the Travel Act provides an opportunity to acknowledge once again the significant difficulties facing local law enforcement in prosecuting many types of complex crime. Despite still oft-cited platitudes about the states as primary protectors of law and order, any serious consideration of contemporary criminal justice administration issues must recognize the necessity of a broad federal criminal law jurisdiction in order to effectively prosecute complex financial fraud, organized crime, and public corruption.

Looking back on the Travel Act and the other RFK Justice Department initiatives is not simply an exercise in nostalgia. Today, ascending theories of a new federalism and Tea Party-inspired politics continue to call into question the legitimacy of the expansive federal government. These attacks, though often not primarily directed at federal criminal law, nevertheless have the potential to seriously weaken a half-century of modern federal criminal law enforcement. An even moderately weakened federal law enforcement role would curtail current accepted notions of federal criminal jurisdiction, significantly impede federal law enforcement, and return the country to a state of affairs in which state law enforcement, in many areas, would be inadequate or incapable of effectively addressing these problems. Modern criminal justice administration cannot devolve to such a retched and untenable state.

In acknowledging the fiftieth anniversary of the Travel Act, the contemporary challenge must be directed at articulating bold and sound constitutional, legal, and policy principles so that modern federal criminal law remains relevant and effective in addressing the necessary priorities of today and tomorrow. That this

Article may offer a new generation of lawyers and legal scholars an opportunity to examine RFK and his Justice Department's role in shaping modern federal criminal law can only further advance the debate in a constructive direction.

