

crimes in 1794; forgery or counterfeiting of instruments of the Bank of the United States were made crimes in 1798; the Logan Act, which forbade private individuals from carrying out international diplomacy on behalf of the United States, was passed in 1799; and criminal penalties for the slave trade were imposed in 1800.

There were also some early efforts to bring common-law crimes under the federal courts. That is, any act traditionally considered a crime under the common law could be prosecuted in federal courts if the offense was committed within federal jurisdiction—i.e., on federal property, the high seas, etc. Alexander Hamilton, for one, believed that the federal courts should have common-law jurisdiction. But even so, this did not mean *general* criminal jurisdiction, merely jurisdiction over all offenses committed against the federal government.

Chief Justice Oliver Ellsworth said in 1795 that a federal grand jury could indict for “acts manifestly subversive of the National Government, or of some of the powers specified in the Constitution.” Thomas Jefferson, predictably, sounded the alarms at this “wholesale doctrine,” warning that the

Bank Law, the Alien and Sedition Acts, etc. were “inconsequential, timid things, in comparison to the audacious, barefaced and sweeping pretention to a system of law for the United States . . . so infinitely beyond their power to adopt.” “If this assumption be yielded to,” Jefferson declared, “the State Courts may be shut up.” (Old Tom must be spinning in his grave today, with the sweeping jurisdiction given to the federal courts today to prosecute all kinds of garden-variety crimes that have no relationship whatsoever to federal constitutional authority or power.) In 1812, the U.S. Supreme Court ruled definitively that the federal courts could only punish those crimes defined by statute, and not those defined by common law.

The federal law enforcement system nevertheless became politicized very early on, particularly with the Alien and Sedition Acts, which were passed in part because of the difficulties in obtaining common-law prosecutions for political offenses. The Sedition Act of 1798 defined as criminal any conspiracy to oppose any measure of the government; it also defined criminal libel, while allowing truth to be entered as a defense against a charge of libel.

## Budget cutters of 1860s created Justice Dept.

In 1870, almost a century of opposition to establishing federal jurisdiction over crimes and law enforcement was finally broken with the passage of H.R. 1328—a bill to establish a federal Department of Justice. The opposition had been rooted in the abhorrence first articulated by our Founding Fathers to the establishment of national police powers. When the yoke of British rule had been thrown off in America, one critical consideration in creating the U.S. Constitution was to eliminate the heavy hand of regal power as reflected in the British system of criminal law. Our forefathers rightly saw that such a system of criminal law was in fact a “tool of politics.”

The first proposal to create a department of law came from President Andrew Jackson in 1828. But it was not until the 1850s that a concerted push was made to get the necessary legislation passed. From 1854 to 1870, when the bill was finally passed, a series of joint committees audited and investigated the legal expenditures made by different governmental departments. In 1870, Rhode Island Congressman Thomas Allen Jenckes pressed the passage of the legislation, with the rationale that it cost too much for each branch of government to have its own law

division. His argument scrupulously circumvented the central argument against such a department being created—the danger of a federal police apparatus—by playing on the budgeting concerns of Congress financing the operations of government.

The creation of the Department of Justice was followed by a series of initiatives which gradually federalized the enforcement of criminal law—exactly what the opponents had feared. These initiatives culminated in the establishment of a Criminal Division of the DoJ in 1928.

A brief chronology follows:

- 1871** A central fund of \$50,000 is authorized for nationally supervised investigative functions out of the DoJ.
- 1872** The Mail Fraud statute is enacted. It is the first federal criminal statute of broad scope used to prosecute criminal activity (e.g., fraudulent schemes) which was normally dealt with under state law.
- 1875** Attorney General Williams begins appointing “special agents” to conduct investigations throughout the country.
- 1883** Attorney General Brewster calls for the revision of federal statutes, with a special emphasis on procedure and substance of the criminal law.
- 1887** The post of “General Agent” is created. The General Agent’s responsibility is to supervise all “special agents.”

The Federalists used the Alien and Sedition Acts against the Jeffersonian Republicans. The latter denounced the former for their politically motivated use of these statutes—especially prosecutions for criminal libel—but they were just as quick to wield these laws against their Federalist adversaries as soon as they had the opportunity.

Under Jefferson's presidency, some additional crimes were defined as federal offenses, such as offenses involving the national bank, the postal system, Indian lands, and the slave trade. The second comprehensive federal criminal code was not passed until 1825; it added little to the limited list of federal crimes, but even so, there were still complaints in Congress that it interfered with state criminal laws.

This was, by and large, the system that existed up until the Civil War. From time to time, new federal crimes were defined, but they were always offenses that involved actual federal jurisdiction or property; there was no need to duplicate state criminal laws. For example, the problem of interstate flight to avoid prosecution did not emerge with the invention of the automobile; a criminal could outrun a local sheriff by horse or boat. But the Constitution considered

that problem and solved it with Article IV's provision for extradition; there never has been any need to "federalize" state crimes because a suspect crosses a state line, whether by foot or by air.

## Creation of the Justice Department

From time to time there were also proposals to broaden the powers of the Attorney General and to create a Department of Law. These were successes on the powers left to the states by the Constitution.

However, under the needs of the Civil War, in 1861 the Attorney General was given formal, administrative control over the district attorneys and U.S. marshals. The Attorney General thus assumed control over prosecutorial functions that had been dispersed in various departments of the government, i.e., the Treasury, State, Navy Departments, etc. In 1870, the Department of Justice was created by Congress, and in 1871 the first federal funds were allocated for "the detection and prosecution of crimes against the United States."

The first significant expansion of federal law enforcement came with the Sherman Anti-Trust Act of 1890—exactly 100 years after the passage of the first federal criminal statute. Also, over the years, the practice of hiring private detectives (Pinkertons, etc.) had grown, and in 1909, under the pretext of "professionalizing" such investigative functions, the Bureau of Investigation (today's FBI) was created.

(It is interesting to recall that the principal investigative agency in the early years of the republic was the grand jury—an independent body of citizens that conducted its own investigations, called witnesses, etc. Unlike today's rubber-stamp grand juries, these bodies in the 19th century frequently acted independently of prosecutors, charting out their own investigations, and indicting or refusing to indict as they saw fit.)

The FBI's "charters"—so to speak—were the Mann Act of 1910 (crossing state lines for immoral purposes) and the Dyer Act of 1919 (making auto thefts across state lines a federal crime). Charter or no, the FBI jumped into the investigation and harassment of radicals and union organizers. During World War I, the FBI increased its strength from 300 to 400 agents for alleged enforcement of the Neutrality Act and the Espionage Act. The most massive political attacks occurred with the 1919 Palmer Raids, when as many as 10,000 aliens and perceived radicals were arrested without warrants.

But it was in the 1930s that the creation of a national police force was seriously undertaken. The stage was set by a multiplication of "crime commissions" in the 1920s, generally funded by the Eastern financial establishment and using Prohibition-spawned gangsterism and racketeering as the excuse to call for new federal criminal laws.

The years 1933-34 saw a massive expansion of federal criminal laws, which were denounced in Congress as "substituting a federal criminal code for the criminal codes of the

- 1890** Sherman Anti-Trust Act is passed.
- 1897** Congress authorizes a commission to revise and codify the criminal penal laws of the U.S.
- 1905** An *ad hoc* reorganization of the appointment of "special agents" occurs—the first step to establishing a national investigative force.
- 1909** The Bureau of Investigation is created within the DoJ. In the same year, a comprehensive federal criminal code is adopted.
- 1910** The Mann Act is passed, prohibiting interstate transportation for immoral purposes.
- 1914** The Harrison Act is passed, beginning federal criminal involvement in dealing with narcotic drugs.
- 1919** The Dyer Act is passed, prohibiting interstate transportation of stolen motor vehicles.
- 1928** A Criminal Division is created within the DoJ with Attorney General Cummings designating 31 functions to the division. The federal criminal code of 1909 is made part of the general statutes of the U.S.
- 1932** The Lindbergh Law, making kidnaping a federal offense, is adopted.
- 1934** Nine new federal criminal statutes are adopted, including the Fugitive Felon Act, wire fraud, bank robbery, extortion, firearms, and interstate transportation of stolen property.