

**THE UNUSUAL CASE OF ANTHONY CHEBATORIS:
THE “NEW DEAL FOR CRIME” AND THE FEDERAL
DEATH PENALTY IN NON-DEATH STATES**

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ABSTRACT

The little-known case of *United States v. Anthony Chebatoris*, arising from a botched bank robbery in Michigan in 1937, has great relevance to today’s criminal justice system. Until this past July, Anthony Chebatoris was the only person in American history to have been executed by the federal government for a crime in a non-death penalty State. Indeed, until 2002, Chebatoris appears to have been the only person in American history even to have been sentenced to death for such a crime. Since 2002, however, ten people have been similarly sentenced to death by the federal government for crimes committed in non-death States. One, Dustin Honken, was executed on July 17, 2020.

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There are obvious federalism concerns that arise when the federal government seeks to punish a person more harshly for a crime than he or she could be punished by the State where the crime occurred. This is particularly so where the federal government imposes the death penalty where it is not authorized by state law. Yet these concerns were recognized and expressed by only a few during the *Chebatoris* case, most notably by Michigan Governor Frank Murphy, who went on to become U.S. Attorney General and later Associate Justice of the U.S. Supreme Court. But even with respect to Murphy, these federalism concerns were strangely muted, overwhelmed by the drastic changes, wrought by the Great Depression and the response thereto, in the relationship among the States, the federal government, and the people. This reconfiguration was manifested not only by the New Deal programs that are commonly known but also by the less familiar “New Deal for Crime,” a bold initiative to inject the federal government into criminal matters on a larger scale than ever before.

Swept up in this re-configuration was *Chebatoris*. Though Murphy protested the execution, he had to walk a fine line between his anti-death penalty absolutism, on the one hand, and his political fealty to President Roosevelt and his embrace of the New Deal, on the other. In the end, Murphy, who had the ear of both Roosevelt and Attorney General Homer Cummings, made only a half-hearted effort to save *Chebatoris*.

INTRODUCTION

*“I feel certain that we have now written the last chapter in this unusual case.”*¹

On September 29, 1937, Anthony *Chebatoris* and an accomplice attempted to rob a bank in Midland, Michigan.² The robbery was botched, and the accomplice and a bystander were killed.³ Though he never crossed state lines and was captured only a few blocks from the bank, *Chebatoris* was prosecuted in federal court under the three-year-old federal Bank Robbery Act because the bank he attempted to rob housed federally-insured funds and was a member of the Federal Reserve System.⁴ He was convicted of attempted bank robbery and murder, and was

1. Letter from Arthur J. Tuttle, U.S. Dist. Judge, E. Dist. of Mich., to John W. Babcock, U.S. Attorney, E. Dist. of Mich. (Nov. 2, 1938) (on file with the Bentley Historical Library, University of Michigan).

2. See DAVID GARDNER CHARDAVOYNE, *THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN: PEOPLE, LAW, AND POLITICS* 212 (2012).

3. *Id.* at 213–15.

4. See *id.* at 215.

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sentenced to death.⁵ Nearly a century earlier, in 1846, Michigan had become the first English-speaking jurisdiction to bar the death penalty for murder (although the punishment was still authorized for treason).⁶ On July 8, 1938, Chebatoris was hanged by the federal government, thus attaining the dubious distinction as the only person in American history until the last several months to have been executed by the federal government for a crime occurring in a State that did not authorize capital punishment for the same offense.⁷

There are obvious federalism concerns that arise when the federal government seeks to punish a person more harshly for a crime than he or she could be punished by the State where the crime occurred. This is particularly so where the federal government imposes the death penalty where it is not authorized by state law. Yet, in the *Chebatoris* case, those concerns were, for the most part, strangely muted. To understand why, one must situate the *Chebatoris* case within the unprecedented expansion of the federal government which was occurring at exactly the same moment in history, and within the context of the complicated relationship between and among Governor Frank Murphy of Michigan, U.S. Attorney General Homer Cummings, and President Franklin D. Roosevelt.

The election of 1932 had effected a sea change in American politics as Americans swept Roosevelt and his New Deal Democrats into office in response to the crisis of the Great Depression.⁸ Just four years earlier, the very first plank of the Democratic Party platform “demand[ed] that the constitutional rights and powers of the states shall be preserved in their full vigor and virtue.”⁹ By stark contrast, the 1932 platform contained not a word about federalism.¹⁰

In early 1934, at the urging of Cummings, Congress passed a series of crime measures with almost no dissent.¹¹ Only two years earlier,

5. *See id.* at 217.

6. *See* Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J. L. & SOC. POL’Y 194, 229 (2018).

7. *See id.* at 230; CHARDAVOYNE, *supra* note 2, at 219.

8. *See* William E. Leuchtenburg, *Franklin D. Roosevelt: Campaigns and Elections*, MILLER CTR., <https://millercenter.org/president/fdroosevelt/campaigns-and-elections> (last visited May 14, 2020).

9. Gerhard Peters & John T. Woolley, *1928 Democratic Party Platform*, AM. PRESIDENCY PROJECT (June 26, 1928), <https://www.presidency.ucsb.edu/documents/1928-democratic-party-platform>.

10. *See* Gerhard Peters and John T. Woolley, *1932 Democratic Party Platform*, AM. PRESIDENCY PROJECT (June 27, 1932), <https://www.presidency.ucsb.edu/documents/1932-democratic-party-platform>.

11. *See* CLAIRE BOND POTTER, *WAR ON CRIME: BANDITS, G-MEN, AND THE POLITICS OF MASS CULTURE* 109–10 (1998).

Congress had cautiously dipped its toe into the water of criminal law by passing the federal Kidnapping Act, which might never have been enacted but for the fateful kidnapping of the infant son of famed aviator Charles Lindbergh.¹² Even so, the Act was passed in the face of opposition by Cummings's predecessor and considerable concern that the federal government was unconstitutionally insinuating itself into local matters.¹³ By contrast, Congress dove headlong in 1934 into criminal law by not only strengthening the Kidnapping Act but also injecting itself into the prosecution of extortion, racketeering, kickbacks, possession of firearms, possession of stolen goods, assault of federal agents, crimes in federal prisons, flight across state lines to avoid prosecution, and—most relevant here—bank robbery.¹⁴ Prior to the federal legislation, all of this conduct typically had been regulated exclusively by state law.¹⁵ This “New Deal for Crime” accompanied the bold new approach to centralization of economic regulation taken by Roosevelt and his allies in Congress.¹⁶ While big economic interests were motivated to litigate the constitutionality of the economic innovations of the New Deal all the way to the Supreme Court, the “New Deal for Crime” was virtually unchallenged.¹⁷

The only outcry in response to Chebatoris's imminent execution came from Michigan Governor Frank Murphy.¹⁸ Sixteen days before the scheduled execution, he asked President Roosevelt to commute Chebatoris's sentence or move the execution outside of Michigan.¹⁹ At first blush, Murphy appears to be a heroic figure standing up to the President. But the reality is more complex. Murphy had deeply held views against the death penalty, it is true.²⁰ He was also running for re-election and it is unclear whether his stance in the *Chebatoris* case would help him or hurt

12. *See id.* at 109.

13. *See* Colin V. Ram, Note, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What is Truly National and What is Truly Local*, 65 WASH. & LEE L. REV. 767, 784 (2008).

14. *See id.* at 785–86; Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 387–88 (2006).

15. Richman, *supra* note 14, at 387.

16. *See* POTTER, *supra* note 11, at 119–20.

17. *See* Mariano-Florentino Cuellar, *The Political Economies of Criminal Justice*, 75 U. CHI. L. REV. 941, 960 (2008), (reviewing JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007)).

18. *See* CHARDAVOYNE, *supra* note 2, at 220.

19. *See id.*

20. *See id.*; Letter from Frank Murphy, Governor of Mich., to Franklin D. Roosevelt, President of the U.S. (June 22, 1938) (on file with author) [hereinafter Murphy June 22 Letter].

him at the polls.²¹ In any event, his request seems strangely muted: a one-and-a-half-page letter, two weeks before the scheduled execution, with no follow-up.²² And Murphy could not even be troubled to get the condemned man's name correct, inadvertently changing his first name to "John."²³

Murphy's actions appear to be those of an opportunistic politician hedging his bets. Murphy, in large part, owed his political career to Roosevelt. The President's appointment of Murphy as Governor General of the Philippines in 1933 transformed Murphy from a local politician to one of national stature.²⁴ And until Murphy's gubernatorial victory in 1936, Michigan had not had a Democratic governor since before the Civil War.²⁵ Roosevelt's landslide victory in that year's presidential race helped sweep Murphy into office.²⁶ Murphy correctly perceived that his political fortunes were tied to Roosevelt's and that his political future lay in Washington, D.C.²⁷ Specifically, he wisely perceived that he would eventually land in the Roosevelt cabinet, the Supreme Court, or even in the White House itself as Roosevelt's successor.²⁸ As a staunch New Dealer, a Roosevelt acolyte, and a beneficiary of Roosevelt's patronage, Murphy could not afford to press too firmly any concerns of "states' rights" vis-à-vis the federal government's proposed execution of Chebatoris for a crime committed in Michigan.²⁹

Roosevelt refused to commute the sentence.³⁰ He handed off to Cummings the question of whether the execution could be moved to a different State.³¹ The request was passed off to an Assistant Attorney General, who punted the issue back to the local U.S. Attorney and the trial judge.³² They determined that the execution could not be moved—a

21. See SIDNEY FINE, *FRANK MURPHY: THE NEW DEAL YEARS*, 429 (1979).

22. See Murphy June 22 Letter, *supra* note 20.

23. Compare *id.* (referring to Anthony Chebatoris as "John Chebatoris"), with Transcript of Record, *United States v. Chebatoris*, No. 3977 (E.D. Mich. 1937) [hereinafter Transcript of Record] (listing "Anthony Cehbatoris" as the defendant).

24. See *THE NEW DEAL YEARS*, *supra* note 21, at 2.

25. See *id.* at 204.

26. See *id.* at 252.

27. See James Wolfinger, *The Strange Career of Frank Murphy: Conservatives, State-Level Politics, and the End of the New Deal*, 65 *THE HISTORIAN* 377, 381 (2002).

28. See *THE NEW DEAL YEARS*, *supra* note 21, at 528.

29. See *id.* at 428–29.

30. See Telegram from Franklin D. Roosevelt, President of the U.S., to Frank Murphy, Governor of Mich. (July 6, 1938) (on file with author).

31. See *id.*

32. See Letter from Joseph B. Kennan, Assistant U.S. Attorney Gen., to John C. Lehr, U.S. Attorney, E. Dist. of Mich. (July 6, 1938) (on file with author); *THE NEW DEAL YEARS*, *supra* note 21 at 429.

federal statute enacted only the previous year required that federal executions take place in the State where the crime occurred so long as the State authorized capital punishment.³³ And Michigan did authorize the death penalty for treason.³⁴ So, Chebatoris was hanged on July 8, 1938 at the Federal Correctional Institute in Milan, Michigan.³⁵ Murphy issued a statement vehemently denouncing the hanging and continued to receive letters in support of his position for weeks afterward.³⁶ Nonetheless, Murphy was defeated in his bid for re-election four months later.³⁷ Less than two months after that, in January 1939, Murphy succeeded Cummings as Attorney General of the United States.³⁸ About a year after that, Roosevelt appointed him to the U.S. Supreme Court, where he stayed until his death.³⁹

The goal of this Article is twofold. First, it unearths from relative obscurity the little-known *Chebatoris* case and highlights its singular place in American jurisprudence. Second, it seeks to explain the outcome in the *Chebatoris* case as the result of the sea change in federal-state relations that occurred between 1933 and 1938. Governor Murphy, the only person in a position to convince Roosevelt to stop the execution, could not press the federalism argument too far without irrevocably harming his credentials as a staunch New Dealer. In the end, Chebatoris's distinctive position in history was a result of a confluence of related forces: a paradigm shift in the relationship between the federal government and the States; a lack of any real motivation to challenge that shift in the realm of criminal regulation; and the half-hearted measures by the only person in a position to try to save Chebatoris's life. Part I provides the details of the *Chebatoris* case: the crime, the trial, and the execution. Parts II and III, respectively, explain the outcome in the case as the result of the rising tide of federal power that, by 1937, proved irresistible, and Governor Murphy's failure of will to press a states' rights claim in the face of the New Deal agenda, which would have alienated him from the Roosevelt administration.

33. See Statement by Arthur J. Tuttle, U.S. Dist. Court Judge, E. Dist. of Mich. (undated) [hereinafter Undated Tuttle Statement] (on file with the Bentley Historical Library, University of Michigan); 18 U.S.C. § 3596(a) (2020).

34. See Undated Tuttle Statement, *supra* note 33; Warden & Lennard, *supra* note 6, at 229.

35. See CHARDAVOYNE, *supra* note 2, at 219.

36. See THE NEW DEAL YEARS, *supra* note 21, at 429.

37. See *id.* at 508.

38. See SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 1 (1984).

39. See *id.* at 145.

I. *UNITED STATES V. ANTHONY CHEBATORIS*

Anthony Chebatoris and Jack Gracey attempted to rob the Chemical State Savings Bank in Midland, Michigan on September 29, 1937.⁴⁰ In the course of their escape, one of them, most likely Chebatoris, shot and mortally wounded bystander Henry Porter.⁴¹ Gracey was killed attempting to flee.⁴² Although Chebatoris was captured only a few hundred yards from the bank, he was tried, convicted, and sentenced to death in federal court under the new federal Bank Robbery Act.⁴³ Within ten months, he was hanged at the federal correctional institute in Milan, Michigan, becoming the only person in American history until this past July to be executed by the federal government for a crime committed in a non-death-penalty State.⁴⁴

A. *The Crime*

Anthony Chebatoris was born in 1898 in Poland.⁴⁵ He emigrated to the United States with his parents as a young child and grew up in Treveskyn, Pennsylvania, obtaining an eighth-grade education.⁴⁶ He moved to Detroit, Michigan in 1920.⁴⁷ Later that year, he was sentenced to seven and a half to fifteen years in prison for armed robbery.⁴⁸ He was released on parole in December 1926, but returned to prison as a parole violator a year later after having been arrested in Louisville, Kentucky for a violation of the federal Dyer Act.⁴⁹

At some point during his incarceration at the Michigan State Prison in Marquette, he met Jack Gracey.⁵⁰ Gracey was a career criminal who had spent most of his adult life in prison.⁵¹ Chebatoris and Gracey were each released from the Marquette Prison in 1935.⁵² Chebatoris spent most

40. See Transcript of Record, *supra* note 23, at 19.

41. See *id.* at 21.

42. See *id.* at 22.

43. See *id.*; NEW DEAL YEARS, *supra* note 21, at 428.

44. See NEW DEAL YEARS, *supra* note 21, at 42; Warden & Lennard, *supra* note 6, at 230.

45. Memorandum from Richard F. Doyle, Chief U.S. Probation Officer, to Arthur J. Tuttle, U.S. District Judge, E. Dist. of Mich. 9 (Nov. 15, 1937) (on file with author) [hereinafter Chebatoris Probation Report].

46. *Id.*

47. *Id.*

48. *Id.*

49. See *id.*

50. See CHARDAVOYNE, *supra* note 2, at 212.

51. *Id.*

52. See Chebatoris Probation Report, *supra* note 45, at 9.

of his time thereafter in Pittsburgh and Treveskyn, Pennsylvania, where he had grown up.⁵³

Sometime in August or September 1937, Chebatoris took a bus from Pittsburgh to Detroit.⁵⁴ At some point thereafter, Gracey learned that “[t]he Dow Chemical Company deposited its \$75,000 payroll twice a month in the Chemical State Savings Bank of Midland, Michigan [He] cased the bank and reported back to Chebatoris that it was an easy mark with no security.”⁵⁵ On September 29, 1937, Chebatoris and Gracey drove from Detroit to Midland in two separate cars, leaving one in Corunna (west of Flint) as a “getaway” car, and continuing to Midland in a blue Ford.⁵⁶

Sometime after 11:30 a.m. on September 29, 1937, Chebatoris and Gracey entered the Chemical State Savings Bank.⁵⁷ Gracey was armed with a shotgun and Chebatoris with a revolver.⁵⁸ When Gracey approached bank president Clarence H. Macomber, Macomber grabbed the barrel of the shotgun and pointed it toward the floor.⁵⁹ Gracey then made some sort of threat on Macomber’s life and Macomber continued to hold the gun to the floor, struggling to get Gracey toward the door of the bank, away from the bank customers and Macomber’s daughter, Clare, who was in the bank that day.⁶⁰ Chebatoris then aimed his revolver at Macomber and fired one shot, striking him below the left shoulder, about an inch from his chest.⁶¹ When bank cashier Paul D. Bywater came toward Macomber, Chebatoris shot him in the back, just over the left hip.⁶² Macomber let go of the gun, and Chebatoris and Gracey left the bank empty handed.⁶³

Dr. Frank Hardy, a dentist, was in an office next to the Chemical Bank building.⁶⁴ He heard a “terrific screaming” coming from the bank,

53. *Id.* at 7.

54. *See id.*

55. *See id.*; CHARDAVOYNE, *supra* note 2, at 212.

56. *See* CHARDAVOYNE, *supra* note 2, at 212; Chebatoris Probation Report, *supra* note 45, at 7.

57. Chebatoris Probation Report, *supra* note 45, at 1. The Bank was part of the federal reserve system with funds insured by the Federal Deposit Insurance Corporation. *See id.*

58. *Id.*

59. *Id.* at 1–2.

60. *See* Transcript of Record, *supra* note 23, at 26, 28.

61. *Id.* at 29.

62. *See id.* at 30, 133.

63. *Id.* at 30, 32.

64. *Id.* at 95–96. In one of this tale’s many strange coincidences, Hardy served in the same unit in World War I as Michigan Governor Frank Murphy. JACK HOBAY, LAWLESS YEARS: THE TONY CHEBATORIS AND JACK GRACEY STORY 145 (2012).

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which caused him to look out the window.⁶⁵ He saw Chebatoris and Gracey coming out of the bank onto the sidewalk, each with a gun.⁶⁶ They pointed their guns at several bystanders, then ran to a 1937 black or maroon Ford Tudor parked near the front of the bank.⁶⁷ They entered the car, Chebatoris on the driver's side and Gracey on the passenger side.⁶⁸

Hardy, realizing there had been a holdup at the bank, picked up a .35 Remington automatic deer rifle he kept in his office, tore the window screen, and began shooting at the car.⁶⁹ He shot the passenger side of the car and, as it began to back away from him down Benson Street, he shot twice in the rear window of the car.⁷⁰ One shot hit Gracey's right leg and one hit Chebatoris in the left arm.⁷¹ The car then veered out of control and crashed into a metal guard rail and the rear right fender of another car on Benson Street next to Venner's Garage.⁷²

The men got out of the car.⁷³ Gracey, on the passenger side, "slid out" and "sprawled on the pavement."⁷⁴ Chebatoris helped him up.⁷⁵ As Gracey limped down Benson Street, Chebatoris "looked to his right as though he was wondering where the shooting was coming from."⁷⁶ He looked toward the bank, then left toward the Midford Garage.⁷⁷ Henry Porter was standing outside the Midford Garage, wearing a chauffeur's cap with a visor.⁷⁸ Chebatoris fired his rifle at Porter, who fell to the ground clutching his upper thigh or lower abdomen.⁷⁹

65. Transcript of Record, *supra* note 23, at 97.

66. *See id.* at 97.

67. *See id.* at 61, 72, 142, 175–76.

68. *See id.* at 201.

69. *Id.* 110–11, 121. Apparently, Hardy had kept the rifle in his office for the express purpose of firing on potential bank robbers. *See Dentist Shoots From his Office Window, Felling Bandits Fleeing After Raid on Bank*, N.Y. TIMES, Sept. 30, 1937, at 10.

70. Transcript of Record, *supra* note 23, at 98.

71. HOBAY, *supra* note 64, at 146.

72. Transcript of Record, *supra* note 23, at 62, 98, 143.

73. *Id.* at 99.

74. *See id.*

75. *See id.*

76. *See id.* at 65, 148–49.

77. Transcript of Record, *supra* note 23, at 65–66.

78. *See id.* at 66, 145. In his closing argument, United States Attorney John C. Lehr made much of this fact in surmising why Chebatoris shot Porter: in his frantic search for the source of the gunshots, Chebetoris likely saw Porter wearing a cap, mistook him for a police officer, and thought it was he who was shooting at them. *Id.* at 352. *See also Dentist Shoots From his Office Window, Felling Bandits Fleeing After Raid on Bank*, *supra* note 69 (stating that Chebatoris shot Porter "apparently in the belief that [Porter] was the one who shot at them").

79. Transcript of Record, *supra* note 23, at 66, 145.

Just then, a black Essex coupe driven by Irene Stolsmark, coming from Main Street, turned to go down Benson Street toward some railroad tracks.⁸⁰ Chebatoris tried to flag the car down near Venner's Garage.⁸¹ When it did not stop, he grabbed onto the right side of the coupe and jumped onto the running board, unsuccessfully tried to enter, and rode it downhill for a while.⁸² Stolsmark began to slow the car down but Chebatoris ordered her to keep driving.⁸³ Eventually he entered the coupe.⁸⁴ Gracey, in the meantime, ran behind the coupe trying to catch up, pointing his gun all around.⁸⁵ When she got to the railroad crossing, Chebatoris told her to stop and she did.⁸⁶ As she stopped, Gracey opened the left door, pointed his gun at Stolsmark, and told her to get out, whereupon she emerged with her two-year-old son, Duane.⁸⁷

When Gracey had his foot on the left running board and was starting to enter the coupe, Hardy began shooting again.⁸⁸ One shot apparently hit Gracey in the elbow.⁸⁹ Gracey then ran toward a large red truck coming across the bridge at the foot of Benson Street, coming into town, and he yelled and signaled to the truck driver to back up.⁹⁰ Hardy shot again, striking Gracey, who "wheeled and fell."⁹¹ Gracey ultimately died of his wounds.⁹²

Chebatoris got out of the coupe holding his arm and ran through a vacant field along the river bank toward the city dump.⁹³ He entered a 1937 Plymouth coupe belonging to Ralph Labinsky at a nearby worksite.⁹⁴ Backing up the car, he struck the left front fender of a car belonging to Labinsky's co-worker, Richard VanOrden.⁹⁵ VanOrden,

80. *See id.* at 304–05.

81. *See id.* at 128, 305.

82. *Id.* at 305.

83. *Id.*

84. *See* Transcript of Record, *supra* note 23, at 306.

85. *See id.* at 138–39.

86. *See id.* at 305.

87. *See id.* at 306; HOBAY, *supra* note 64, at 148.

88. *See* Transcript of Record, *supra* note 23, at 102–03.

89. *See id.* at 119.

90. *See id.* at 103, 249–51.

91. *See id.* at 103.

92. *See* Chebatoris Probation Report, *supra* note 45, at 4; Ray J. Kuhn, *Bank Gunmen Linked with Other Crimes*, BAY CITY TIMES, Sept. 30, 1937, at 1. This fact is curiously absent from the trial record.

93. *See* Transcript of Record, *supra* note 23, at 161, 250.

94. *See id.* at 258; *Fender Dent Brought Arrest of Bandit*, MIDLAND DAILY NEWS, Sept. 30, 1937, at 1 (spelling Ralph's last name as "Lubinski").

95. *See* Transcript of Record, *supra* note 23, at 258.

witnessing this, ran out of his office and approached the car.⁹⁶ The car then backed around in a semi-circle and headed toward the railroad tracks.⁹⁷ When VanOrden stepped up to left side of the car and asked Chebatoris where he thought he was going, Chebatoris threatened to kill or seriously injure him.⁹⁸ VanOrden then jumped on the running board and held on as Chebatoris drove down a road parallel to the tracks.⁹⁹ After making a right turn, Chebatoris stopped the car and picked up his rifle, which had been laying in the seat next to him.¹⁰⁰ VanOrden jumped off the car and Chebatoris again threatened to kill him.¹⁰¹ When Chebatoris put down the rifle and started the car up again, VanOrden jumped back on the car and tried to seize him by the throat, but Chebatoris broke his hold.¹⁰² The car went another two hundred feet or so, swung to the left, hit some clay dirt, and then stalled out.¹⁰³

Chebatoris picked up the rifle again and pointed it toward VanOrden, who grabbed the butt of the rifle, stuck his finger into the trigger guard, and pulled the trigger, but the gun did not fire.¹⁰⁴ Chebatoris tried to bite VanOrden's right hand, but VanOrden pushed him away, and the two struggled.¹⁰⁵ VanOrden unsuccessfully tried to wrestle the rifle away from Chebatoris.¹⁰⁶ VanOrden then called for help, and some other men, including Midland County Sheriff Ira Smith, arrived.¹⁰⁷ Finally, Chebatoris said, "I give up" and let go of the rifle.¹⁰⁸ Smith opened the right door of the car, grabbed Chebatoris by the neck, hit him on the side of the head, and pulled him to the ground.¹⁰⁹ VanOrden held onto the rifle as Smith held Chebatoris's head to the ground with his knee.¹¹⁰ One of the other men "started to kick [Chebatoris] and said 'he had killed a man up

96. *Id.*

97. *Id.*

98. *Id.* at 258–59.

99. *Id.* at 259.

100. *See* Transcript of Record, *supra* note 23, at 259.

101. *Id.*

102. *Id.*

103. *Id.* at 259–60.

104. *Id.* at 260.

105. Transcript of Record, *supra* note 23, at 260.

106. *See id.*

107. *See id.* at 260. Fortuitously, Smith happened to be in the immediate vicinity investigating an unrelated case of property theft. *Id.* at 264. He had heard Chebatoris crashing Labinsky's car into VanOrden's and had seen VanOrden jump onto the running board of the Labinsky car. *Id.*

108. Transcript of Record, *supra* note 23, at 260.

109. *Id.* at 260, 265.

110. *Id.* at 260–61, 265.

town.”¹¹¹ Chebatoris responded, “[l]et them kill me I deserve it,” but Smith protected him and kept anyone from hurting him.¹¹² At some point, Smith discovered that Chebatoris had an empty zippered pouch about twelve to fourteen inches long pinned to the inside of his jacket, presumably to hold money he had planned to steal from the bank.¹¹³

Smith placed Chebatoris under arrest.¹¹⁴ After a few minutes, the city police came, handcuffed Chebatoris, and took him away.¹¹⁵ Upon opening the rifle, Smith saw that there was one empty shell in the chamber and three loaded shells.¹¹⁶

Meanwhile, Clinton Skym, who had been two feet away from Porter when he was shot, grabbed Porter under the arm with the help of another man, George Dewey, and carried him to Dr. Harvey McCory’s office on the second floor over the Midford Garage.¹¹⁷ Porter was in a “grave state of shock” with a rifle wound in the lower left portion of his abdomen.¹¹⁸ Dr. McCory treated the shock and applied a compress to the gunshot wound.¹¹⁹ Porter was taken by ambulance to Mercy Hospital in nearby Bay City where he was x-rayed.¹²⁰ The bullet had fractured Porter’s pelvic bone where the femur enters it.¹²¹

After three or four hours, consulting surgeon Dr. Royston Scrafford took over.¹²² Scrafford operated on Porter and gave him two blood transfusions.¹²³ Porter’s wound was not initially considered fatal.¹²⁴ However, the force of the gunshot had been transmitted to the intestines, puncturing the sigmoid—part of the large bowel—causing peritonitis, in which the

111. *Id.* at 272. This rank hearsay was elicited from Smith by the court following cross-examination. It was unobjected to. *See id.*

112. Transcript of Record, *supra* note 23, at 272. Again, this comment was elicited by the court following cross-examination of Smith. Defense counsel did not object to the judge’s questioning. *See id.*

113. *See id.* at 267–6

114. *Id.* at 270.

115. *Id.* at 261.

116. Transcript of Record, *supra* note 23, at 270.

117. *See id.* at 194, 198–99, 211.

118. *Id.* at 216.

119. *Id.* at 217.

120. *Id.* at 217–18.

121. Transcript of Record, *supra* note 23, at 219.

122. *See id.* at 221, 225.

123. *Id.* at 223. Bywater was also taken to the hospital and operated on. Several holes in his small bowel and abdomen were sewn up. He was in very serious condition for several days, but he survived. *See id.* at 134–35. There was nothing in the record indicating the seriousness of Macomber’s condition but he, too, survived. *See id.* at 29.

124. Transcript of Record, *supra* note 23, at 217–18.

contents of the bowels spill into the peritoneum.¹²⁵ The peritonitis led to Porter's death on October 11, 1937.¹²⁶ Scrafford testified that the hole in his bowel was not discovered until an autopsy was performed.¹²⁷ The official cause of death was "acute peritonitis with a multiple perforation of the large intestine commonly called the sigmoid, secondary to a compound multiple fracture called the ilium and the femur, which was associated with a traumatized wound called a gunshot wound."¹²⁸

B. *The Legal Proceedings*

Had Chebatoris been charged with murder "[u]nder Michigan law, his maximum sentence would have been life in prison without the possibility of parole."¹²⁹ In 1846, Michigan had become the first English-speaking jurisdiction to have abandoned capital punishment for the crime of murder.¹³⁰ Its last execution had taken place in 1830, while it was still a territory.¹³¹

But the federal Bank Robbery Act of 1934 provided that whoever killed another person in the course of robbing or attempting to rob a bank "or in avoiding or attempting to avoid apprehension for the commission of such offense," could be punished "by death if the verdict of the jury shall so direct."¹³² It appears that there never was a doubt that Chebatoris would be tried in federal court.¹³³ Some news reports suggested that federal charges would be brought only if Bywater or Porter were to die.¹³⁴ For example, one such report the day after the crime quoted Michigan Police as denying a request for extradition by Pennsylvania authorities "with the explanation that, in [the] event any of the injured men die, Chebatoris may face a federal charge and the prospect of a death penalty."¹³⁵ The same report also quoted Midland County prosecutor Joel H. Kahn as

125. *See id.* at 224, 244.

126. *Id.* at 223.

127. *Id.* at 224. This testimony is belied by a newspaper account from the day after the robbery, which reported that Porter "suffered . . . numerous intestinal punctures." *See Fender Dent Brought Arrest of Bandit*, *supra* note 94.

128. *Id.* at 243.

129. CHARDAVOYNE, *supra* note 2, at 215.

130. *Id.*

131. *See id.*

132. Act of May 18, 1934, ch. 304, § 3, 48 Stat. 783 (current version at 18 U.S.C. § 2113 (2019)).

133. *See* Aaron J. Veselenak, *The Execution of Anthony Chebatoris*, MICH. HIST. MAG., May–June 1998 at 35, 36.

134. Veselenak, *supra* note 133 at 36.

135. *See* Kuhn, *supra* note 92, at 2. *See also* *Fender Dent Brought Arrest of Bandit*, *supra* note 94 ("Placing of charges against Chebatoris is being deferred . . . until the outcome of the injuries to both men is learned.").

saying “that the issuance of any county warrants w[ould] ‘depend on the outcome of the two injured parties,’”¹³⁶ suggesting that the State would prosecute if neither Bywater nor Porter died.

But agents of the Federal Bureau of Investigation arrived in Midland by 5 p.m. the day after the attempted robbery.¹³⁷ That day, U.S. Attorney John C. Lehr said that he would seek the death penalty against Chebatoris if one of the shooting victims were to die,¹³⁸ implying that the decision to bring federal charges had already been made. The following day, Kahn apparently recommended that federal charges be brought.¹³⁹ Later that day, a federal complaint was filed against him and he was taken into custody by the U.S. Marshal in Bay City, Michigan.¹⁴⁰ He was arraigned that night before U.S. Court Commissioner Otto J. Manary and held in lieu of \$250,000 bail.¹⁴¹ On October 8, 1937, Chebatoris was indicted by a federal grand jury in the Eastern District of Michigan for the attempted bank robbery and the associated assaults on Macomber, Bywater, and Porter.¹⁴² After Porter died, an amended indictment was filed charging him with Porter’s murder,¹⁴³ and Chebatoris became the first person in the U.S. to be charged with homicide under the nascent bank robbery statute.¹⁴⁴

On October 21, 1937, Dell H. Thompson, President of the Bay County Bar Association, and James K. Brooker, a Commissioner of the Michigan State Bar, were appointed to represent Chebatoris pro bono.¹⁴⁵ Jury selection took a little over two hours on October 26th.¹⁴⁶ Chebatoris

136. Kuhn, *supra* note 92, at 2.

137. See ROBERT A. WATERS & JOHN T. WATERS, *OUTGUNNED!: TRUE STORIES OF CITIZENS WHO STOOD UP TO OUTLAWS —AND WON* 62 (2004); HOBEY, *supra* note 64, at 155.

138. See “Grand Jury Hearing Set for Tuesday,” Oct. 1, 1937.

139. See *id.*

140. Chebatoris Probation Report, *supra* note 45, at 4.

141. See Chebatoris Probation Report, *supra* note 45, at 4. See also *Under Special Guard*, MIDLAND DAILY NEWS, Oct. 2, 1937, at 1.

142. See Indictment, *United States v. Chebatoris*, No. 3977 (E.D. Mich. Oct. 8, 1937).

143. See *id.* A subsequent indictment repeated these charges but provided more detail, including the date of Porter’s death. *Id.*

144. See ROSS PARKER, *CARVING OUT THE RULE OF LAW: THE HISTORY OF THE UNITED STATES ATTORNEY’S OFFICE IN EASTERN MICHIGAN, 1815-2008* 189 (2009).

145. See Chebatoris Probation Report, *supra* note 45, at 5; Transcript of Record, *supra* note 23, at 387. See also CHARDAVOYNE, *supra* note 2, at 215; Letter from Arthur J. Tuttle, U.S. Dist. Judge, E. Dist. of Mich., to James K. Brooker (July 12, 1938) (on file with author); Letter from Arthur J. Tuttle, U.S. Dist. Judge, E. Dist. of Mich., to Dell H. Thompson, (July 12, 1938) (on file with the Bentley Historical Library, University of Michigan). Apparently, appointment of counsel for indigents in criminal cases at this time, at least for Judge Tuttle, was unusual. See CHARDAVOYNE, *supra* note 2, at 215 (“In 1935, in response to an inquiry from the Justice Department regarding his method of appointing attorneys for indigent criminal defendants, he asserted that: ‘I have not made such an assignment in at least ten years.’”).

146. See HOBEY, *supra* note 64, at 188.

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was then tried over the course of about two and a half days, from October 26th to 28th.¹⁴⁷ After the Government rested, the defense declined to put on a case.¹⁴⁸

Each of the four attorneys involved in the case, two on each side, gave a closing argument.¹⁴⁹ The Government's closing arguments relied heavily on the metaphor of war.¹⁵⁰ For example, toward the end of his summation, Assistant U.S. Attorney John Babcock subtly lumped Chebatoris in with foreign enemies of the United States:

The Government of the United States must preserve and maintain respect for its laws. In the course of the history of this Government we may have enemies attack from foreign lands but those enemies are no more dangerous than the enemies we have within the borders of this country, who contemptuously flaunt in the face of the Government its laws for the protection of its citizens and the property of its citizens.¹⁵¹

Lehr was less subtle. He not only evoked the war metaphor but also, by summoning the memory of the day the United States entered World War I, suggested that the jury's duty to sentence Chebatoris to death was tantamount to the duties of the citizen when war is declared.¹⁵² Lehr called upon the jury to utilize the death penalty as a weapon in the "war against crime":

We are engaged in this country in a war against crime. Men are being shot down ruthlessly, as Henry Porter was, and as Mr. Bywater was, and as Mr. Macomber was . . . They are being shot down ruthlessly in America, and Congress has passed that law so that a jury may have the right . . . if your good judgment, and if your sound discretion tells you that the death penalty should be inflicted.¹⁵³

Defense attorney Thompson's closing suggested that Chebatoris might be innocent, for example by pointing out errors and inconsistencies in the testimony,¹⁵⁴ questioning whether Chebatoris, as opposed to

147. See Lisa Satayut, *Current Case Brings Attention to Historic Chebatoris Execution*, MIDLAND DAILY NEWS (Aug. 12, 2010), <https://www.ourmidland.com/news/article/Current-case-brings-attention-to-historic-6982912.php>.

148. See Transcript of Record, *supra* note 23, at 321.

149. See *id.* at 323–381.

150. See, e.g., *id.* at 341.

151. *Id.* at 331.

152. *Id.* at 340–41.

153. Transcript of Record, *supra* note 23, at 356. After the verdict was announced, Lehr resurrected this metaphor, thanking the jury for helping the Government "in waging this war on crime." *Id.* at 392.

154. See *id.* at 336–38.

Gracey, killed Porter,¹⁵⁵ and suggesting that the doctors might have erred in concluding Porter died of peritonitis.¹⁵⁶ However, the entirety of Brooker's closing, and the tail end of Thompson's, consisted of a plea to spare Chebatoris's life.¹⁵⁷ Both attorneys invoked, or at least tried to invoke, Michigan's rejection of the death penalty as a reason to spare Chebatoris. Brooker told them: "We don't do it in this State and we don't do it in a majority of the States of the United States and capital punishment is fast losing favor."¹⁵⁸ Thompson tried to go further, pointing specifically to Michigan voters' rejection of capital punishment, but his remarks were withdrawn after a Government objection:

[MR. THOMPSON:] We in Michigan do not believe in capital punishment. It has been voted upon by the people and they have turned it down—

MR. BABCOCK: If the Court please, may I take exception to that remark? There is nothing in the evidence to establish that as a fact.

MR. THOMPSON: I'll withdraw that. Capital punishment is nothing more or less than a hangover from the feudal ages. Michigan happens to be one of the States that does not have capital punishment.¹⁵⁹

Lehr responded powerfully, reminding the jurors of their allegiance, not just to Michigan, but to the United States, and arguing that Michigan law was irrelevant:

[Y]ou are citizens of the United States of America, just as well as you are citizens of the State of Michigan. You now are in Federal territory when you are in this building. This is a Federal Court, this [sic] not a State Court. This Court has only to do with the enforcement of Federal Laws and not with the enforcement of State Laws and it makes no difference whatsoever that the Law of the State of Michigan maybe [sic] relative to capital punishment.

. . . .

[Y]ou are just as much removed from the State of Michigan as if you were on the Hawaiian Islands in the middle of the Pacific. This is

155. *See id.* at 335. Presumably, under conventional criminal law principles, Chebatoris would still be guilty of murder even if Gracey killed Porter, based on the doctrine of felony murder. Interestingly, there was no jury instruction on felony murder, or even on accomplice liability. Perhaps the Government saw no need for such an instruction in the face of very strong evidence that Chebatoris was the triggerman. Nevertheless, Thompson's attempt to seed doubt as to whether Gracey or Chebatoris killed Porter was likely a ploy to avoid the death penalty rather than to obtain an acquittal.

156. *See id.* at 338.

157. Transcript of Record, *supra* note 23, at 333, 339–40.

158. *Id.* at 334.

159. *Id.* at 338–39.

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Federal ground, this is a Federal Court, you are a Federal jury empaneled to enforce Federal Laws. So I beg of you not to let any such a suggestion, as that appeal to you.¹⁶⁰

The jury deliberated for less than six hours and cast seven ballots.¹⁶¹ Based on statements made by the jury foreman, it appears that the jury quickly decided on Chebatoris's guilt and spent the bulk of their time deciding whether he should die for his crime.¹⁶² Shortly after 8 p.m. on October 28, 1937, the jury found Chebatoris guilty and directed that he be punished by death.¹⁶³

It was unclear at first whether the execution could take place in Michigan. A federal statute, enacted earlier that year, provided that “[t]he manner of inflicting the punishment of death [in federal cases] shall be the manner prescribed by the laws of the State within which the sentence is imposed.”¹⁶⁴ If that State did not authorize capital punishment, “then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof.”¹⁶⁵ Because it was common knowledge that Michigan had abolished the death penalty long before, it was thought that the execution would have to take place in a nearby State.¹⁶⁶ However, Lehr discovered that Michigan still made treason a capital crime.¹⁶⁷ Thus, on November 30, 1937, the judge formally sentenced Chebatoris to death by hanging, to take place on July 8, 1938, at the U.S. Detention Farm at Milan, Michigan.¹⁶⁸

Why Chebatoris never appealed his conviction or death sentence—something that would be virtually unheard of today—is unclear. According to one source, Chebatoris was interested in an appeal but his defense attorneys told him that he had no grounds for an appeal, and Brooker told some reporters after sentence was handed down: “There will be no appeal

160. *Id.* at 381–82.

161. Chebatoris Probation Report, *supra* note 45, at 6; *Expect Decision Today on Time, Place of Penalty*, MIDLAND DAILY NEWS, Oct. 29, 1937, at 1.

162. *Expect Decision*, *supra* note 161.

163. See Transcript of Record, *supra* note 23, at 355–56.

164. Act of June 19, 1937, ch. 367, § 323, 50 Stat. 304 (codified as amended at 18 U.S.C. § 542 (1937)).

165. *Id.*

166. See MIDLAND DAILY NEWS, Dec. 1, 1937, at 1 (“Because Michigan law does not provide for capital punishment—the death penalty was erased from Michigan statutes in 1840—it was at first believed it would be necessary for the execution to be carried out in some nearby state which provides for capital punishment.”). In fact, Michigan abandoned the death penalty for most crimes in 1846, not 1840.

167. See *id.*; CHARDAVOYNE, *supra* note 2, at 219.

168. Transcript of Record, *supra* note 23, at 394, 398; Judgment and Warrant, United States v. Chebatoris, No. 3977 (E.D. Mich. Nov. 30, 1937).

unless he gets some money and some new attorneys.”¹⁶⁹ Another source similarly asserted that Brooker and Thompson told Chebatoris that “he had neither the money nor legal grounds for another trial.”¹⁷⁰ However, according to the grandson of defense attorney Dell Thompson (also named Dell Thompson): “Chebatoris . . . immediately chose not to appeal” and Brooker and Thompson unsuccessfully tried to convince Chebatoris to change his mind.¹⁷¹ This apparently troubled Thompson greatly, “as he very strongly felt that through extended litigation [Chebatoris’s] life could have been preserved.”¹⁷² In any event, there was no appeal.

C. *The Execution*

Shortly before Chebatoris’s execution was to take place, Michigan Governor Frank Murphy entered the scene. An ardent death penalty foe, Murphy requested that the sentence be commuted or, at the least, that the execution not take place in Michigan.¹⁷³ As a friend and political disciple of President Franklin Roosevelt, one would think that if anyone could convince Roosevelt to take one of these routes, it would be Murphy. His attempt, however, met with failure.

It is unclear at what point Murphy became aware of Chebatoris’s impending execution. What is known is that in a one-and-a-half-page letter dated June 22, 1938, sixteen days before the scheduled execution, Murphy asked Roosevelt to spare Chebatoris’s life.¹⁷⁴ Mistakenly giving Chebatoris the first name “John,” Murphy briefly explained his crime and sentence.¹⁷⁵ Continuing, he explained Michigan’s distaste for capital punishment:

As you are doubtless aware, capital punishment was abolished in this state many years ago. On several occasions during recent years, when the question of restoring capital punishment has been made a public issue, it has been decided adversely, either in the legislature or by direct popular vote. I am informed that there has been no public execution in this state by hanging or otherwise for approximately one hundred years.¹⁷⁶

169. See HOBAY, *supra* note 64, at 223.

170. See JAMES L. HOPP, EXECUTION 13: A HANGING IN MICHIGAN 94 (2009).

171. E-mail from Dell H. Thompson to author (Nov. 29, 2014, 7:27 PM) (on file with author).

172. *Id.*

173. CHARDAVOYNE, *supra* note 2, at 220; Murphy June 22 Letter, *supra* note 20.

174. See Murphy June 22 Letter, *supra* note 20.

175. *Id.* at 1.

176. *Id.*

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Murphy then conceded that “there is no doubt as to the right and authority of the federal government to carry out the sentence.”¹⁷⁷ However, he contended, an execution “would be displeasing if not offensive to a majority of the people of Michigan,” and would be “a serious mistake.”¹⁷⁸ He therefore requested that the sentence be commuted.¹⁷⁹ In the alternative, he asked that the actual execution be moved outside of Michigan.¹⁸⁰

The following day, June 23, 1938, a memorandum was prepared for Roosevelt to accompany Murphy’s letter.¹⁸¹ The memorandum noted that Murphy’s letter represented no “mere perfunctory request.”¹⁸² To the contrary, it stated: “Governor Murphy feels very deeply about the matter and has been moved to action by his feelings and not merely because of requests made upon him.”¹⁸³ The memorandum seemed sympathetic to commutation of Chebatoris’s sentence, or at the very least the relocation of the hanging outside of Michigan: “If it should for any reason be inconsistent with general Federal policy to commute the death sentence in this case, it should be possible to arrange that the hanging not occur within the State of Michigan.”¹⁸⁴

Two days later, the Murphy letter and the accompanying memorandum were sent to Attorney General Homer Cummings, with instructions that Cummings prepare a reply for the President’s signature.¹⁸⁵ Cummings, however, had left Washington, D.C. on June 21 for a vacation to New York City and Connecticut with his wife,¹⁸⁶ so the task fell to Assistant Attorney General Joseph B. Keenan.¹⁸⁷ On June 30, 1938, Keenan sent to Roosevelt a draft of a proposed letter to Murphy, politely declining Murphy’s requests.¹⁸⁸ While the President, in this draft, was “deeply sensible of the considerations outlined in” the Murphy letter, the draft

177. *Id.*

178. *Id.* at 1–2.

179. *See* Murphy June 22 Letter, *supra* note 20, at 2.

180. *See id.* Correspondence found in Murphy’s files indicates that he was in Washington, D.C. on June 22, 1938, suggesting that Murphy might have met with President Roosevelt to discuss the matter. However, there is no information in any written materials to confirm this.

181. Memorandum from Presidential Aide to Franklin D. Roosevelt, President of the U.S. (June 23, 1938) (on file with author) [hereinafter June 23 Memo].

182. *Id.*

183. *Id.*

184. *Id.*

185. *See* Memorandum from Franklin D. Roosevelt, President of the U.S., to Homer S. Cummings, U.S. Attorney Gen. (June 25, 1938) (on file with author).

186. *See* Letter from Homer S. Cummings, U.S. Attorney Gen., to Franklin D. Roosevelt, President of the U.S. (undated) (on file with author).

187. THE NEW DEAL YEARS, *supra* note 21, at 429.

188. *See* Letter from Joseph B. Keenan, Assistant U.S. Attorney Gen., to Franklin D. Roosevelt, President of the U.S. (June 30, 1938) (on file with author).

correctly noted that federal law required the execution to take place in the State where the crime occurred, if that State provides for capital punishment under any circumstances.¹⁸⁹ Referring to the fact that Michigan still treated treason as a capital offense, the draft then observed: “As you are aware, the laws of Michigan . . . make provision for the infliction of the death penalty in certain cases.”¹⁹⁰ The Keenan draft went on: “Moreover, I do not find justification for a commutation of Chebatoris’ sentence, as no facts have been presented either to me or to the Department of Justice which indicate that the prisoner is entitled to any mitigation of sentence.”¹⁹¹

Roosevelt held onto the Keenan draft for several days. Meanwhile, Murphy made public his request on July 1, stating to the press: “I do not feel that it is at all proper for the Federal Government to come into Michigan and erect a scaffold, in view of the attitude of Michigan people on capital punishment.”¹⁹² He stated further:

Our state showed its progressiveness when it abolished capital punishment. It began the first civilized movement in the direction of abolishment of this hangover from the middle ages. No person has been executed in Michigan for one hundred years and I have no intention of letting the federal government come within our borders and hang anyone.¹⁹³

In another press statement on July 4, he said that he objected to “the state’s becoming a killer,”¹⁹⁴ and continued: “Putting a rope around a man’s neck and hanging him is an uncivilized act and Michigan made a contribution to civilization when it abolished the practice.”¹⁹⁵ In addition, citing “Michigan tradition,” he expressed his hope that the hanging would be moved to another State.¹⁹⁶

Then, in a telegram dated July 6, 1938, only two days before the scheduled execution,¹⁹⁷ Roosevelt responded to Murphy. In it, he retained

189. *See id.*

190. *Id.*

191. *Id.*

192. *Chebatoris Hanging Protested by Murphy*, DETROIT NEWS, July 1, 1938. *See* Paul Egan, *Killer Hanged in 1938 Under Federal Law*, DETROIT NEWS (Oct. 18, 2007), <https://www.pressreader.com/usa/the-detroit-news/20071018/281736970088678>.

193. *Governor Murphy Objects to Federal Hanging in Michigan*, CLINTON LOCAL, July 7, 1938.

194. *Tradition, Not Killer, Defended*, DETROIT NEWS, July 5, 1938.

195. *Id.*

196. *Tradition, Not Killer, Defended*, *supra* note 194.

197. *See* Telegram from Franklin D. Roosevelt, President of the U.S., to Frank Murphy, Governor of Mich. (July 6, 1938) (on file with author) [hereinafter July 6 Telegram]. The date of the telegram is almost certainly inaccurate. At a press conference held at the White House

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Keenan's suggested "deeply sensible" language.¹⁹⁸ He moved up to the second paragraph his rejection of the idea of commuting Chebatoris's sentence, paralleling the order in which Murphy had framed his requests, for commutation and, in the alternative, to move the execution.¹⁹⁹ Relating to the request to move the execution, Roosevelt took less of a hard line than Keenan had proposed, replacing Keenan's unequivocal rebuff with:

However, in view of your representation concerning the law of the State of Michigan on capital punishment and your deep interest in the matter as the Governor of a sovereign State[,] I am referring your letter to the Attorney General expressing the hope that he will do whatever he can do[,] so far as it may be consistent with law[,] to meet your wishes that the execution take place outside the State of Michigan.²⁰⁰

Later the same day, Keenan sent a telegram to Lehr, directing him to "formally if possible, otherwise informally" bring to Tuttle's attention Murphy's request that the Chebatoris execution take place outside of Michigan.²⁰¹ Keenan wrote that Tuttle should know that the Department of Justice "would not raise any objection" if Tuttle could find some way that the execution could legally take place outside of Michigan.²⁰² Further, Keenan advised Lehr: "We hope that you will do whatever you can to respect the wishes of the Governor of the State of Michigan."²⁰³ Yet, if Tuttle were to determine that the execution could not take place outside of Michigan, then "[e]very precaution must be taken that under no circumstances should there be a failure to carry out the verdict of the jury and the judgment of the court that the defendant be executed."²⁰⁴

on July 5, 1938, at 4:05 p.m., in response to a question about the upcoming hanging of Chebatoris, Roosevelt said that he had responded to Murphy's requests "yesterday"—that is, July 4, 1938. *See* Franklin D. Roosevelt, President of the U.S., Press Conference 472 5 (July 5, 1938) (transcript on file with author) [hereinafter Press Conference]. A diary entry for July 4, 1938 indicates that Cummings talked to Roosevelt for about an hour that day, but does not mention Chebatoris or Murphy. (on file with the Special Collections, University of Virginia Library).

198. *See* July 6 Telegram, *supra* note 197.

199. *Id.*

200. *Id.* Again, the press conference held at the White House on July 5, 1938, reveals an inconsistency. In response to a question about the impending execution, Roosevelt said that he had informed Murphy that the execution would have to take place in Michigan. *See* Press Conference, *supra* note 197.

201. *See* Telegram from Joseph B. Keenan, Assistant Attorney General of the U.S., to John C. Lehr, U.S. Attorney, E. Dist. of Mich. 1 (July 6, 1938) (on file with author) [hereinafter Keenan Telegram]. *See also* THE NEW DEAL YEARS, *supra* note 2, at 429.

202. *See* Keenan Telegram, *supra* note 201, at 2; THE NEW DEAL YEARS, *supra* note 21, at 429.

203. Keenan Telegram, *supra* note 201, at 3.

204. *See id.* at 2.

A memorandum recounting a telephone message to Murphy, dated July 8, 1938, the day of the execution, reveals the substance of Lehr's (apparently *ex parte*) discussion with Tuttle.²⁰⁵ According to the memorandum, Lehr and Tuttle "discussed the matter for about two hours calmly and sympathetically."²⁰⁶ The result of this discussion: "Judge Tuttle holds there is nothing he can do legally; that the verdict and judgment were in strict accordance with the law at the time they were pronounced and could not be changed then or now."²⁰⁷

In a surprising move, Tuttle issued a one-page statement to the media.²⁰⁸ He emphasized that, given the jury verdict, "the law was mandatory in three respects, namely that the penalty should be death, that it should be by hanging, and that it should be within the State of Michigan. These last two requirements resulted from the fact that Michigan has one statute providing the death penalty by hanging."²⁰⁹ He added: "I have neither the power nor the inclination to change the sentence."²¹⁰

United States Marshal John J. Barc was in charge of the execution on July 8, 1938, at the U.S. Detention Farm at Milan, Michigan.²¹¹ The gallows, built especially for this occasion and completed just the day before, was eighteen feet high with a twelve foot square floor raised ten feet above the ground.²¹² A three-foot deep hole had been dug into the ground below the trap "to allow for the body to fall the necessary distance."²¹³ Canvas surrounded the structure in order to render it impossible for the execution to be viewed by any but the official witnesses.²¹⁴

At 5:03 a.m., Chebatoris was taken from his cell, handcuffed, and led by Barc, Warden John J. Ryan, and Father Lee Laige, a Catholic priest, the 150 feet to the gallows.²¹⁵ The other witnesses followed.²¹⁶

205. See Memorandum from EK to Frank Murphy, Governor of Mich. (July 8, 1938) (on file with author) [hereinafter EK Memorandum] (on file with the Bentley Historical Library, University of Michigan).

206. *Id.*

207. *Id.* See also THE NEW DEAL YEARS, *supra* note 21, at 429.

208. See EK Memorandum, *supra* note 205; Tuttle Statement, *supra* note 33, at 1.

209. Tuttle Statement, *supra* note 33; *Chebatoris to be Hanged at Dawn Today in Milan; Murphy's Plea Refused*, DETROIT FREE PRESS, July 8, 1938.

210. *Id.*

211. See Letter from Richard F. Doyle, Chief U.S. Probation Officer, to Arthur J. Tuttle, U.S. Dist. Court Judge, E. Dist. of Mich. 1 (July 9, 1938) (on file with author) [hereinafter Doyle Letter].

212. See *id.*

213. See *id.*

214. See *id.*

215. See *id.* at 2.

216. See Doyle Letter, *supra* note 211, at 2.

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Chebatoris climbed the traditional thirteen steps to the gallows and onto the trap.²¹⁷ He was bound around the ankles and knees, and his arms pinned to his sides.²¹⁸ His “expression assumed a pronounced sneer but after a few words with [executioner Phillip] Hanna, this gave way to an expression of fear.”²¹⁹ It had previously been determined that Chebatoris did not wish to make any last statement.²²⁰ So Chester Pyle, Hanna’s assistant, placed a hood over Chebatoris’s head and Hanna placed the noose around his neck.²²¹ At 5:07 a.m., Hanna motioned to Sheriff Smith.²²² Smith, who had captured Chebatoris less than ten months previously, pushed a lever, springing the trap.²²³ Chebatoris’s “body hurtled through the rope and when his body came to rest . . . his feet were but two feet from the bottom of the excavation.”²²⁴ Four physicians were in attendance and they determined “that his neck was broken during the fall and that he lost consciousness immediately.”²²⁵ The physicians periodically checked his pulse and his heartbeat and pronounced him dead at 5:22 a.m.²²⁶ Thus did Anthony Chebatoris attain the dubious distinction as having been the only person ever to be executed by the federal government until just this past year for a crime occurring in a State that did not authorize capital punishment for the same offense.

II. *CHEBATORIS* AND THE “NEW DEAL FOR CRIME”

How did it happen that the Chebatoris execution could occur despite the laws of Michigan? More importantly, how could it occur without more of a hue and cry, given our nation’s powerful tradition of federalism? The seeds of the answer lie with the unprecedented crime wave that hit this country during the waning days and immediate aftermath of the Prohibition Era, combined with an unprecedented federal response to a grave national crisis, the Great Depression. The result was a perfect storm of federal power that washed over the nation, sweeping aside traditional notions of state supremacy in the realm of crime and punishment.

217. *See id.*

218. *See id.*

219. *Id.*

220. *See id.*

221. Doyle Letter, *supra* note 211, at 2.

222. *See id.*

223. *See id.*

224. *Id.*

225. *See id.*

226. Doyle Letter, *supra* note 211, at 2.

A. The Crime Wave of the 1920s and 1930s

For the first quarter of the nineteenth century, “new forms of crime, especially organized crime,” began to emerge, but the federal government generally did not address this growing problem.²²⁷ This is unsurprising: during this time, with the exception of the Wilson years, the White House was controlled by Republicans, who generally (Theodore Roosevelt notwithstanding) believed in restrained federal powers in areas historically dominated by the States.²²⁸ Yet pressure grew for a greater federal presence in crime control. This pressure stemmed from three major developments.²²⁹ “First, criminal techniques had advanced from earlier periods Second, geographic distribution of crime, aided by the emergence of new criminal organizations in all regions of the country, made state boundaries largely irrelevant. And third, the automobile, the truck, and eventually the airplane gave mobility to criminals.”²³⁰

Prohibition fed the growth of organized crime.²³¹ Enforcement of Prohibition was, by all accounts, an unmitigated failure, “a nightmare of understaffing and maladministration.”²³² Federal agents were sparse and relied mainly on state officers for enforcement.²³³ Moreover, there was some lack of commitment on the part of both state and federal officers responsible for enforcing Prohibition.²³⁴ “Poor enforcement was compounded by inability to get cases into court,” often because inexperienced federal agents failed to properly preserve evidence or draft and execute search warrants.²³⁵

In the face of these failures, President Herbert Hoover struck a moderate position in favor of increased federal involvement in crime control.²³⁶ His Inaugural Address on March 4, 1929, included as “its first substantive order of business, ‘The Failure of Our System of Criminal

227. See JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY: HERBERT HOOVER’S INITIATIVES* 58 (1993).

228. See JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM : ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 204 (1983) (“Since the end of Reconstruction (except for the Theodore Roosevelt aberration . . .) Republicans had stood on the principle that the federal government should not intervene in the affairs of business, states, local communities, or private charities.”).

229. CALDER, *supra* note 227, at 56.

230. CALDER, *supra* note 227, at 56. See also Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L.Q. REV. 646, 651 (1935).

231. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 340 (1993).

232. See CALDER, *supra* note 227, at 108.

233. See *id.* at 107.

234. See *id.*

235. See *id.* at 108.

236. See *id.* at 5.

Justice.”²³⁷ Indeed, fully a quarter of the address spoke to the significance of crime and justice.²³⁸ Hoover then followed words with action, asking Congress “to increase appropriations for the Justice Department”²³⁹ and bringing twenty-three percent more criminal cases in the first six months of 1929 than had been brought in all of 1928.²⁴⁰

Beyond increased enforcement of federal law, Hoover saw two places for an enhanced federal presence. First, he used his bully pulpit to try to change attitudes toward, and decry the rise in and failure to punish, what was essentially local crime.²⁴¹ Second, and more significantly, he saw a federal role in the “investigation of social problems like crime” and construction of “a reservoir of information.”²⁴² To that end, Hoover broke ground in 1929 by appointing a federal crime control commission—the famed Wickersham Commission—to study crime.²⁴³ “Hoover’s appointment of the Wickersham Commission was formal recognition of a federal role in the scientific inquiry into crime and justice administration.”²⁴⁴ One of Hoover’s key strategies was to seek buy-in from that traditional Republican stronghold, the business community, regarding the progressive idea of a more robust federal presence in crime control.²⁴⁵ One way of doing so was to have the Commission examine the costs of crime to big business.²⁴⁶ He asked Secretary of Commerce, Robert P. Lamont, to come up with an estimate of those costs in order to ““help in aligning psychology to the general problem,”” suggesting “Hoover’s need to bring the business community, so often ambivalent to progressive measures of crime control, into the dialogue.”²⁴⁷

Yet Hoover’s position was a moderate one, focused on the enforcement of existing criminal laws, including the Volstead Act, rather than

237. *Id.*

238. See CALDER, *supra* note 227, at 5.

239. *Id.* at 36.

240. See *id.* at 16.

241. See *id.* at 34–36.

242. *Id.* at 33.

243. See CALDER, *supra* note 227, at 36; Kenneth O’Reilly, *A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security*, 69 J. AM. HIST. 638, 641 (1982) (“Though a states’ righter on crime, President Hoover also appointed the Commission on Law Observance and Enforcement, chaired by former Attorney General George W. Wickersham which made an exhaustive study of the national crime problem.”).

244. CALDER, *supra* note 227, at 75.

245. See *id.* at 15.

246. See *id.* (“Among all the topics selected for deep investigation by the [Wickersham] commission, Hoover was most interested in the costs of crime to the business community.”).

247. See *id.* at 15–16.

enacting new ones.²⁴⁸ His main concern was that non-enforcement would lead to de facto nullification of federal law.²⁴⁹ He coupled his advocacy for greater enforcement of federal law with the Republicans' traditional "[i]deological commitment to local jurisdictional crime control"²⁵⁰ At a news conference early in 1930, he said: "We have no notion of relieving the States of responsibilities or extending the Federal activities beyond their proper relationship with the States."²⁵¹ And he specifically denied that there was a need for more federal laws: "Any suggestion of increasing the Federal criminal laws is a reflection upon the sovereignty and stamina of State government."²⁵²

These two conservative values—limited government and protection for big business—were brought into conflict with each other by the "unprecedented wave of violent and well-publicized crimes" that began early in Hoover's term.²⁵³ The criminals of the 1920s and 30s hit businesspeople in their pocketbooks, specializing in bank robberies and payroll heists.²⁵⁴ They used cars for quick getaways²⁵⁵ and "took advantage of the limited jurisdiction of state and local police forces by fleeing quickly across city, county, and state lines."²⁵⁶ Thus, banks along State borders were particularly vulnerable.²⁵⁷ When the conservative value of small government clashed with the equally conservative value of security for private property, the former began to yield.²⁵⁸ Thus, for example, representatives of the Traveler's Insurance Company testified before the Wickersham Commission in support of new federal criminal laws because of a drastic increase in property crimes.²⁵⁹ Similarly, the private National Crime Commission, though peopled in large part by conservative businessmen, advocated a greater federal presence in crime

248. *See id.* at 14 ("Leading his concerns were rampant nullification of the Eighteenth Amendment and lax enforcement of the congressionally generated Volstead Act."); SUNDQUIST, *supra* note 228, at 199, 200 (observing that though Hoover was "a moderate progressive," he was also "a believer in keeping intervention as limited as possible").

249. *See* CALDER, *supra* note 227, at 29–30 (observing that Hoover ran in 1928 on a platform supporting Prohibition as a matter of "law observance").

250. *Id.* at 55.

251. *Id.* at 115. *See also* SUNDQUIST, *supra* note 228, at 198 (Hoover was "philosophically committed to the concept of limited government").

252. CALDER, *supra* note 227, at 115.

253. *See* SANFORD J. UNGAR, FBI 69 (1975).

254. *See* POTTER, *supra* note 11, at 5.

255. *See id.*

256. UNGAR, *supra* note 253, at 69.

257. *See* POTTER, *supra* note 11, at 67.

258. *See id.* at 68.

259. *See id.*

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control.²⁶⁰ A new wave of a particular crime aimed especially at the rich and powerful, ransom kidnappings, opened the door to greater federal involvement in criminal law.

B. The Foot in the Door: The Federal Kidnapping Act

As banks began to hold less cash on hand, former bank robbers turned to ransom kidnappings as a more reliable source of income.²⁶¹ By 1931, ransom kidnappings became more prevalent, “a new crime associated with the psychopathic criminal.”²⁶² These were inextricably linked with organized crime, given that the average kidnapping involved from eight to twenty perpetrators.²⁶³ Though the crime was actually quite rare,²⁶⁴ for obvious reasons it disproportionately affected people with great wealth, fame, and power,²⁶⁵ with the result that the cases were well

260. See UNGAR, *supra* note 253, at 70; O’Reilly, *supra* note 243, at 641.

261. CALDER, *supra* note 227, at 23. See also *Kidnaping: Hearing Before the H. Comm. on the Judiciary*, 72nd Cong. 32 (1932) (statement of Robert Isham Randolph) (“The slump has hit the bank-robbing industry. It does not profit a man much to steal a bundle of bonds if he can not dispose of the bonds. It is much easier to steal a human victim and get his ransom in cash.”).

262. See POTTER, *supra* note 11, at 106; Fisher & McGuire, *supra* note 230, at 652 (reporting that in late 1931, “kidnappings were becoming more numerous, and . . . the hit-or-miss methods of the lone criminal had given away [sic] to the carefully planned activity of the professional”).

263. See Fisher & McGuire, *supra* note 230, at 652; Barry Cushman, *Headline Kidnappings and the Origins of the Lindbergh Law*, 55 ST. LOUIS U. L.J. 1293, 1294 (2011) (“[K]idnaping became a profession for organized criminals.”).

264. See POTTER, *supra* note 11, at 107 (“In reality, major kidnapping cases were so rare in the interwar years that *Modern Criminal Investigations* (1935), a classic police training text, did not mention them at all”). According to one informal estimate, there were 279 kidnappings in 501 cities in 1931. *Kidnaping: Hearing Before the H. Comm. on the Judiciary*, *supra* note 261, at 5 (statement of Hon. Cleveland A. Newton). A telling exchange took place during the House floor debate on the anti-kidnaping bill in June, 1932:

“Mr. WHITE: There is a kidnaping in these cities every two or three days.

“Mr. STAFFORD: I am fairly well acquainted with local conditions both at Detroit and Chicago, and I must insist that the gentleman is greatly magnifying the evils when he makes that extravagant statement.” 75 CONG. REC. 13,302 (June 17, 1932).

265. See POTTER, *supra* note 11, at 107; Cushman, *supra* note 263, at 1294 (observing that “snatching up respectable business and professional men and their families” became a “lucrative enterprise”); Fisher & McGuire, *supra* note 230, at 652 (“[T]he lucrateness of the field led to the organization of a so-called racket which extended its activities to business and professional men and the children of wealthy parents.”). See *Kidnaping: Hearing Before the H. Comm. on the Judiciary*, *supra* note 261, at 3 (statement of Hon. Cleveland A. Newton) (observing that kidnapers “have been applying their racket to people of respectability, members of the best families”).

publicized.²⁶⁶ By early 1932, “citizens groups across the country” demanded that the federal government take action, “contending that ransom kidnappings were no longer mere local matters.”²⁶⁷

Indeed, at that time, federal kidnapping laws were under consideration by the judiciary committees of both houses of Congress.²⁶⁸ The main concern addressed by these bills was the fact that local law enforcement could be frustrated when a kidnap victim was immediately taken out of the State in which he or she was kidnapped.²⁶⁹ As Representative John J. Cochran, Democrat of Missouri and sponsor of the House bill, put it: “The men that are engaged in kidnapping people . . . know that the police of the city of St. Louis can not follow them into Illinois,” so that “[w]hen they kidnap an individual and hold him for ransom, they immediately take him out of the city of St. Louis and cross over any one of five or six bridges, and are in Illinois.”²⁷⁰ Intertwined with this concern was the specter of corruption of local law enforcement officials. For example, Joseph A. Gerke, Chief of Police of St. Louis, Missouri, testified before the House Judiciary Committee that “we have heard of instances where some peace officers were on the pay roll of these gangsters and received a

266. For a discussion of four high-profile kidnappings in 1931, see Cushman, *supra* note 263, at 1296–1306.

267. See CALDER, *supra* note 227, at 23. See also Cushman, *supra* note 263, at 1306 (discussing group that formed in 1931 “to seek federal legislation” against kidnapping).

268. See ERNEST KAHLAR ALIX, RANSOM KIDNAPPING IN AMERICA, 1874–1974: THE CREATION OF CAPITAL CRIME 66 (1978). The Senate bill, S.1525, had been introduced on December 10, 1931, by Senator Roscoe Patterson of Missouri. See 75 CONG. REC. 275 (1931). The House bill, H.R. 5657, was introduced four days later by Representative John J. Cochran, also of Missouri. See 75 CONG. REC. 491 (1931).

269. See S. REP. NO. 72-765, 1–2 (1932) (“Kidnapers often seize a person in one State and transport him into another State. The police officers of the first State have no authority to follow into the second State . . .”). See also *Kidnaping: Hearing Before the H. Comm. on the Judiciary*, *supra* note 261, at 3 (1932) (statement of Hon. Cleveland A. Newton) (“[I]n every case where the kidnapers have kept the victim within the State, or within the city, the police officers and other civil officers have been able to apprehend and punish.”).

270. *Kidnaping: Hearing Before the H. Comm. on the Judiciary*, *supra* note 261, at 2 (statement of Rep. Cochran, Member, H. Committee on the Judiciary). See also Cushman, *supra* note 263, at 1295 (“A common technique was to kidnap a victim in one state and then transport him by automobile to another and perhaps yet another.”); Fisher & McGuire, *supra* note 230, at 653 (“The procedure was simple—a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned.”). Representative Cochran’s example was by no means arbitrary, nor was it coincidental that the legislation was sponsored in each house by a Missourian: “St. Louis became a favored locale for [kidnapers] . . . due to the geographical location of the city and the excellent highways which made nearby state boundary lines easily accessible to kidnapers operating in high-powered automobiles.” Robert C. Finley, *The Lindbergh Law*, 28 GEO. L.J. 908, 909 (1940). See also Cushman, *supra* note 263, at 1295 (“St. Louis became one of the favorite hunting grounds for the interstate snatch racket.”).

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monthly stipend.”²⁷¹ Thus, the call for federal action was founded on the twin pillars of the inability and disinclination of local actors to enforce their own laws.

Yet, Congress was in no haste to pass these bills.²⁷² Concerns had been raised about, among other things, “encroaching upon States’ Rights and centralization of power in the federal government,” and the related issue of “creating overdependency of the states on the federal government.”²⁷³ For example, Representative Hatton W. Sumners, Democrat of Texas and the committee chairman in the House, asked rhetorically (and provocatively): “How long are we to continue our present constitutional system of Government, with its dual relationship, if the people of the States will not gird up their loins and perform their duty of making their State laws effective, instead of leaving everything to the Federal Government?”²⁷⁴ In addition, some raised concerns about the fact that the House bill provided for the death penalty for kidnapping simpliciter (i.e., without a related homicide). For example, Francis B. Condon, Democrat of Rhode Island, asked a witness: “How important do you consider the death penalty in this bill? I am disposed to favor the bill but . . . I hesitate to put the death penalty in a new criminal statute. *We do not have it in my State.*”²⁷⁵ Representative Frank Oliver, Democrat of New York, elaborated: “There are a number of States in the Union that do not have the death penalty, and representatives from those States are asked to vote for the death penalty in a Federal statute. Don’t you see they might oppose the bill?”²⁷⁶ And even if the bills were to get out of committee and pass both houses, it was not unlikely that Hoover would veto any such legislation, given his view “that kidnapping remained a state crime” and thus that “[f]ederal policy in this regard was of marginal concern.”²⁷⁷

271. *Kidnaping: Hearing Before the H. Comm. on the Judiciary, supra* note 261, at 24 (statement of Joseph A. Gerk, Chief of Police, St. Louis, Mo.). *See* Cushman, *supra* note 263, at 1295 (“[K]idnappers frequently took their victims to jurisdictions in which local authorities had been bribed to look the other way or to tip them off in the event that their location had been discovered by other officers of the law.”).

272. *See* ALIX, *supra* note 268, at 66 (“At the beginning of March 1932, Congress was not prepared to move rapidly on a federal kidnapping law.”).

273. *Id.* at 66–67. *See* UNGAR, *supra* note 253, at 70 (“For all the terror and concern over kidnapping, there was by no means an overwhelming national consensus in favor of such legislation, which was regarded in some quarters as a dangerous incursion on the police powers reserved to the states in the federal Constitution.”)

274. *Kidnaping: Hearing Before the H. Comm. on the Judiciary, supra* note 261, at 7 (statement of Rep. Sumners, Chairman, H. Comm. on the Judiciary).

275. *Id.* at 27 (statement of Rep. Condon, Member, H. Comm. on the Judiciary) (emphasis added).

276. *Id.* (statement of Rep. Oliver, Member, H. Comm. on the Judiciary).

277. *See* CALDER, *supra* note 227, at 23.

Then, the night of March 1, 1932, the infant son of famed aviator Charles Lindbergh was kidnapped from the second-story bedroom of his Hopewell, New Jersey home.²⁷⁸ This pivotal event galvanized public opinion and spurred Congress to act.²⁷⁹ Robert Finley later wrote: “Almost overnight kidnaping legislation became a principal concern of the Congress.”²⁸⁰ He might have dropped the “almost.” The very next day, Senator William W. Barbour, Republican of New Jersey, rose to speak on the Senate floor, his words capturing the nation’s shock and grief.²⁸¹ Speaking of the Senate bill he said: “I express the hope that this shocking occurrence will help expedite the immediate passage of this or any other measure that may tend to put an end to a crime which I, as a father myself, consider the most horrible of crimes and even worse than murder.”²⁸² Representative George N. Seger, Republican of New Jersey, similarly urged action by the House:

I can think of no crime which tugs at the heartstrings and causes more anguish to a father and a mother than the kidnaping of a child . . . I am glad that the committee at this time has under consideration several kidnaping bills. I hope they will be reported to us soon, and I appeal to you as a parent . . . that when these bills come before the House they will receive support from all the Members²⁸³

His statements were greeted with applause.²⁸⁴ The mass media “launched into a campaign in support of the pending federal legislation,”

278. ALIX, *supra* note 268, at 67. See CALDER, *supra* note 227, at 23; RICHARD HACK, PUPPETMASTER: THE SECRET LIFE OF J. EDGAR HOOVER 129, 130 (2004); POTTER, *supra* note 11, at 106.

279. See UNGAR, *supra* note 253, at 72 (calling the Lindbergh kidnapping “[t]he turning point”); Cushman, *supra* note 263, at 1294 (“It was the Lindbergh kidnapping that roused these bills from their slumbers in the Judiciary Committees of the respective chambers”); Finley, *supra* note 270, at 908 (“Had not Charles A. Lindbergh flown the Atlantic, it is possible that a federal kidnaping statute might not yet have been enacted.”); Fisher & McGuire, *supra* note 230, at 654 (observing that the Lindbergh kidnapping “precipitated a reconsideration of both bills” in Congress); O’Reilly, *supra* note 243, at 641 (observing that “public sentiment” in support of federalization of crime control “evolved only in 1932 following the kidnapping of Charles Augustus Lindbergh, Jr.”); 75 CONG. REC. 13,283 (June 17, 1932) (statement of Rep. Michener) (“In my judgment, this legislation would not be on the floor of the House to-day [sic] were it not for the recent distressing Lindbergh kidnaping case.”).

280. Finley, *supra* note 270, at 910. See HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 478 (1937) (“Overnight the whole public policy respecting the federal criminal law was challenged”).

281. See 75 CONG. REC. 5,076 (Mar. 2, 1932) (statement of Sen. Barbour).

282. *Id.*; see Cushman, *supra* note 263, at 1307.

283. 75 CONG. REC. 5,116 (Mar. 2, 1932) (statement of Rep. Seger).

284. *Id.*

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as exemplified by a *New York Times* article published three days after the Lindbergh kidnapping, entitled “Kidnapping Wave Sweeps Nation.”²⁸⁵ Representative Cochran himself took to the airwaves on March 3, giving a speech over CBS radio urging support for the kidnapping bill, despite its tendency to “centralize power in the Federal Government.”²⁸⁶ He argued that “when the time arrives that mothers fear to send their children to school, then the time has arrived when thoughts of State rights and centralization of power must be forgotten.”²⁸⁷

Calmer heads urged caution before enmeshing the federal government into what had heretofore been considered a local problem (even putting to one side the inconvenient fact that there was no evidence that the Lindbergh baby had been taken across state lines which, indeed, he had not). Then-Professor Felix Frankfurter, speaking at the annual dinner of the New York Patent Law Association, opposed the new proposed kidnapping law on policy grounds, arguing that “[w]e have too many statutes in the Federal code that should never have been put there.”²⁸⁸ Attorney General William Mitchell, in a radio address on March 6, said that the proposed legislation “probably will be passed” and “[u]nder present conditions no doubt . . . should be” passed.²⁸⁹ Yet he refused to officially support the bill,²⁹⁰ and he expressed serious constitutional reservations:

The Tenth Amendment to the Federal Constitution expressly provides that powers not delegated to the United States by the Constitution are reserved to the States. The federal government is limited by the Constitution to the punishment of those crimes which interfere with the operations of the federal government or relate to the limited number of subjects over which the federal government is given jurisdiction. . . . Murder, extortion, kidnaping, banditry, theft, blackmail, levy of tribute on business or threats of violence, and frauds, unless committed in those limited areas in which the federal government has exclusive

285. See ALIX, *supra* note 268, at 68.

286. See 75 CONG. REC. 5,385 (Mar. 7, 1932) (statement of Rep. Cochran). See also *id.* at 5407 (statement of Rep. Fulbright) (“The first and immediate effect of the Lindbergh kidnaping should be to send the Patterson-Cochran antikidnaping bill through Congress.”).

287. See 75 CONG. REC. 5,386 (Mar. 7, 1932) (statement of Rep. Cochran).

288. *Frankfurter Opposes Federal Kidnap Law*, N.Y. TIMES, Mar. 3, 1932, at 8. See ALIX, *supra* note 268, at 69; CALDER, *supra* note 227, at 202.

289. William T. Mitchell, Attorney Gen. of the U.S., *The Administration of Criminal Justice* (Mar. 6, 1932) [hereinafter Mitchell Address].

290. See 75 CONG. REC. 13,284 (June 17, 1932) (statement of Rep. Cochran) (expressing amazement that the Attorney General objected to the bill).

sovereignty, such as the District of Columbia, are not directly violation of federal law, *and cannot be made so*.²⁹¹

He advocated limited government involvement, “only to the extent of supplementing, fortifying, and cooperating with state and municipal authorities who are better situated from a legal standpoint to deal with the great mass of criminal offenses.”²⁹²

Yet, caution did not prevail. The House Judiciary Committee reported favorably upon its bill on March 2, 1932, the day after the Lindbergh kidnapping.²⁹³ When the body of the young Lindbergh was found on May 12, 1932, the public clamored for action.²⁹⁴ When the House bill was debated on the floor little over a month later, some members from both parties reiterated Frankfurter’s and Mitchell’s skepticism over whether the federal government should be making this foray into crime. Significantly, one of the voices of caution was Representative Earl C. Michener, Republican of Michigan.²⁹⁵ Although ultimately expressing reluctant support for the bill, he advised caution:

Congress should be very careful about enacting additional criminal statutes punishing for crime, when the same result can be obtained through State legislation. Whenever you remove responsibility from the local community to Washington, to that extent you lessen the interest of the local community in the enforcement of the law. Let the States make their own laws whenever possible, and then those same States being responsible for the laws will enforce them.²⁹⁶

Representative Andrew J. Montague, Democrat of Virginia, similarly sounded a note of caution: “I am very wary of conferring criminal jurisdiction upon the Federal Government unless it is necessary to effectuate powers already conferred in the Constitution.”²⁹⁷ Representative Loring Black, Jr., Democrat of New York, objected: “We give another power to the Federal Government. We again contravene State rights”²⁹⁸ Representative Milton C. Garber, Republican of Oklahoma, argued that the argument of the bill’s proponents would lead inexorably to

291. Mitchell Address, *supra* note 289 (emphasis added). *See also* ALIX, *supra* note 268, at 71; CALDER, *supra* note 227, at 202; CUMMINGS & MCFARLAND, *supra* note 280, at 478 (quoting Mitchell as opining that “[d]ealing with organized crime . . . is largely a local problem”).

292. Mitchell Address, *supra* note 289.

293. *See* 75 CONG. REC. 5,385, 5,386 (Mar. 7, 1932) (statement of Rep. Cochran) (reporting that the “committee reported [the] bill favorably Wednesday,” March 2, 1932).

294. *See* ALIX, *supra* note 268, at 72 (stating that after the body was found, “[s]ocietal reaction now reached even greater heights”).

295. *See* 75 CONG. REC. 13,283 (June 17, 1932) (statement of Rep. Michener).

296. *Id.*

297. *Id.* at 13,288 (statement of Rep. Montague).

298. *Id.* at 13,304 (statement of Rep. Black).

the federal government's assumption of power to prosecute "all felonies in the several States."²⁹⁹ And he mocked those Democrats supporting the bill for their hypocrisy: "These disciples of Jefferson, who have been rendering lip service year in and year out upon every occasion from every platform for State rights and about the necessity of preserving the sovereignty of the several States, should practice what they preach."³⁰⁰

Yet others agreed with Cochran's earlier pronouncement that dangers of centralization of power "must be forgotten."³⁰¹ Representative Fiorello LaGuardia, Republican of New York and a strong supporter of the bill, asserted "that States' rights and States' responsibilities are no longer applicable to the modern crime system confronting the country today [sic]."³⁰² "[C]rime," he said, "is no longer local."³⁰³

The question became not only whether the bill would pass, but also whether it would provide for the death penalty for kidnapping simpliciter. While the House version of the bill had so provided, the Senate bill, which had been passed on June 8, did not. Some members of the House objected to including the death penalty provision in the bill. Representative Emanuel Celler, Democrat of New York, for example, observed that only six of the forty-eight states capitalized ransom kidnapping, which should give the Congress pause before doing the same.³⁰⁴ LaGuardia made much the same point.³⁰⁵ On the other hand, other members pointed to the absence of the death penalty as a punishment for kidnapping as militating in favor of including the death penalty provision in the federal bill. Representative Leonidas C. Dyer, Republican of Missouri, for example, said: "If we did not have this provision in the bill . . . the legislation would not be worth anything, because every State now has a kidnaping law and few of them provide the death penalty."³⁰⁶ Ultimately, the death penalty provision was stricken from the bill for fear that the gap between the Senate

299. *See id.* at 13,290 (statement of Rep. Garber).

300. 75 CONG. REC. 13,290 (June 17, 1932) (statement of Rep. Garber).

301. *See id.* at 13,289 (statements of Rep. Woodruff and Rep. LaGuardia); 75 CONG. REC. 5,385–86 (Mar. 7, 1932) (statement of Rep. Cochran).

302. *Id.* at 13,289 (statement of Rep. LaGuardia).

303. *Id.*

304. 75 CONG. REC. 13,285 (June 17, 1932) (statement of Rep. Celler). *See also id.* at 13,290 (Statement of Rep. Garber) ("Forty-two States . . . have concluded that the death penalty is not a sufficient deterrent of crime for its justification.").

305. *See id.* at 13,304 (statement of Rep. LaGuardia) ("Many States have no death penalty even for murder—very few States have death penalty for kidnaping.").

306. *See id.* at 13,287 (statement of Rep. Dyer). Later remarks raise the possibility that Representative Dyer favored the death penalty only when death resulted from a kidnaping. *See id.* ("Let us provide laws that will give the punishment that is deserved by those guilty of this horrible offense, where they have kidnaped *and death results.*") (emphasis added).

and House versions would prove unbridgeable.³⁰⁷ The Senate version was passed in the House on June 17, 1932.³⁰⁸

There was still the matter of getting Hoover's signature. Given Attorney General Mitchell's comments in his radio address, one might have expected him to advise a veto.³⁰⁹ Indeed, in a June 21, 1932, memo, Mitchell reminded Hoover that had the kidnaping bill been the law on March 1, it would have made no difference in the Lindbergh case,³¹⁰ for the body of the baby was found less than a mile from the Lindbergh home.³¹¹ But Mitchell nonetheless advised Hoover to sign the bill: "Congress is very largely in favor of it and I do not believe the veto power should be resorted to in situations of this kind."³¹² Mitchell did not elaborate. But the Presidential election was less than five months away. Hoover reluctantly took his Attorney General's advice and the Federal Kidnapping Act became law.³¹³

The Kidnapping Act was not without precedent. In 1910, Congress had enacted the White Slave Traffic Act, or Mann Act, making it a federal crime to "knowingly transport . . . in interstate or foreign commerce . . . any woman or girl . . . for any . . . immoral purpose."³¹⁴ Nine years later, the Dyer Act made it a federal crime to "transport . . . in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen."³¹⁵ These acts were cited as precedent for the new kidnapping act.³¹⁶

307. See 75 CONG. REC. at 13,303–04 (June 17, 1932). See also *id.* at 13,304 (statement of Rep. Cochran) ("I was informed by members of the Judiciary Committee of the Senate that the bill would never have been reported out by the Senate committee unless the death penalty was eliminated.").

308. See *id.* at 13,304 (statement of Speaker of the H.).

309. See Mitchell Address, *supra* note 289

310. See CALDER, *supra* note 227, at 202; see CUMMINGS & MCFARLAND, *supra* note 280, at 479.

311. HACK, *supra* note 278, at 136.

312. CUMMINGS & MCFARLAND, *supra* note 280, at 479; accord CALDER, *supra* note 227, at 203.

313. See O'Reilly, *supra* note 243, at 641 ("[T]he legislation was signed by a reluctant President Hoover, who continued to hold a states' rights position on crime.").

314. White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2020)). See also O'Reilly, *supra* note 243, at 640 ("Not until passage of the White Slave Traffic Act (also known as the Mann Act) in 1910 did Progressive era legislators begin to chip away at a states' rights tradition that confined law enforcement responsibilities to local and state police agencies.")

315. National Motor Vehicle Theft (Dyer) Act, Pub. L. No. 66-70, 41 Stat. 324 (1919) (codified as amended at 18 U.S.C. §§ 2312–2313 (2020)).

316. For example, testifying before the House Judiciary Committee, President of the St. Louis, Missouri Chamber of Commerce, Walter B. Weisenberger, observed:

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And so they were. All three pieces of legislation required that someone or something cross state lines before the federal government would make the act criminal.³¹⁷ Two years after the Federal Kidnaping Act was passed, a new Congress and a new President would not be so restrained.

C. “A New Deal for Crime”

In 1929, a young, politically-ambitious, first-term governor, in an address before the Conference of Governors, acknowledged that the Nation was “faced with new and alarming problems in criminal activity.”³¹⁸ Yet he stridently defended as the prerogative of the States the responsibility of defining and punishing crime. He began his address:

No constitutional sovereign right vested in the forty-eight States which make up our great Nation has been more zealously defended or clearly established than the right of each State to control the police powers and the administration of justice within its borders. *What constitutes a crime is a matter which each State determines for itself.*³¹⁹

He decried the tendency of the federal government to overreach based on a too-liberal understanding of the Constitution’s Commerce Clause³²⁰:

[T]here is a tendency, and to my mind a dangerous tendency, on the part of our national Government, to encroach, on one excuse or another, more and more upon State supremacy. *The elastic theory of interstate*

It might be a Federal offense to take a used automobile and drive it across the border-line of the State: or it might be a Federal offense to take a woman for immoral purposes across the State lines . . . But now you are raising the question as to whether, under the Federal laws, it should be made a crime to steal a child from the mother’s breast and take it away from the State. And I do not think there is any comparison—so far as the feeling of a layman goes, that such a heinous offense should be made a Federal crime

Kidnaping: Hearing Before the H. Comm. on the Judiciary, supra note 261, at 15 (statement of Walter B. Weisenberger, President, Chamber of Commerce, St. Louis, Mo.).

317. See White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2020)); National Motor Vehicle Theft (Dyer) Act, Pub. L. No. 66-70, 41 Stat. 324 (1919) (codified as amended at 18 U.S.C. §§ 2312-2313 (2020)); Kidnaped Persons Act (Linbergh Law), Pub. L. 72-189, 47 Stat. 326 (1932) (codified as amended at 18 U.S.C. § 1201 (2020)).

318. 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE GENESIS OF THE NEW DEAL, 1928-1932, at 367 (Samuel I. Rosenman, ed. 1938) [hereinafter THE GENESIS OF THE NEW DEAL].

319. *Id.* (emphasis added).

320. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . to regulate Commerce . . . among the several states . . .”).

*commerce, for instance, has been stretched almost to the breaking point to cover certain regulatory powers desired by Washington.*³²¹

As the reader has perhaps already surmised, the young governor was Franklin D. Roosevelt of New York.³²² As President of the United States, less than five years after his Conference of Governors address, Roosevelt sang a different tune. In his first annual message to Congress on January 3, 1934, he decried the “crimes of organized banditry, cold blooded shooting, lynching and kidnapping [that] have threatened our security.”³²³ He invoked the power of the federal government to meet this criminal activity: “[T]hese violations of law call on the strong arm of Government for their immediate suppression”³²⁴

A new broom sweeps clean and in 1932, the broom belonged to Roosevelt. He swept into office in a landslide, with 472 electoral votes to Hoover’s 59.³²⁵ In addition, the Democrats picked up 97 seats in the House of Representatives.³²⁶ The left-leaning Farmer-Labor Party took four more, effectively giving the Democrats a 317 to 117 edge over the Republicans.³²⁷ The Democrats also picked up 12 seats in the Senate, giving them a majority of 59 seats to the Republicans’ 36.³²⁸ The result is well known: a dramatic restructuring of federal-state relations stemming

321. THE GENESIS OF THE NEW DEAL, *supra* note 318, at 367 (emphasis added); ALFRED B. ROLLINS, JR., ROOSEVELT AND HOWE 271 (1962).

322. See ROLLINS, *supra* note 321, at 271. Continuing his address, Roosevelt said that this encroachment was in part the result of inactivity on the part of the states in addressing the social ills of the day: “[I]n many cases this has been due to a failure of the States, themselves, by common agreement, to pass legislation necessary to meet certain conditions.” THE GENESIS OF THE NEW DEAL, *supra* note 318, at 367. Foreshadowing things to come, he warned that the States themselves must act or the national government would further encroach into traditionally state affairs, including crime:

[I]f our States do not themselves, . . . remedy the existing condition of affairs, we shall find the heavy hand of Washington laid on us by Federal legislation, and the people of our own commonwealths will raise no voice in protest, because their own State Governments have been inefficient, stupid or negligent.

Id. at 368.

323. 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE ADVANCE OF RECOVERY AND REFORM, 1934, at 12 (Samuel I. Rosenman, ed. 1938) [hereinafter THE ADVANCE OF RECOVERY AND REFORM].

324. *Id.* at 12–13. See also O’Reilly, *supra* note 243, at 642.

325. See WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940 17 (1963).

326. *A Momentous Political Realignment: November 8, 1932*, SENATE.GOV, https://www.senate.gov/artandhistory/history/minute/Momentous_Political_Realignment.htm (last visited May 18, 2020).

327. See *Congress Profiles: 73rd Congress (1933–1935)*, HOUSE.GOV, <https://history.house.gov/Congressional-Overview/Profiles/73rd/> (last visited May 18, 2020).

328. *A Momentous Political Realignment: November 8, 1932*, *supra* note 326.

from a slew of federal economic legislation known as the New Deal, designed to meet the disastrous Great Depression.³²⁹ Less well known, because less controversial, was the “New Deal for Crime,” a program of expansion of the federal government into the realm of criminal law far surpassing the Kidnaping Act.³³⁰

Even as Prohibition ended, as Roosevelt’s Attorney General would later put it, “there remained the criminal elements tutored in methods born of the liquor traffic and hungry for new fields of lucrative crime.”³³¹ Thus, despite the Lindbergh Act, kidnappings of the wealthy continued. Twenty-seven well-publicized kidnappings took place in 1933, including those of Oklahoma oil tycoon Charles Urschel, Minnesota brewing magnate William Hamm, and Illinois banker August Luer, all in the summer of 1933.³³² “[K]idnap hysteria dominated national crime news.”³³³ Meanwhile, notorious bandits “such as George ‘Machine Gun’ Kelly . . . Bonnie Parker and Clyde Barrow, Charles ‘Pretty Boy’ Floyd, Alvin ‘Old Creepy’ Karpis, and Kate ‘Ma’ Barker and her son Fred” continued to take advantage of the mobility offered by the automobile by crossing state lines after heists of banks and trains.³³⁴ John Dillinger pulled off at least ten bank robberies between May and October 1933.³³⁵ Gangs also migrated into “protection, labor manipulation, [and] dope smuggling.”³³⁶ To top it off was the “Kansas City Massacre” on June 17, 1933, in which three state lawmen, an FBI agent, and bandit, Frank Nash, were killed by Floyd and his henchmen in an attempt to free Nash after he had escaped from Leavenworth and was being returned to prison.³³⁷

Early in Roosevelt’s first term, he and Attorney General Cummings resolved that a federal response to this crime wave was called for. The person behind this “war on crime” was probably Louis M. Howe, Roosevelt’s personal secretary, who was “[t]he architect of Roosevelt’s political career.”³³⁸ “Howe had for some years maintained a passionate interest

329. See *President Franklin Delano Roosevelt and the New Deal, 1933–1945*, LIBR. CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/depwii/newdeal/> (last visited May 18, 2020).

330. Richman, *supra* note 14, at 387–88.

331. See CUMMINGS & MCFARLAND, *supra* note 280, at 481.

332. POTTER, *supra* note 11, at 108–09.

333. *Id.* at 108.

334. O’Reilly, *supra* note 243, at 642. See also UNGAR, *supra* note 253, at 73.

335. See *id.*

336. ROLLINS, *supra* note 321, at 412.

337. See HACK, *supra* note 278, at 140; UNGAR, *supra* note 253, at 73.

338. See POTTER, *supra* note 11, at 122.

in the anticrime movement and had promoted it as a political issue,³³⁹ having attempted without success to have himself appointed to the Wickersham Commission.³⁴⁰ He found a powerful and sympathetic ally in Roosevelt.³⁴¹ “By July 27, 1933, Howe had secured FDR’s commitment to a federal anticrime effort”³⁴² Two days later, Howe published an article in the *Saturday Evening Post* entitled “Uncle Sam Starts After Crime,” in which he touted a new national police force, using modern crime-detection methods “and fearless government policemen, unaffected by local politics or local sympathy.”³⁴³ Thereafter, he “prodded” Cummings to come up with a federal crime-control agenda.³⁴⁴

Roosevelt advisor, Raymond Moley, was also influential. “[A]s a participant in several crime commissions and author of their reports, he had urged federal intervention [in crime] since the 1920s.”³⁴⁵ Four days after Howe’s *Saturday Evening Post* article appeared, Roosevelt, at Cummings’ request, assigned Moley the task of conducting a survey of potential federal crime control measures for review by the Department of Justice.³⁴⁶ Moley was to remain at the Justice Department for four to five weeks and afterwards “to make some recommendations for the more efficient operation of the Federal Government in suppressing crime,” and to recommend new federal legislation.³⁴⁷

Ultimately, the Justice Department recommended to Congress “a ‘twelve point program’ of proposed laws.”³⁴⁸ While some addressed procedural issues, such as the competency of spouses to testify against one another and the requirement of prior notice of a defendant’s alibi defense,

339. *Id.* See also ROLLINS, *supra* note 321, at 412 (asserting that Howe’s “own private hobby was the crime wave”).

340. See POTTER, *supra* note 11, at 122.

341. See ROLLINS, *supra* note 321, at 402, 417 (asserting that an “anti-crime crusade” was one of “three pet projects [Howe] shared with Eleanor and Franklin”).

342. POTTER, *supra* note 11, at 123.

343. *Id.*; ROLLINS, *supra* note 321, at 412 (observing that the piece “claim[ed] for Roosevelt the original suggestion of a national law-enforcement agency”).

344. See ROLLINS, *supra* note 321, at 412.

345. POTTER, *supra* note 11, at 122.

346. See *Moley to Make Federal Survey*, 24 J. CRIM. L. & CRIMINOLOGY 618, 618 (1933); ALIX, *supra* note 268, at 90. The influence of both Howe and Moley is evident from Cummings’ mention of both of them in a radio address he gave in September 1933. See Homer S. Cummings, Attorney Gen. of the U.S., *Predatory Crime 7–8* (Sept. 11, 1933) [hereinafter *Predatory Crime*].

347. Letter from Joseph B. Keenan, Assistant Attorney Gen. of the U.S., to Homer S. Cummings, Attorney Gen. of the U.S. (Aug. 8, 1933) (on file with the Special Collections, University of Virginia Library).

348. Homer S. Cummings, *Bars [sic] Immediate Problem: Address at Banquet Meeting of the New York County Lawyers*, 6 N.Y. ST. B. ASS’N BULL. 209, 210 (1934).

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six created new federal crimes and one amended the two-year-old Lindbergh Law.³⁴⁹ Cummings outlined these proposals in an address before the Daughters of the American Revolution (DAR) on April 19, 1934:

A law dealing with racketeering which will make it a felony to do any act restraining interstate or foreign commerce, if such act is accompanied by extortion, violence, coercion, or intimidation.

A law making it a Federal offense for any person knowingly to transport stolen property in interstate or foreign commerce.

Two laws strengthening and extending the so-called Lindbergh kidnapping statute.

A law making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution or the giving of testimony in felony cases.

A law making it a criminal offense for anyone to rob, burglarize, or steal, from banks operating under the laws of the United States or as members of the Federal Reserve System.

A law making it a criminal offense for any person to kill or assault a Federal officer or employee while he is engaged in the performance of official duties, and a law to provide punishment for any person who assists in a riot or escape at any Federal penal institution.

. . . .

A law to regulate the importation, manufacture or sale, or other disposition, of machine guns and concealable firearms.³⁵⁰

Where Hoover and Mitchell had been ambivalent about crime two years earlier, Roosevelt and his men were audacious. Roosevelt personally spoke to Senators in support of the bills,³⁵¹ and Howe also personally lobbied for the legislation.³⁵² But it was Cummings who took on the role of front man for the administration's efforts to broaden federal law enforcement power. Part of the Roosevelt administration's strategy to push its interventionist agenda was a media blitz aimed directly at the American public.³⁵³ And blitz Cummings did. Between August 1933 and

349. See Homer S. Cummings, Attorney Gen. of the U.S., A Twelve Point Program: Address Delivered Before the Continental Congress of the Daughters of the American Revolution 5–6 (Apr. 19, 1934) [hereinafter Twelve Point Program].

350. *Id.* This address was re-broadcast later the same night over the Columbia Broadcasting Company. See Homer S. Cummings, Attorney Gen. of the U.S., Attorney General Cummings Outlines Crime Prevention Program Over CBS 3–4 (Apr. 19, 1934).

351. See, e.g., 78 CONG. REC. 449 (Jan. 11, 1934) (statement of Sen. Copeland).

352. See ROLLINS, *supra* note 321 at 412–13.

353. See POTTER, *supra* note 11, at 125 (“The creation of strategies to publicize government programs . . . was foundational to the ideology of national revitalization that undergirded the New Deal. . . .”).

January 1937, Cummings delivered or wrote at least thirty separate addresses or articles on federal crime control.³⁵⁴

In these addresses and writings, he pushed the analogy of federal crime control as warfare.³⁵⁵ Beginning in the spring of 1933, he took to the pen and the airwaves to appeal to the public for their support for the federal agenda in this “war on crime.” In November 1933, he told a radio audience: “In very truth the Nation has embarked upon a war on crime.”³⁵⁶ In the first line of a radio broadcast in September 1933, he said: “The warfare which an armed underworld is waging upon organized society has reached disturbing proportions.”³⁵⁷ In a speech in San Francisco, California, he provoked applause from his audience by telling them that “it is a relentless warfare which will never cease until the black flag of gangsterism has been hauled down.”³⁵⁸ Before the DAR in April 1934, he proclaimed: “[W]e are now engaged in a war that threatens the safety of our country—a war with the organized forces of crime.”³⁵⁹ And in the pages of the *American Bankers Association Journal*, he solemnly observed: “The war on crime is a war to the death, grim and serious.”³⁶⁰ Law enforcement officers, prosecutors, and judges, he observed, “are the veritable peace time soldiers of the Republic.”³⁶¹ In the DAR speech, he claimed that “it is conservative to say that there are more people in the underworld carrying deadly weapons, than there are in the Army and

354. See *Speeches of Attorney General Homer Stille Cummings*, U.S. DEP’T. OF JUST., <https://www.justice.gov/ag/speeches-5#1933> (last visited May 18, 2020).

355. See POTTER, *supra* note 11, at 118.

356. Homer S. Cummings, Attorney Gen. of the U.S., *The Campaign Against Crime* 1 (Nov. 22, 1933) [hereinafter *Campaign Against Crime*].

357. *Predatory Crime*, *supra* note 346, at 1.

358. Homer S. Cummings, Attorney Gen. of the U.S., *Address Delivered Before the Commonwealth Club of California* 12 (Aug. 17, 1934), [hereinafter *Address to the Commonwealth Club of Cal.*].

359. *Twelve Point Program*, *supra* note 342, at 7.

360. Homer S. Cummings, *Organized Crime and the Banks* Am. Bankers Ass’n J. 37 (1934) (on file with the Special Collections, University of Virginia Library). The analogy to war also was made on the floor of the House, where Rep. Oliver of New York, to a round of applause, compared the 1934 crime bills to the aid the nation gave to France and Britain during World War I. See 78 CONG. REC. 8140 (May 5, 1934) (statement of Rep. Oliver).

361. See *Campaign Against Crime*, *supra* note 360, at 6–7.

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Navy of the United States.”³⁶² He would repeat this claim on several occasions,³⁶³ with no support, and to some ridicule.³⁶⁴

In his public addresses and writings, Cummings stressed the interstate nature of the crime wave. For example, he mentioned the Urschel kidnapping case on more than one occasion, stressing the need for federal action because the crime occurred across seven different States.³⁶⁵ But he carefully expanded the concern over interstate crime beyond kidnappings, which, of course, were already addressed by the Lindbergh Act, by claiming that interstate crime in general called for federal action:

Rapid means of transportation and communication not only enable the criminal to speed away from the scene of his crime to another jurisdiction, but, in some cases, enable him to conspire in one state to commit unlawful acts in another under circumstances likely to complicate the prosecution of his crime. These factors have given many offenses an interstate rather than a purely local character. In any event they have created a national problem.³⁶⁶

In his DAR Speech, he said:

We are no longer a nation whose problems are local and isolated. The growing density of our population and the development of high speed methods of transportation have resulted not only in a large increase in our crime rate, but, also, have given many offenses an interstate character.

...

Crime today, is organized on a nation-wide basis, and law-breakers extend their activities over many States.³⁶⁷

362. Twelve Point Program, *supra* note 349, at 2.

363. See Homer S. Cummings, Attorney Gen. of the U.S., Address Delivered Before The New York Herald Tribune's Fourth Annual Conference 2 (Sep. 26, 1934); Homer Cummings, "Are We to Have an American Scotland Yard," draft at 3 (on file with the Special Collections, University of Virginia Library); *Organized Crime and the Banks*, *supra* note 360, at 35.

364. In floor debate in the House of Representatives, Representative Stephen Young, Democrat of Ohio, called the claim "absurd" and "the most asinine and hysterical statement made by any Cabinet officer in the last decade." 76 CONG. REC. 8138 (May 5, 1934). Young concluded that Cummings either "lack[ed] competency or [wa]s hysterical." *Id.*

365. See Twelve Point Program, *supra* note 349, at 5; Address to The Commonwealth Club of Cal., *supra* note 358, at 10; Homer S. Cummings, Attorney Gen. of the U.S., Address Broadcast over the Network of the National Broadcasting Company 2 (Jan. 10, 1934); Homer S. Cummings, *A National War on Crime*, N.Y. HERALD TRIB., Oct. 29, 1933, at 5 (on file with the Special Collections, University of Virginia Library); Homer S. Cummings, Attorney Gen. of the U.S., The Recurring Problem of Crime 2-3 (Oct 12, 1933). See also *Organized Crime and the Banks*, *supra* note 360, at 35 (citing a case in which nine states were involved).

366. *Organized Crime and the Banks*, *supra* note 360, at 35.

367. Twelve Point Program, *supra* note 365, at 4-5.

As with the rationales for the Lindbergh Law, Cummings again cited both the ease with which criminals could evade local authorities by crossing state lines³⁶⁸ and the fact that local law enforcement was sometimes in cahoots with the gangsters.³⁶⁹

As Hoover had done with the Wickersham Commission, Cummings attempted to enlist conservative business interests by stressing the costs of crime. In his article in the *American Bankers Association Journal*, he claimed (without support) that the cost of crime was “certainly several billion dollars a year.”³⁷⁰ In that same article, he understandably homed in on bank robbery, which he called “one of the most spectacular features of the modern crime situation [and] one of the most disconcerting forms of the war of gangdom on society.”³⁷¹ He urged the support of the banking industry: “No business has a more vital stake in the suppression of crime than banking”³⁷²

Cummings took care to stress that the administration did not favor the usurpation of legitimate state power. He acknowledged that “[t]he framers of the Federal Constitution regarded law enforcement as inherently a local power.”³⁷³ However, times had changed. When the Constitution was adopted, “[d]ue to the isolation of the different settlements, the operations of criminals were, of necessity, local in their nature.”³⁷⁴ Now, “[t]he modern criminal has learned that there is a certain security in the

368. Organized Crime and the Banks, *supra* note 360, at 35 (“There are a number of reasons for the increase of organized crime in the country, but it has long been recognized that one of the chief reasons has been the comparative ease with which criminals, by organized effort, have been able to flee from the local authorities and evade justice through interstate operations”); Homer Cummings, *On Crime: Abstract from 1937 Report of the U.S. Attorney General*, 8 L. Soc’y J. 59, 59 (1938) (“The automobile has enabled roving bands of desperate criminals rapidly to shift their zone of operations from one State to another, and quickly make their departure from the scene of their depredations.”).

369. Organized Crime and the Banks, *supra* note 360, at 36 (observing that local law enforcement in some cases could not be trusted because they were in league with the criminals); *Bars Immediate Problem*, *supra* note 348, at 209 (asserting that there was in many places an “alliance between the lower grade of politicians and the criminal classes”).

370. Organized Crime and the Banks, *supra* note 360, at 35. See Twelve Point Program, *supra* note 365, at 2 (“Undoubtedly crime costs our country several billion dollars each year”); *Bars Immediate Problem*, *supra* note 341, at 209 (“The cost of crime has cast upon the people of the United States an annual burden of appalling proportions.”); 78 CONG. REC. 451 (Jan. 11, 1934) (statement of Sen. Copeland) (estimating “the annual cost of crime in the United States” at nearly \$13 billion).

371. Organized Crime and the Banks, *supra* note 360, at 34.

372. *Id.* at 35.

373. Campaign Against Crime, *supra* note 356, at 2. See also *On Crime*, *supra* note 36, at 60 (“In most respects the crime problem is a local problem”); Homer Cummings, *Bars Immediate Problem*, *supra* note 348, at 210 (“Law enforcement, now and hereafter, must, for the most part, be a matter of local concern.”).

374. Twelve Point Program, *supra* note 349, at 4.

Twilight Zone between State and Federal jurisdictions.”³⁷⁵ Still, he assured the public that the federal legislation was entirely consistent with constitutional limitations on federal power.³⁷⁶ In his *American Bankers Association Journal* article, he wrote: “In seeking this legislation the Department of Justice carefully avoided the taking over of any power belonging to the states under the Constitution. . . . In no case do they supplant state laws.”³⁷⁷ He continued to make this claim time and again in the years after the legislation was enacted.³⁷⁸ As he would later put it, the Dyer and Mann Acts established that “proposals for federal legislation in the crime crisis following the post-war decade could not be met with serious charges of unconstitutionality. The question was solely one of policy and necessity.”³⁷⁹

Cummings self-consciously tied this new federal crime-fighting agenda into the expansion of the federal government more generally that had been occasioned by the New Deal. For example, on several occasions, the first few pages of prepared remarks would defend the

375. Campaign Against Crime, *supra* note 356, at 2. See *Bars Immediate Problem*, *supra* note 348, at 209 (asserting that bandits enjoy a “relative security which lies in the twilight zone between Federal and State authority. . .”).

376. Predatory Crime, *supra* note 346, at 4 (“It would be idle to deny that the Constitutional limitations upon Federal activities present a serious problem in the matter of police administration. I have every confidence that we shall be able to meet this problem without doing violence either to our Constitution or to our traditions.”). See also *Bars Immediate Problem*, *supra* note 348, at 210 (“[T]here are constitutional limitations which have ever been kept in view.”).

377. Organized Crime and the Banks, *supra* note 360, at 36. See also Homer S. Cummings, Attorney Gen. of the U.S., The Government’s Program to Fight Lawlessness: Address before the American Bar Association 2–3 (Oct. 13, 1934).

378. See, e.g., Homer S. Cummings, Attorney Gen. of the U.S., Criminal Law Administration—Its Problems and Improvement: Address before the Continental Congress of the Daughters of the American Revolution 5 (Apr. 15, 1935) (“[T]hese statutes were designed to supplement, not to supplant, the law enforcement machinery of the various States.”); Homer S. Cummings, Attorney Gen. of the U.S., Progress Towards a National Program for the Prevention, Detection and Punishment of Crime: Address at the Celebration of the Founding of the First Congregationalist Church 2 (June 7, 1935) (“It was not a desire to usurp the functions of State and local authorities, that brought the Federal Government upon the scene. Imperative circumstances required it . . .”); Homer S. Cummings, Attorney Gen. of the U.S., Address before the Annual Convention of the International Association of Chiefs of Police 2 (July 8, 1935); Homer S. Cummings, Attorney Gen. of the U.S., Address before the Masonic Forum on Crime 3 (Apr. 3, 1936); Homer S. Cummings, Attorney Gen. of the U.S., Progress in Cooperation for Crime Control: Address delivered at the Third General Assembly of the Council of State Governments 1 (Jan. 22, 1937) (“We have resisted, and we shall resist, all attempts to bring the Department of Justice into the sphere of State or local criminal activities.”); Homer S. Cummings, *Crime Can Be Curbed!*, 48 *ROTARIAN* 1, 18 (1936) (“[T]o usurp the functions of the States and local communities is not the aim of the Federal government. It does not seek to over-ride constitutional limitations.”) [hereinafter Cummings, *Crime Can Be Curbed!*].

379. See also CUMMINGS & MCFARLAND, *supra* note 280, at 481.

constitutionality of the New Deal in general, after which he would segue to a discussion of the federal government's new foray into criminal law enforcement.³⁸⁰ In a speech before the National Press Club defending the newly enacted legislation in July 1934, he defended both federal economic and crime legislation in the same breath against the forces of "states rights": "Manifestly we could neither ignore nor fail to share in the concern felt by Members of Congress concerning both economy plans and any extension of the Federal police power that might encroach on the rights of the states."³⁸¹

Indeed, it was part of the strategy of the Roosevelt administration to tie the new federal crime agenda to the New Deal more generally.³⁸² The program, after all, was dubbed "a New Deal for crime."³⁸³ As Claire Bond Potter put it: "Articulating a war on crime as part of the New Deal was . . . a political strategy that framed the expansion of federal police power as ideologically similar to social welfare programs . . ."³⁸⁴ Once again, Howe was at the center of this strategy. In a radio broadcast in the midst of the campaign for greater federal presence in criminal law, in the summer of 1933, he "linked state and nation to the crusade against criminals through the symbol of the National Recovery Administration eagle," thereby linking the war on crime "to the broader moral outlook of the New Deal."³⁸⁵ This was all part of the Roosevelt plan to mobilize the citizenry in favor of a permanent shift in power to the federal government in all areas. An essential aspect of this plan was to fundamentally alter conventional modes of thinking by positing the average American as a citizen, not just of her local community, but of the national community

380. See Address before the Commonwealth Club of Cal., *supra* note 358, at 3–4; Homer S. Cummings, Attorney Gen. of the U.S., *The Law and the Prophets* 3–4 (July 9, 1934); Homer S. Cummings, Attorney Gen. of the U.S., *Law and the New Deal: Address before The National Press Club* 1–2 (July 6, 1934) [hereinafter *Law and the New Deal*].

381. *Law and the New Deal*, *supra* note 380, at 7. Cummings tied the economic and anti-crime measures together in another way as well: by claiming that the administration's economic initiatives would help reduce crime. Thus, in his "Campaign Against Crime" speech in November 1933, he claimed that "[t]he efforts of the Federal Government to reduce unemployment through the National Recovery Act, the Public Works Administration, the Civilian Conservation Corps, and allied measures, have a collateral and helpful effect in the matter of crime prevention." *Campaign Against Crime*, *supra* note 356, at 5. See also *Crime Can Be Curbed!*, *supra* note 378, at 19 (making a link between Depression and higher rates of criminality).

382. Adam Winkler, *Franklin Roosevelt: The Father of Gun Control*, NEW REPUBLIC (Dec. 19, 2012), <https://newrepublic.com/article/111266/franklin-roosevelt-father-gun-control>.

383. See POTTER, *supra* note 11, at 105.

384. *Id.* at 109.

385. *Id.* at 122.

as well.³⁸⁶ “In this view, the nation was seen as a larger version of the local community, in which each individual participated in the life of the whole and took responsibility for his or her role.”³⁸⁷ In Roosevelt’s view, the American public “played a crucial role in fighting crime and creating moral order,” transforming itself from “the object of regulation” into “the moral ally of [the] regulative state.”³⁸⁸ This view of the polity encompassed an expanded role for the federal government, as enhanced citizen participation in government necessarily meant an enhanced role for the federal government.³⁸⁹ As a result, “governmental powers shifted significantly from local and state governments to the national government.”³⁹⁰

And there was no better way to acculturate Americans to accumulation of federal power while respecting conventional racial and class hierarchies than by putting a crime-control agenda at the forefront of a federal interventionist agenda.³⁹¹ Convincing the public that such intervention had become an absolute necessity was relatively easy, for the threat to the national community posed by the gangsters of the early 1930s was all too real. Yet Roosevelt, Cummings, Howe, and Moley transformed this threat into “a highly political publicity campaign,” the war on crime.³⁹² Having successfully stoked the anxieties of middle-class Americans,³⁹³ they were able to push through their crime bills with little opposition.

More so than its initiatives in the economic realm, the New Deal for crime held appeal across party, class, and geographic lines.³⁹⁴ “By invoking the Blue Eagle [of the National Recovery Administration] for his anticrime campaign, Howe linked his work to a symbol of cross-class cooperation”³⁹⁵ The Roosevelt administration was able to “capital-ize[] on preexisting anticrime sentiment among middle-class white voters

386. See Daniel R. Fusfeld, *The New Deal and the Corporate State*, in FRANKLIN D. ROOSEVELT: THE MAN, THE MYTH, THE ERA, 1882–1945 141 (Herbert D. Rosenbaum & Elizabeth Bartelme eds., 1987) (“Franklin D. Roosevelt brought to the presidency a philosophy of politics that envisaged a unified, holistic society”).

387. *Id.* at 141.

388. POTTER, *supra* note 11, at 124.

389. See Fusfeld, *supra* note 386, at 141.

390. *Id.* at 143.

391. See POTTER, *supra* note 11, at 110 (“A campaign against bandit crime . . . underlin[ed] a New Deal commitment to enlarging federal intervention without fundamentally disturbing the race and class hierarchies that middle-class, white voters imagined when they spoke the word ‘community.’”).

392. See *id.* at 64.

393. *Id.* at 66 (“[T]he apparent inefficiency and ineffectiveness of local law enforcement contributed to anxieties that a crime wave was sweeping through middle-class communities.”).

394. See *id.* at 2 (“The anticrime movement bridged party and regional lines”).

395. *Id.* at 122.

by projecting a vision of a moral and efficient state that transcended political and cultural differences to unite law-abiding citizens against common dangers.³⁹⁶ Thus could as prominent an opponent of the New Deal as Republican John D. Rockefeller commend the Justice Department in June 1936 for making serious inroads on the problem of kidnapping, “despite the fact that he opposed similar developments in other spheres of state activity.”³⁹⁷ The federal war on crime thus became a sort of fulcrum upon which pivoted the entirety of the administration’s ambitious interventionist agenda. As Potter put it: “The war on crime became a tangible, nationalist rallying point for a new interventionist state and a vernacular arena for envisioning a national public committed to the New Deal across party lines.”³⁹⁸

Where Congress had been cautious two years earlier in inserting the federal government into the crime-fighting endeavor, historically a state enclave, it now was brazen. When the measures were debated, barely any member of either house expressed concerns about the federal government overreaching its constitutionally limited powers.³⁹⁹ In the Senate, only Senator William H. King, Democrat of Utah, raised any opposition based on federalism grounds, and his opposition was selective.⁴⁰⁰ For example, regarding the proposed bill criminalizing the crossing of state lines for the purpose of avoiding prosecution or avoiding being a witness in a state criminal case, he objected: “By this measure, we are taking a position that the States are incompetent to deal with matters with which they have complete authority to deal and which are exclusively within their jurisdiction.”⁴⁰¹ Senator King was doubtful of the bill’s constitutionality, and indicated his opposition to it, saying: “We are substituting a Federal criminal code for the criminal codes of the States.”⁴⁰² At the end of the day, however, “Senator King was nearly alone in his protests,”⁴⁰³ and he consented to the adoption of the legislation by unanimous consent.⁴⁰⁴

396. POTTER, *supra* note 11, at 110.

397. *Id.* at 201.

398. *Id.* at 110.

399. *See* 78 CONG. REC. 5,734–38 (Mar. 29, 1934); 78 CONG. REC. 8,136–40 (May 5, 1934).

400. *See id.* at 5,736 (statement of Sen. King).

401. *See id.* He also objected to extending the Dyer Act to other stolen property, presumably on federalism grounds as well. *See id.* at 5,738 (statement of Sen. King).

402. *Id.* at 5,737 (statement of Sen. King).

403. UNGAR, *supra* note 253, at 75.

404. *See* Memorandum from Joseph B. Keenan, Assistant Attorney Gen., to Homer S. Cummings, Attorney Gen. of the U.S. (July 3, 1934) (on file with author) (“Senator King of Utah was very gracious in withdrawing his objection to unanimous consent to these bills, although he was not entirely convinced that they should be enacted.”).

In the House, only Representative Stephen Young, Democrat of Ohio, raised any constitutional concerns, and then only obliquely, when he protested that the bills “giv[e] additional power, and add[] to the already arbitrary authority exercised by Federal courts.”⁴⁰⁵ But even he indicated he would vote for the measures.⁴⁰⁶ And when Representative Oliver responded harshly to Young’s skeptical stance, he was met with applause three times.⁴⁰⁷

Nor did any member of either House express concern about the amendment to the Federal Kidnaping Act that authorized imposition of the death penalty if the victim was not released unharmed prior to sentencing.⁴⁰⁸ Two years earlier, the House had shrunk from its version of the kidnaping bill that authorized capital punishment, in the face of considerable opposition and questions about whether the bill would pass with this provision. Now, the House insisted on re-inserting a death penalty provision and opposition was non-existent.⁴⁰⁹ Nor was a word uttered about the inclusion of capital punishment in the bank robbery bill if a murder or kidnaping were committed in relation to the robbery.⁴¹⁰

“By the spring of 1934, the surge in kidnappings and the spectacular crimes of the Barrow and Dillinger gangs made passage of the twelve acts of the omnibus crime bill inevitable.”⁴¹¹ In the end, the extortion and racketeering bills, the amendments to the Lindbergh Law and the Dyer Act, and the bills making it a crime to assault or kill federal officers or

405. See 78 CONG. REC. 8,138 (May 5, 1934) (statement of Rep. Young). It appears that Young’s objection was aimed more at the judicial branch of the government than the legislative, for he continued: “Federal judges, as a class, are domineering, arrogant, and tyrannical. Federal judges, with some notable exceptions, have become not a group of public servants but a group of public dictators and tyrants.” *Id.* He “advocate[d] the abolition of all inferior Federal courts.” *Id.*

406. See *id.*

407. See 78 CONG. REC. 8,140 (May 5, 1934) (statement of Rep. Oliver).

408. See 78 CONG. REC. 8,775 (May 14, 1934). The other amendment created a rebuttable presumption that the victim was transported in interstate or foreign commerce if not released within seven days after the kidnaping. See *id.* That measure did generate a modicum of debate in the Senate. See 78 CONG. REC. 8,864–65 (May 15, 1934).

409. See 78 CONG. REC. 8,775 (May 14, 1934).

410. See *id.* at 8,776. Nor was there much opposition outside Congress. Senator Copeland announced that he had sent a survey to all forty-eight governors asking for their thoughts on the new proposed federal agenda on crime. Out of thirty-six who responded, thirty-four favored the idea, including the governors of “[a]lmost every Southern State.” See 78 CONG. REC. 456 (Jan. 11, 1934) (statement of Sen. Copeland).

411. See POTTER, *supra* note 11, at 124.

commit any number of acts in a federal prison were passed without any federalism-based opposition.⁴¹² So, too, was the bank robbery bill.⁴¹³

The story the lawsuits brought by business interests challenging the constitutionality of the New Deal economic programs is well known to every lawyer and law student. As Cummings put it in 1938, “the great financial interests that center in Wall Street” fought these economic reforms in the courts every step of the way.⁴¹⁴ When anti-gold-hoarding measures were passed, “[t]hose who maintained that the whole financial policy of the administration was unconstitutional instituted a series of suits.”⁴¹⁵ In 1935, “a group of fifty-eight eminent lawyers” wrote a lengthy report determining that the Wagner Act was unconstitutional.⁴¹⁶ These economic interests were largely successful up until about six months before the Midland bank robbery, their first major defeat being a case brought by the Jones & Laughlin Steel Corporation, which, ironically, had been Chebatoris’s former employer.⁴¹⁷

Yet criminal defendants who ran afoul of the new federal criminal provisions had no natural lobby to fight on their behalf. As one contemporary writer put it:

Current controversies over the expansion of federal activities are generally concerned with economic and social policies in the fields of business regulation, labor, agriculture, and public welfare. The centralization in the field of criminal-law enforcement, which has been going on with accelerating speed in recent years, appears to have received general approval.⁴¹⁸

There was no concerted challenge to the “New Deal for Crime.”

Among the members of the Congress that passed the Roosevelt/Cummings crime bills was a first-term Democrat from Michigan who served on the House Judiciary Committee.⁴¹⁹ Michigan had been “a one-party Republican State from the founding of the party until the Great

412. See 76 CONG. REC. 5,734–35, 5,737–38 (Mar. 29, 1934) (passing these bills in the Senate); 78 CONG. REC. 8,127, 8,129, 8136 (May 5, 1934) (passing these bills in the House).

413. See 76 CONG. REC. 5,734 (Mar. 29, 1934) (passing in the Senate); 78 CONG. REC. 8,132–33 (May 5, 1934) (passing in the House).

414. See Homer S. Cummings, Attorney Gen. of the U.S., Preserving Democracy: Address at the Jackson Day Banquet 2 (Jan. 8, 1938) [hereinafter Preserving Democracy].

415. *Id.* at 3.

416. *Id.* at 4.

417. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding the constitutionality of National Labor Relations Act).

418. ARTHUR C. MILLSPAUGH, CRIME CONTROL BY THE NATIONAL GOVERNMENT 283 (1937).

419. See PARKER, *supra* note 144, at 184, 189.

Depression.”⁴²⁰ But in 1932, Roosevelt’s coattails were long enough to reach deeply into this Republican State.⁴²¹ In that year, Democrats won the governorship and ten out of seventeen seats in Congress.⁴²² This particular Michigander gained his seat by defeating Republican incumbent Earl C. Michener, who, earlier that year, had expressed reluctance in injecting the federal government into as local a crime as kidnaping. But the anti-Republican fervor in Michigan apparently was short-lived. The same year that the Roosevelt/Cummings crime bills were passed, this Michigan Democrat lost his bid for re-election.⁴²³ But he was rewarded for his loyalty to the party and to the New Deal agenda. In 1936, he was appointed the U.S. Attorney for the Eastern District of Michigan.⁴²⁴ He was John C. Lehr, the man who would put Anthony Chebatoris on the gallows.⁴²⁵

III. *CHEBATORIS* AND THE POLITICAL AMBITIONS OF FRANK MURPHY

As his execution date loomed, it appeared that Anthony Chebatoris had a friend in Governor Frank Murphy.⁴²⁶ Murphy interceded on behalf of Chebatoris by personally asking President Roosevelt to commute the sentence or at least move it outside of Michigan.⁴²⁷ Ultimately, Roosevelt, through his Justice Department, politely refused.⁴²⁸ After the execution, Murphy bitterly denounced it.⁴²⁹ Thus, at first blush, Murphy appears, to foes of capital punishment and friends of federalism, as a hero, nobly standing up against his friend and the popular President. As always, however, the reality is more complex. To understand why, one must look at Murphy’s rise to power as a Roosevelt disciple and his personal relationship with Roosevelt’s Attorney General, Homer Cummings, and then put his brief involvement in the Chebatoris case in proper context.

A. The Relationship Between Murphy and Roosevelt

Murphy, “a devout Catholic,”⁴³⁰ had always been opposed to capital punishment. As his primary biographer, Sidney Fine, put it: “There was . . . no more dedicated and outspoken foe of capital punishment in

420. NEW DEAL YEARS, *supra* note 21, at 204.

421. *Id.* at 205.

422. *Id.*

423. *See* PARKER, *supra* note 144, at 184.

424. *See id.* at 183.

425. *See id.* at 189.

426. *See* THE NEW DEAL YEARS, *supra* note 21 at 428.

427. *See id.* at 429.

428. *See id.*

429. *Id.*

430. NEW DEAL YEARS, *supra* note 21, at 2.

Michigan than the state's governor, Frank Murphy.⁴³¹ In 1931, while still serving as mayor of Detroit, Murphy had spoken at a meeting held by the Michigan Association Opposed to Capital Punishment in response to a proposed law pending in the Michigan legislature to reinstate the death penalty in the State.⁴³² His files contained numerous pamphlets from the American League to Abolish Capital Punishment,⁴³³ to which he had been appointed by Clarence Darrow,⁴³⁴ and he was described in a *Saturday Evening Post* article as “an implacable foe of capital punishment.”⁴³⁵ He publicly espoused these views as early as 1927, when he engaged in a radio debate over the death penalty with Harry N. Nimmo, editor of *Saturday Night*, a Detroit periodical.⁴³⁶ Murphy took the position that the death penalty did not deter but “instead . . . set a pernicious example;” that it was applied only to “the weak” and unpopular; and that it “‘only muddle[d] the question of law enforcement’ with false diagnosis.”⁴³⁷ Later, as Governor General of the Philippines, he would commute all death sentences.⁴³⁸

But Murphy also had supremely high aspirations.⁴³⁹ As he himself put it: “‘I have more than my quota of the stuff they call ambition’”⁴⁴⁰ As Detroit's mayor, Murphy was “ambitious for success beyond Detroit.”⁴⁴¹ That ambition would lead to his allegiance to Franklin Roosevelt.⁴⁴² Though touting his own independence, he determined “that his vaulting ambition for high office could be realized only through the Democratic party.”⁴⁴³ “Sensitive to the political winds, Murphy increasingly linked his political aspirations with the presidential candidacy of Franklin D. Roosevelt.”⁴⁴⁴ Murphy's own political aspirations did not go

431. *Id.* at 428–29.

432. Murphy Files, Box 78, Folder 80–20 (on file with the Bentley Historical Library, University of Michigan).

433. *Id.*

434. See J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 29 (1968).

435. J.H. Creighton, *Frank Murphy—Off the Record, Part Two, His Yesterday and Our Tomorrow*, SATURDAY EVENING POST, (on file with the Bentley Historical Library, University of Michigan). See also HOWARD, *supra* note 435, at 25 (“He fought capital punishment as being a barbarism all his life.”).

436. See HOWARD, *supra* note 435, at 28.

437. *Id.* (alteration added).

438. See *id.* at 76.

439. See NEW DEAL YEARS, *supra* note 21, at 203.

440. *Id.* at 204 (alteration added).

441. SIDNEY FINE, FRANK MURPHY: THE DETROIT YEARS 432 (1975).

442. *Id.* at 442.

443. *Id.*

444. *Id.*

unnoticed by those in his home State.⁴⁴⁵ One prominent Michigan Democrat cynically characterized Murphy as “nothing more nor less than a political climber, without principle and willing to sacrifice his nearest and dearest friends on the alter [sic] of his political ambitions.”⁴⁴⁶ He was attacked in the Republican press as “unscrupulous and self-seeking.”⁴⁴⁷

Given his ambitions, Murphy had the perfect “in” with FDR: during his term as mayor of Detroit, he became acquainted with G. Hall Roosevelt, Eleanor’s brother, whom he would appoint as comptroller for the city.⁴⁴⁸ Murphy publicly proclaimed his great admiration for FDR in early 1931.⁴⁴⁹ It has been speculated that Murphy, a Catholic, may have been positioning himself as Roosevelt’s vice-presidential candidate to help him attract the votes of urban Catholics.⁴⁵⁰ At least in the beginning, Roosevelt sorely needed Murphy’s help in Michigan. Democrats had not won the State in a Presidential election since the formation of the Republican Party in 1852.⁴⁵¹ Once FDR’s presidential aspirations were set, Hall informed close Roosevelt adviser Louis M. Howe that if Murphy could win re-election to the mayoralty of Detroit, Murphy could “control the State Convention and the National Committeemen,” and that Michigan would go for FDR “in a big way” in 1932.⁴⁵²

After Murphy won re-election in 1931, Howe told Hall that they should begin “to get busy delegate collecting.”⁴⁵³ That they did: Murphy politicked all over Michigan for FDR, and his brother George “organized Roosevelt clubs across the state.”⁴⁵⁴ Murphy “now saw his political future as linked with the election of the New York governor” as President.⁴⁵⁵

445. See, e.g., Drew Pearson & Robert Allen, *Washington Merry-Go-Round*, SOUTH HAVEN DAILY TRIB., Aug. 29, 1938, at 1; Drew Pearson & Robert Allen, *Washington Merry-Go-Round*, SOUTH HAVEN DAILY TRIB., Oct. 22, 1938, at 1.

446. See THE DETROIT YEARS, *supra* note 442, at 445. See also NEW DEAL YEARS, *supra* note 21, at 2, 277 (observing that Murphy was “immensely self-centered” and “aspired to the presidency itself;” noting that some within his own party “claimed, with some reason, that he was more interested in his own career than in the success of the party”).

447. NEW DEAL YEARS, *supra* note 21, at 235.

448. See HOWARD, *supra* note 435, at 54; NEW DEAL YEARS, *supra* note 21, at 23.

449. See THE DETROIT YEARS, *supra* note 442, at 442; HOWARD, *supra* note 435, at 55.

450. See THE DETROIT YEARS, *supra* note 442, at 442.

451. See *id.* at 450; HOWARD, *supra* note 435, at 56.

452. See HOWARD, *supra* note 435, at 54. See also THE DETROIT YEARS, *supra* note 442, at 436 (stating that Hall “led the Roosevelt forces to believe that Murphy’s reelection [as mayor of Detroit in 1931] was essential to the New York governor’s winning the Michigan delegation in 1932”).

453. See HOWARD, *supra* note 435, at 54.

454. See *id.* at 56; THE DETROIT YEARS, *supra* note 442, at 447, 449 (observing that Murphy “campaign[ed] vigorously for Roosevelt in 1932” in Michigan, and also made a speech for Roosevelt in Cleveland, Ohio).

455. THE DETROIT YEARS, *supra* note 442, at 447–48.

That FDR deemed Michigan both important and within his grasp is demonstrated by his trip to Detroit just about a month before Election Day.⁴⁵⁶ The Michigan gambit was successful: Roosevelt took the State and “the Democrats also captured the governorship and both houses of the state legislature.”⁴⁵⁷

It was widely understood that Murphy would be rewarded with a “major federal appointment” for his loyalty.⁴⁵⁸ Some were of the opinion that “Murphy was ‘entirely responsible’ for the Democratic victory in Michigan.”⁴⁵⁹ Whatever credit was due Murphy, everyone seemed to recognize that “Murphy deserved serious consideration both because of his importance to the future of the Democratic party in Michigan and because of his status as a prominent Catholic layman.”⁴⁶⁰ Hall Roosevelt, of course, urged FDR to appoint Murphy to a major post, but his recommendation was tinged with a recognition of the presidential aspirations that the campaign had apparently ignited in Murphy: “He ‘will do a million dollar job for you,’ Hall summarized, ‘as long as it blazes the trail ‘Frank Murphy for President!’”⁴⁶¹

Murphy most desired to be Attorney General, but “he was willing to accept the governor-generalship of the Philippines as a second choice.”⁴⁶² Murphy informed the administration of his preferences through Roosevelt advisor Moley in early 1933, but was told that the attorney generalship had already been promised to Senator Thomas J. Walsh of Montana, “and Homer Cummings had been promised the Philippines post.”⁴⁶³ When Walsh died unexpectedly two days before Roosevelt was to be inaugurated, “Murphy confidently expected to be offered the attorney generalship” to replace his fellow Catholic Walsh.⁴⁶⁴ Instead, Roosevelt

456. *See id.* at 448.

457. *Id.* at 450.

458. *Id.* *See also* HOWARD, *supra* note 435, at 57 (“As one of the early preconvention supporters, he . . . was due a rich reward.”).

459. THE DETROIT YEARS, *supra* note 442, at 450.

460. *Id.*

461. *Id.* at 451.

462. *Id.* *See also* THE NEW DEAL YEARS, *supra* note 21, at 2.

463. *See* THE DETROIT YEARS, *supra* note 442, at 451. *See also* HOWARD, *supra* note 435, at 57; HOMER CUMMINGS, SELECTED PAPERS OF HOMER CUMMINGS: ATTORNEY GENERAL OF THE UNITED STATES, 1933–1939 279 (Carl Swisher ed. 1939).

464. *See* THE DETROIT YEARS, *supra* note 442, at 451.

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asked Cummings to serve as Attorney General.⁴⁶⁵ The Governor-Generalship of the Philippines fell to Murphy.⁴⁶⁶

Murphy bided his time in the Philippines but almost immediately looked to the next stage in his progress toward the White House. He knew that if he stayed in the Philippines too long, he would not advance his political career and would be forgotten in Michigan.⁴⁶⁷ Within his first year as Governor-General, “Murphy was already sending word to Washington that he was ‘available’ for another position.”⁴⁶⁸ Ever the self-promoter, he made a practice of sending clippings from positive articles published in Philippine newspapers on to “influential persons and makers of opinion in the United States.”⁴⁶⁹

That next stage, if it were not to be in Roosevelt’s cabinet, would be either the U.S. Senate or Michigan’s state house.⁴⁷⁰ Roosevelt did express an interest in having Murphy run for the Michigan Senate seat in 1934 against incumbent Republican Arthur Vandenberg, and Murphy considered that option.⁴⁷¹ But, as Murphy told his brother George, he was more interested in the Cabinet than the Senate.⁴⁷² His greatest hope was to be appointed to head the Department of Justice, War, or State, posts for which he felt himself to be well equipped.⁴⁷³ Indeed, Murphy allegedly circulated a rumor in 1935 that he would be asked to replace Frances Perkins as Secretary of Labor.⁴⁷⁴

But the identity of Murphy’s next job was to be “determined less by his own wishes than by the political needs of the Roosevelt administration.”⁴⁷⁵ First, Roosevelt increasingly felt the need “to stave off a possible third-party threat to his chances for reelection in 1936” posed by populists such as Michigander Father Charles Coughlin, previously a Roosevelt

465. *See id.* at 451; HOWARD, *supra* note 435, at 57; SELECTED PAPERS, *supra* note 464, at 280.

466. *See* HOWARD, *supra* note 435, at 57. The title of the position was changed to “High Commissioner to the Philippines” in 1935, and Murphy took on that title at that time. *See* Thomas Powers, *Balita mula Maynila (News from Manila)*, BENTLEY HIST. LIBR. 7, https://bentley.umich.edu/wp-content/uploads/2014/09/American_Philippine_Relations_Subject_Guide.pdf (last visited May 19, 2020).

467. *See* THE NEW DEAL YEARS, *supra* note 21, at 226.

468. *Id.* at 204.

469. *See id.* at 203.

470. *See id.* at 203–04.

471. *See id.* at 211.

472. *See* THE NEW DEAL YEARS, *supra* note 21, at 213.

473. *See id.* at 157.

474. *See id.* at 204.

475. *Id.* at 219.

ally but who began to break from FDR in 1935.⁴⁷⁶ Perhaps more importantly, the White House became concerned about winning Michigan in 1936.⁴⁷⁷ “It became increasingly evident that . . . the president would bring [Murphy] back to the United States in 1936 to play a part in the campaign, most probably ‘to pull the Democratic party in [Michigan] together and to help carry the state for Roosevelt.’”⁴⁷⁸ The Democratic Party in Michigan was so threatened by infighting that in 1935, “Roosevelt froze federal appointments in Michigan until” Murphy could be made “temporary czar of state patronage.”⁴⁷⁹ Of all viable Michigan Democrats, Roosevelt considered Murphy best able “to unite the warring factions in the state.”⁴⁸⁰

So, in the Spring of 1935, Roosevelt asked Murphy to meet with him in Washington, and told Murphy that although in the short term he intended to keep him in his post in the Philippines (which would shortly be altered from Governor-General to High Commissioner) FDR would soon ask Murphy to return home.⁴⁸¹ Murphy publicly demonstrated reluctance to run for Governor.⁴⁸² He still held out hope for a Cabinet post, but privately confided to his brother in June 1935 that if he did not receive one, he would indeed return to Michigan “to run for governor or ‘otherwise assist’ Roosevelt in the presidential campaign.”⁴⁸³ In a letter dated January 7, 1936, Roosevelt officially asked him to run for Governor.⁴⁸⁴

The general sense at that time was that Murphy had to run for Governor or FDR would lose the State.⁴⁸⁵ In his January letter, Roosevelt wrote that no other potential Democratic candidate for Governor “show[ed] the slightest likelihood of a successful outcome.”⁴⁸⁶ In turn, Roosevelt feared that if he lost Michigan, he could lose the election.⁴⁸⁷ “Murphy was the only figure with the mass appeal to unite the party,

476. *See id.*

477. *See* THE NEW DEAL YEARS, *supra* note 21, at 222.

478. *Id.* at 222–23 (alteration in original).

479. *See* HOWARD, *supra* note 435, at 110.

480. THE NEW DEAL YEARS, *supra* note 21, at 216.

481. *See id.* at 216, 221.

482. *See id.* at 219.

483. *See id.* at 157, 223.

484. *See* Letter from Franklin D. Roosevelt, President of the U.S., to Frank Murphy, U.S. High Comm’r to the Phil., (Jan. 7, 1936) (on file with author); HOWARD, *supra* note 435, at 111.

485. *See* THE NEW DEAL YEARS, *supra* note 21, at 229; HOWARD, *supra* note 435, at 110.

486. Letter from Franklin D. Roosevelt, President of the U.S., to Frank Murphy, U.S. High Comm’r to the Phil. (Jan. 7, 1936) (on file with author).

487. *See* THE NEW DEAL YEARS, *supra* note 21, at 229.

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capture or neutralize Coughlin's supporters sufficiently to carry Michigan, and thus strengthen Roosevelt."⁴⁸⁸

Murphy continued to express great reluctance to run, even as he made a show of overcoming that reluctance in deference and loyalty to his political patron. In his February 12, 1936 wire to the President to accept the challenge, he assured Roosevelt that it entailed "no sacrifice on [his] part."⁴⁸⁹ "Though I prefer to remain at my present post," he wrote Father Coughlin, "I cannot be soft in my loyalty to the President in whom I believe, and who reposed this great trust in me."⁴⁹⁰ To another friend, he confided that he would run only because "he owed it to the president to do so."⁴⁹¹ As he left the meeting at Hyde Park on June 29, in which FDR essentially decided that Murphy would run, Murphy remarked to the President's secretary "that he felt like a prisoner being sentenced to a two-year term."⁴⁹² Indeed, to the outside observer, it seemed Murphy was making an enormous sacrifice to his President and his party.⁴⁹³ As the *Detroit News* pointed out, it was "an arduous sacrifice," to give up the Philippines position, the third most lucrative in the government, in favor of a two-year term as Governor that paid \$5,000 per year.⁴⁹⁴

But it was also obvious that the Governorship would put Murphy in a position to win the grand prize in 1940: the Democratic nomination for President.⁴⁹⁵ And as early as 1934, his own brother had been publicly suggesting that Murphy would run for governor in 1936.⁴⁹⁶ Finally, he acceded to FDR's request and threw his hat in the ring.⁴⁹⁷

From the start, it was clear that, policy-wise, Murphy fell in lock-step behind FDR. In his announcement of his candidacy, "Murphy declared that, if elected, he would establish in Lansing 'those humane and enlightened social conditions envisioned by the New Deal.'"⁴⁹⁸ In his campaign speeches, "Murphy portrayed Roosevelt as the savior of the nation's political and economic institutions and the friend of 'the average

488. HOWARD, *supra* note 435, a

489. Telegram from Frank Murphy, U.S. High Comm'r to the Phil., to Franklin D. Roosevelt, President of the U.S. (Feb. 12, 1936) (on file with author).

490. HOWARD, *supra* note 435, at 113.

491. THE NEW DEAL YEARS, *supra* note 21, at 225.

492. *See id.* at 229–30.

493. *See* HOWARD, *supra* note 435, at 110 ("[O]n the surface his candidacy would entail personal sacrifice for party loyalty.").

494. *See id.* at 57, 119–20.

495. *See id.* at 110.

496. *See* THE NEW DEAL YEARS, *supra* note 21, at 219.

497. *See* HOWARD, *supra* note 435, at 114.

498. *See* THE NEW DEAL YEARS, *supra* note 21, at 231.

man”⁴⁹⁹ The *Detroit Free Press* characterized his as a “Me-and-Roosevelt” campaign.⁵⁰⁰ “The essence of Murphy’s campaign speeches . . . was that he was in the campaign to aid Roosevelt and the New Deal”⁵⁰¹

As it turned out, victory for Murphy in Michigan was not as easy as he and the Roosevelt administration had thought.⁵⁰² Murphy was very popular in Detroit, but was largely unknown and untested in the rest of the State.⁵⁰³ In the last few weeks before the election, a consensus emerged that Roosevelt would win Michigan, but that Murphy’s chances were more questionable.⁵⁰⁴ In the end, instead of Roosevelt riding Murphy’s coattails to victory, it was quite the other way around:⁵⁰⁵ FDR won Michigan by 317,000 votes while Murphy won by only 48,000.⁵⁰⁶ Put another way, Roosevelt beat his Republican opponent by nearly twenty percentage points in Michigan, while Murphy eked out a victory with less than three percentage points separating him and his opponent.⁵⁰⁷

As Governor, he did indeed fall in line lockstep with the New Deal agenda. He was, as a close Roosevelt confidante was reported to have said, “a real New Dealer in viewpoint.”⁵⁰⁸ His first State-of-the-State address on January 7, 1937, six days after he was inaugurated, was interpreted as “proposing ‘a little New Deal’ for Michigan.”⁵⁰⁹ He eagerly rode the wave of change in federal-state relations augured by FDR’s election in 1932 and his landslide re-election in 1936. As Fine put it:

A New Dealer among New Dealers, Murphy was acutely conscious of the change that was taking place in federal-state relations, and he eagerly sought Washington’s aid in attempting to deal with Michigan’s problems. Few governors . . . accepted cooperative federalism with quite the same enthusiasm as Michigan’s Murphy.⁵¹⁰

499. *See id.* at 239.

500. *See id.*

501. *Id.* *See also* HOWARD, *supra* note 435, at 57, 120 (observing that Murphy openly embraced FDR and the New Deal in his run for Governor in 1936).

502. *See* HOWARD, *supra* note 435, at 118 (“The election was an uphill fight all the way.”).

503. *See id.*

504. *See* THE NEW DEAL YEARS, *supra* note 21, at 250.

505. *See id.* at 250–51 (“Roosevelt had wanted Murphy to return to Michigan to help the president carry the state, but, as it turned out, it was Roosevelt who carried Murphy to victory.”); HOWARD, *supra* note 435, at 122 (“Roosevelt and Murphy, in fact, switched coats.”).

506. HOWARD, *supra* note 435, at 122.

507. *See* THE NEW DEAL YEARS, *supra* note 21, at 251.

508. *Id.* at 483.

509. *See id.* at 267, 268.

510. *Id.* at 283–84.

More traditional Democrats bemoaned the change. William Comstock, for example, complained that “[t]he Democratic party, which had become ‘the New Deal party,’ advocated principles that were closer to the historical doctrines of the Republican party than to the party of Jefferson, and it was the Republican party . . . that now looked ‘suspiciously Jeffersonian.’”⁵¹¹

Murphy’s victory further fueled his presidential aspirations. As Sidney Fine put it: “The chairman of the association of state Democratic chairmen thought that the next step on the political ladder for Murphy was the presidency, and we may assume that this thought had crossed Murphy’s mind as well.”⁵¹² He soon gained national attention for his adept handling of labor unrest in Michigan and his commitment to social reform; the national press soon began to speculate about his 1940 presidential prospects.⁵¹³ After Murphy helped successfully negotiate an end to the sit-down strike at a General Motors plant in February 1937, a *Time* magazine article proclaimed that “‘the first vehicle to roll off General Motors’ revived assembly lines’ would be ‘a bandwagon labeled “Frank Murphy for President in 1940.”’”⁵¹⁴ According to Democratic Party chair and Roosevelt confidante James Farley, by 1938, Murphy had become FDR’s third favorite candidate to succeed him in 1940, after Agriculture Secretary Harry Hopkins and Assistant Attorney General Robert H. Jackson.⁵¹⁵ Murphy almost certainly would have ranked higher if his Catholicism had not been seen as a “political handicap.”⁵¹⁶

But Murphy’s road to the White House in 1940 would depend on his re-winning the state house in 1938.⁵¹⁷ Unfortunately for him, labor unrest in Michigan would largely undo Murphy by the summer of 1938. A rash of “sit-down” strikes following the GM affair hurt Murphy deeply, when he was viewed as being too conciliatory toward the striking auto workers.⁵¹⁸ Murphy was caught between his very pro-labor proclivities and his desire for re-election in a State where the sit-down strikes were sparking calls for law and order.⁵¹⁹ These competing demands led to Murphy’s

511. *Id.* at 274.

512. THE NEW DEAL YEARS, *supra* note 21, at 253.

513. *See id.* at

514. *Id.* at 324–25.

515. *See id.* at 483.

516. *See id.*

517. *See* THE NEW DEAL YEARS, *supra* note 21, at 481. (“[Murphy’s] aspirations for still higher political office rested on his ability to win reelection in 1938.”).

518. *See id.* at 329; HOWARD, *supra* note 435, at 158–61.

519. *See* THE NEW DEAL YEARS, *supra* note 21, at 373 (“The sit-down strikes and labor turbulence of the early months of 1937 adversely affected the public standing of organized labor, as polling data revealed, and led to a spreading demand for law and order that influenced

failure to enact a state labor relations act.⁵²⁰ As if that were not enough, a severe economic downturn hit the nation from September 1937 through June 1938, and it both started and ended later in Michigan than elsewhere, meaning that it was fresh in voters' minds come Election Day.⁵²¹

Once again, Roosevelt's and Murphy's fortunes were intertwined. "[T]he Michigan contest took on national significance as a 'barometer' of popular feeling regarding the New Deal and President Roosevelt."⁵²² On September 2, the day after the *Detroit Free Press* ran an article reporting that FDR had cancelled a trip to Michigan out of concern that Murphy might lose,⁵²³ Roosevelt held a news conference "denounc[ing]" the story⁵²⁴ and sent a personal note to Murphy assuring him that the report was false and promising to help in any way "short of taking an actual part in the campaign."⁵²⁵ FDR did send Secretary of the Interior Harold Ickes, Agriculture Secretary Henry Wallace, and Democratic chair James Farley to Michigan to campaign for Murphy, while members of the President's "brain trust," Thomas G. Corcoran and Benjamin V. Cohen, were loaned out for speechwriting.⁵²⁶ In a national radio address just before Election Day, FDR urged voters to support liberal candidates, specifically naming Murphy and Governor Herbert Lehman of New York.⁵²⁷

And when the Special House Committee on Un-American Activities, known then as the Dies Committee, held hearings beginning in October 1938, with witness after witness blaming Murphy for a breakdown in law and order occasioned by the GM sit-down strike, Roosevelt released a statement, printed on the front page of the *New York Times*, seen by some as "an unprecedented presidential attack on a congressional committee."⁵²⁸ Roosevelt expressed his displeasure at the "coterie of disgruntled Republican officeholders" making "absurdly false charges . . .

a governor known throughout the nation for his support of organized labor but anxious, at the same time, to further his own political career.").

520. *See id.* at 373.

521. *See id.* at 453; HOWARD, *supra* note 435, at 168.

522. THE NEW DEAL YEARS, *supra* note 21, at 484.

523. *Rebuff to Murphy Dealt as Roosevelt Cancels State Trip*, DETROIT FREE PRESS, Sept. 1, 1938. *See also* THE NEW DEAL YEARS, *supra* note 21, at 487.

524. *See* THE NEW DEAL YEARS, *supra* note 21, at 487–88.

525. Letter from President Franklin D. Roosevelt, President of the U.S., to Frank Murphy, Gov. of Mich. (Sept. 2, 1938) (on file with author).

526. *See* THE NEW DEAL YEARS, *supra* note 21, at 495; HOWARD, *supra* note 435, at 171.

527. *See id.*

528. *See The President's Statement*, N.Y. TIMES, Oct. 26, 1938, at 1; THE NEW DEAL YEARS, *supra* note 21, at 502, 504. *See also* HOWARD, *supra* note 435, at 169 (observing that the press release "defied [Roosevelt's] professed policy against intervention in state politics").

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against a profoundly religious, able and law-abiding Governor”⁵²⁹ He charged the committee with having “permitted itself to be used in a flagrantly unfair and un-American attempt to influence an election.”⁵³⁰ And he “praised Murphy’s handling of the sit-down strikes as ‘a great achievement of a great American.’”⁵³¹ Murphy responded with a brief note: “Will try to be worthy of your courage and loyalty.”⁵³²

Nevertheless, Murphy lost the election by over five percentage points.⁵³³ It is unclear what effect Murphy’s stance in the *Chebatoris* case had on the election. On the one hand, “[t]he residents of Midland ‘seethed with indignation’” and the press also “was critical of [his] behavior.”⁵³⁴ On the other hand, judging by the letters Murphy received regarding the matter, public opinion was on his side: in his files, there are nearly thirty letters supporting his stance in the *Chebatoris* matter and only three criticizing him for it. Some of the letters of support explicitly make constitutional arguments.⁵³⁵ Yet the primary cause of his defeat was more than likely the labor strife that had occurred in Michigan that year and his response to it.⁵³⁶ Any hopes of a successful presidential run having “been dealt a shattering blow,”⁵³⁷ Murphy turned to Roosevelt. In his letter to Murphy asking him in early 1936 to run for Governor, FDR had promised

529. *The President’s Statement*, *supra* note 529, at 1. *See also* FRANK J. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA’S POLITICAL INTELLIGENCE SYSTEM* 62 (1980) (“Organized in 1938, the [Dies] committee was soon locked in conflict with the [Roosevelt] administration over its intervention in the election campaign of Michigan Governor Frank Murphy.”).

530. *The President’s Statement*, *supra* note 529, at 1; *THE NEW DEAL YEARS*, *supra* note 21, at 505.

531. *The President’s Statement*, *supra* note 529, at 12; *THE NEW DEAL YEARS*, *supra* note 21, at 505.

532. *See* Telegram from Frank Murphy, Gov. of Mich., to Franklin D. Roosevelt, President of the U.S. (Oct. 26, 1938) (on file with author).

533. *See* *THE NEW DEAL YEARS*, *supra* note 21, at 508.

534. *Id.* at 429.

535. *See* Letter from Bruce J. Walker to Frank Murphy, Governor of Mich. (July 2, 1938) (on file with author) (“I sincerely believe that this is an infringement on the rights of our state.”); Letter from Harold A. Otis to Frank Murphy, Governor of Mich. (July 4, 1938) (on file with author) (“I firmly believe that the Federal Government has no right to perform a legalized murder in this state”); Letter to Frank Murphy, Governor of Mich., (July 6, 1938) (on file with author) (“In the name of Mercy [sic] hold up this unconstitutional Barbaric [sic] execution of Anthony Chebatoris”). *See also* Letter to Frank Murphy, Governor of Mich. (July 7, 1938). (suggesting that the jurors in the *Chebatoris* case be tried for treason against the State of Michigan) (all letters on file with the Bentley Historical Library, University of Michigan).

536. *See* *THE NEW DEAL YEARS*, *supra* note 21, at 510 (“The consensus regarding the principal reason for Murphy’s defeat was that the voters had reacted negatively to his behavior during the sit-down strikes”).

537. *See id.* at 516.

that, should Murphy be defeated, he would be rewarded with another federal appointment.⁵³⁸ Now it was time to make good on that promise. Shortly after Election Day, Murphy wrote to Roosevelt to thank him for all he had done in the ultimately unsuccessful attempt to get him re-elected (“With the assurance of my everlasting gratitude for all that you have done for me . . .”), but also to subtly remind him of his promise from more than two years before (“to reassure you of my undiminished devotion to this cause and of my continued determination to fight for its fulfillment”).⁵³⁹ The two met two days later to discuss Murphy’s future.⁵⁴⁰ Murphy sent a follow-up letter three weeks later, further stroking Roosevelt’s ego (“your courage and magnificent leadership”) and to demonstrate his own usefulness to Roosevelt’s administration in carrying the New Deal forward (“Trusting not to appear presumptuous, I wish to take the liberty of presenting a few suggestions . . .”).⁵⁴¹

Several weeks later, Roosevelt nominated Murphy to be Attorney General, surprising many, given that the job had been all but promised to Robert H. Jackson.⁵⁴² Just over a year later, Murphy was appointed to the Supreme Court, where he served for nine years until his death in 1949.⁵⁴³

B. The Relationship Between Murphy and Cummings

Murphy was also close friends with Homer Cummings, the powerful and, at that time, longest-serving head of the Justice Department.⁵⁴⁴ While this meant that Murphy had Cummings’ ear in the *Chebatoris* case, it also meant that Murphy had to be careful not to burn bridges with Cummings, for Murphy savored all the powerful Washington connections he could maintain.

538. See Letter from Franklin D. Roosevelt, President of the U.S., to Frank Murphy, U.S. High Comm’r to Phil., (Jan. 7, 1936) (on file with author) (“[E]ven if you should fail and this Administration continues, your work would obviously be recognized.”).

539. See Letter from Frank Murphy, Governor of Mich., to Franklin D. Roosevelt, President of the U.S. (Nov. 11, 1938) (on file with author).

540. See THE NEW DEAL YEARS, *supra* note 21, at 528. When Murphy learned at that meeting that the President had not seen the November 11 letter, Murphy anxiously wired Roosevelt’s secretary to make sure that she show it to him. See Telegram from Frank Murphy, Governor of Mich., to Marguerite Le Hand, secretary to President Franklin D. Roosevelt (Nov. 15, 1938) (on file with author).

541. See Letter from Frank Murphy, Governor of Mich., to Franklin D. Roosevelt, President of the U.S. (Dec. 2, 1938) (on file with author).

542. See HOWARD, *supra* note 435, at 180–81. Jackson, of course, succeeded Murphy as Attorney General when Murphy was appointed to the Supreme Court, and then joined Murphy on the Court. See *id.* at 181.

543. See Wolfinger, *supra* note 27, at 398 n.30.

544. See U.S. Attorney General Homer S. Cummings, Address at the Book-Cadillac Hotel 1 (Oct. 27, 1936).

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An early indication of a growing friendship between Murphy and Cummings is evident in a letter from the latter to the former in early 1933 congratulating him on his appointment as Governor-General of the Philippines,⁵⁴⁵ a position, it should be remembered, for which Cummings himself was slated until the untimely death of Senator Walsh bumped Cummings into the Attorney-Generalship.⁵⁴⁶ Soon, Murphy was sending Cummings news clippings about himself and copies of addresses he made as Governor-General.⁵⁴⁷ By August of that year, Cummings was writing Murphy things such as “[m]y mind often turns to you” and “[i]t is quite natural that I should have a special interest in your welfare and I am happy to know that you are making such a splendid record.”⁵⁴⁸ In a letter the next April, accompanied by more news clippings favorable to him, Murphy both stroked Cummings’s ego and expressed his fealty to the New Deal:

Your pithy and convincing addresses suggest to me the necessity for a well organized unit of those close to the President to preach the gospel of the New Deal and make reply to attacks to the numerous assaults now being made against it. . . . No attacks should go unanswered.⁵⁴⁹

By the Spring of 1935, the two were close enough friends that Murphy stayed with the Attorney General and his wife when he visited Washington to discuss his possible run for Governor with Roosevelt.⁵⁵⁰ Cummings travelled to Michigan to campaign for Murphy days before Election Day in 1936.⁵⁵¹ When Joe Louis had his second bout with Max Schmelling at Yankee Stadium on June 22, 1938—coincidentally, the

545. See Letter from Homer S. Cummings, U.S. Attorney General, to Frank Murphy, Governor-Gen. of the Phil. (Apr. 21, 1933) (on file with the Bentley Historical Library, University of Michigan).

546. See *supra* text accompanying notes 451–54.

547. See Homer S. Cummings Papers, Box 135 (on file with the Special Collections, University of Virginia Library).

548. See Letter from Homer S. Cummings, U.S. Attorney General, to Frank Murphy, Governor-Gen. of the Phil. (Aug. 22, 1933) (on file with the Bentley Historical Library, University of Michigan).

549. See Letter from Frank Murphy, Governor-Gen. of the Phil., to Homer S. Cummings, U.S. Attorney Gen. (Apr. 2, 1934) (on file with the Special Collections, University of Virginia Library).

550. See Letter from Frank Murphy, Governor-Gen. of the Phil. to Homer S. Cummings, U.S. Attorney Gen. (May 14, 1935) (on file with the Special Collections, University of Virginia Library). (thanking Cummings and his wife for “the thoughtful hospitality of [their] home”).

551. See generally U.S. Attorney General Homer S. Cummings, Address at the Book-Cadillac Hotel (Oct. 27, 1936) (discussing Murphy’s achievements and leadership).

same day Murphy interceded with Roosevelt on behalf of Chebatoris—Murphy and Cummings sat together at ringside.⁵⁵²

At the same time, Murphy also needed to stay on Cummings's good side if he wanted one particular federal appointment that was a continuing possibility in 1937 and 1938: Justice of the Supreme Court.⁵⁵³ During that time, three Justices—Willis Van Devanter, George Sutherland, and Benjamin Cardozo—retired or died.⁵⁵⁴ Each time, Murphy was mentioned as a potential replacement.⁵⁵⁵ A Justice Department memo identifies Murphy as among twenty-four potential nominees as early as May 29, 1937, several days before Van Devanter retired.⁵⁵⁶ A memo drafted in August to Cummings from his underling, Joseph Keenan, continued to identify Murphy as a potential replacement for Van Devanter.⁵⁵⁷ A similar memo, dated Aug. 3, 1937, appears to have been prepared for Roosevelt, and it contains Murphy's name as well as fifty-four others.⁵⁵⁸ Lest one think that Murphy's placement as the fifth from last on a lengthy list suggests that his nomination was not seriously considered at the time, the last fourteen names on the list include six eventual appointees: Hugo Black, Felix Frankfurter, Robert H. Jackson, Sherman Minton, Stanley Reed, and Murphy.⁵⁵⁹

552. See, e.g., DAILY MIRROR, June 23, 1938, at 20–21 (showing a photo of Murphy and Cummings seated together at fight); Diary entry of Homer S. Cummings, U.S. Attorney Gen. (June 22, 1938) (on file with author); Letter from Gene Tunney, Am. Prof'l Boxer, to Homer S. Cummings, U.S. Attorney Gen. (June 15, 1938) (on file with author). Sitting on the other side of Murphy was former heavyweight boxing champion Gene Tunney, who was also good friends with Cummings. See, e.g., Invoice to Homer S. Cummings, U.S. Attorney Gen. (June 17, 1937) (on file with author) (listing four cases of liquor sent by Tunney to Cummings); Letter from Gene Tunney, Am. Prof'l Boxer, to Homer S. Cummings, U.S. Attorney Gen. (May 25, 1936) (on file with author) (inviting Cummings to the first Louis/Schmelling fight); Letter from Gene Tunney, Am. Prof'l Boxer, to Homer S. Cummings, U.S. Attorney Gen. (June 8, 1936) (on file with the Special Collections, University of Virginia Library) (indicating that Tunney acted as Cummings's alternate at Democratic National Convention that year).

553. See THE NEW DEAL YEARS, *supra* note 21, at 527.

554. Justice Van Devanter retired on June 2, 1937, Justice Sutherland retired on January 17, 1938, and Justice Cardozo died on July 9, 1938. See THE NEW DEAL YEARS, *supra* note 21, at 527; *Willis Van Devanter, 1911-1937*, SUP. CT. HIST. SOC'Y, https://supremecourthis-tory.org/timeline_devanter.html (last visited May 20, 2020).

555. See THE NEW DEAL YEARS, *supra* note 21, at 527.

556. See Justice Dep't Memorandum (May 29, 1937) (on file with the Special Collections, University of Virginia Library). Although the memo contains forty-seven names, twenty-three are crossed off. It is unclear who crossed them off and when.

557. See Memorandum from Joseph Keenan to Homer S. Cummings, U.S. Attorney Gen. (Aug. 12, 1937) (on file with the Special Collections, University of Virginia Library).

558. See Memorandum in re Supreme Court 2 (Aug. 3, 1937) (on file with author).

559. See *id.*; *Supreme Court Nominations (Present-1789)*, SENATE.GOV, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited May 20, 2020).

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Judicial nominees, particularly to the Supreme Court, obviously had to pass a litmus test: unconditional support for the New Deal. Memos in Cummings's files indicate that he closely followed the positions taken in cases challenging the New Deal by appellate judges who were potential Supreme Court nominees. An August 9, 1937 memo from Cummings to Roosevelt discusses Judges Hucheson and Sibley of the Fifth Circuit, both of whom appeared on a list of potential nominees drawn up six days earlier.⁵⁶⁰ A similar memo two days later to Cummings from an unknown source discusses Court of Appeals Judge Evans, and district judges Stone and Pollard, all of whom appear on the same list.⁵⁶¹ Indeed, even potential nominees to district court judgeships underwent some scrutiny regarding their fealty for the New Deal. For example, a memo from Roosevelt to Cummings on June 4, 1937, indicates concerns regarding Congressman Frank Kloeb of Ohio, a prospect for a district court judgeship.⁵⁶² The memo indicates that Kloeb "[s]aid something against [the] Court Plan but not violent," and that Roosevelt wished to discuss the matter with Cummings.⁵⁶³ Roosevelt apparently was satisfied with Kloeb's loyalty, and Kloeb was nominated for the judgeship two weeks later.⁵⁶⁴

Even after Black was appointed to fill Van Devanter's seat, Murphy's name was bandied about in the press as a likely nominee for the next open seat.⁵⁶⁵ The day after Sutherland announced his retirement, Murphy's name popped up again as "perhaps as close a prototype to [President] Roosevelt as there is in the country."⁵⁶⁶ And the day after Cardozo passed – two days after Chebatoris's execution—one media source named Murphy as one of seven potential appointees.⁵⁶⁷

Of course, Murphy was passed over again and was instead later appointed to succeed Cummings as Attorney General.⁵⁶⁸ After Justice Pierce Butler died in late 1939, Attorney General Murphy sent to

560. See Memorandum from Homer S. Cummings, U.S. Attorney Gen., to Franklin D. Roosevelt, President of the U.S. (Aug. 9, 1937) (on file with the Special Collections, University of Virginia Library).

561. See Memorandum from Anonymous, to Homer S. Cummings, U.S. Attorney Gen. (Aug. 11, 1937) (on file with the Special Collections, University of Virginia Library).

562. See Memorandum from Franklin D. Roosevelt, President of the U.S., to Homer S. Cummings, U.S. Attorney Gen. (June 4, 1937) (on file with author).

563. See *id.*

564. See BICENTENNIAL COMM. OF THE JUDICIAL CONFERENCE OF THE U.S., HISTORY OF THE SIXTH CIRCUIT: A BICENTENNIAL PROJECT 155 (1976).

565. See, e.g., Paul Mallon, *Murphy Chances in 1940 Slim*, DETROIT TIMES, Nov. 4, 1937.

566. Blair Moody, *Court Vacancy Puts Problem to Roosevelt*, DETROIT NEWS, Jan. 6, 1938.

567. See International News Service, *Murphy May Be Selected*, HERALD, July 10, 1938.

568. See HOWARD, *supra* note 435, at 180–81.

Roosevelt a list of fourteen potential nominees.⁵⁶⁹ In an accompanying letter, Murphy described one characteristic of the ideal candidate in these terms: “A liberal and open mind with respect to problems of government in a modern democratic society, coupled with an intelligent understanding of its structure and essential relationships and a profound faith in democratic principles.”⁵⁷⁰ In subtly spelling out support for the New Deal as a job requirement, Murphy perhaps was hinting, even if subconsciously, at his own qualifications. Intended or not, Roosevelt took the hint and nominated Frank Murphy four weeks later to be the 80th Justice of the U.S. Supreme Court.⁵⁷¹

Murphy’s response to the Chebatoris execution contrasts with his conduct in a similar matter in 1943, once Murphy was safely ensconced in a job featuring lifetime tenure. Max Stephan, a Detroit restaurateur, had been convicted the previous year of treason, prosecuted by John Lehr in a trial presided over by Judge Tuttle in the U.S. District Court for the Eastern District of Michigan.⁵⁷² His crime was assisting a captured Nazi pilot escape from a Canadian POW camp.⁵⁷³ Judge Tuttle sentenced him to hang.⁵⁷⁴

As the July 2, 1943 execution date approached, a number of people urged Roosevelt to commute Stephan’s sentence.⁵⁷⁵ One of them was Justice Murphy.⁵⁷⁶ According to the Senate chaplain at the time, Murphy “made a strong representation to the President in favor of clemency.”⁵⁷⁷ Sidney Fine agreed that “Murphy . . . interceded with President Roosevelt to save Stephan from the gallows.”⁵⁷⁸ Stephan’s attorney stated that Murphy had been “of inestimable aid . . . and . . . ha[d] done much more than one would expect of a man in such a high place.”⁵⁷⁹ Murphy in fact “pleaded for commutation” to Roosevelt a number of times in the weeks leading up to the scheduled execution.⁵⁸⁰ For a sitting Supreme Court

569. See Letter from Frank Murphy, U.S. Attorney Gen., to Franklin D. Roosevelt, President of the U.S. 3 (Dec. 9, 1939) (on file with author).

570. *Id.* at 1.

571. See *Supreme Court Nominations (Present-1789)*, *supra* note 561.

572. See JAMES R. WILSON, NO ORDINARY CRIME: AN AUTHENTIC TALE OF JUSTICE INFLUENCED BY WAR HYSTERIA 103–40 (1989); JOHN SASE, PETER KRUG & MAX STEPHAN: NAZIS, ESPIONAGE, AND TREASON IN DETROIT 63 (2017).

573. See SASE, *supra* note 574, at 35, 43; WILSON, *supra* note 574, at 112, 119.

574. See SASE, *supra* note 574, at 63; WILSON, *supra* note 574, at 149.

575. See WILSON, *supra* note 574, at 174–78.

576. See *id.* at 178.

577. See *id.* at 213.

578. THE WASHINGTON YEARS, *supra* note 38, at 406.

579. *Id.*

580. See WILSON, *supra* note 574, at 178.

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Justice, who could potentially hear a last minute appeal by Stephan, to take such actions would be nearly unthinkable today. In any event, based on his and other pleas, Roosevelt commuted Stephan's sentence to life imprisonment eight hours before the execution was to take place.⁵⁸¹

In the end, Murphy's conduct in the Chebatoris matter was perhaps exemplary of two competing aspects of his character, as identified by Fine. On the one hand, "he was influenced by conscience, idealism, religion, and a genuine compassion for the less fortunate among God's creatures."⁵⁸² But on the other hand, these more positive qualities were put in service of his outsized ego and ambitions: "Murphy was an egocentric individual who had enormous confidence in himself and a profound belief in his own destiny. Although Murphy was entirely sincere in his desire to aid his fellowman, *Fortune* shrewdly observed that this 'desire' was 'bound up with a psychological need for personal aggrandizement.'"⁵⁸³

CONCLUSION

*"It is the sort of thing which may some day serve as a precedent. It is the sort of thing which may be examined and scrutinized and criticized by someone."*⁵⁸⁴

Anthony Chebatoris remained until just a few months ago the only person in the 230-year history of the Republic ever to be executed by the federal government for a crime committed in a non-death-penalty State.⁵⁸⁵ In that respect, the *Chebatoris* case remained unique for eighty-two years. Yet, since 1993, it has silently "serve[d] as a precedent[.]" as Judge Tuttle presciently predicted, for eighty cases in which a notice of intent to seek the death penalty has been filed by the federal government for crimes committed in non-death States.⁵⁸⁶ In one sense, Chebatoris seems like a novelty only because his fate was sealed on the cusp of a dramatic reinvention of the federal government. On this view, the expansiveness of the federal government today seems commonplace and any

581. See THE WASHINGTON YEARS, *supra* note 38, at 406.

582. THE NEW DEAL YEARS, *supra* note 21, at 288.

583. *Id.*

584. Letter from Arthur J. Tuttle, U.S. Dist. Court Judge, E. Dist. of Mich., to John C. Lehr, U.S. Attorney, E. Dist. of Mich. 1 (Feb. 10, 1938) (on file with the Bentley Historical Library, University of Michigan).

585. See Warden & Lennard, *supra* note 6, at 230.

586. See Letter from Arthur J. Tuttle, U.S. District Court Judge, E. Dist. of Mich., to John C. Lehr, U.S. Attorney, E. Dist. of Mich. 1 (Feb. 10, 1938) (on file with the Bentley Historical Library, University of Michigan); Michael J. Zydney Mannheimer, *The Coming Federalism Battle in the War over the Death Penalty*, 70 ARK. L. REV. 309, 315 (2017).

federalism arguments in such a case seem quaint. Indeed, when Dustin Honken was executed by the federal government on July 17, 2020, for a crime committed in Iowa, the relative novelty of this event was utterly ignored,⁵⁸⁷ and his attorneys made no federalism arguments to prevent his execution.⁵⁸⁸

But on another view, *Chebatoris* is something of an exception that proves the rule. Despite the expansion of the federal government, not another similarly situated defendant was sentenced to death until 2002, sixty-five years later.⁵⁸⁹ And none had been executed until just months ago. Ironically, this return of the strange specter of the federal death penalty in non-death States coincides with a serious re-thinking by scholars and judges of the constitutional structure wrought by the New Deal cases.⁵⁹⁰ Perhaps, then, *Chebatoris* remains an object lesson, an exception to a virtually unbroken 230-year tradition by which the federal government has respected the choice of a State that rejects capital punishment.

587. See, e.g., Hailey Fuchs, *For Third Time This Week, the Federal Government Carries Out an Execution*, N.Y. Times, July 17, 2020 (noting only, in the third paragraph from the bottom, that “Mr. Honken was the first Iowa inmate to be put to death since 1963; the state abolished capital punishment two years later.”).

588. Honken’s co-defendant, Angela Johnson, had unsuccessfully made those arguments in the district court. See *United States v. Johnson*, 900 F.Supp.2d 949, 961-63 (N.D. Iowa 2012).

589. See *Mannheimer*, *supra* note 588, at 309.

590. See, e.g., *Gamble v. United States*, 139 S.Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring) (“[I]t seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court’s incorrect interpretation of the Commerce Clause and is thus an incursion into the States’ general criminal jurisdiction and an imposition on the People’s liberty.”).