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Uncovering the Legislative Histories of the Early Mail Fraud Statutes: The Origin of Federal Auxiliary Crimes Jurisdiction

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UNCOVERING THE LEGISLATIVE HISTORIES OF THE EARLY MAIL FRAUD STATUTES: THE ORIGIN OF FEDERAL AUXILIARY CRIMES JURISDICTION

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Abstract

The federal crime of mail fraud is generally viewed as the original federal auxiliary jurisdiction crime, that is, a crime that does not protect direct federal interests against harm. Rather, it functions as an auxiliary to state crime enforcement. In the almost 150 years since Congress enacted the mail fraud statute, federal auxiliary crimes have proliferated and have become the most important part of federal criminal jurisdiction—so that, today, they largely duplicate state crimes. It is important to know how this form of federal criminal jurisdiction originated.

Mail fraud is a crime that scholars, judges, and lawyers have viewed as having almost no legislative histories linked to its original enactment in 1872 and its two revisions in 1889 and 1909. The details of its origins have remained generally unknown.

This paper breaks new ground by uncovering a rich set of legislative history details related to each of those three early statutes. Inter alia, these legislative history materials reveal that the original mail fraud provision might not have been drafted and enacted except for the fortuitous timing of the addition of a criminal penalty to a closely related statute. It also explains how mail fraud came to be the original federal auxiliary jurisdiction crime; that was not the original intention.

I. INTRODUCTION

In 1948, Professor Louis B. Schwartz published a landmark article on the federal criminal system.[1] His paper emphasized a category of federal crimes that he termed "Federal Criminal Jurisdiction Auxiliary to State Enforcement"—that is, crimes whose primary purpose was *not* federal self-defensive criminal jurisdiction (i.e., protection of federal money, property, personnel, or other direct federal interests). Rather, federal auxiliary crimes involved enlisting "federal power in the battle against [conduct typically prosecuted under state law such as] obscenity,

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[1] L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 L. & CONTEMP. PROBS. 64 (1948).

lotteries, theft, alcoholism, and prostitution . . . ."[2] Today, the number and content of such federal crimes have grown to the point that federal auxiliary crimes, to a significant extent, overlap with traditional state criminal codes.[3]

Scholars who study federal criminal law and judges who decide federal criminal cases have uniformly concluded that the original federal auxiliary crime was mail fraud.[4] Congress enacted the first statute criminalizing mail fraud in 1872.[5]

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[2] *Id.* The criminal categories are instructive. All of them are kinds of criminal activities that the late 19th to early 20th century moral crusaders targeted. Later in this Article, we shall see some evidence of the influence of a prominent moral crusader directly on the legislative process in Congress relating to our subject matter. While determining the overall influence of the Victorian Age moral crusaders on the development of early federal crimes is not the subject matter of this paper, it is a topic worth pursuing. This Article calls attention to signs of their influence where it seems appropriate to do so.

[3] Another paper that provides important background for this study is an article on the mail fraud statute and its early history written forty years ago, in 1980, by Jed S. Rakoff who currently is a United States District Court Judge. *See* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980). One is hard-pressed to improve upon the excellence of Judge Rakoff's basic analysis. With the assistance of executive and legislative branch materials, however, many of which were not available at the time, important additions can be made to this early legislative story that provide insights and increase our understanding of this important piece of federal legal history.

[4] *See generally* N. Abrams, *Consultants Report on Jurisdiction: Chapter 2*, *in* WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS VOLUME I 33, 34 (U.S. Government Printing Office ed., 1968) (providing the historical development of federal auxiliary crime); *see also* 18 U.S.C. § 1341 (citing the current version of the mail fraud statute).

[5] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 288, 323 (current version at 18 U.S.C. § 1341). *See, e.g.*, Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. ON LEGIS. 153, 158 n.12 (1994) ("[L]aw marked the first use by Congress of its postal authority to criminalize conduct that posed no obvious threat to a federal interest.") (citing Symposium, *Federalism and the Scope of the Federal Criminal Law*, 26 AM. CRIM. L. REV. 1737, 1738 (1989)).

It might be suggested that there are other candidates for the title of the original federal auxiliary offenses—namely, the federal offenses of conspiring "either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever . . . ." Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 471, at 484 (current version at 18 U.S.C. § 1341). These two offenses first became law in Section 30, five years before the 1872 enactment of the mail fraud provision. *See id.* But the question is whether they have the character of federal auxiliary offenses or are better viewed as federal self-defensive crimes. On several grounds, the latter characterization is more apt. Section 30 was a provision in an act that was a set of revenue laws dealing with revenue matters in all its other provisions. Section 30 described an offense consisting of a conspiracy *to defraud the United States* in one of its clauses. Whether or not designed to protect the revenues of the U.S., by its terms, this clause was intended to be protective of the federal government against fraud and thus fairly described as a federal self-defensive offense. *See id;* U.S. v. Hirsch, 100 U.S. 33, 34 (1879) (noting that Section 30 was "intended solely for the protection of the revenue arising from customs . . . ."). What about basing the earliest auxiliary offense argument on the

Most scholars have also observed that, with the exception of one general statement made during the relevant congressional debates,[6] there is no legislative history available that provides useful details about the origins of the 1872 mail fraud statute,[7] nor about the two revisions that occurred in 1889[8] and 1909.[9]

Contrary to these observations, this paper uncovers a rich legislative history linked to the original mail fraud statute. That history makes clear a conclusion that scholars and judges had not previously drawn[10]—that the mail fraud statute, as originally drafted, was mainly intended to be a federal self-defensive statute.[11] Legislators designed the statute primarily to protect against harms to a direct federal interest: the postal system and the post office establishment. It was only in 1909, almost forty years after its original enactment, that Congress stripped out the language in the statute that incorporated its harms-to-the-mails features, and only then did mail fraud truly become the first pure federal auxiliary crime.[12]

The statute underwent important amendments in its 1889 revision[13] and was pared down in the 1909 revision.[14] This Article describes and closely examines the

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conspiracy to commit an offense against the United States clause of Section 30? Whether a crime charged under this clause could be described as auxiliary to state enforcement systems or federal self-defensive would seem to depend on the nature of the offense against the United States that was the object of the particular conspiracy. At the time this conspiracy provision was enacted, however, there were no other federal auxiliary crimes on the statute books.

[6] *See, e.g.*, Peter R. Ezersky, *Intra-corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427, 1428 n.3 (1985) ("The bill's sponsor stated that the provision was necessary 'to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleeing the innocent people in the country.'") (citing CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth)). A detailed treatment of this portion of the congressional debates is presented below. *See* discussion *infra* Part II. *See also* Bettman v. United States, 224 F. 819, 823 (6th Cir. 1915) (discussing the legislative history).

[7] *See* Rakoff, *supra* note 3, at 779 ("In view of the novelty and breadth of this section, it is surprising that it generated no congressional debate or other legislative history explaining its origins and purpose."). *See also* Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 225 (1992) ("The crime of mail fraud emanates from an 1872 recodification of the Postal Act. The initiation of this criminal offense generated no congressional debate and therefore no legislative history.").

[8] *See, e.g.*, Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute,* 36 B.C. L. REV. 435, 445 (1995) ("There is no legislative history for the [1889] amendment . . . .").

[9] Regarding the 1909 amendment of the mail fraud statute, *see* Rakoff, *supra* note 3, at 816 n.205 ("[A]gain, there is virtually no direct legislative history that might otherwise serve to manifest the legislative purpose.").

[10] *See, e.g.*, *id.* at 779 ("[I]t is surprising that [the original Mail Fraud Statute] generated no congressional debate or other legislative history explaining its origins and purpose.").

[11] *See* Henning, *supra* note 8, at 437. *See also* Section II.A.2.

[12] *See also* Section IV.B.

[13] *See* Henning, *supra* note 8, at 445.

[14] *Id.* at 447–48; Rakoff, *supra* note 3, at 816–21.

executive and legislative branch documents and actions that were behind the complex story of the 1872 enactment.[15] It then recounts the direct legislative history relating to the two subsequent revisions of the statute, including the last one, which stripped the federal self-defensive language from the statute.[16]

Converting the mail fraud statute, which was drafted primarily as a federal self-defense offense, into an authentic federal auxiliary jurisdiction offense can be viewed as a significant historic legislative change. Strikingly, there is no evidence that Congress appreciated the importance of this transformation at the time it occurred. This change, however, turned out to have major, long-term consequences. It enabled the crime of mail fraud to be used to prosecute conduct far removed from typical fraud and to become the wellspring of federal crimes that were purely auxiliary to state criminal enforcement. Congress subsequently enacted many such offenses in different forms.

The conclusion reached by many scholars and judges that there are no significant legislative history materials that explain the origins of the early mail fraud statutes is in part based on the paucity of substantive legislative history sources *directly* related to the original mail fraud statute (i.e., legislative committee reports, committee hearings, etc.). The fact is, however, that one can deduce a great deal about how the original mail fraud offense came to be legislated by piecing together and drawing inferences from a trove of closely related executive and legislative source materials that came out of the period leading up to, and immediately before and after, the introduction of the original mail fraud bill. There is also more to be learned from the congressional debates alluded to above that prior treatments have overlooked. Together, all these materials provide a rich and compelling explanation framing the origins of Section 301—the mail fraud statute—as enacted by Congress on June 8, 1872.[17] This story, with the explanation presented here, has not previously been told.

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[15] *See* Henning, *supra* note 8, at 442; Rakoff, *supra* note 3, at 779–86.

[16] *See* Henning, *supra* note 8, at 447–48; *see, e.g.*, Rakoff, *supra* note 3 (detailing the revisions of the mail fraud statute in both 1889 and 1909).

[17] Many of the documentary sources that bear on the original mail fraud bill have been available for some years; they have not been hidden. Strangely, some of them have hardly ever been taken note of in scholarly works or judicial opinions. While some have been alluded to by scholars, they have not been addressed in detail. *See, e.g.*, DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 55–57 (1977); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990) (discussing the broad application of the mail fraud statute). An example of such a document is: JOSEPH H. BLACKFAN, C. F. MACDONALD & JOSEPH A. WARE, REPORT OF THE COMMITTEE APPOINTED BY THE POSTMASTER GENERAL TO EXAMINE AND REVISE THE POSTAL CODE, CONG. COMM'N (1870) [hereinafter PMG COMMITTEE REPORT] (cited in the Brief for the Petitioner at 19, Fasulo v. United States, 272 U.S. 629 (1926) and referred to in Williams, *supra*, at 140 n.24). Another key document which has been almost entirely overlooked by scholars is the 1866 letter from the Solicitor of the Post Office Department, which was mentioned briefly in an article dealing with gambling, not

The paper is divided into Parts. Part II begins with a detailed analysis of Section 301 and then reviews a series of documents, statutory materials, and congressional debates that tell the story of the original version of the mail fraud statute. It also includes a brief treatment of relevant case law between 1872 and 1889. Part III initially analyzes the language of the 1889 revision of the mail fraud statute and then focuses on the immediate legislative history leading up to the enactment of that revision. Part IV reviews the language of the 1909 revision of the statute and details the legislative history related to that revision.

II. SECTION 301 AND RELATED EXECUTIVE AND LEGISLATIVE DOCUMENTS AND ENACTMENTS

A. Introduction

This Part examines the original text of Section 301 and then presents a series of interrelated documents and legislative materials that explain how the mail fraud provision came to be drafted. These documents and materials include: (1) a Post Office Department letter written in 1866 by the Solicitor of the Post Office Department (with accompanying documents);[18] (2) a statutory provision enacted in 1868—likely to have been in response to the 1866 Post Office Department letter;[19] (3) an excerpt from a March 30, 1870 Report of a committee appointed by the Postmaster General commenting on draft Post Office legislation prepared by a statutorily authorized Congressional Commission;[20] (4) a postal code legislative package that was introduced into Congress in June 1870[21] shortly after the March Report of the Postmaster General's Committee; (5) Congressional debates from December 1870 regarding certain provisions of the H.R. 2295 postal code package;[22] and (6) a couple of provisions[23] from the postal code legislative package, in addition to the mail fraud provision finally enacted in June 1872.[24]

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mail fraud. JOSEPH A. WARE, LETTER OF THE SOLICITOR OF THE POST OFFICE DEPARTMENT, S. MISC. DOC. NO. 39-57, at 1–3 (1st Sess. 1866); *see* G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 931 at n.25 (1978). Some scholars have made general observations about the history of the mail fraud statute, but they have not examined or analyzed these key documents. *See, e.g.*, Ezersky, *supra* note 6, at 1427 ("Mail/wire fraud law has evolved from its origins as an antidote to 'lottery swindles.'").

[18] WARE, *supra* note 17. This document includes two accompanying items. *See infra* note 39 and accompanying text.

[19] Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194.

[20] PMG COMMITTEE REPORT, *supra* note 17.

[21] H.R. 2295, 41st Cong. (June 24, 1870).

[22] CONG. GLOBE, 41st Cong., 3d Sess. 30–37 (1870).

[23] H.R. 2295, 41st Cong. §§ 149 & 300 (June 24, 1870).

[24] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 288, 323 (current version at 18 U.S.C. §1341).

The tale reflected in the foregoing documents is complex, reads almost like a detective story, and is worth telling.

1. Section 301 Enacted on June 8, 1872: The Original Mail Fraud Provision

We begin with an analysis of the language and elements of the mail fraud statute, as enacted in June 1872.[25]

A close examination of the language of the provision helps provide a better understanding of its structural features and purposes and how it compares with traditional criminal statutes. An examination of its language—when viewed together with executive and legislative documents discussed below—also sheds light on the origins of this provision.

The mail fraud provision, as originally enacted by Congress, reads as follows:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or[26] be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offences to the number of three, when committed within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.[27]

The extended verbiage of Section 301 in its original form appears to describe a crime consisting of three essential elements. First, the mens rea language in Section 301 is framed as: "having devised . . . any scheme . . . to defraud . . . [to] be effected

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[25] *Id.*

[26] The original statute contained a typographical error—the word "or" should have been "to," and the typo was subsequently corrected. Other minor, non-substantive changes were made, particularly to the penalty language at the end of the section, when Section 301 was incorporated into the Revised Statutes as Section 5480.

[27] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 288, 323.

by . . . opening[28] . . . or intending to open correspondence . . . with any other person . . . by means of the post office establishment . . . ."[29]

The mens rea of the offense is thus complex. It translates into planning to defraud someone, and part of the plan is to open correspondence with another person. Several things are noteworthy in describing this element of the offense. First, this portion of the mens rea element is cast not in terms of the usual limited mental state terminology such as knowing, intending, etc. Rather, it is described as devising a scheme to defraud, i.e., developing a plan to defraud someone. Planning implies a more complex and extended mental state than simply intending a simple act, and certain aspects of the requisite plan are spelled out in the statute. Thus, the planned fraud must contemplate the use of the mails, but that aspect is framed in terms of opening correspondence with someone by means of the post office establishment. While it is not expressly stated, in most, if not all, contexts, this correspondence would be likely to be between the perpetrator and their victim(s), and thus, the correspondence to be opened would likely be a significant and central part of the scheme.[30]

Interestingly, the mens rea language does not require that the correspondence actually be opened; rather, it states that it need only "to be effected by either opening or intending to open correspondence . . . ."[31] Up to this point, the statute deals with mental activity that need not have been realized through any conduct or actus reus component of the offense—that is, inchoate conduct.

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[28] Insofar as the scheme devised was to be affected by opening correspondence, it contemplated planning to do something in the future, which only required something planned, not something accomplished. Adding "or intending to open correspondence" highlights the inchoate nature of the scheme; it is not necessary that the opening of correspondence be accomplished for criminal liability to attach. *Id.*

[29] *Id.*

[30] The significance of this statutory language as bearing on the necessary relationship of the use of mails to the fraudulent scheme was taken note of by some courts. *See, e.g.*, United States v. Mitchell, 36 Fed. 492, 493 (W.D. Pa.1888) ("A careful study of the language employed has convinced me that it was not intended that this section should embrace every case where a letter promotive of, or connected with, a fraudulent design, may be sent through the post-office by the person engaged in or contemplating the fraud. As was said in Brand v. U.S., 4 Fed.Rep. 395, the scheme to defraud within the meaning of said section is one which is to be effected by the deviser of it opening a correspondence by mail, or by inciting some one else to open such correspondence with him. To constitute the statutory offense, then, something more is necessary than the mere sending through the mail of a letter forming part, or designed to aid in the perpetration, of a fraud. The scope of the section was considered in U.S. v. Owens, 17 Fed. Rep. 72, 74, by Judge Treat, who said: 'It appears to the court that the act was designed to strike at common schemes of fraud, whereby, through the post-office, circulars, etc., are distributed, generally to entrap and defraud the unwary; and not the supervision of commercial correspondence solely between a debtor and creditor.'"). Note that in *Owens*, the court highlights frauds that involve sending circulars through the mails, that is, large-scale mailings seeking victims from among the public at large. *United States v. Owens*, 17 Fed. Rep. 72, 74 (E.D. Mo.1883).

[31] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 288, 323.

The actus reus component is fulfilled by the requirement in the statute that the person to be charged have "for executing the scheme . . . placed a letter or packet in any post office."[32] Despite having set up a complex mental state requirement—the devising of a scheme—the statute here requires a more traditional specific mens rea and actus reus, that is, for purposes of executing the scheme, the accused deposits a letter in the post office. In other words, the accused must have the purpose of furthering the scheme when they deposit a letter in the mails.

Up to this point, the statute has described a mens rea and an actus reus. Most criminal statutes stop there. What makes this statute especially unusual is what comes next in its provisions. There is a clause that indicates that by engaging in the aforesaid conduct with the aforesaid mens rea, the perpetrator would be "so misusing the post-office establishment."[33] The notion that the previously described elements of the offense involve a misuse of—that is, cause harm to—the post office establishment is initially introduced into the offense through this clause. This notion that the offense is aimed at addressing real harms to the post office establishment is further reinforced by the final sentence in Section 301, which instructs the judge in sentencing a person convicted of this offense to "proportion the punishment, especially to the degree to which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."[34]

Including the opening of correspondence as an element of the planned scheme seems intended to ensure that the use of the mails is a central element in the scheme. Combining that with language that speaks of misuse of the post office establishment and adding to it the final provision relating to the proportioning of punishment[35] seems to strongly indicate that the drafters conceived of this offense as one aimed at protecting the post office against the harms caused to it by fraud schemes (rather than thinking of it only as fraud that happened to be perpetrated through the mails).

Further confirmation of this view can be found in the facts noted above: the fraud feature of the offense is only found in the mens rea element, and the statute does not require a completed fraud to impose criminal liability (only the devising of a scheme to defraud). With respect to the fraud element, the crime is only required

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] It is worth noting that this is a very early version of a sentencing guideline. The seeming indeterminate nature of the inquiry by the judge under the proportionate punishment provision led Rakoff to conclude as follows:

> The only plausible reason for including such an ambiguous, abstract and amoral provision, which would appear to be wholly unamenable to principled application and unlikely ever to be given effect, was to demonstrate a concern with "abuse" of the mail, and thus to make it less likely that the statute would be struck down as an unconstitutional extension of federal jurisdiction over ordinary fraud.

Rakoff, *supra* note 3, at 785.

to be the rough equivalent of an attempt, inchoate with respect to the harm involved in the fraud.

Drafting a statute in this form and making the criminality of the offense so heavily dependent on the mental state of the actor (i.e., their subjective state of mind at the time the crime was allegedly committed) was unusual in this relatively early period of the development of the criminal law in the United States. If the main goal were to create a crime that protected the mails against the harms that could be caused by frauds involving the use of the mails, the actual perpetration of the fraud would be less significant than the acts that would cause harm to the mails. In this context, it should not be a surprise that the perpetration of the fraud need not have occurred for the crime to be committed.

Finally, if there were still any doubt about the conclusion that the drafters intended Section 301 to be primarily a federal self-defensive offense aimed at protecting an important federal institution, confirmation can be found in the descriptive note in the margin of the original enactment of Section 301 which provided: "Penalty for misusing the post-office establishment, by opening, &c., correspondence with intent to defraud, and placing, &c., letter in post-office."[36]

Based on the last sentence in Section 301, it would seem that the drafters assumed that different schemes to defraud might have a differentially harmful impact on the post office and the operation of the mails: the judge was supposed to take those differences in harm into account when determining the punishment within the statutory maximum. The different types of harms that the judge might weigh in sentencing are discussed, infra in Section II.A.2.d.

A lurking concern remains, however. The typical federal self-defensive offense establishes its character by including in the actus reus of the offense aspects of the harms to the specific federal interest. But here, the direct protection against harms to the Post Office Department is introduced indirectly—in the process of sentencing by the judge. This approach does not ensure that before this offense can be committed actual harms must have been caused to the post office establishment.

2. The 1866 Post Office Department Letter

(a) Introduction

We turn now to consider a series of different sources that, together, help explain the drafting of the original mail fraud provision. A letter dealing with lottery fraud dated February 16, 1866,[37] not previously considered by anyone concerned with the history of Section 301, was written in support of a proposed bill, S. 148[38] by the Solicitor of the Post Office Department, Joseph A. Ware—an important character in this tale. Mr. Ware sent the letter in question to the Postmaster General who endorsed

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[36] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 288, 323.

[37] *See* WARE, *supra* note 17.

[38] S. 148, 39th Cong. (1866). *See infra* note 45 for a description of this bill.

it. It was then sent to the Senate for printing and referral to the Committee on the Post Office and Post Roads.[39]

In 1868, a provision was enacted, Section 13, as part of a postal laws revision that dealt with lotteries (but not expressly dealing with lottery fraud, which is the subject of the 1866 letter).[40] Given its subject matter and timing, however, it would appear to have been in at least partial response to the 1866 letter. It also constitutes an important transitional provision that, as we shall see, ultimately played a key role in the development of Section 301. This 1868 statutory provision is discussed in the next section.

The 1866 letter is an especially important document in the history of Section 301. Together with some additional documents discussed below, we learn several different things: e.g., the likely originally perceived need for the federal crime of mail fraud and an explanation for the harms-to-the-post-office-establishment language contained in the original mail fraud provision.

Importantly, this letter, plus other documents to be discussed below, support the notion that the federal mail fraud crime likely had its origin in concerns about mass-mailings-to-the-public-lottery-frauds and other similar mass-mailing swindles. Also, as we shall see below, the kind of harms to the post office establishment caused through the perpetration of lottery frauds that are described in detail in the 1866 letter help explain the original purpose of, and language in, the mail fraud provision that refers to the misuse of the post office and proportioning the punishment. One cannot read this letter without realizing that the primary motivation for writing the letter and the drafting of implementing legislation[41] was to protect the mails and the post office establishment from the type of harms that are described in the letter.

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[39] *See* WARE, *supra* note 17. The letter was accompanied by a legal opinion that had been written immediately prior to the onset of the Civil War by the then-Attorney General and concerned a different but related issue. *See* Fraudulent Lottery and Gift Enterprises, Op. Att'y Gen. (July 24, 1860) (containing an opinion from Attorney General Black explaining the circumstances when the Post Office Department can order the non-delivery of letters due to fraud). Because of the war, this opinion probably languished in a drawer for a half dozen years, only to be retrieved and used in connection with the 1866 letter. The opinion addressed a question posed by an actual instance, whether the Postmaster General could authorize non-delivery and sending letters addressed to fictitious persons to the dead letter office. The Attorney General opined that the Postmaster General had such inherent authority if the letter was sent with an intent to defraud. The first section of S. 148, 39th Cong. (1866), the bill that accompanied the Solicitor's 1866 letter, would have expressly incorporated into statutory law the Postmaster General's authority to do so.

[40] *See* WARE, *supra* note 17; Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194. Insofar as this statute made unlawful the mailing of lottery materials, it would also cover lottery fraud materials.

[41] In this instance, the proposed implementing legislation was not the familiar mail fraud statute. Instead, the legislation was S. 148, which was aimed at lottery fraud-type crimes through narrowly crafted statutory language. *See infra* note 45 and accompanying text.

(b) Contents of the 1866 Letter

The following excerpts from the 1866 letter provide its general tenor and substance:

> Sir: I desire to call your attention to the necessity of further legislation in regard to fraudulent "lottery" and "gift enterprises"[42] schemes which are carried on, advertised, and made successful by using the mails of the United States.[43]
>
> It is not the business of the Post Office Department to detect and pursue all dishonest transactions of this character, but many cases have been brought to my notice where persons have prostituted the mail service to purposes of fraud and have so ingeniously arranged their schemes that the victims cast the entire odium of their losses on the Post Office Department . . . .
>
> . . . [B]y appropriate legislation by Congress giving certain powers to the Postmaster General . . . the officers of the government will be relieved from the accusations of defalcation and theft which are now daily brought against them.
>
> I wish now to call your attention to a few cases . . . which will explain my ideas more fully.
>
> A certain firm in New York obtains names of persons living in the rural districts . . . and sends through the mail circulars of a "gift enterprise" scheme which is notoriously fraudulent. They receive, in answer to these circulars, a large amount of money every day. Whenever complaint is made of the loss of money, they say either that they have never received the money or they have mailed the promised package. Thus, they place the whole blame on the Post Office Department . . . .
>
> . . . [T]he persons who are swindled in this manner believe that their losses are due to the defective organization of the Post Office Department . . . . Complaints are received by the postmaster at Brooklyn by hundreds, and everyday complaints are received in New York.

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[42] *See Gift Enterprise,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("A scheme for the distribution of items by chance among those who have purchased shares in the scheme."). In other words, a gift enterprise scheme is a type of lottery.

[43] This last clause is similar to language in the Postmaster General Committee Report, *see infra* text at note 59.

> In nearly all of these complaints it is assumed that the fault of the non-delivery of the goods or the non-reception of the money lies at the door of the Post Office Department . . . . By the representations of the authors of the fraud, the blame is thrown on the Post Office Department . . . .
>
> [W]hat makes it more difficult to break up these fraudulent practices is the fact that in scarcely any of the States are there any laws which cover these offenses. Under the various State laws for the obtaining of money under false pretences, no conviction can be had for obtaining money by means of a promise which has not been fulfilled . . . .That . . . [the frauds] are carried on so cheaply and successfully as they are is due solely to facilities afforded by the mail[], for if these men were compelled to advertise in the newspapers[44] instead of sending circulars through the mails, they would be compelled to undergo considerable expense, and might in some States be subject to the operation of State laws.
>
> Unless some power is vested in the Postmaster General, and some statute passed by Congress declaring these offenses to be criminal, the persons who are now making fortunes in this fraudulent business will go on in the future as in the past without punishment.
>
> Complaints are received . . . by hundreds, which show that this fraudulent business is carried on very extensively. The labor of answering complaints is a great tax on the clerical force of the department, and it is impossible, in many cases, to give any satisfaction to the persons defrauded. The whole blame of their loss is laid upon the Post Office Department.
>
> I enclose a draught of a statute, which I respectfully recommend to your consideration. The first section gives the power to detain letters addressed to a fictitious address, adopted for fraudulent purposes . . . . in most of the cases for which legislation is needed, the addresses are fictitious.
>
> Under the second section, persons committing these frauds are subject to criminal prosecution . . . .
>
> I think that provisions contained in the first two sections are indispensable for protection of the people against fraudulent schemes and for the relief

[44] The reference to the use of newspapers as a way to initiate contact with potential victims is a foreshadowing of a technique used in such frauds that came to be used more frequently later and had a role in the 1909 revision of the mail fraud statute. *See infra* note 149 and accompanying text.

> of the Post Office Department from the constant and often-recurring imputation of dishonesty, carelessness, and incompetency.[45]

(c) Lottery Frauds as a Primary Target

The main purpose of the Postal Department in writing the aforementioned letter was (1) to address the impact that *fraudulent* lotteries and gift enterprises schemes were having on the mails and the postal establishment, and (2) to provide support for a proposed legislative bill on that subject.

Inter alia, this attack on fraudulent lotteries may also have been an advance indication of a shift in the public's and federal government's attitude toward lotteries themselves, which, in the early days of the nation, had become widespread throughout the country and an important source of revenue for state and local governments.[46] The lottery had crossed over from Europe and "rooted itself in the everyday life of the colonies."[47] Historian John Samuel Ezell explained, "The lottery was believed to be necessary during this period of transition in which the states moved from a condition of decentralization toward the unity provided by the Constitution. In the new and economically embarrassed country, these schemes flourished and grew with the nation. To discard them as a financial crutch would not be easy."[48]

But after the Civil War, arguably, the wheel had begun to turn; moral crusaders who spoke out against gambling and other vices were beginning to gain traction, and changes in public attitudes led to increased opposition to the institution of the lottery itself. By virtue of the 1866 letter and, arguably, its subsequent implementation in 1868, 1872, and later legislation, the federal government came to join the fray on the side of the opposition.

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[45] *See* WARE, *supra* note 17 (the Solicitor of the Post Office Department's views explaining Senate Bill No. 148 of the 39th Congress, a bill to prevent the perversion of the mails to fraudulent and illegal purposes). The accompanying legislative bill, S. 148, contained three sections: the first would have authorized the Postmaster General to send to the dead letter office letters mailed to fictitious addresses with intent to defraud; the second would attach a criminal penalty to inducing individuals through circulars or handbills sent through the mail to invest money in a lottery, gift enterprise, or other game of chance which is carried on with intent to deceive and defraud; the third section of the bill would criminalize falsely asserting with intent to deceive and defraud non-receipt of money or valuable articles or the deposit of money or valuable articles for transmission through the mail. S. 148, 39th Cong. (1866).

[46] *See, e.g.*, JOHN SAMUEL EZELL, FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA 12 (1960).

[47] *Id.*

[48] *Id.* at 78.

The 1866 letter[49] can thus be seen as both an attack on a type of widespread mass-mailing fraudulent behavior (lotteries and gift enterprises in which prizes or gifts were promised but not sent)—schemes that were causing harms to the post office itself as well as to its many victims—and as an initial step by the federal executive branch against the institution of the lottery in its role in the economy of the nation. One should keep in mind that, at the time, the post office and the delivery of the mail were already a key instrument of the central government, perhaps the only federal operation that was encountered on a daily basis by the general populace.

(d) Harms to the Mails and the Post Office Establishment

Fraudulent lottery or gift enterprise schemes were typically initiated by sending hundreds, even thousands, of "circulars" through the mails to a great many potential victims who were enticed into purchasing one or more lottery tickets with the false promise that they would receive a prize or gift. What made the schemes extremely profitable for the perpetrators was the fact that so many circulars were sent out by mail that the accumulation of a great many small sums from the gullible victims added up to large criminal profits. The scheme was dependent on mass mailings and enticing a great number of recipients into becoming victims. That kind of scheme caused a variety of harms to the operation of the mail service, the post office establishment, and the lives of a great many people.

To return, for a moment, to the description in the Solicitor's 1866 letter of harms to the post office establishment, perhaps the most serious type of harm, when it is present in the commission of the crime, is that which flows from the defrauders falsely placing the blame on the Post Office Department for the alleged failure to deliver prizes through the mail, or making similar false claims that they never received the victim's application and money that were sent through the mails. The post office is thereby made the scapegoat of the crime. Its reputation is harmed, even destroyed, and, as a result, the general populace is given reason to lose faith in the reliability and trustworthiness of the post office delivery system.

A second type of harm is caused by using fictitious names to hide the scheme and perpetrators from the authorities. The use of false names initially put a special burden on postal workers and mail carriers trying to deliver the letters to the addressees. Typically, the return letters replying to the circulars were forwarded from fictitious addressees at one or two post offices to a fictitious name addressed to a bar or other public establishment (where the letter could be picked up by an agent of the fraudsters). This was all done in aid of the scheme to conceal the true identity and location of the perpetrators, thereby putting a special burden on postal inspectors trying to track down the culprits.

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[49] *See* WARE, *supra* note 17. As far as can be determined, this document has not previously been identified as being related to the origins of the mail fraud statute. In a way, this is not surprising since the document was written six years before the mail fraud statute became law and dealt with a specific type of conduct—lottery fraud.

A third type of harm flowing from such schemes, especially where the scheme is widespread and there are many victims, is that the post office receives a multiplicity of complaints from the victims. The 1866 letter highlighted this fact. These complaints needed to be processed and investigated, thus engaging many post office personnel and committing substantial resources to the pursuit of the perpetrators. The larger the scheme, the greater the number of letters and circulars sent to the intended victims, the greater the number of complaints by victims, and the greater the harm caused to the Post Office Department.

A fourth type of harm is that the hundreds, even thousands, of letters containing circulars overburdened the post office and mail carriers with all the actions that are involved in their delivery. It is true that it is the responsibility of the post office to deliver the mail, but when doing so involves massive numbers of circulars sent with the purpose of perpetrating crimes, it is arguably an unjustified burden and can be viewed as a real harm not warranted by the notion of fulfilling the responsibilities of the post office. It should be emphasized that these harms to the mails and the post office described in the letter are not figurative or a legal fiction.[50] These are specific, concrete harms.

Finally, it is important to note that the nature of the harms caused by fraudulent conduct involving the use of the mails would vary depending on the nature and details of the fraudulent scheme. Mass mailing frauds like the lottery swindles probably present the greatest potential for causing actual harms to the post office establishment. Even among mass mailing schemes, however, there can be different kinds of schemes which, depending on their elements, may present a different potential for causing harms to the post office establishment.[51]

On the face of it, it seems likely that it was harms such as those listed above that were intended to be taken into account under the sentencing provision contained in the original mail fraud provision. Thus, it can be argued that in assessing the degree of harm to (i.e., abuse of) the Post Office Department under the language of Section 301, the sentencing judge was expected to take into account the particular methods used (e.g., blaming the post office for asserted non-delivery or non-receipt, the number of mailings, the number of potential victims, etc.). At the same time, it must be conceded that the statutory means chosen to effect the goal of having the judge in sentencing determine the proportionate harm to the mails was not hard-edged and left room for many cases where prosecutions under the statute could be undertaken, despite the absence of indications of concrete harms to the post office.[52]

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[50] Much later in the history of the mail fraud statute, the courts also speak of schemes to defraud using the mails as causing harm to the mails. However, in those allusions, it is clear that the courts are speaking metaphorically and that the harms in question are fictional.

[51] *See, e.g.*, the discussion of the sawdust swindle mass mailing schemes, *infra* notes 98 & 123 and accompanying text; Hanley v. United States, 127 F. 929, 931 (2d Cir. 1904) (discussing the fact that 14,000 "first letters" were mailed, followed by a second wave of letters).

[52] Recognition of the reality of the possible harms to the mails makes it harder to argue that the "harms" language was inserted into the statute simply to bolster its constitutional justification.

It seems likely that the type of frauds described in the 1866 Post Office Department letter would have been perceived as the archetypal most serious offenses. Other actual harms to the post office establishment, albeit lesser harms, might be present even in schemes to defraud where false blaming and scapegoating were not present, or where the scheme had fewer victims. Where the use of the mails is a central feature in the scheme—where the scheme takes place through the opening and pursuing of correspondence through the mails with the victims—the persons deceived as well as others, may also be inclined to attach blame to the mode of communication and the deceptive materials themselves, especially in an era where a nationwide postal system was seen as a relatively new form of supposedly reliable communication.[53]

3. A Puzzle: If Section 301 Was Intended to Be a Self-Defensive Federal Crime, Why Was Harm to the Post Office Establishment Not Made an Element of the Crime, i.e., Not Included in the Actus Reus of the Offense?

Having concluded that, given the language of Section 301, the mail fraud statute in its original form was intended primarily to protect a direct federal interest, it is fair to ask: if the statute was aimed at punishing those who cause harm to the mails or the post office establishment, why was it not drafted in a more traditional way by making the causing of harm to the mails or the post office establishment part of the actus reus of the offense?

To formulate such a provision is to immediately see the problems with it. The notion of harm to the mail or the Post Office Department, as discussed above, can take many forms and, even more important, can be a matter of degree. Ultimately, it can consist of one or more different actions that may cause either minor or major harm to the post office. The extent to which harms have been caused to the post office by the accused's conduct would inevitably be a matter that needs to be assessed in the particular circumstances of the case—a kind of assessment that is best considered by the judge as a factor in sentencing, rather than as an actus reus element on which the guilt of the accused is to be predicated. Those who drafted the original mail fraud statute would have understood this; hence, this helps to explain the drafting approach that they chose. [54]

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[53] Overall, the reputation and general perception of the mails as a source of good in the society could be affected. Witness how today there have been demands for companies like Facebook and Twitter to censor or prevent "bad" communications on their platforms. The medium gets blamed for the "bad" message. *See, e.g.*, Lily A. Coad, *Compelling Code, A First Amendment Argument Against Requiring Political Neutrality in Online Content Moderation*, 106 CORNELL L. REV. 457, 487 (2021) ("Mark Zuckerberg explained, 'We have a different policy than, I think, Twitter on this . . . . I just believe strongly that Facebook shouldn't be the arbiter of truth of everything that people say online.'").

[54] The drafting approach used in Section 301 amounted to a non-traditional way to create a self-defensive federal crime, and it suffered from some flaws. It left the determination of harm essentially hidden from public view, determined by the essentially

4. The 1868 Legislation Which Makes Unlawful the Mailing of Lottery Materials

Two years after the date of the 1866 letter and its accompanying documents, Congress enacted post office legislation addressing a number of different post-office-related topics. One section of this legislation, Section 13, is relevant to our inquiry. It provided:

> Section 13. *And be it further enacted,* That it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever.[55]

While this provision makes the indicated conduct "not . . . lawful," it *is not* a criminal provision. It did not authorize criminal prosecution or the imposition of criminal penalties. As explained later, Section 13 originally contained a criminal penalty that was stricken during the legislative process. It seems likely that the deletion of the criminal sanction was accomplished by legislators who supported the institution of the lottery. Thus, by deleting the criminal sanction, they effectively neutered the prohibition.

Section 13 may be seen as an initial effort to take away the mails as an instrument of distributing lottery materials. If the effort had been successful, it would have dealt a devastating blow to the lottery business. But for a few more years, at least, lotteries remained protected. On this occasion, the anti-lottery forces had effectively failed,[56] but they had planted a flag, signaling their intentions.

Additionally, given its subject matter and enactment close in time to the 1866 letter, it is not unreasonable to view Section 13 as a legislative response to the proposals made in the 1866 letter,[57] even though it appears to have been applicable

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unreviewable discretion of the judge. More important, cases could be successfully prosecuted that did not involve the causing of concrete harms to the postal establishment. That may have turned out to be a fatal weakness for a crime that was intended to be a federal self-defensive offense.

[55] Act of July 27, 1868, ch. 246, 15 Stat. 194.

[56] What may be present here in enacting this legislation while deleting its criminal penalty was a political move representing a microcosm of the then-ongoing debate regarding lotteries during this post-civil war period.

[57] Section 13 of the 1868 legislation was quite different from the specifically focused nature of S. 148, 39th Cong. (1866)—the draft bill accompanying the 1866 letter—but it could nevertheless have been seen as a satisfactory response to the proposals contained in the letter, had its criminal penalties not been stricken before enactment. It would have avoided requiring postal officials to make difficult determinations of intent in dealing with the problem of fraudulent lotteries. Even without a criminal penalty, Section 13 can be viewed as providing authority to the Postmaster General to issue regulations relating to lottery circulars to deal with them administratively by seizing them or sending them to the dead letter office. In this feature, Section 13 may be viewed as also responding to the 1860

to all lottery materials and was not specially aimed at lottery fraud.[58] Indeed, in the next section, additional evidence is presented to support the view that there was a direct line from the 1866 letter through the 1868 provision and then to the 1872 mail fraud statute.

5. The Postmaster General Committee Report, March 30, 1870

A Report issued two years after the enactment of the lottery prohibition provision (and four years after the 1866 Post Office Department letter) is a key document for understanding the origins of the mail fraud statute. Dated March 30, 1870, it was prepared by a committee appointed by the Postmaster General[59] to comment on provisions of a draft postal code written by a congressionally authorized commission. Of special interest are the comments in this Report on a particular provision of this draft legislation: Section 152. This section in its unamended form is substantially similar to Section 13—the 1868 statutory provision discussed in the previous section. The relevant paragraph in this Report (*hereinafter* "Report*"* or "PMG Report" or "PMG Committee Report") reads as follows:

> GIFT ENTERPRISES AND LOTTERIES. In section 152, the amendments we propose are obviously such as are necessary to the efficiency of the law. It contains no penalty. It is a naked declaration. We are of opinion that Congress ought to go to the extreme limit of its power to prevent the frauds which are perpetrated by lottery swindlers through the mails, and which they could not successfully carry on except by using mail facilities. An effort was made some time since to secure the passage of an act "to prevent the perversion of the mails to improper purposes." It was but partially successful. The act proposed was so drawn as to affix moderate penalties to the commission of the offenses therein described, for without such penalties, the law would be a dead letter. The penalties were stricken out, leaving the act practically inoperative. The report and

Opinion of the Attorney General that accompanied the 1866 letter. Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194, 196; S. 148, 39th Cong. (1866); WARE, *supra* note 17.

[58] It could be argued that the inclusion of the phrase, "on any pretext whatever," added to this provision a limiting element of fraud or trickery, but this language is at best ambiguous. Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194, 196.

[59] PMG COMMITTEE REPORT, *supra,* note 17, at 3 (this Committee, composed of post office-related individuals was appointed by the Postmaster General on October 29, 1869); *see* CONG. GLOBE, 41st Cong., 3d Sess. 957 (1871) (explaining that when introducing the postal code legislative bill, Senator Ramsey described it, inter alia, as having been thoroughly scrutinized by "a number of experts from the Post Office Department"); *See* PMG COMMITTEE REPORT, *supra,* note 17, at 32 (showing that, as indicated in the text, Joseph A. Ware was a member of this Committee); *Id.* at 3 (describing in the introductory paragraph of the PMG Committee's Report, the Committee's role, "to carefully examine the 'statutes relating to the postal service, as revised, simplified, arranged, and consolidated by the commission appointed for that purpose'").

> draught of an act on this subject were forwarded to Congress by one of your predecessors. We strongly recommend the passage of an act similar to the one proposed, but if that is deemed inexpedient, we then suggest that some discretionary power be given to the officers of the department to prevent the nefarious operations of lottery gamblers through the postal service. For want of a more satisfactory statute, we suggest that section 152 be amended so as to read as follows:
>
> 'SEC. 152. It shall not be lawful to convey by mail nor to deposit in a post office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, *or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses*;[60] and any such letters or circulars shall be detained by the postmaster at the office of mailing or delivery and disposed of under the instructions of the Postmaster General.[61]

Some of the sentences in the paragraph of text preceding the statutory draft describe two documents that are not expressly identified. We believe we can identify each of these documents with a reasonable degree of accuracy from the descriptions contained therein.

The sentence that contains the statement that the "effort . . . made some time since to secure the passage of an act . . . ." refers to the "partially successful" effort involved in the passage of Section 13 enacted in 1868, as described in the previous section of this paper.[62] The two sentences following the "effort" sentence tell us that Section 13, which, as enacted, had no criminal sanction, in fact as originally drawn included a penalty, but "[t]he penalties were stricken out."[63]

The sentence in the PMG Report that begins with, "The report and draught of an act on this subject were forwarded to Congress . . . ."[64] refers to the 1866 letter from the Solicitor of the Post Office and the accompanying proposed S.148, both of which would certainly have been familiar to the Committee *since the author of the 1866 letter, Joseph A. Ware, then Solicitor of the Post Office Department, was now a member of the PMG Committee making the instant Report,* and probably was responsible for the sentences we have just reviewed. That he was a member of this Committee serves to provide a human link from the 1866 letter, through the 1868 Section 13 statute, to the 1870 PMG Committee Report, which recommends the enactment of Section 152 (viz. essentially the 1868 statute's Section 13 but with the italicized language added by the PMG Committee).

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[60] The text in italics represents the amended language recommended in the PMG COMMITTEE REPORT, *supra* note 17, at 20.

[61] *Id.*

[62] *See supra* Section II.A.5.

[63] PMG COMMITTEE REPORT, *supra* note 17, at 19–20.

[64] *Id.* at 20.

The PMG Committee Report in the final three sentences of the excerpt supports enactment of lottery fraud legislation similar to S. 148, as had been proposed in the Solicitor's 1866 letter, and, if not, the granting of broad discretion with respect to lottery gambling generally and the enactment of an amended Section 152.

The PMG Committee Report also proposed adding the italicized language above to Section 152, to broaden the scope of the section—making unlawful not only the mailing of letters and circulars containing lottery or gift concert materials but also letters and circulars concerning any fraudulent schemes. This addition can be seen as reflecting Joseph Ware's continuing concern[65] to prevent lottery fraud.[66] Notably, however, the PMG committee did not include or recommend the addition of a criminal penalty to Section 152.

Given the PMG Committee's obvious desire to strengthen the anti-fraud capability of Section 152, the failure to recommend the addition of a criminal penalty to this section initially seems surprising. A plausible explanation is that the PMG Committee, as indicated in the Report, was aware that a criminal penalty originally had been part of the bill enacted as Section 13 in the 1868 legislation, but the penalty language in that section had been stricken before the bill was passed. Accordingly, it would not have been unreasonable for the Committee to have anticipated a similar fate for any language attempting to add a criminal penalty to the lottery materials prohibition language of Section 152.[67]

6. HR 2295 and the Original Version of the Mail Fraud Statute

Less than three months after the March 30, 1870 issuance of the PMG Committee Report, on June 24, 1870, Representative Farnsworth, Chair of the House Committee on the Post Offices and Post Roads, on behalf of the Committee, introduced HR 2295, a comprehensive package of post-office-related legislation that generally tracked the draft prepared by the Congressional Commission, with such tweaks as were recommended by the PMG Committee Report.[68] Thus, HR 2295 also

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[65] It is appreciated that we are interpreting Committee's recommendation as that of Ware. This interpretation assumes that Ware was likely to have been a highly influential voice on the Committee with respect to these issues, a not-unreasonable inference to draw.

[66] It is possible, of course, that the 1866 letter that focused on lottery frauds had, in fact, been using that approach as a subterfuge and that its real target was lotteries as such. Indeed, the fact that the 1868 statute targeted lotteries, not lottery fraud, might be offered in support of that hypothesis. While we cannot know for certain what was in Joseph Ware's mind, he seems to have consistently been focused on lotteries and similar games used as part of fraudulent schemes.

[67] The irony, of course, is that a criminal penalty was later added to that section during the subsequent legislative process. *See infra* note 101; CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870).

[68] The Commission's draft, as reviewed by the PMG committee, ended at Section 295. Hence, all the sections from Section 296 forward in H.R. 2295 appear to have been added subsequent to the PMG Committee's review. H.R. 2295, 41st Cong. (June 24, 1870). *See also* PMG COMMITTEE REPORT, *supra* note 17.

included Section 152 with its amended language, as recommended in the PMG Committee Report; that is, *Section 152 did not contain a criminal penalty.* No legislative committee hearings concerning HR 2295 were held; no reports were issued.

Additionally, HR 2295 contained a series of provisions added by the House Committee on Post Offices and Post Roads to the legislative package that had been drafted by the Congressional Commission. Two of those newly added provisions were Sections 297 and 296. Section 297 was the mail fraud provision,[69] and Section 296 dealt with closely related subject matter.[70]

(a) How Did It Happen that There Were No Legislative Committee Reports or Other Explanatory Commentary on the Newly Drafted Provisions Contained in HR 2295, Including the Mail Fraud Provision?

As far as can be determined, Section 297 in HR 2295, when it was introduced into the House on June 24, 1870, was the maiden appearance of the mail fraud provision.[71] As mentioned above, there were no legislative committee reports, nor were any legislative hearings held relating to HR 2295. Upon reflection, this is not surprising since most of the bill reflected the Commission's work, and the comments of the PMG Committee[72] generally served as a commentary on the Commission's draft. Given the availability of the Commission's draft and the PMG commentary, the House of Representatives Post Office Committee chaired by Representative Farnsworth, which introduced the proposed HR 2295, may well have thought that there was no need for their committee to issue an additional report in support of the bill.[73] But, of course, this left the provisions that the Post Office Committee had added to the Commission's draft without any explanatory commentary.

Also, note the short time interval between the issuance of the PMG Report and the introduction of HR 2295. There may have been some perceived urgency in introducing the bill in the hope that it might be passed during that session of Congress. The short interval between receiving the draft and comments from the PMG Committee and introducing it in the form of HR 2295 to Congress left little

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[69] H.R. 2295, § 297 (June 24, 1870). This was the original version of the mail fraud statute that was enacted as Section 301 and that was previously examined in detail. *See supra* Section II.A.2.

[70] H.R. 2295, § 296 (June 24, 1870) (providing that the Postmaster General, upon determining that a person or firm was conducting a fraudulent lottery, could forbid the payment of any postal money order to such person and instruct postmasters to return registered letters to the writers thereof, marking them, "fraudulent").

[71] *See* CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (explaining that Representative Farnsworth, in his comments on the floor of the House regarding Section 150 (i.e., Section 152 in the PMG report) in a clear reference to Section 297 and 296 indicated that those sections had been incorporated into the bill by the Post Office and Post Roads committee).

[72] *See* PMG COMMITTEE REPORT, *supra* note 17, at 8–9.

[73] The summary of the scrutiny given to H.R. 2295 as described at the beginning of the Senate consideration of the bill supports this observation. *See supra* note 59.

time to prepare a legislative committee report regarding the provisions that the Committee had added to the bill.

As we shall see, however, pertinent statements were made on the floor of the House of Representatives regarding the bill, and these both included some statements often quoted regarding the proposed mail fraud provision as well as some additional relevant statements that have not been generally referred to. Additionally, there was a key action taken on the floor of the House of Representatives that we believe was significant and that, in context, may be viewed as a turning point regarding the then-future of the mail fraud statute.

(b) How Did Section 297, the Mail Fraud Provision, Come to Be Added to HR 2295?

All the materials considered thus far in this paper contribute to answering this question and, we believe, shed additional light on the mail fraud statute's origins and early history. A more narrowly focused explanation is presented below.

There is a statement in the PMG report near the beginning of the Section 152 commentary that can be viewed as a recommendation to which the drafting of Section 297 was a response: "We are of opinion that Congress ought to go to the extreme limit of its power to prevent the frauds which are perpetrated by lottery swindlers through the mails, and which they could not successfully carry on except by using mail facilities."[74]

The drafting of Section 297 and its inclusion in HR 2295 can be viewed as a direct response to this comment in the PMG Committee Report, issued a few months earlier. The reader will note, of course, that the "extreme limit" statement in the Report focused on addressing the frauds perpetrated by lottery swindlers, while the language of the mail fraud provision applied more broadly to all types of fraudulent schemes, without expressly mentioning lottery fraud. There are, however, reasons why, even though lottery swindles were the primary target, it may have been seen as useful to draft the provision in broad terms.

Drafting the mail fraud provision broadly was probably seen as the best way to attack not only lottery swindles but also closely related frauds that use games and schemes, which did not fall neatly into the lottery fraud category. Drafting it broadly so that it covered frauds perpetrated through the mails that did not involve games of chance may also have seemed a logical and reasonable extension, especially insofar as the provision was aimed (by some of the language in Section 297) at frauds that would involve the same type of misuse and abuse of the mails as was caused by fraudulent lotteries and other games of chance.

Further, one can point to the fact of the centrality of the use of the mails in Section 297, as well as its mention of misusing the post-office establishment, and the language referring to the proportioning of the punishment to the degree of abuse

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[74] PMG COMMITTEE REPORT, *supra* note 17, at 19. It seems likely that Joseph Ware may have been responsible for this sentence, which is very similar to the overall thrust of the 1866 letter. *See, e.g.*, S. 148, 39th Cong. (1866).

of the post-office establishment. All this language amounts to an effort to focus the statute on those frauds "which they could not successfully carry on except by using mail facilities[,]"[75] that is, lottery swindles and similar mass-mailing kinds of frauds.

The language in Section 297, including the proportionate punishment sentence, fits nicely with the kinds of harms to the Post Office Department that lottery swindles and similar kinds of mass mailing frauds cause, as described in the 1866 letter.[76] The very inclusion of the proportionate punishment language can be viewed as positive evidence that the mail fraud provision originally was aimed primarily at lottery swindles and other mass mailing fraudulent crimes, though it substantively swept more broadly.[77]

Finally, the fact that Joseph Ware served both on the PMG Committee and, four years earlier, was the author of the 1866 letter, also may be viewed as significant in regard to the drafting of the mail fraud provision, its inclusion in HR 2295, and its contents, especially when one takes into account what was written in the PMG report and the subject matter of the earlier letter. Indeed, one must wonder more generally about the responsibility of Ware for both the commentary on Section 152 prepared by the PMG Committee and, possibly, for the drafting of Section 297. His fingerprints are clearly seen on the former. There is a strong link between the 1866 letter and the focused targeting of lottery swindles found in the PMG commentary on Section 152. One can also, with reason, speculate about whether Ware may have consulted with the Committee on the Post Office and Post Roads and may even have had a role in the actual drafting of, and/or the adding of, Section 297 to HR 2295.

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[75] PMG COMMITTEE REPORT, *supra* note 17, at 19.

[76] Earlier in this paper, we also noted how the 1866 letter's cataloging of some of the harms caused to the post office establishment by lottery fraud naturally fit with the proportionate punishment language of Section 297. *See supra* Section II.A.2.b. The presence of punishment language in Section 297 in H.R. 2295 is arguably strong evidence supporting a link between that section and the 1866 letter and that an important purpose of Section 297 was to attack lottery frauds and their ilk, especially regarding offenses "which . . . could not successfully [be] carr[ied] on except by using mail facilities," as described in the PMG report. PMG COMMITTEE REPORT, *supra* note 17, at 19; H.R. 2295, 41st Cong., §297 (June 24, 1870).

[77] Another link between Section 152 and Section 297 of H.R. 2295: the drafters of Section 297—the legislative committee—may have borrowed from the amended language of Section 152. Thus compare "the schemes devised and intended to deceive and defraud" phraseology in Section 152 with the "having devised . . . any scheme or artifice to defraud" language in Section 297. H.R. 2295, 41st Cong. §§ 152, 297 (June 24, 1870). It is also worth calling attention to the fact that Section 296 in HR 2295, introduced for the first time along with Section 297, closely tracked some of the language of Section 152 in the bill when it referred to "fraudulent lottery, gift enterprise," or schemes, and provided for post office non-criminal interventions regarding such fraudulent schemes by forbidding payments of postal money orders sent in response to such schemes. *Id.* § 296. It also provided for return to the remitters of the sums paid in such money orders as well as the return of registered letters marked fraudulent sent as part of such schemes. *Id.* Section 296 can thus be viewed as providing a link between the more general language of the mail fraud provision and a special concern about lottery fraud conduct.

True, this is merely speculation, but given the totality of the circumstances, it would not be a surprise if he were involved in this way.[78]

(c) But Why Was a Provision Like Section 297 Even Needed, Given the Existence of Section 152?

Given the time sequence, we know that Section 152 was in the draft postal code (March 1870) three months before the mail fraud provision was officially added to the draft code, i.e., when HR 2295, which included Section 297, was introduced into the House of Representatives (June 1870). But that raises a question: were not lottery frauds and schemes to defraud already generally covered by Section 152, which had been amended in accordance with the recommendation of the PMG Committee and now contained broad language covering all kinds of frauds? Why was the addition of a broad anti-fraud provision involving the use of the mails like Section 297 even needed, given the existence of the amended Section 152?

As previously noted, Section 152, as recommended by the PMG Committee, and incorporated into HR 2295, *did not include a criminal penalty*. Accordingly, it may have been thought that to exercise the "extreme limit"[79] of congressional power, a provision that included a criminal sanction was needed. The reason for the failure of the PMG committee to add a criminal penalty to Section 152 has already been suggested. It may also have been thought less objectionable to include a criminal penalty in a more traditional general criminal provision like Section 297 than to include it as punishment for violating a ban on sending lottery materials through the mails.

The sequence and timing of these particular steps taken in the legislative process help explain the context in which the mail fraud provision was drafted and are suggestive of the fortuity involved. Had the sequence and/or the timing been different—that is, had a criminal penalty been added to Section 152 by the PMG committee—it is likely that the legislators would not have seen a need for a provision like the mail fraud statute and that this provision might not have been drafted and enacted at that time.

It was only sometime after HR 2295 (with Section 297 already included) had been introduced in the House and, during the course of the floor consideration of the bill in the House on December 7, 1870, six months after the introduction of HR 2295, that the criminal penalty was added to Section 150 (the renumbered Section 152). Thereby, *two* anti-lottery-fraud and anti-fraud general provisions with criminal penalties were created, each drafted in a different form. We review below in detail how this amendment of Section 152 came about.

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[78] One might ask: if Mr. Ware were so deeply involved, why had the PMG committee not itself recommended the inclusion of the mail fraud provision? Recommending additional sections appears to have been outside the purview of the committee. The mandates of the PMG committee prevented it from adding any new substantive provisions. Adding a clause to an existing provision, however, seems to have been acceptable; the PMG Committee did that with Section 152. *See* PMG COMMITTEE REPORT, *supra* note 17, at 3–4, 19–20.

[79] *Id.* at 19.

As it turned out, the addition of a criminal penalty to Section 152 on the House floor arguably also had important, long-term consequences for operations under the mail fraud provision. Indeed, it may now be seen as a turning point and the beginning of a process that eventually led to the demise of the role of the mail fraud provision as a federal self-defensive offense.

7. Congressional Statements on the Floor of the House Relating to Section 150 (Formerly Section 152, Which Became Section 149 in the Enacted Legislation) and the Original Mail Fraud Provision[80]

We have reviewed certain executive branch materials as well as some legislative materials that provide important and relevant background to the drafting and enactment of the mail fraud provision. We now turn to the consideration on the floor of Congress of both Section 150 and the mail fraud provision, Section 297. As previously mentioned, almost all of the authorities, scholarly[81] and judicial[82] alike, cite the following excerpt from a statement made by Representative Farnsworth on December 7, 1870, and many refer to it as the only congressional history regarding the mail fraud provision—that the provision was "intended to prevent the frauds [which are mostly found] in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."

In fact, however, there is much additional useful information and background regarding Sections 297 and 150, to be culled from the House debates surrounding this excerpt. Consider, for example, the fact that the excerpt quoted above was uttered *during a discussion of issues relating to Section 150*, although the specific Farnsworth-quoted comment did relate to Section 297 (and also to Section 296). This point deserves emphasis. The oft-cited quotation referring to Section 297 by Representative Farnsworth on the House floor did not occur in a debate about Section 297 but rather in a discussion of Section 150! A fuller recounting of the debate that the above excerpt was taken from is very informative. It reads as follows (with our commentary in italics interspersed below the specific excerpts in roman type (most of which are comments made by Representative Farnsworth)):

"Mr. Farnsworth: I do not think it wise to strike out this section [ed. Section 150]; it is in the present law, and I am willing to let it stand for what it is worth."[83]

Mr. Farnsworth's statement above was made in response to a motion by Representative Sargent, with supporting argument, to delete Section 150 (i.e., Section 152 in the PMG report) from the bill on the ground that it had no provision for enforcement. Mr. Farnsworth had initiated his response with the foregoing

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[80] The quotations from the House floor statements quoted in this section begin at CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870).

[81] *See e.g.*, Peter T. Barbur, *Mail Fraud and Free Speech*, 61 N.Y.U. L. Rev. 942, 969 n.201 (1986). Numerous other law review articles cite this quotation.

[82] *See, e.g.*, McNally v. U.S., 483 U.S. 350, 356 (1987).

[83] CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870).

sentence, but then he immediately continued with the sentences immediately below in what appears to be a digression:

"There is a great deal of this matter now transmitted through the mails. There are sections further along in the bill, which have been incorporated into it by the Committee on the Post Office and Post Roads, and which are intended to prevent the frauds which are mostly gotten up in the large cities of New York and Philadelphia, chiefly in New York, by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country . . . ."[84]

Representative Farnsworth, the chair of the Post Office Committee, switched here from discussing Section 150 to talking about "sections further along in the bill." He does not identify the specific sections, but from what follows, it is clear that he is referring to Sections 297 and 296 in the then-current bill, enacted a year and a half later, in 1872, as Sections 301 and 300, the original mail fraud provision and the accompanying provision. The foregoing excerpt contains the lengthy clause beginning with the words, "which are intended to prevent the frauds," which is usually quoted as the only legislative history statement relating to the mail fraud statute.

It is also noteworthy that, as Representative Farnsworth makes clear, the mail fraud provision was added to the bill by his Committee; this is confirmation that it was not part of the Congressional Commission's original draft, nor was it part of or specifically recommended in the Postmaster General Committee's Report.

It is further worth mentioning that the "thieves, forgers, rapscallions, etc." statement could easily be a general description of the lottery swindles mentioned in the PMG report and described in detail in the 1866 letter.

Mr. Farnsworth proceeded in his congressional debate statement to describe in more detail the kind of swindles at which Sections 297 and 296 were aimed: "I have here on my desk a large number of specimen circulars and letters sent out, which have been forwarded to the Post Office Department in this city. They were sent from various bogus offices in the large cities . . . ."[85]

Representative Farnsworth refers here to swindles initiated by the mass mailing of circulars and letters sent out from fictitious addresses in large cities. Such mailed circulars and letters were a characteristic of counterfeiting frauds, as well as lottery frauds and other kinds.

"Some of them are schemes for selling counterfeit money . . . . [T]he countryman . . . sends to the address of the agent, in New York, for instance, ten, fifteen, or twenty dollars, with an order for as much as it may purchase. A box or package is sent to him, perhaps, which upon being opened is found to contain waste paper, sawdust or may be bogus money."[86]

This is the so-called sawdust swindle which, as we shall see, became a matter of major attention in the 1889 revision of the mail fraud statute, treated in detail infra. It is worth noting that this appears to have been a widely prevalent form of

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[84] *Id.*
[85] *Id.*
[86] *Id.*

swindle nineteen years earlier. Representative Farnsworth, of course, could as well have used lottery fraud conduct as an example. Indeed, one might have expected him to do so since, after all, this was ultimately a debate about Section 150. Perhaps he declined to use lottery swindles as his example because that would have highlighted the duplicative coverage of Sections 297 and 150 and thereby sown confusion.

The type of counterfeiting scheme Representative Farnsworth refers to is a scheme that, something like lottery fraud, may rely on large scale mailing of circulars to entice victims and involves some (but not all) of the same kind of harms to the postal system as the lottery fraud schemes that we believe were the source point for the idea of a mail fraud statute. Generally, Representative Farnsworth's comments here remind of the fact that the mail fraud statute was primarily aimed at frauds committed through large-scale or mass mailings "which they could not successfully carry on except by using mail facilities."[87]

"He [the postmaster] ought, therefore, to be empowered in some way to ascertain the character of these letters, and to return the money to those who have been thus deluded into sending it. That, however, is not a reason for this section, though it is a reason for some of the subsequent sections of this bill. It certainly will do no harm to declare that it shall be illegal to send lottery and gift-concert circulars through the mails."[88]

Representative Farnsworth, in stating that "That . . . is not a reason for this section," is referring to Section 150. In referring to "the subsequent sections," he is specifically referring to Section 296, which provided for returning sums of money to the victims of the swindles when they made payment by postal money orders. Finally, he returns to commenting on Section 150. Having made the case regarding fraudulent use of the mails, and saying that there is no harm in declaring it illegal to send lottery and gift-concert circulars through the mails, he may be implying that such materials can also be used to perpetrate swindles. Here, for the first time in this extensive digression, having come back to Section 150, he specifically mentions lottery and gift-concert circulars, the principal subject of Section 150. Note that as of that particular moment in time, Section 150 still had no criminal enforcement mechanism attached to it. Also note that in these remarks, Representative Farnsworth has put the focus on frauds perpetrated through the mails, not on the mere mailing of lottery materials. But when stating that it would certainly do no harm to declare it illegal to send lottery materials through the mail, he seems to be saying that the fact that Section 150 lacks a sanction is not a reason to delete the provision.

At that point, a vote was taken on Representative Sargent's motion to strike Section 150; it was defeated.[89] *Immediately following, Representative Brooks made a motion to add a criminal penalty to Section 150.*[90]

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[87] *See* PMG COMMITTEE REPORT, *supra* note 17, at 19–20.

[88] CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870).

[89] *See Id.* ("[T]he motion of Mr. Sargent, to strike out the section . . . was not agreed to.").

[90] *Id.*

8. How Did a Criminal Penalty Come to Be Added to Section 150 (Which Earlier Was Section 152 and Later Became Section 149)?

There is much that can be learned from the legislative actions relating to Section 150. The final clause in that provision, as recommended in the PMG report and introduced in HR 2295, stated: "and any such letters or circulars shall be detained by the postmaster at the office of mailing or delivery, and disposed of under the instructions of the Postmaster General."[91]

Thus, Section 150, the successor provision to Section 13 in the 1868 statute, did initially have a non-criminal enforcement provision in its 1870 incarnation—it provided for the detaining of the letters and circulars prohibited to be deposited in the mails and their disposition in some manner to be prescribed. But Representative Brooks, just before Representative Farnsworth made the statements described in detail above and just before Representative Sargent made his motion to strike Section 150, had succeeded in removing this non-criminal enforcement mechanism from the section, on the ground that "it would . . . expose the correspondence of the people to a scrutiny and espionage of a most dangerous character . . . ."[92] Immediately following this action, Representative Sargent, as mentioned above, moved to delete the entire section on the ground that it was "a dead letter" for the reason that now no sanction was provided for its enforcement.[93] But as previously noted, after Mr. Farnsworth made his statement in favor of retaining the section (which included the digression relating to Section 297), Sargent's motion to delete the section failed to obtain a majority vote.[94]

Mr. Brooks then proceeded, in apparent response to Mr. Sargent's highlighting of the now-absence of any enforcement provision in Section 150, and Mr. Farnsworth's statement regarding frauds perpetrated through the mails, to propose the addition of a criminal penalty to Section 150.[95] Mr. Farnsworth, in response, as the manager of the bill, stated he had no objection to the Brooks proposal; a vote was taken, and the Brooks amendment passed.[96] And so on December 7, 1870—without any fanfare, any comment on the fact that this provision could now effectively be used to bar lottery materials from the mails, any recognition of the redundancy that this section created with Section 297, or any acknowledgment that

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[91] H.R. 2295, 41st Cong. § 150 (June 24, 1870).

[92] CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870).

[93] *Id.*

[94] *Id.*

[95] *See id.* (quoting Mr. Brooks as he said he "wish[ed] that this fraudulent use of the post office shall be arrested . . . .").

[96] *Id.* This response by Representative Farnsworth is troubling. He, of course, was aware of the extent of the redundancy between Section 150 and Section 297. As long as Section 150 lacked a criminal sanction, it remained different from Section 297. Attaching a criminal penalty to the section removed the main difference. Representative Farnsworth's failure to raise a question about it suggests that, in fact, these congressmen may have engaged in an elaborate dance to reach a predestined result, outlawing lottery materials from the mail on pain of criminal sanction.

it was a reversal of the earlier congressional action stripping the penalty from the same provision—a criminal penalty was added to Section 150.[97]

What was going on here? Anything more than the obvious addition of a criminal penalty to Section 150? Perhaps. There was an oddity in the digression by Representative Farnsworth, with his going into such detail about Section 297 and the use of the mails to perpetrate "sawdust"[98] swindles, when Section 150 was under immediate scrutiny. Perhaps what this was really about was the aforementioned ongoing major controversy about lotteries and sending lottery materials through the mails. Adding a criminal penalty to Section 150 would be a major victory for the anti-lottery forces. By highlighting the use of the mails for fraud in the consideration of Section 150, including, implicitly, lottery swindles, Representative Farnsworth kept the focus on an aspect of some lottery mailings, enforcement against which was most likely not controversial, and thereby diverted attention from the major controversy regarding a ban against all lottery materials. Was this a way of trying to garner a few more votes for Representative Brooks' motion to add a criminal penalty to the section without highlighting the fact that this provision would effectively bar lottery materials from the mails irrespective of their use in perpetrating swindles? This could be the explanation for what otherwise seems to be an inexplicable digression.[99]

Also tending to support this explanation, Representative Brooks, in making his motion to add a criminal penalty to Section 150, immediately after Representative Farnsworth had made his lengthy statement about Section 297, stated: "I thoroughly agree with the remarks just made by the chairman of the committee. . . . I am desirous, as he is, that some penalty shall be provided for *this fraudulent use* of the post office . . . . I wish that *this fraudulent use* of the post office shall be arrested, particularly as the headquarter of these frauds are in the city which I in part represent."[100]

Representative Brooks thus (with the probable collaborative assistance of Representative Farnsworth) characterized Section 150, to which he had just proposed the addition of a criminal penalty, as a provision that dealt with using the mails to perpetrate frauds while omitting to mention that the main thrust of this

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[97] Subsequently, Representative Sargent tried to delete the words "or so-called gift concerts" on the ground that all agreed that fraudulent lottery material should be banned from the mails, but there were charitable, legal fundraisers in many states, and the bill swept too broadly in prohibiting them from the mails. His proposed amendment to this effect failed. Later there was another effort in the same direction that for a time succeeded—viz. the addition of the word "illegal." *See supra* Section II.A.7.

[98] CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870).

[99] Another possible more benign explanation for Representative Farnsworth's digression to discuss Sections 296 and 297 and the use of the mails in fraud schemes may have been his wish to point out to the members of the House that there were related provisions much further along in the bill (which would not otherwise be apparent to the members). Moreover, the manager of the bill might not reach its higher-numbered sections in the course of shepherding the bill.

[100] CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (emphasis added).

provision would be to bar lottery materials from the mails through a criminal penalty, irrespective of any connection to fraudulent behavior.

And so, a criminal penalty was added to Section 150,[101] a major development not only in connection with the long-standing lottery controversy but, as we shall soon see, also in the developing early history of the mail fraud statute.

But the supporters of lotteries still had a card to play. During further consideration of Section 150 in Congress, the adjective "illegal" was attached to the word "lotteries," so that only illegal lottery materials were barred from the mails.[102] The intention, it appears, was to allow states where lotteries were still legal to be able to send such materials through the mails. As enacted in 1872, Section 149 (formerly Section 152 and then 150) of the postal legislative package read as follows:

> That it shall not be lawful to convey by mail, . . . any letters or circulars concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, and a penalty of not more than five hundred dollars nor less than one hundred dollars . . . . Is hereby imposed upon conviction . . . .[103]

But that amendment lasted only four years. In 1876, Congress struck the word "illegal" from Section 149.[104] The anti-lottery forces finally won a total victory, at least with respect to banning all lottery materials from the mails—a ban enforceable through criminal prosecution.

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[101] CONG. GLOBE, 41st Cong., 3d Sess. 36 (1870).

[102] The word "illegal" was attached to the noun lotteries during the final consideration of the postal legislative package, which was enacted in June 1872. HR 2295 had failed to achieve passage during the 41st Congress. The package, which included the mail fraud provision as well as Section 150 with its criminal penalty, was reintroduced in the 42nd Congress as HR 1. H.R. 1, 42d Cong. (1872). The proposal to amend Section 150 (which became Section 149) by adding the word "illegal" originated with the Senate Committee on Post Offices and Post Roads, chaired by Sen. Ramsey. The committee recommendation (along with numerous other recommended amendments) was approved by the Senate on April 22, 1872. CONG. GLOBE, 42d Cong., 2d Sess. 2650 (1872). The House version of the legislation did not include this amendment. *See* H.R. 1, 42d Cong. 1st Sess. (1871). A conference committee was appointed to consider this as well as dozens of other differences between the two bills. CONG. GLOBE, 42d Cong., 2d Sess. 3893 (1872). The conference committee reported its recommendation on May 31, 1872, that the House accept the amendment of Section 150 (as well as dozens of other amendments made by the Senate). CONG. GLOBE, 42d Cong., 2d Sess. 4105 (1872), and the entire legislative package was approved on June 8, 1872.

[103] Act of June 8, 1872, ch. 335, § 149, 17 Stat. 288, 312.

[104] 4 CONG. REC. 4261–64 (1876); *see also* FOWLER, *supra* note 17, at 63–64.

9. The Relationship Between Section 149 and Section 301

As described above, the enactment of both Section 301 (originally Section 297) and Section 149 (earlier, it had been Section 152, and then it became Section 150) may be viewed as the result of chance timing and the fortuitous creation of two closely related and partially overlapping provisions. But with both on the books and both being criminal provisions, it is useful to describe the relationship between them in both analytical and practical terms.

There is an obvious similarity between the substantive coverage of the second "concerning" clause in Section 149 and the coverage under Section 301. While not identical, it is similar enough to ask how the two sections relate to each other. How is the partial redundancy between them to be handled?

The statutory approach in Section 149 is different from that of Section 301. Section 149 bans categories of materials from the mails by making it a crime to *send materials of the indicated type through the mails*.[105] Section 301, on the other hand, is a more traditional criminal provision containing the structure and, mostly, the usual elements of a crime.[106]

The premise underlying the criminal banning from the mails of certain kinds of materials (including lottery letters and circulars) is that there are certain kinds of materials, the very nature of which justifies banning them from the mails. It involves a theoretical basis different from ordinary crimes for federal intervention. The notion is that the mails, a federally operated method of communication for the people, is corrupted or harmed when evil or corrupting materials are sent through the mails. This is a property-like approach to the banning of intrinsically bad things from the mails. Section 148 in the 1872 postal legislation puts obscene publications on the list of banned items,[107] and Section 149 can be viewed as an attempt by Congress to expand the list still further by adding two categories, namely, circulars concerning lotteries and fraudulent schemes.[108]

The Supreme Court affirmed the constitutionality of the criminal banning of lottery materials from the mails reflected in Section 149 in 1877 in *Ex Parte Jackson*.[109] The prohibition against sending circulars relating to lotteries, that is, a particular kind of gambling materials, through the mails was seen as similar to a prohibition against sending obscene materials, both being deemed the kind of materials that are injurious to public morals.[110]

The inclusion of a prohibition against letters or circulars concerning schemes to defraud might seem to be more of a stretch, in part because this type of material does not necessarily reveal its corrupt nature on its face. Among the arguments

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[105] Act of June 8, 1872, ch. 335, § 149, 17 Stat. 288, 312.

[106] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 288, 323 (current version at 18 U.S.C. § 1341). Of course, this provision also had some special features as described *supra* Section II.A.1.

[107] Act of June 8, 1872, ch. 335, § 148, 17 Stat. 288, 302.

[108] Act of June 8, 1872, ch. 335, § 149, 17 Stat. 288, 302.

[109] 96 U.S. 727 (1877).

[110] *See id.* at 736–37.

against upholding such a ban would be the concern that a path would be opened to applying a similar approach to materials related to many traditional crimes, thereby undermining the actus reus/mens rea approach of the traditional criminal law.

The question of using a banning approach against materials concerning schemes intended to defraud—that is, the second "concerning" clause in Section 149—only reached the Supreme Court long after the first "concerning" clause had been upheld in *Ex Parte Jackson*.[111] On the ground that, inter alia, the second concerning clause of Section 149 was largely redundant of—and would have undermined enforcement under—Section 301, in 1911, the Supreme Court, in *United States v. Stever*,[112] narrowed that clause of Section 149 by construction. The Court read into the second "concerning" clause in Section 149 a limitation to schemes to defraud that involved lotteries.[113]

Differences between an approach involving the criminal banning from the mails of certain types of materials and the traditional actus reus/mens rea approach used in ordinary crime control help to explain the differing decisions regarding the two "concerning" clauses of Section 149.

The result was that prosecutions under Section 149 served to ban lottery materials as well as lottery materials used in aid of fraudulent schemes, while Section 301 could be used to focus on all other schemes to defraud. While there was no legal bar to prosecuting lottery schemes to defraud under Section 301, as a practical matter, if such were to be prosecuted, it was easier to do so under Section 149. In fact, it was even easier to prosecute such cases under the first "concerning" clause of Section 149, namely, sending lottery materials through the mails.

Consequently, during the post-1872 period, lottery fraud schemes were generally not found among the cases prosecuted under Section 301. Why prosecute for lottery fraud under Section 301, needing to prove a number of different elements, when one could more easily prosecute for simply violating the prohibition against sending lottery materials through the mails?[114]

The ironic result of this pattern of enforcement was to eliminate the very category of crime—lottery fraud—from prosecution as mail fraud under Section 301 that had been the original, galvanizing cause for the drafting of the mail fraud offense in the first place.[115]

The elimination of lottery fraud as a significant area of prosecution under the mail fraud statute had an important long-term consequence. Lottery frauds, as has been contended here, were the archetype of the category of frauds at which Section 301 was originally and primarily aimed. Among other things, lottery frauds tended

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[111] 96 U.S. 727 (1877).

[112] 222 U.S. 167 (1911).

[113] *Id.* at 174–75.

[114] *See infra* note 119 for a listing of some of the cases prosecuted under Section 149.

[115] *See, e.g.*, U.S. v. Watson, 35 F. 358, 359 (E.D. N.C.1888) ("It is claimed that the statute [Section 5480] was aimed against lottery companies. There is a statute (Rev. Stat. § 3894 [§ 149]) especially devoted to that matter. The words of Section 5480 are plainly general."). *See also* Durland v. United States, 161 U.S. 306, 306–11 (1896) (gratuitously inserting in a mail fraud prosecution not involving a lottery a reference to lottery swindles).

to cause exactly the multiple kinds of harm to the post office establishment at which the mail fraud statute in its original form was targeted, and that led to the particular language used in the statute.

With lottery frauds largely removed from the Section 301 prosecutorial docket, there was a question as to whether any other large category of frauds involving the mails that were being prosecuted would present a similar range of potential concrete harms to the post office. Were there other frauds using mass mailings that would cause harm to the Post Office operations, in the same way as did lottery frauds?

B. The Case Law Handed Down Between 1872 and 1889: What Can It Tell Us About the Interpretation Of, and Operations Under Both Section 301 and Section 149?

During the period between the mail fraud enactments in 1872 and 1889 (when Section 301 was amended), there were a series of prosecutions under Section 301 and Section 149, which produced a limited number of reported cases. What can be learned from this small body of case law?

First, some general conclusions: A variety of different types of fraudulent conduct are reflected in the cases, and we shall not try to describe them all. As discussed above, not unexpectedly, there do not appear to have been any prosecutions involving lottery fraud under Section 301 during this period.

While the 1872–1889 case law reveals some prosecutions in which multiple letters and circulars were mailed to potential victims,[116] as far as can be determined from this body of judicial opinions, the type of mass mailings that were used in the lottery fraud cases were not common. An exception may have been the aforementioned sawdust swindles, which often did utilize mass mailings.

Regarding another matter arising out of the language of Section 301, it merits mention that there is not in any of the Section 301 judicial opinions any discussion of the extent of the harms caused to the post office establishment insofar as they may have affected the sentence imposed. That should not be surprising, however, since

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[116] *See, e.g.*, U.S. v. Flemming, 18 F. Supp. 907 (N.D. Ill. 1883) (detailing how defendants sent letters to solicit investments in a fake mutual fund); U.S. v. Hoeflinger, 33 F. 469 (E.D. Mo.1887) (describing how defendants sent letters to potential victims who were led to believe they were heirs to large fortunes in England; the plaintiff would obtain from them a fee for his services) [Interestingly, the same scam is being perpetrated today using the internet.]; United States v. Wooten, 29 F. 702, 703 (E.D.S.C. 1887) (detailing how the defendants posed as business merchants and ordered goods with no intention of paying for them); U.S. v. Watson, 35 F. 358, 358 (E.D.N.C. 1888) (holding that ordering goods by mail without the intent to pay for them is indictable as a "scheme or artifice to defraud."); United States v. McMillan, 29 F. 247 (E.D.S.C. 1886) (describing how the defendant sent circulars through the mail, using assumed names and offering items for sale that he did not possess nor intend to furnish to the putative purchasers); United States v. Stickle, 15 F. 798 (C.C.W.D. Wis. 1883) (explaining how a defendant promoted a fake tea distribution business whereby he solicited victims to act as agents for defendant in selling the goods and solicited payments for agent's sample case, which he had no intention of providing).

length of sentence issues were not generally reviewable upon appeal.[117] The absence of any discussion of the language in Section 301 dealing with proportionate penalties does not necessarily mean that that language was not being applied by trial judges.[118]

During this same period, between 1872 and 1889, Section 149 was also actively enforced against those who sent lottery materials through the mails.[119] For the most part,[120] these were simple cases to prosecute, and, as previously stated, it is believed these prosecutions drew the air out of lottery frauds and generally accounted for the fact that lottery fraud was not being prosecuted under Section 301.

III. THE 1889 AMENDMENT OF SECTION 5480 (THE REVISED STATUTES RENUMBERED VERSION OF SECTION 301)

A. Introduction

Recall that in 1870, when Representative Farnsworth on the floor of the House referred to a type of serious fraud involving the use of the mails, he used as his illustration the sawdust swindle, not lottery fraud. In 1889, work was being done on a general revision of the postal code, and some unusual amending language was added to Section 5480,[121] the mail fraud provision. Language relating to the sawdust swindle and the offering of counterfeit money for sale was added to the generally broad anti-fraud language of Section 5480. How this happened, the addition of such specific language to Section 5480 attacking particular kinds of misconduct and fraudulent behavior, is another brief tale worth telling. Examining some detailed legislative history materials can help us to understand how this amending language came to be added to Section 5480.[122]

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[117] It may be the case that this provision was not being fully used, which may have been attributable to the fact that lottery fraud and related offenses that caused the type of harms described in the 1866 letter were not frequently being prosecuted under Section 301.

[118] Issues arising out of the language in Section 301 that provided, "The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence . . ." were addressed in a number of cases. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 288, 323; *see, e.g., In re* Henry, 123 U.S. 372 (1887).

[119] *See, e.g.*, U.S. v. Duff, 6 F. 45 (C.C.S.D.N.Y. 1881); U.S. v. Moore, 19 F. 39 (N.D. Ill. 1883); U.S. v. Dauphin, 20 F. 625 (C.C.E.D. La. 1884); U.S. v. Clark, 22 F. 708 (C.C.E.D. Va.1885); U.S. v. Zeisler, 30 Fed. 499 (C.C.N.D. Ill. 1887); U.S. v. Noelke, 1 F. 426, 440 (C.C.S.D.N.Y. 1880).

[120] A few cases prosecuted under Section 149 or its successor provisions did not involve materials sent through the mails relating to simple lotteries but rather more complex arrangements where the courts had to decide whether the activities involved what amounted to a lottery. *See, e.g.*, U.S. v. McKenna, 149 F. 252 (W.D.N.Y. 1906).

[121] H.R. 9268, 50th Cong. § 5480 (1889).

[122] This legislative history seems not to have been treated previously by criminal law scholars or legal historians. Those who directed their attention to the 1889 revision of the mail fraud statute typically asserted that there is no legislative history for the changes made

B. Changes in the Legislative Language Effected in the 1889 Legislative Revision

We begin with an overview of the changes that were made in the 1889 revision of the mail fraud statute, which is reproduced here (with minor editorial elisions) in the accompanying footnote.[123]

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in the statute. *See* Rakoff, *supra* note 3. The reason why this small block of legislative history materials has not previously been uncovered is not entirely clear. It could be explained by the fact that the direct subject of the committee report that incorporates the relevant history was a bill proposing a separate statute, not an amendment of Section 5480. One needs to dig into the materials attached to that report to see that, in fact, almost everything in the report relates to amending Section 5480.

[123] The 1889 revision of the mail fraud reads as follows:

> SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States . . . or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called 'the sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars' . . . to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device. SEC. 2. That any person who, in and for conducting, promoting, or carrying on, in any manner by means of the Post-Office Establishment of the United States, any scheme or device mentioned in the preceding section, or any other unlawful business whatsoever, shall use or assume or request to be addressed by any fictitious, false, or assumed title, name, or address, or name other than his own proper name, or shall take or receive from any post-office of the United States any letter, postal card, or packet addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own lawful and

A careful reading of the amended—now even more wordy—1889 version of the statute reveals that (1) it continues to make criminal the devising of a scheme to defraud; (2) it expressly and separately makes criminal devising a scheme to sell, etc. "real" counterfeit currency; (3) it makes criminal the devising of a scheme to sell, etc. anything represented to be counterfeit money; (4) it makes criminal schemes to obtain money by the sawdust swindle; (5) it makes criminal dealing in or pretending to deal in green articles, green cigars, etc. (listing the various kind of terms that the criminal element used to describe the counterfeited items); but (6) otherwise it generally retains the several key clauses that were in the 1872 version of the mail fraud statute (as discussed in Part II).

Although set out separately, items (3) and (4) would also qualify as schemes to defraud, and item (4) would seem to be a specific example of (3). Further, item (5) arguably covers the same ground as items (1), (2), (3), and (4) in cases where the argot terms are used. Accordingly, although there are interpretative issues that would need to be resolved, essentially Section 5480, as revised in 1889, covers two basic sets of conduct—schemes to defraud, including schemes to pretend to sell counterfeit money, and schemes to sell counterfeit money.

The addition of these specific terms to the mail fraud statute in 1889 was a curious development on several counts. When a statute is originally broadly formulated, as was the mail fraud statute, it seems rather odd to later add specific categories that seem to attach special importance to a certain type of fraud, namely, the sawdust swindle, that otherwise seemed plainly covered by the original, broad language. While the oddness of this addition raised a question whether the 1889 revision was intended to narrow the application of the statute, generally courts concluded that the statute was broadened.[124]

Separately, it seems odd to insert language that deals with "non-fraudulent" offers for the sale of counterfeit money into a provision that had previously dealt exclusively with schemes to defraud. As we shall see, there is an explanation why that language was added. Finally, the inclusion of terms referring to the argot language of the street was, to say the least, unusual.[125]

> proper name, shall, upon conviction, be punishable as provided in the first section of this act.

S. REP. NO. 50-2566 (1889) (Report to accompany H.R. 9268, 50th Cong. § 5480 (1889)). Additional subsections of the Act dealt with non-criminal enforcement tools relating to the subject matter of Section 2. Act of Mar. 2, 1889, ch. 393, 25 Stat. 873.

[124] *See* Bettman v. United States, 224 F. 819, 825 (6th Cir. 1915) ("[W]e think the statute has been broadened by each amendment made thereto. It is well settled that the effect of the amendment of 1889 was to expand the statute.").

[125] The colorful argot language persisted in the mail fraud statute for almost sixty years before being deleted in 1948 as part of a cleaning up of the statute in a codification process that was not supposed to produce any substantive changes in the applicable law. The scheme to sell counterfeit money (in addition to the original scheme to defraud) language is still in the current-day statute. It is not often noted that the mail fraud statute also can be used to

C. Legislative History Relating to the 1889 Amendment of Section 5480

The moral crusaders, previously referenced here only in the background, for the first time appear front and center, in the direct history of the 1889 amendment of the mail fraud statute and in the person of one of their leading figures, Anthony Comstock.

The story of the 1889 legislative materials revolves around Comstock, famous as a crusader on behalf of morality causes, targeting activities like obscenity, prostitution, and gambling[126] as well as, it turns out, counterfeiting schemes and other broad-scale schemes of fraudulent conduct. Comstock was appointed to be a post inspector in 1873—after a successful, intense personal lobbying campaign in Washington, D.C.—to enact federal statutory provisions relating to obscene materials.[127]

Therefore, by early 1889, Comstock had already been a postal inspector for fifteen years and was also well-known as a founder and agent of the New York Society for the Suppression of Vice.[128] Indeed, in their forwarding through the post office hierarchy of a key letter that he wrote regarding the bill then under consideration by a Senate committee, two high-ranking postal officials separately noted in their cover letters not only his position as a postal inspector but also the fact that he was the "agent" of the aforementioned New York Society.[129] There seems little doubt that, at the time, Comstock wielded an unusual degree of power and influence beyond that of any ordinary postal inspector.[130]

In 1888–1889, the Senate Committee on the Post Office and Post Roads had before it a legislative bill, HR 9268, referred to it by the House Committee on the Judiciary,[131] which proposed the enactment of a new statutory provision, designated as a bill to punish dealers and pretended dealers in counterfeit money and other

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prosecute schemes that arguably do not involve schemes to defraud. *Compare* Offenses Against the Postal Service, Pub. L. No. 60-350, § 215, 35 Stat. 1088, 1130–31 (1909) (using language such as "saw-dust swindle," "green articles," and "green goods" as examples of "counterfeit or spurious articles") *with* Frauds and Swindles, Pub. L. No. 80-772, §1342, 62 Stat. 683, 763 (1948) (using the all-encompassing language of "anything represented to be or intimated or held out to be such counterfeit or spurious article . . . .").

[126] *See* ANNA LOUISE BATES, WEEDER IN THE GARDEN OF THE LORD: ANTHONY COMSTOCK'S LIFE AND CAREER 2–16 (1995); Margaret Talbot, *Purity: The Women Who Resisted Anthony Comstock's Crusade Against Vice*, THE NEW YORKER, July 26, 2021, at 72 (reviewing AMY SOHN, THE MAN WHO HATED WOMEN: SEX, CENSORSHIP AND CIVIL LIBERTIES IN THE GILDED AGE (2021)).

[127] *See* BATES, *supra* note 126, at 69–91.

[128] *Id.* at 2, 99–100.

[129] *See* S. REP. NO. 50-2566, 2–3 Exs. A, B (1889) (Report to accompany H.R. 9268, 50th Cong. (1889)) (discussing exhibits A and B); FOWLER, *supra* note 17, at 60.

[130] *See* BATES, *supra* note 126, at 16 (noting that Comstock was a crusader and "no ordinary reformer").

[131] S. REP. NO. 50-2566 (1889) (Report to accompany H.R. 9268, 50th Cong. (1889)) (containing the history described in the text, Comstock's letter as an exhibit attached to the Report, as well as several other relevant documents).

fraudulent devices. This bill would have made it a felony to deposit in the mails an "offering, or proposing to sell, give, deliver, or transfer, to any person, any imitation of any coin, bill, note, bond, or other security of the United States, or banknotes . . . ."[132]

HR 9268 thus proposed a new provision separate from the mail fraud statute to expressly criminalize the conduct described therein; in this referral by the House Judiciary Committee, there was no express mention of the mail fraud provision, Section 5480, or its contents.[133] Both by its reference to "dealers and pretended dealers" and to "counterfeit money and other fraudulent devices," the bill seemed aimed, through a single provision—offering to sell phony money—at those who purvey counterfeit money as well as those who pretend to purvey counterfeit money in order to defraud their victims.[134] In the body of its brief Report, the House Judiciary Committee focused its attention only on what seemed to be sawdust swindles and pretended sales of counterfeit money.[135]

In response to HR 9268, Comstock, in his role as a postal inspector, wrote a strongly worded letter that proceeded through the Post Office Department hierarchy and included cover letters from high-ranking postal officials and a slightly longer letter from the Assistant Attorney General for the Postal Department.[136]

In his letter, Comstock recommended substituting a different House bill, HR 8859, which had been introduced the previous spring,[137] in place of HR 9268. HR 8859,[138] unlike HR 9268, consisted of a proposal for a substantial amendment of Section 5480, the mail fraud statute. In its Report, the Senate Committee endorsed the substitution of Comstock's recommended bill for HR 9268.[139] Subsequently, Comstock's recommended bill was passed by both Houses of Congress and signed into law. This became the 1889 version of Section 5480,[140] as reproduced supra in footnote 123.

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[132] S. REP. NO. 50-2566, at 2 (1889) (quoting H.R. REP. NO. 1501, at 1–2 (1888).

[133] *See* H.R. REP. NO. 50-1501, at 1–2 (1888).

[134] S. REP. NO. 50-2566, at 1 (1889).

[135] *See id.*

[136] *See* S. REP. NO. 50-2566, at 1 (1889) (indicating that some changes had been made in the bill that Comstock forwarded).

[137] H.R. 8859, 50th Cong. (1888). Congressman White of New York introduced this bill. While there is no direct evidence to support this, reasonable speculation is that Mr. Comstock had a role in drafting this bill.

[138] *Id.* In its journey from Comstock's desk through several Post Office Department offices, HR 8859 was amended somewhat in style and details, but its basic substance survived.

[139] S. REP. NO. 50-2566 (1889) (Report to accompany H.R. 9268, 50th Cong. (1889)).

[140] H.R. 9268, 50th Cong., § 5480 (1889) (current version at Offenses Against the Postal Service, Pub. L. No. 60-350, § 215, 35 Stat. 1088, 1130–31 (1909)).

Comstock introduced his letter[141] by referring to HR 9268 as a bill "to punish dealers and pretended dealers in counterfeit money," so he seemed to be addressing the issues posed by the relationship and possible confusion between prosecutions of dealers and pretended dealers in counterfeit, but in the body of the letter he, too, only referred to pretended dealers.[142] In criticizing HR 9268, he proceeded to focus the letter on "this business of pretending to sell counterfeit money . . . carried through the mails," stating, "That the mails . . . are the essential element of success to this business."[143] He noted that in the past year and a half, he had received more than 1,500 complaints and proceeded to describe the kinds of schemes whereby "thousands of circulars" were being sent out with a fictitious name used in the return address at the bottom of each circular.[144] Reply mail sent to the fictitious address would be bounced from one location (often a bar or cigar store, the proprietor of which would deny knowledge of the addressee) to another.[145] Multiple post office boxes with multiple names on each box were also used, and different underlings would pick up mail from them each day.[146]

Comstock identified a perceived failing in HR 9268 in the following terms: "The great majority of the circulars sent out by the 'green goods' men at the present time would not come within the purview of this bill as very few of them 'advertise' any 'imitation of any coin, note, bond,' etc. Rather they characterize their operations as 'green articles,' 'queer coin,' 'bills,' 'paper goods,' 'green paper goods,' etc."[147]

This comment seems to have been the principal rationale offered by Comstock for the addition of the argot language to Section 5480. An alternative way to proceed would have been for prosecutors to rely on expert testimony regarding the meaning of the argot terms that were being used in the circulars. Thereby, the awkwardness of introducing the argot terms into Section 5480 could have been avoided.

It is noteworthy that in his letter, Comstock did not otherwise discuss the sale of counterfeit money that did not involve a swindle. The bill he recommended did, however, fold language covering such conduct into Section 5480, where it remains to this day. Why was this language added to the mail fraud provision? While Comstock did not offer any explanation for incorporating this additional "non-fraudulent" criminal conduct into this statute, we can deduce the reasons therefor.

Comstock's legislative recommendation avoided two problems that the enactment of HR 9268 would have created. Were that bill enacted, it would have overlapped and probably conflicted with Section 5480. Even more important, if cases were brought under the language of that bill, the prosecution would risk losing them if the wrong choice were made—that is, if, for example, the prosecutor charged

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[141] Letter from Anthony Comstock, Post-Office Inspector, Post-Off. Dept., to Chairman of the Judiciary Committee of the Senate (Sept. 7, 1888) (found in S. REP. NO. 50-2566, Exhibit D, at 3–5 (1889)).

[142] *Id.* at 3–5.

[143] *Id.* at 3.

[144] *Id.* at 4.

[145] *Id.*

[146] *Id.*

[147] *Id.*

a defendant with offering to sell counterfeit, and the defendant countered by claiming that theirs was not a sincere offer, but instead that they were engaged in a sawdust swindle, or vice versa. But once Section 5480 was enacted, the defendant could be charged with both offenses under separate clauses of that section, and if either one of them were sustained, the conviction would stand.[148]

Accordingly, while the 1889 revision of the mail fraud statute as enacted was a verbose version of a federal criminal statutory provision, it was legally a better approach than the more succinct alternative, HR 9268, for which it was substituted.

IV. THE 1909 REVISION OF SECTION 5480—BACKGROUND AND LEGISLATIVE HISTORY

A. Language Changes in the 1909 Revision

The 1909 version of the mail fraud statute—Section 5480 in the Revised Statutes—is reproduced in the accompanying footnote.[149]

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[148] The implications of two Milby decisions, Milby v. U.S., 109 F. 638 (6th Cir. 1901) [hereinafter Milby I] and Milby v. U.S., 120 F. 1 (6th Cir. 1903) [hereinafter Milby II], are that the problem of shifting defenses, where the defendant may have dealt in, or pretended to deal in, counterfeit currency, generally seems to be solvable under the 1889 statute by addressing such conduct through the multi-count pleading of both of those charges, based on separate clauses of the same provision. That approach combined with a court's application of Milby II's view of motions in arrest of judgment—no reversal if any count can be sustained—would seem to solve the shifting defense's concern: The defendant may have a defense to one or the other charge, but under Milby II, if at least one of the charges is sustainable, the conviction would be upheld.

An interpretation of the pre-1889 mail fraud statute, had it been generally accepted, would have avoided the necessity for this 1889 amendment of the statute. In *U.S. v. Jones*, 10 F. 469 (S.D.N.Y. 1882), the Southern District of New York upheld a conviction of Jones: "The scheme to defraud described in the information may be a scheme to defraud any person upon whom the bad money might be passed, and it is within the scope of the statute, although no particular person had been selected as the subject of its operation. Any scheme, the necessary result of which would be the defrauding of somebody, is a scheme to defraud within the meaning of section 5480, and a scheme to put counterfeit money in circulation is such a scheme." *Id*. at 470. Thus, in *Jones,* the immediate purchaser of the counterfeit currency had not been deceived. He was going to receive what he paid for. Only the secondary or tertiary recipients of counterfeit money were going to be defrauded. However, *Jones* ruled that such actions were sufficient to create a scheme to defraud under the statute. The *Jones* decision was problematic because its interpretation strained and extended the language of the statute.

[149] Offenses Against the Postal Service, Pub. L. No. 60-350, § 215, 35 Stat. 1088, 1130–31 (1909) (Section 5480 appeared as Section 215 in the 1909 legislation passed by the 50th Congress in Chapter 321). This version is similar to the present-day provision adopted in the 1948 codification of the federal criminal code, except that the argot language added in 1889 was still in the statute. As previously mentioned, the argot terms were finally removed from the statute in 1948. The 1909 version of Revised Statute, § 5480 reads as follows:

A few simple language changes made in the amendment of the mail fraud statute in 1909 produced a basic structural change in the thrust of the offense. The federal self-defensive elements were removed from the statute, thereby effecting a change in the theory underpinning this provision. These changes resulted in an offense that became the model for many subsequently enacted federal auxiliary crimes. Accordingly, it is important to try to learn what triggered the 1909 changes.

The 1909 version of Section 5480 made changes in the 1889 version in two key respects. First, the language that ensured that the use of the mails was a central and substantive feature of any cases prosecuted, namely, the portion that read, "to be effected by either opening or intending to open correspondence or communication with any person, . . . by means of the post-office establishment of the United States . . ."[150] was deleted.

Second, the language that indicated that the provision was targeted at harm to the post office establishment was stripped out of the statute: Namely, the references to "misusing the post office establishment" and the proportionate punishment language in the final sentence were removed. The result was that while the use of

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> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin, "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

Id.

[150] The quoted language had been contained in both the 1872 and 1889 versions of the mail fraud provisions, as reflected in previous references to these statutes. *See* Act of June 8, 1872, ch. 335, 17 Stat. 283 (1872); H.R. 9268, 50th Cong., § 5480 (1889).

the mails was still retained as an element, it was no longer required that it be a significant part of the scheme or an index of harm to the post office establishment. Why were these deletions made?

B. Legislative History Materials Relating to the 1909 Revision

It turns out there is a limited set of legislative history materials relating to the 1909 version of the statute that provides some information about the changes made in the statute. These materials offer a clear explanation for one of the deletions and, possibly, explain most of the other changes. More important, they also provide some basis for deducing whether the lawmakers appreciated the nature and significance of the changes made in the statute.

The relevant legislative history materials include: (1) two reports of a Commission appointed by the President for revising the laws of the United States,[151] (2) reports in the Senate and House that are the respective versions from each House of the report of a Special Joint Committee[152] appointed to respond to the aforementioned Commission reports, and (3) brief comments in the Congressional Record[153] regarding these proposals that were made in the course of the legislative process.

The aforementioned Commission filed two reports, one on May 15, 1901,[154] and the second on December 15, 1906.[155] The Commission's first report provides the most relevant information as to why the changes were made. The comment to Section 190 (the mail fraud provision is so numbered in this Report) reads as follows:

> . . . Section 5480, Revised Statutes, as amended by the act of March 2, 1889, contains the words "to be effected by either opening, or intending to open, correspondence or communication with any person, whether resident within or outside the United States, or by inciting such other person or any person to open communication with the person so devising or intending." It is obvious that these words are not necessary to establish the criminality of the act sought to be denounced or the jurisdiction of the

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[151] The appointments of the members of the Commission were made under the authority of the Act of June 4, 1897, 30 Stat. L. 58; *see also* H.R. Rept. 6203, 59th Cong. 2d Sess., Jan. 10, 1907.

[152] *See* 42 CONG. REC. H. 539–41 (daily ed. Jan. 8, 1908) (statements of Sens. Dalzell, De Armond, Sherley, Houston & Macon) (explaining the reasons for appointing a Special Joint Committee); *see also* 42 CONG. REC. S. 725 (daily ed. Jan. 15, 1908) (Senator Heyburn summarizes the work of the Commission and the Joint Committee).

[153] *See* 42 CONG. REC. S. 1026 (1908).

[154] Sen. Doc. No. 68, Pt. 2, 57th Cong. 1st Sess. Report of Commissioners, May 15, 1901.

[155] FINAL REPORT OF THE COMMISSION TO REVISE AND CODIFY THE CRIMINAL AND PENAL LAWS OF THE UNITED STATES, § 190, at XVI (1906) [hereinafter FINAL REPORT OF THE COMMISSION].

> United States over the same, and it further appears from the decision in United States v. Smith, (45 Fed. Rep., 561) that they add an element to the proof necessary for conviction. They are accordingly omitted in the revision here submitted. The section is further amended by adding the words "or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed." The following words are omitted: "The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-Office Establishment enters as an instrument into such fraudulent scheme and device."[156]

The Commission focused on the two changes that it was recommending in the existing mail fraud statute. It explained the first—the deletion of the language that required that an element of the scheme to defraud be "opening of correspondence with any person . . ."—on the ground that that element was not necessary to establish either criminality or jurisdiction and further that it imposed a requirement that could defeat a prosecution, citing *United States v. Smith.*[157] In *Smith*, the judge sustained a demurrer in a case where the original communication to the victim was through a newspaper ad and therefore did not involve the opening of correspondence by mail.[158] The Commission also recommended the deletion of the language relating to sentencing and apportioning punishment according to the degree of abuse of the post office establishment without offering any specific explanation or reason for this action.[159] The Commission demonstrated no awareness of the original reasons for this language that it proposed to delete from the statute.

A possible explanation for the last-mentioned deletion is that the Commission believed that the apportioning punishment sentence was linked to the opening correspondence provision, which it arguably was—that deletion of the latter was also grounds for omitting the former.

The requirement of opening correspondence could trip up a prosecution, as it did in *Smith.* The case and the resulting change in the statute could be important insofar as fraudulent schemes during this era, involving some use of the mails, were more likely to be initiated through newspaper advertisements.[160]

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[156] *Id.*

[157] *Id.*; U.S. v. Smith, 45 F. 561 (E.D. Wis. 1891).

[158] *See Smith*, 45 F. 561.

[159] The language "so misusing the post-office establishment" was also omitted but was not expressly mentioned in the Report. FINAL REPORT OF THE COMMISSION, *supra* note 155.

[160] *See* William M. O'Barr, *A Brief History of Advertising in America*, 6 ADVERT. & SOC'Y REV. 3 (2005) (discussing consumer discontent with disingenuous advertisements for patent medicines). An increasingly literate population, newspapers with national circulation, and thousands of subscribers made the use of newspapers as communication vehicles

There also may have been other factors that contributed to the deletion of the proportionate penalty language from the statute. Consideration of different kinds of harms to the post office in determining the sentence was probably not as relevant in mail fraud prosecutions as it once was. The mass-mailing type of fraud that produced the most such harms may no longer have been so common. Also, as noted previously, we have no evidence, one way or the other, in the reported cases about how often sentencing judges used the proportionate penalty language of the statute. It may well have been the case that this language had fallen into disuse. Also, trying to achieve the goal of targeting real harm to the post office establishment through this kind of provision had been a weak measure from the outset; it left the pertinent language inapplicable in many cases, and, though its intent seems clear, it did not serve to ensure that prosecutions were limited to, or even involved, many cases where real harms to the post office establishment were being caused.[161]

What is concerning, however, is that, while all these were good reasons why changes were needed and made, neither the Commission, nor the Special Joint Committee of the House and Senate, nor the responsible legislators, showed any awareness of why the language that was deleted had been originally placed in the statute. Nor did they show any understanding of the significance of the changes that they were making. Indeed, there is no indication that any legislators in the House or Senate at the time were even aware that these deletions had been made by the Commission.[162]

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generally effective and cost-efficient. *See, e.g.*, Robert McNamara, *History of Newspapers in America*, THOUGHTCO, https://www.thoughtco.com/history-of-newspapers-in-america-4097503 [https://perma.cc/LR5H-LT8C] (last updated Feb. 24, 2020).

[161] It can be argued that the import of the various factors listed in the text in this paragraph and the preceding one is that while the mail fraud statute had begun as a self-defensive federal crime, in practice, it was no longer functioning in that role—that it had effectively become what amounted to an auxiliary federal crime. The subsequent stripping out of the self-defensive language from the statute thus simply recognized that reality.

[162] There is no mention of the deletions in the statements made on the House and Senate floors. Senator Heyburn, who was chair of the Special Joint Committee and managed the bill in the Senate, in his review of the reasons for appointment of the Special Joint Committee, fails to mention the Report of the Commission from May 15, 1901, stating that the first report from the Commission was its Final Report in 1906. The 1901 Report is the only source in the legislative history that we have found where attention is called to the fact of the deletions. REPORT OF THE COMMISSION TO REVISE AND CODIFY THE CRIMINAL AND PENAL LAWS OF THE UNITED STATES, § 190, at XVI (1901). Apparently, there was dissatisfaction with the Commission's Final Report, which contained 9000 provisions. *See also* S. REP. NO. 388 (1910); 42 CONG. REC. H. 539–41 (daily ed. Jan. 8, 1908) (statements of Sens. Dalzell, De Armond, Sherley, Houston & Macon); 42 CONG. REC. S. 725 (daily ed. Jan. 15, 1908) (statement of Senator Heyburn, who was the manager of the bill in the Senate debates and a chair of the Special Joint Committee).

The introductory comments to the Final Report also included the following: "The notes appended . . . to the criminal and penal laws in former reports are incorporated with notes on the remaining titles in this report, so that ready reference may be had to same." FINAL REPORT

As an immediate prelude to the enactment of the 1909 legislative revision of which the mail fraud statute was a part, on January 7, 1908, Senator Heyburn, on behalf of the Senate members of the Special Joint Committee on Revision of the Laws, issued its report on S. 2982, containing its recommendations on the revision and codification of the criminal and penal laws of the United States prepared by the Commission, whose work is described supra. Interestingly, the specific comments made in the Report of the Special Joint Committee on Section 216, the mail fraud provision in S. 2982, which was to become the mail fraud provision in the 1909 statute, made no reference to the aforementioned comments regarding Section 190 that the Commission made in its first report. Rather the Senate Special Joint Committee only stated the following: "Aside from a transposition of language, all other changes made in this section are indicated by italics and need no other explanation."[163]

Senator Heyburn also shepherded the reading of the bill, which appeared in the Congressional Record. In that context, after first calling attention to the amendments of the language in Section 216 that extended the reach of the mail fraud statute extra-territorially, he made a comment in a vein similar to the comments made in the report of the Special Joint Committee: "I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation."[164]

Both comments linked to Senator Heyburn seem innocuous and do not seem to add substantively to the legislative history. In fact, however, they can be viewed as significant. When Senator Heyburn states that no other explanation is needed, this appears to signify that he believes that the nature of the changes is clear. That may be so, but what is missing is any indication of what the specific changes are, their significance, and the reasons therefor.

Accordingly, it is not unreasonable to infer that Senator Heyburn, and, likely, his colleagues on the Joint Committee, did not think that any changes in the mail fraud provision were significant. Overall, the best that we can infer from this treatment of the changes in the mail fraud statute from the 1989 version is that the

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OF THE COMMISSION TO REVISE AND CODIFY THE LAWS OF THE UNITED STATES, at 6 (1906). Accordingly, while the Final Report included provisions as modified by the intervening House Committee (that is, the House version of the Joint Special Committee), it would seem to have also included the notes accompanying the Commission's First Report. *Id.*

[163] H.R. REP. NO. 2, pt. 1 at 22 (1908) (Report to accompany H.R. 11701). New language in the bill was, as was stated, indicated by italics, but deletions were not revealed by ellipses or any other indications, so the reader who was not familiar with a previous version of a section, nor with the comments in the Commission's first report, would have no way of knowing what changes were made by way of deletion.

[164] *See generally* 42 CONG. REC. S. 1026, (1908). Both the Special Joint Committee Report and the Congressional Record reading occurred in January 1908. The bill was reported out from Conference and printed approximately one year later on February 27, 1909. Pub. L. No. 60-350, ch. 321, 35 Stat. 1088, 1088–1159 (1909). By this time, some renumbering of the sections had occurred, and the mail fraud provision was Section 214. *Id.* at 1130.

legislators who voted on the bill were not likely to have perceived the changes as weighty and significant.

The comments that were made could also be interpreted to support the conclusion that these legislators were not aware of the changes that had been made earlier by the Commission. In the context of a massive penal law draft, with a great many different issues occupying the attention of the legislators, the fact that deletions had been made earlier in the process could easily have been overlooked.[165]

It is a stunning conclusion to draw that the amendments of the statutory language of the mail fraud provision that converted it into the first true federal auxiliary offense and initiated the long-term growth of this important category of federal crime may have been accomplished with the responsible legislators unaware of the changes made in the language. It is even more damning if they failed to appreciate the significance of these changes.

V. CONCLUSION

Viewed from a distance, the origins of the mail fraud statute are intertwined with the long-running cultural, social, and political battles revolving around lotteries and the transmission of lottery materials through the mails. The early mail fraud statute also crossed paths with the 19th-century moral crusaders, for example, through its links to the suppression of lotteries, which, as a form of gambling, were a prime crusade target and, more directly later, in the person of a leading crusader, Anthony Comstock. There was also a close relationship between the original mail fraud statute (Section 301) and the eventually successful efforts to ban lottery materials from the mails by attaching a criminal penalty to Section 149. And, of course, it was concern about harms to the post office establishment being caused by lottery and gift exchange frauds extensively using the mails that originally triggered interest in drafting legislation that became the mail fraud statute.

More specifically, the legislative and executive historical documents uncovered here help to explain what led to the drafting of the original mail fraud statute and the two subsequent major revisions that occurred within the next thirty-seven years. These documents reveal, for example, that the drafting of the mail fraud crime arose out of concerns about lottery fraud and similar swindles, and in its beginning, that it was an offense intended to protect against the harms those kinds of crimes could cause to the mails and the post office establishment. At the same time, given that goal, it was drafted in a way that made it a not-very-robust protector of the post office establishment: it could be and was prosecuted in cases that did not involve many concrete harms to the mails. The weakness of the form in which it was drafted was likely one of the factors that contributed to its ultimate transformation into a pure federal auxiliary offense.

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[165] Of course, it is possible that Senator Heywood and other members of the Special Joint Committee were aware of the changes and their significance and chose not to inform their legislative colleagues. However, it is difficult to discern any likely motive that there might have been for such an action.

Other factors also probably played a role: The kind of crime that was the raison d'être for the enactment of the mail fraud provision, namely lottery fraud, which is also the archetypal offense for causing harms to the post office establishment, became a less serious crime problem, not as a result of effective mail fraud prosecutions, but rather through criminal enforcement under another provision, Section 149.

Similarly, emphasis on enforcement against the sawdust swindlers probably reduced the number of players still committing such crimes. As a result, another crime category that caused real harms to the Post Office Department probably no longer appeared with frequency on the mail fraud prosecution docket. While other kinds of mail frauds may also have caused harms to the Post Office Department, there may not have been enough of them to justify the retention of the proportionate punishment language in the statute.

Finally, changes in the nature of some features of fraud schemes being perpetrated at the time probably limited the extent to which the pre-1909 form of the mail fraud statute could be effectively enforced. More specifically, as large-scale fraud schemes began to be more frequently initiated through newspaper advertising, it tended to make the then-existing version of the mail fraud statute problematic. This appears to have been the immediate catalyst for the removal of the federal self-defensive language from the statute in the 1909 legislative process.

The effect of the transformation of the mail fraud offense that took place between its original enactment in 1872 and its revision in 1909 was to create a crime that was no longer drafted in a way that aimed at punishing those who caused harm to a direct federal interest. While this new version of the mail fraud crime contained a federal jurisdictional link, viz. use of the mails, sufficient to satisfy constitutional concerns, its structure and thrust made it clear that it had now become an offense aimed at punishing and deterring fraudulent conduct in much the same way as state anti-fraud crimes. And this change was accomplished in 1909, without any indication that Congress was aware of what it was doing to the statute, or its significance.

This creation of the first pure federal offense auxiliary to state criminal enforcement was thus not accomplished through a conscious drafting process with that kind of statute in mind. Rather, it evolved and occurred over time through a series of steps involving some fortuity and happenstance. Indeed, there was a point early in its history when—had the timing of the addition of a criminal penalty to a sister provision been different—the mail fraud statute might not have been drafted at all. Given its subsequent history, how interpretations of the mail fraud statute evolved, and its ubiquitous and central role in hundreds, even thousands of federal prosecutions, it is somewhat shocking to learn now that only because of an accident of timing it came to be originally drafted. Had the mail fraud statute not been enacted then, we can only speculate how different might have been the history and the evolution of federal auxiliary crimes.