
ARTICLE

RECONSTRUCTION ENFORCEMENT AND THE FOUNDING OF THE DEPARTMENT OF JUSTICE

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Was the Department of Justice founded in 1870 to advance Reconstruction and civil rights enforcement? Or was its founding a conservative retrenchment toward fiscal responsibility and limiting federal enforcement power? These questions about congressional purpose in establishing the Department take on renewed salience as presidential control threatens not only its traditional independence, but the integrity of its prosecutions and the credibility of its officers in court. Reading the debates, the text of the statute, correspondence of federal lawyers, and the surrounding context together demonstrates that Reconstruction enforcement was in fact central to the DOJ bill even if promises of fiscal responsibility played a role in its promotion and passage. Moreover, evidence from the first period of enforcement of civil rights after the Department of Justice was founded shows that it was surprisingly effective despite extravagantly violent southern resistance, at least until political will in the Grant administration faded.

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I. INTRODUCTION

Was the Department of Justice founded in 1870 to advance Reconstruction and civil rights enforcement?¹ Or was its founding a conservative retrenchment toward fiscal responsibility and limiting federal enforcement power?² Questions about congressional objectives in establishing the Department take on renewed salience as presidential control threatens not only its traditional independence, but the integrity of its actions and the credibility of its officers in court.³

One of the most challenging aspects of Reconstruction historiography is that a counter-revolution arose from the ashes of the South’s military defeat and surrender at Appomattox. It is conventional to say that while the North won the war,

1. See, e.g., Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 *Stan. L. Rev.* 409, 438 (2011); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 *Stan. L. Rev.* 1931, 1937, 1959-60 (2008); Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876*, at 68 (2005).

2. See, e.g., Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 *STAN. L. REV.* 121, 123 (2014).

3. With respects to threats to use the Department of Justice for the purpose of prosecuting political adversaries, see Tom Dreisbach, *Trump Has Made More Than 100 Threats to Prosecute or Punish Perceived Enemies*, NPR (Oct. 22, 2024), <https://www.npr.org/2024/10/21/nx-s1-5134924/trump-election-2024-kamala-harris-elizabeth-cheney-threat-civil-liberties>; Sarah N. Lynch, *Unprecedented Errors are Eroding the Credibility of Trump’s Justice Department*, REUTERS (Dec. 17, 2025), <https://www.reuters.com/legal/government/unprecedented-errors-are-eroding-credibility-trumps-justice-department-2025-12-17/> (noting a 21 percent dismissal rate for U.S. Attorneys’ criminal complaints in the District of Columbia over eight weeks in 2025, “compared to a mere 0.5% dismissal rate over the prior 10 years”).

it lost the peace.⁴ The truth of the matter is that for black people and for white Republicans in the South, no peace followed Union victory at Appomattox. In the midst of abolition, the ascendancy of the Republican Party in Congress, and the ratification of the Thirteenth Amendment, southern resistance to Reconstruction surged, aided by President Andrew Johnson's generous pardon policy and other efforts to promote immediate sectional reconciliation.⁵ Southern resistance was strident, well-funded, extravagantly violent, and persistent.⁶ Even as Republicans extended the legal framework of Reconstruction in response, securing ratification of the Fourteenth and the Fifteenth Amendments and enacting a series of aggressive enforcement acts in 1870 and 1871, a deadly, anti-black and anti-Reconstruction paramilitary campaign led by the Ku Klux Klan and southern conservatives took root.⁷

As importantly, northern will to make good on its constitutional commitments and innovations was "flagging."⁸ President Johnson was not the only proponent of sectional reconciliation in the 1860s. By the end of President Ulysses

4. See generally A.J. LANGGUTH, *AFTER LINCOLN: HOW THE NORTH WON THE CIVIL WAR AND LOST THE PEACE* (2014) (documenting resistance to Reconstruction after the North won the Civil War).

5. On May 20, 1865, Johnson issued a general amnesty and pardon to low ranking Confederates whose taxable property was under \$20,000. See JONATHAN T. DORRIS, *PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861-1898*, at 339, 135-42, 343-44 (1953). Wealthy and higher ranking Confederate officers were pardoned by "special" applications during the Johnson administration. J.T. Dorris, *Pardoning the Leaders of the Confederacy*, 15 *MISS. VALLEY HIST. REV.* 3, 3 n.2 (1928). One historian concludes that the effect was to "restor[e] the political status of the planter elite who had dominated antebellum Southern society." Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 *STAN. J. C.R. & C.L.* 253, 310 (2010); see also WALTER A. MCDUGALL, *THROES OF DEMOCRACY: THE AMERICAN CIVIL WAR ERA 1829-1877*, at 510 (2008); 6 CHARLES FAIRMAN, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, PART ONE, RECONSTRUCTION AND REUNION 1864-88*, at 788 (1971) ("On Christmas Day, 1868, when impeachment lay behind and the end of his term was close at hand, Johnson threw open the gates and granted a full pardon for the offense of treason to all participants in the rebellion.").

6. See WILLIAM S. McFEELY, *GRANT: A BIOGRAPHY* 368 (1981) ("'Outrages,' as the Freedmen's Bureau termed the murders, cruel beatings, and terrifying threats of both that were intended to relegate black people in the South to a dependent position, had been going on since slavery ended. The records of the Bureau were full of documented cases of brutal mistreatment."). See generally STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* (2003) (describing the longstanding, complex role of violence in political and social power in the South and black resistance). Recent historians have argued that the proper way to understand Reconstruction in light of the systematic violence of southern resistance, is as a "Second Civil War." See JOHN PATRICK DALY, *THE WAR AFTER THE WAR: A NEW HISTORY OF RECONSTRUCTION* 15 (2022); *id.* at 155-56, nn.3-13 (gathering sources).

7. See ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* xxxv-xli, xlvii (1971) (describing rationalization of anti-black violence by southern conservatives; noting that after 1867 the "Klan became in effect a terrorist arm of the Democratic party").

8. KACZOROWSKI, *supra* note 1, at 75.

S. Grant's first term in office the Republican Party, which had always been divided between moderates and more radical egalitarians, was badly splintered. Liberal Republicans would break away in the election of 1872, unsuccessfully supporting Horace Greely over Grant, and in 1874 Democrats would retake control of Congress for the first time since the Civil War.⁹ White supremacy flourished not only in the South, but in the North.¹⁰

For the legal historian, these powerful, shifting socio-political currents can make it difficult to distinguish concessions to counter-revolutionary resistance from efforts to make Reconstruction effective that withered in the face of resistance and internal divisions in the Republican Party. Applying standard assumptions about legislative intent during the period can therefore be misleading. What was said did not always fit what was done, debates were far from comprehensive even on exceedingly important legislative matters,¹¹ and in light of southern resistance what was done was sometimes unequal to the task. Even landmark achievements were abandoned, repudiated, or undone, sometimes by their most ardent sponsors.

This was true in many areas of Reconstruction enforcement, including contests between Congress and the Supreme Court over the jurisdiction of the federal courts and contests between Congress and the Johnson Administration over the power of the executive branch. Jurisdiction-stripping legislation to insulate the Military Reconstruction Act of 1867¹² from review of its constitutionality by the Supreme Court in *Ex parte McCardle* is a classic example of contestation between Congress and federal courts.¹³ Having dramatically expanded federal habeas jurisdiction in 1867, Congress promptly repealed appellate jurisdiction to prevent the Supreme Court from hearing the habeas petition of William H. McCardle, a southerner who had been arrested for publishing critiques of Union generals and was subjected to trial before a military commission for undermining Reconstruction.¹⁴ Johnson's refusal to enforce the Civil Rights Act of 1866, his

9. See Andrew L. Slap, *The Doom of Reconstruction: The Liberal Republicans in the Civil War Era* xi-xiii (2006).

10. Indeed, it has long been a feature of northern politics and society, see generally PAUL D. ESCOTT, *THE WORST PASSIONS OF HUMAN NATURE: WHITE SUPREMACY IN THE CIVIL WAR NORTH* (2020).

11. On the inherent limitations of relying on the Congressional Globe to establish legislative purpose, see Rachel A. Sheldon, *Finding Meaning in the Congressional Globe: The Fourteenth Amendment and the Problem of Constitutional Archives*, 2 J. AM. CONST. HIST. 715, 725-26, 729-30 (2024) (discussing the various, widespread practices of "buncombe speechmaking . . . designed to appeal to constituents rather than to colleagues in Congress"; some speeches published in the *Globe* were not delivered on the floor but simply published there and to constituents at home, and some speeches were written by paid reporters).

12. Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

13. See William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 232 (1973).

14. See *id.* at 236-43; see also *Ex Parte McCardle*, 74 U.S. 506 (1868) (dismissing a petition on grounds of congressional repeal of jurisdiction under an 1867 habeas statute but noting that the Court retained habeas jurisdiction under Section 14 of the First Judiciary Act to entertain similar petitions in the future).

efforts to hobble the Freedmen's Bureau, and his eventual impeachment are examples of sharp contestation between Congress and the President.¹⁵

Notice the interpretive dilemma these incidents present. Is it proper, for instance, to view the work of the Freedmen's Bureau's as a failure, woefully insufficient to meet the needs of freedmen, or as a valuable project undermined by a President overtly hostile to its mission? Or both?¹⁶ Is it proper to view the Court as having caved to Congress regarding the constitutionality of Reconstruction (the explosive issue underneath McCardle's habeas petition), as modeling judicial restraint by respecting congressional authority over the Court's jurisdiction, or as using the language of judicial restraint as a veneer for retaining jurisdiction to hear challenges to Reconstruction? Answers depend in part on one's normative priors, but also on how the surrounding context is assessed.

The establishment of the Department of Justice in the summer of 1870 is another case in point. On the one hand, as Jed Shugerman and others have ably demonstrated, key sponsors of the bill were concerned with patronage spoils, reducing waste in federal expenditures, and enhancing the supervision of attorneys charged with enforcing federal law.¹⁷ Moderate Republicans who sponsored the DOJ bill, such as Representative Thomas Jenckes, were not particularly concerned with the fate of black people or deeply committed to the work of Reconstruction.¹⁸ And as historians of the retreat from Reconstruction have long noted, federal enforcement of the Enforcement Acts of 1870 and 1871 fell off sharply during Grant's second term.¹⁹ The "Long Depression" began in 1873 and endured for the remainder of the decade.²⁰ Even before this nationwide economic downturn, corruption scandals from party patronage and machine politics reduced public faith in government and lent public support to fiscal conservatism and moderate Republican anti-patronage policies.²¹ Congressional debate in

15. See Harold M. Hyman & William M. Wiececk, *Equal Justice Under Law: Constitutional Development, 1835-1875*, at 323, 326, 448-59 (1982).

16. KACZOROWSKI, *supra* note 1, at 61 (documenting early successes of the Department of Justice in enforcing civil rights in the South during Reconstruction); Zachary Newkirk, Feature, *A Brief Moment in the Sun: The Reconstruction-Era Courts of the Freedmen's Bureau*, 101 JUDICATURE, no. 1, 2017, at 49, 50-51 (examining functioning and limitations of Freedmen's Bureau); AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 263 (2017) (examining the operation and jurisdiction of Freedmen's Bureau courts).

17. See generally Shugerman, *supra* note 2 (scrupulously documenting these reform goals and the role of sponsors committed to them).

18. See *id.* at 142.

19. E.g., KACZOROWSKI, *supra* note 1, at 89-92 ("The Grant administration abandoned civil rights enforcement in the summer of 1873 despite the warnings of its legal officers about the effect leniency would have on the resumption of crime and violence.").

20. O.V. Wells, *The Depression of 1873-79*, 19 J. FARM ECON. 621, 622 (1937); M. JOHN LUBETKIN, *JAY COOKE'S GAMBLE: THE NORTHERN PACIFIC RAILROAD, THE SIOUX, AND THE PANIC OF 1873*, at 285 (2006); Brooks D. Simpson, *Mission Impossible: Reconstruction Policy Reconsidered*, 6 J. CIV. WAR ERA 85, 93 (2016).

21. WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-1879*, at 56

1870 on the DOJ bill and its precursors demonstrate that a principal objective of the bill was reducing the cost of federal law enforcement by eliminating the practice of hiring outside counsel to handle cases, often for large, unsupervised fees. Jenckes introduced the bill by emphasizing that it was “shaped . . . to cut off all this outside work.”²²

There is no gainsaying these elements of the bill’s enactment. There is not only Jenckes’s sponsorship and desire to eliminate outside fees for government work, but as Shugerman carefully documents, Jenckes’s biography as a champion of fiscal conservatism and a broader professionalism movement which established the first state and national bar associations to elevate professional standards in the same decade.²³ All of this dovetails with well-established historical treatments of moderate Republicans’ growing concern with corruption, patronage, waste, and civil service reform, scandals within the Grant administration and in state and local politics,²⁴ and with the bar’s efforts to restore its stature after descending into overtly sectional and partisan constitutional strife leading up to the Civil War.²⁵

Shugerman goes further, contending not only that the DOJ bill was animated by “retrenchment” (budget cutting and fiscal conservatism) and anti-patronage reform,²⁶ but that it “actually *undermined* Reconstruction” by imposing strict constraints on how the federal government retained lawyers to enforce and defend federal law.²⁶ As he emphasizes:

It has been overlooked that the DOJ Act eliminated the primary tool of the federal government for keeping up with a surge in postwar litigation: outside counsel. From 1864 to 1869, the federal government had paid over \$800,000 to such “outside counsel.” The DOJ Act essentially cut the equivalent of about . . . forty assistant attorneys general from the federal government—about one-third of the federal government’s legal staff—and replaced them with only one new lawyer, the Solicitor General. . . . Representative Jenckes and the other reformers paid little attention to Reconstruction or to black civil rights. . . . The DOJ Act then played a role in frustrating the Reconstruction effort.²⁷

(1979) (noting that by the end of Grant’s first term, “the administration was reeling from charges of corruption, cronyism, and absenteeism” and that “a number of Republicans lacked confidence in the president”); HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY 89-90* (2014) (observing that some members of Congress believed that “[t]he president . . . had thrown in his lot with machine politicians. . . . [And] that Grant and his small-minded cronies were out to line their own pockets”).

22. CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Thomas Jenckes).

23. See Shugerman, *supra* note 2, at 123-24.

24. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at xx (1988) (noting mid-twentieth century revisionist scholarly emphasis on northern corruption scandals).

25. See Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2011 (2005); Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 472-73 (1998).

26. Shugerman, *supra* note 2, at 123 (emphasis added).

27. *Id.* at 123, 126 (footnotes omitted).

The legislative record and post-enactment history are not quite so clear. Reconstruction enforcement was a core concern in Congress at the time of enactment. Further, the statute Congress passed allowed the Attorney General to continue to seek help as needed. And he did. In 1871 and 1872, the two years after the bill passed, the Attorney General requested and received \$1 million and \$1.2 million in supplemental funding—amounting to nearly three times the amount ostensibly spent on outside counsel over the previous five years.²⁸ As importantly, the new department's early enforcement efforts were courageous, adaptive, and effective in prosecuting Klan members, overcoming enormous obstacles and undercutting the Klan's campaign before the Grant administration shifted course.

The anti-corruption, fiscal conservative thesis and the expansion of resistance to Reconstruction among Republicans demand recognition. But there is also a vexed historiographic tradition of treating Reconstruction and its proponents as corrupt, misguided, and doomed to fail.²⁹ In perhaps its most “paradoxical” form, one that took hold even in the highest Republican circles during Grant's second term, advocates of abandoning Reconstruction contended that the way to restore law and order in the South was to end the enforcement of federal civil rights law altogether, abandoning black people both to extra-legal violence and other overt betrayals of the rule of law in southern legal systems.³⁰ For modern historians, the challenge is examining the events of Grant's first term, when the DOJ was founded and many Republicans were serious about Reconstruction enforcement, without what we know about the way resistance to Reconstruction played out driving assessment. The early enthusiasm, benevolent impulses, and achievements do not mean that Republicans were undivided. They were. But the achievements were real too.³¹

28. See *infra* text accompanying notes 151-153 **Error! Bookmark not defined.**

29. The basic contours of the claims that Reconstruction was a “sordid period” from which the South was rescued by the restoration of “home rule”—claims central to the Dunning School and Lost Cause ideology—are described in FONER, *supra*, note 24, at xvii-xx.

30. KACZOROWSKI, *supra* note 1, at 91-92 (explaining that Grant and Attorney General George Williams “were apparently susceptible to th[e] paradoxical argument” advanced by Southern Democratic Conservatives “that law enforcement bred crime and that the absence of law enforcement produced peace, law, and order”).

31. On the contemporaneous association between southern and Democratic resistance to Reconstruction, Lost Cause ideology, and claims that civil rights enforcement was a politically corrupt enterprise, see *id.* at 75-76 (explaining that by the 1870s, “[i]t was easy to view civil rights enforcement in the South as another aspect of administration corruption since Democrats so vehemently insisted that it was,” and observing that “Grant's administration was . . . under fire for corruption, venal partisanship, extravagance, waste, military despotism, and tyranny, and prosecutions under the Enforcement Acts fed the fires of that criticism”). Obviously, the opposite historiographic impulse to make heroes out of anyone who supported Reconstruction must also be resisted. A fair amount of historical work on the period falls into one or the other error. There is also more archival work to be done on the interaction between the office of the Attorney General in the new Department and the Judge Advocate General in the War Department to discern how contemporaries understood and implemented the DOJ bill.

Reading the debates, the text of the statute, and the surrounding context together demonstrates that Reconstruction enforcement was central to the DOJ bill, travelling alongside the desire for more efficient management of federal legal work. Reconstruction enforcement was discussed on the floor of Congress and the bill's sponsors were keen to offer assurances that there would be no diminution in federal enforcement power by creating the new department and ending reliance on outside lawyers. One can argue that the assurances offered by the bill's proponents should not have been believed, that these were empty assurances. But the record is hard to square with the assertion that there was "no mention of how the new department would help (or even hinder) federal law officers enforce civil rights legislation."³² Moreover, evidence from the first period of enforcement of civil rights after the Department of Justice was founded shows that it was remarkably effective despite extravagantly violent southern resistance, at least until political will in the Grant administration faded. If Jenckes' goal was to undermine enforcement, that project did not initially bear fruit.

Part II provides a brief overview of the arc of Reconstruction enforcement in the spring of 1870 when Congress took up the DOJ bill, emphasizing that five years after Appomattox, southern states were still seeking readmission to the Union after having been broken up into military districts in 1867 in order to enfranchise African Americans and ensure ratification of the Fourteenth Amendment. Crucially, Congress took up the DOJ bill just weeks after passing significant civil rights enforcement legislation—legislation that provided new authority to U.S. Attorneys to criminally prosecute resistance to Reconstruction. It is implausible that consideration and passage of the DOJ bill just weeks later was unconnected to this remarkable expansion of federal crimes and prosecutorial power to protect civil rights. Part III analyzes congressional debate on the DOJ bill to show how pivotal concern for effective Reconstruction enforcement was. Part IV briefly assesses evidence regarding enforcement of civil rights following the creation of the new department. The essay concludes by examining the double-edged sword of centralizing the legal work of the federal government in the Attorney General as the head of the DOJ. If it was effective in enabling enforcement of Reconstruction by an Attorney General committed to civil rights, it also enabled retreat from Reconstruction when the Grant Administration's priorities shifted and a new Attorney General was appointed.

II. RECONSTRUCTION ENFORCEMENT IN THE SPRING OF 1870

Even a cursory review of the timetable of the legislative agenda in the spring and summer of 1870 draws into relief how peculiar it would have been for

Part III.C below contributes to that work but does not complete it.

32. Shugerman, *supra* note 2, at 149. Shugerman states even more emphatically that "[t]here would have been very little downside for a congressman to mention how an idea would help Reconstruction if he thought it would. And yet, neither Representative Jenckes nor any other supporters *even hinted* at such an argument." *Id.* at 153 (emphasis added). This conclusion is not supported by the record. *See infra* Part III.A.

Congress to have passed the DOJ bill with civil rights enforcement out of mind, or with a purpose of undermining Reconstruction enforcement front of mind. The Fifteenth Amendment was ratified on March 30, 1870.³³ Two months later, on May 31, 1870, Congress passed and President Grant signed the first Ku Klux Klan Act, also known as the First Civil Rights Enforcement Act or Force Bill.³⁴ The DOJ bill became law just a few weeks later on June 22, 1870.³⁵ The proximity between the ratification of the Fifteenth Amendment and the First Enforcement Act is significant, not least of which because the statute created new federal crimes for a wide range of voter interference as well as Klan-like terrorist conspiracies against the exercise of a federal right or privilege.³⁶ Exclusive federal court jurisdiction was established for the prosecution of crimes under the statute.³⁷

One of the most sensitive readers of federal civil rights enforcement during Reconstruction describes the criminal provisions of the First Enforcement Act as imposing a “*radically new function* . . . upon federal legal officers” because of its emphasis on federal “protection of persons and property from violence.”³⁸

33. Secretary of State Hamilton Fish issued a proclamation certifying the ratification on this date. *See* Proclamation No. 10, 16 Stat. app. at 1131-32 (1870).

34. First Enforcement Act, ch. 114, 16 Stat. 140 (1870) (codified as amended in scattered sections of 42 U.S.C.).

35. An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870) (codified as amended in scattered sections of the U.S. Code).

36. Section 3 of the statute created a cause of action for statutory damages and attorneys fees against state election officers “who shall wrongfully refuse or omit to receive, count, certify, register, report, or give effect to the vote of” a citizen. First Enforcement Act § 3. It also made such conduct a federal crime. *Id.* Section 4 of the statute created similar civil and misdemeanor criminal penalties for interfering with registering to vote or casting a vote. *Id.* § 4. Section 5 made it a federal crime to use bribery or threats to property, employment, or of physical violence to interfere with voting. *Id.* § 5. Section 6 directly targeted Klan conspiracies, making it a federal felony to conspire or “go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act,” or to “prevent or hinder [the] free exercise and enjoyment of any right or privilege granted or secured . . . by the Constitution or laws of the United States.” *Id.* § 6. Sections 10 and 11 made it a federal felony for a marshal to refuse to execute a warrant issued to enforce the statute, made it a federal misdemeanor for any person to “knowingly and willfully obstruct” execution of such warrants, and empowered commissioners and their subordinates “to summon and call to their aid . . . such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the fifteenth amendment to the Constitution of the United States.” *Id.* §§ 10-11. Other sections of the law included federal misdemeanors for depriving individuals of their civil rights under color of law. *Id.* §§ 16-17 (providing penalties for depriving individuals’ rights “to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws . . . for the security of person and property as is enjoyed by white citizens”).

37. The statute provided exclusive federal court jurisdiction over “all crimes and offences committed against the provisions of this act.” *Id.* § 8. District attorneys were authorized to seek removal, by writ of *quo warranto*, and to prosecute as a misdemeanor, anyone holding office in violation of Section 3 of the Fourteenth Amendment. *Id.* §§ 14-15.

38. KACZOROWSKI, *supra* note 1, at 63 (emphasis added).

The administration of criminal justice was traditionally recognized as a core state function, especially as concerned the security of persons and property from violence, but “the Klan’s criminality was so pervasive that local law enforcement authorities in several Southern states were unable to provide even the semblance of criminal law enforcement.”³⁹ Depredations visited upon black people and white supporters threatened to nullify the Reconstruction Amendments and their protection of black freedom, citizenship, and civil and political rights. David Donald writes that by December 1869, “it was abundantly evident that if the Southern whites were prepared formally to assent to the conditions imposed by Congress” for re-entry to the Union under the Military Reconstruction Act of 1867, but:

once back in control, [they] would in effect nullify those [conditions]. Congress could give the Negro the vote, but all over the South the Ku Klux Klan and other terrorist organizations systematically intimidated the freedmen, flogged or slaughtered their leaders, and drove whites who worked with them into exile. Congress could require federal troops to supervise the registration of voters, but Negroes were waylaid and butchered on the roads to the registration offices.⁴⁰

Congress was well aware of the problem. It had delayed the readmission of southern states to the Union because of evidence that their new state governments were overtly hostile to Reconstruction.⁴¹ Congress expanded the role of federal prosecutors and courts to prevent the Reconstruction Amendments from being nullified in the First Enforcement Act because state law, state legal officers, and state courts could not be trusted. In so doing, it transformed state and federal relations regarding criminal enforcement.⁴²

The First Enforcement Act went beyond merely establishing new federal crimes that cut into state sovereignty and expanded federal court jurisdiction. It authorized the use of the Army and Navy as well as militias to protect judicial process in the federal courts from Klan interference; it permitted the appointment of new federal legal officers to aid arrests, evidence gathering, and trial; and it required the federal government to pay the expenses of district attorneys, marshals, and other officers at rates comparable to other cases.⁴³

It is unlikely that legislation creating the new Department of Justice was not informed by the First Enforcement Act’s creation of a fundamentally new role

39. *Id.* at 64.

40. DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 420 (1970).

41. *See id.* at 424-45.

42. *See* KACZOROWSKI, *supra* note 1, at 11 (discussing jurisdictional ambiguity in the Civil Rights Act of 1866).

43. The statute empowered federal courts to “increase the number of commissioners” to aid in the “arrest and examination of persons charged with a violation of this act,” and it obliged the federal government to pay for the costs of district attorneys, marshals, and commissioners “to institute proceedings against all and every person who shall violate provisions of this act” at “like fees as may be allowed to them for similar services in other cases.” First Enforcement Act, ch. 114, §§ 9, 12, 16 Stat. 140, 142-43 (1870) (codified as amended at 42 U.S.C. §§ 1987, 1989, 1991). The President was explicitly authorized to “employ” military forces “as . . . necessary to aid in the execution of judicial process.” *Id.* § 13.

for federal prosecutors and the extension of authority to rely on the military to protect the civil and political rights established by the Reconstruction Amendments. To be sure, the idea of creating a department of justice had been proposed on several occasions between 1867 and 1869 in both the House and the Senate, and its proponents consistently spoke the language of cost savings regarding retention of outside counsel.⁴⁴ An entire page of the Congressional Globe in 1868 is filled with figures detailing the expenses paid to outside counsel.⁴⁵ But those earlier Congresses were also preoccupied with Reconstruction enforcement policy, and the key debate leading to passage of the bill in the House occurred over two days in April 1870, just weeks after the ratification of the Fifteenth Amendment, and during consideration of the First Enforcement Act. What was said over those two days in April, and just as importantly, what needed no saying for everyone to understand, cannot plausibly be separated from the imperatives of civil rights enforcement. The next Part attends to this debate.

III. HOUSE DEBATE ON THE DOJ BILL

A. Efficient or Diminished Enforcement Capacity?

Debate opened with Jenckes's argument in support of the bill. He emphasized four points. First, that the hiring of outside counsel to litigate cases on behalf of the federal government was costly. Second, that the absence of centralized control over opinion giving by lawyers working in different departments of the federal government created conflicting interpretations of statutory obligations and powers, while also raising the risk of agency directors receiving self-serving advice. Third, that district attorneys had at least three masters: the Treasury Department, the Internal Revenue Department, and the Attorney General. This created confusion about how to coordinate and execute tasks, how to appropriately supervise expenditures and legal positions taken in court, and how to address errors and incompetence. Fourth, Jenckes argued that legal officers responsible for courts-martial must remain within the War Department. Notice that these points correspond to the core functions of federal legal work: prosecuting and defending federal laws (in civil and criminal cases), providing opinions on the legality (constitutional, statutory, and regulatory) of executive branch action in its various departments (civilian and military), and assorted administrative work

44. The legislative history of earlier bills and Henry Stanbery's recommendation to the Senate for an office of the solicitor general are discussed by Representative William Lawrence, CONG. GLOBE, 41st Cong., 2d Sess. 3038 (1870) (statement of Rep. William Lawrence), and in the twentieth century by Solicitor General Seth Waxman, Seth P. Waxman, Solic. Gen. of the U.S., "Presenting the Case as it Should Be": The Solicitor General in Historical Context, Address to the Supreme Court Historical Society (June 1, 1998), <https://www.justice.gov/osg/solicitor-general-historical-context>.

45. CONG. GLOBE, 40th Cong., 2d Sess. 1272 (1868). The desire to limit waste by ending the payment of *excessive* fees to outside counsel is not, in itself, inconsistent with supporting federal Reconstruction enforcement efforts.

(hiring supplemental help, managing other expenses, supervising performance, coordinating across districts, supervising appeals, etc.).

Even the work that was most obviously a target for cost saving (the hiring of outside counsel) is described by Jenckes in terms that related to the Civil War and Reconstruction. His opening remarks on the need to “cut off . . . outside work”⁴⁶ were expressly tied to the expansion of the legal work of the federal government during the Civil War and Reconstruction. The expansion, as he described it, had occurred along three lines. The first was new work arising from the capture of Confederate property under the Confiscation⁴⁷ and Captured and Abandoned Property Acts,⁴⁸ a source of revenue for the federal government during and after the Civil War.⁴⁹ Second, was the work of protecting “rights to personal liberty,” a capacious phrase which, in the context of reference to the Civil War could have encompassed the legal consequences of emancipation, abolition, and suspension of the writ of habeas corpus (in the North during the war, and in the South to support Reconstruction, after the war ended).⁵⁰ Third, various law of war questions which surfaced not only during the war, but most prominently and recently under the Military Reconstruction Act of 1867,⁵¹ to deal with southern resistance to Reconstruction and ensure ratification of the Fourteenth Amendment.⁵²

46. CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Thomas Jenckes).

47. First Confiscation Act, ch. 60, 12 Stat. 319 (1861) (codified as amended at 50 U.S.C. §§ 212-13, 215 and in scattered sections of 28 U.S.C.); Second Confiscation Act, ch. 195, 12 Stat. 589 (1862).

48. Captured and Abandoned Property Act, ch. 120, 12 Stat. 820 (1863).

49. CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Thomas Jenckes). On the connection between the revenue generated from captured and abandoned property, Reconstruction, and Black freedom, see generally Helen Hershkoff & Fred Smith, Jr., *Reconstructing Klein*, 90 U. CHI. L. REV. 2101 (2023). In his first annual report to Congress on the Department of Justice, Attorney General Akerman also emphasized the importance of the DOJ’s work to generating revenue for the government. U.S. DEP’T OF JUST., ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 2 (1871) (“The general professional service which these officers perform is of the highest value to the Government. Unless that service is efficient, dues to the Government are unpaid and crime is unpunished”); *id.* at 3-4 (advocating various reforms to jurisdictional rules to enhance the government’s debt collection efforts).

50. The term had a well-recognized meaning tied to personal autonomy and freedom from bondage stretching at least as far back as Blackstone. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130-31, 134 (1st ed. 1765) (“[T]he law of England regards, asserts, and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion . . . without imprisonment or restraint, unless by due course of law. . . . it is a right strictly natural . . . no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land.”). On the direct connection to slavery, personal liberty laws in the antebellum period, the Civil War, and emancipation, see THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861*, at 59-71 (2001); Herman Belz, *Protection of Personal Liberty in Republican Emancipation Legislation of 1862*, 42 J. S. HIST. 385 (1976).

51. Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

52. CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Thomas

Here is Jenckes' brief introductory history drawing each of these connections:

At the commencement of the rebellion . . . the law officers of the Government were the Attorney General, the solicitor of the Treasury, the solicitor of the Court of Claims, and the assistant attorney general. In 1861, there being a pressure upon the law department, the Attorney General was authorized to employ assistants to the district attorneys, and under this power eminent lawyers were employed in different parts of the United States to conduct special cases in each of the districts. At this time the law business of the Government greatly outgrew the capacity of the persons authorized to transact it, and the number of outside counsel, if I may use the phrase, appointed subsequent to 1861 was greater than all the commissioned law officers of the Government in every part of the country. . . . [T]he Government was put to [great expense] by the employment of these extra counsel . . . [Jenckes' Committee on Retrenchment took the initiative to consider reforms in light of] numerous litigations involving titles to property worth millions of dollars, rights to personal liberty, and all the numerous litigations which can arise under the law of war. It has been impossible, with the force created by law, to attend to these matters properly in the various courts of the United States.

. . . .

This bill is shaped for that purpose, to cut off all this outside work.⁵³

As specific examples of the cost of retaining outside counsel, Jenckes emphasized "proportional[] increase[s]" in 1868 and 1869, and detailed the expenditures for customs cases, revenue collection cases, "cases relating to captured and abandoned property . . . cases relating to the cotton laws . . . recovery of confederate property in foreign countries . . . [and] services of counsel" for the War Department, the Treasury Department, and "additional counsel" hired by "United States district attorneys."⁵⁴ Setting aside customs, revenue collection, and "miscellaneous services" for the Treasury Department, all of the other expenditures for outside counsel bore some connection to Reconstruction, especially litigation over captured and abandoned Confederate property.⁵⁵

Jenckes expressed concern with the total cost arising from decentralized departmental decisions about hiring outside counsel, but not, in the first instance, fraud, corruption, or even extravagance. His emphasis was instead on the fact that the exigencies of the war and Reconstruction created distinctive legal needs that had outstripped the capacity of government lawyers. Asked specifically

Jenckes).

53. *Id.*

54. *Id.*

55. On the laws concerning captured and abandoned property, see, for example, JOHN SYRETT, *THE CIVIL WAR CONFISCATION ACTS: FAILING TO RECONSTRUCT THE SOUTH* (2005); DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* (2010); James G. Randall, *Some Legal Aspects of the Confiscation Acts of the Civil War*, 18 AM. HIST. REV. 79 (1912); James G. Randall, *Captured and Abandoned Property During the Civil War*, 19 AM. HIST. REV. 65 (1913); Hershkoff & Smith, *supra* note 49.

about the effect of the bill on recent litigation to recover captured and abandoned Confederate property, Jenckes recognized that the need to hire outside counsel had been understandable.⁵⁶ But insofar as the bill would take that option off the table, and it did, he was at pains to show that this would *not* undermine or limit the overall capacity of the federal government to handle the enforcement of federal law, in both the North and the South. Given the obvious, persistent, violent southern resistance to federal law, his geographic references to “all parts of the United States” and his reference to having a “sufficiently numerous” amount of lawyers on staff are telling:

One of the objects of this bill is to establish a staff of law officers sufficiently numerous and of sufficient ability to transact this law business of the Government in all parts of the United States. . . . We do not complain that the officers of the Government have heretofore employed these leading counsel, nor of the amount of fees paid to them in some cases. It seemed impossible to transact the business of the Government properly without having their assistance; and if they employed eminent counsel, taking them out of their regular business, for the Government service, it was only reasonable to pay them what seem at first sight to have been large fees.

But the evil was in the fact that the necessity existed for going outside the proper law force of the Government, that the Government could not always command the services of men of sufficient ability and learning to transact its law business.⁵⁷

He went on to emphasize that if existing staff were not sufficient in number, new lawyers could be brought on. The key was that they should be brought on as commissioned federal officers rather than as outside counsel:

We believe that the addition of this officer would be sufficient to keep well in hand the business of the United States in its own courts. *Of course he cannot perform all the duties himself. In some cases extra counsel may be required*, but the district attorneys with his assistance can generally perform these duties; and we provide that if the Attorney General, under the authority given him by existing law, shall employ assistant counsel in any district he shall designate those counsel as assistant district attorneys or assistants to the Attorney General and give them commissions as such in the special business in which they are charged, in order that they be responsible to him and to the Government for the performance of their duties. . . . [N]o person should be charged with the conduct of litigation in behalf of the United States unless he holds a commission under the United States and is responsible to the law and the proper authorities. *By this scheme we hope to have a law department equal to the present emergencies of the law business of the country.*⁵⁸

56. See CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Thomas Jenckes).

57. *Id.* (emphasis added).

58. *Id.* (emphasis added); see also *id.* at 3036 (statement of Rep. Thomas Jenckes) (“There will of course have to be employed some special assistants for the district attorneys; but, as I have said, they will be appointed by special commissions, receiving a fee to be agreed upon or determined by the Attorney General, and by him alone, and which in no case will exceed the compensation properly allowable for the service rendered.”).

Cost savings, on this account, would not occur by understaffing the department, but rather by centralizing supervisory authority in the Attorney General and ensuring that fees for additional legal services were set to reasonable government rates for commissioned officers rather than the high fees often demanded by outside counsel.⁵⁹ Notably, Jenckes insisted that the new department would be “equal to the present emergencies of the law business of the country.”⁶⁰ As the next Part describes, whether this assurance was properly interpreted as a reference to Reconstruction enforcement, unforeseen needs for additional legal services unconnected to Reconstruction, or both, became central to the floor debate.

B. “All the Emergencies and Exigencies of the Government”

Jenckes was immediately pressed on the question whether, in view of the new conditions the bill created for hiring additional lawyers, the framework would be adequate to meet “all” of the federal government’s needs as he had just stated.⁶¹ Representative Horace Maynard of Tennessee asked: “Does the gentleman think it practicable for us to organize by this bill *a force adequate to all the emergencies and exigencies of the Government?*”⁶² Maynard’s question demonstrates concern with whether the bill would be adequate not only for Confederate property and revenue cases that had been repeatedly mentioned as examples as to which eliminating outside counsel would save money, but for all areas of federal legal work.

It is reasonable to believe that Maynard’s question was about Reconstruction enforcement and that others would have so understood his query. The evidence is not just the recent passage of the First Enforcement Act and its transformative expansion of the role of federal prosecutors. Maynard was a Whig, turned Unionist, turned abolitionist Republican during the war when Tennessee Unionists

59. *See id.* at 3037 (statement of Rep. Thomas Jenckes) (“If the Attorney General cannot try the case and the emergency requires assistant counsel, *he can employ them*. . . . He is responsible as the chief law officer of the Government. If any error is committed we shall know who is chargeable with it. We have then the assurance, if he be the proper person, that the office will be administered economically. These are the principal provisions of the bill. They may not provide a perfect system, but they are certainly adequate to the present law business of the country.”) (emphasis added). In his first report to Congress in 1870, Attorney General Ackerman lobbied for higher compensation of U.S. Attorneys, in view of their work load, but also emphasized that he thought their capacities equal to the needs of federal litigation: “I think that upon general grounds the regular attorneys of the United States and their regular assistants ought to be equal to the ordinary necessities of the Government, and that special counsel should only be employed in cases of emergency.” U.S. DEP’T OF JUST., *supra* note 49, at 3.

60. CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Thomas Jenckes).

61. *Id.* at 3036 (statement of Rep. Horace Maynard).

62. *Id.* (emphasis added).

split on the validity of the Emancipation Proclamation.⁶³ He supported emancipation, and in the early 1870s he was an ardent supporter of Reconstruction enforcement legislation.⁶⁴ In 1871, for example, he excoriated his colleagues on the floor of the House for considering delaying action on the Second Enforcement Act despite comprehensive findings of “outrages” committed by the Klan in the Senate investigation.⁶⁵ Moreover, his question about the DOJ bill is framed in precisely the way one would expect from a congressperson keen to ascertain the effect of the bill on civil rights enforcement—emphasizing the need for “force” within the DOJ “adequate to all the emergencies and exigencies of the Government.”

Jenckes’s reply again referenced cost savings, but with an eye to *optimizing* enforcement resources by creating a more efficient means of providing legal services, not precluding the hiring of an appropriate number of government lawyers:

We cannot, of course, foretell with precise certainty how the system will operate; *but we anticipate that the force organized by this bill will be able to transact the present law business of the Government. . . .* In the course of a year one competent lawyer could try all these important cases, and thus dispense with these numerous counsel. . . . A retainer of \$10,000 was sent to an eminent lawyer [to work on cotton seizure cases in New Orleans], but we cannot find that he ever did anything. . . . [T]his money has not been paid under any authority of law, but out of the gross sum appropriated for the collection of revenue. . . . *If these extra services are needed I wish to have officers attend to them. . . . If the Attorney General cannot try the case and the emergency requires assistant counsel, he can employ them. . . .* We have then the assurance, if he be the proper person, that the office will be administered economically. These are the principal provisions of the bill. They may not provide a perfect system, but they are certainly adequate to the present law business of the country.⁶⁶

The “present law business of the Government” and “present law business of the country” included the transformative new forms of criminal prosecution recently established in the First Enforcement Act. It may have been fanciful to think Congress would fund every request of the Attorney General. It may have been Jenckes’s hidden agenda to create conditions for underfunding. But this is conspicuously not what he said in defending the bill when asked directly by a vocal proponent of Reconstruction about how the new department would affect the government’s legal enforcement capacity *as a whole*. The tenor of Jenckes’s

63. Horace Maynard (1880-1881), UVA MILLER CTR., <https://miller-center.org/president/hayes/maynard-1880-postmaster-general> (last visited Apr. 27, 2026); *Portraits in Oversight: Congress Investigates KKK Violence During Reconstruction*, LEVIN CTR. HOME, <https://www.carllevincenter.org/congress-investigates-kkk-violence-during-reconstruction/> (last visited Jan. 18, 2025); WILLIAM HORATIO BARNES, BIOGRAPHIES OF MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE FORTY-THIRD CONGRESS 71-76 (1874).

64. *Portraits in Oversight: Congress Investigates KKK Violence During Reconstruction*, *supra* note 63.

65. *Id.*; see also JAMES GILLESPIE BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 435 (1884) (describing Maynard as a “radical Republican”).

66. CONG. GLOBE, 41st Cong., 2d Sess. 3036-37 (1870) (statement of Rep. Thomas Jenckes) (emphasis added).

remarks is about ensuring effective enforcement through improved efficiency, not undermining enforcement.

As to whether these discussions concerned enforcement of civil rights specifically, the term “emergencies” is undefined. Moreover, Jenckes emphasized suits to secure federal revenue from Confederate property and tax cases rather than civil rights enforcement.⁶⁷ But funds from captured and abandoned property would aid Reconstruction. And Maynard’s question explicitly extended beyond these cases to “all the emergencies and exigencies of the Government.”⁶⁸ This framing would have recalled for the House a range of post-war emergencies arising from southern resistance to Reconstruction enforcement of civil rights that required federal legal intervention. The most immediate emergency before the Forty-First Congress was the rise of paramilitary Klan terrorism throughout the South and the need for adequate manpower to enforce the new criminal provisions of the First Enforcement Act.⁶⁹ Maynard and others could scarcely have been expected to support the DOJ bill if the reference to “emergencies” and Jenckes’s assurances about the capacity to meeting them did not compass civil rights enforcement. The context, framing, and breadth of Maynard’s question—immediately following a question about whether the bill would eliminate existing legal offices in addition to restricting the retention of outside counsel—makes this abundantly clear. Proponents of Reconstruction sought assurance that “all” enforcement needs would be met, and Jenckes gave it.⁷⁰

C. Debate Over the Role of the Military in Reconstruction

Congress is likely to have associated “emergencies and exigencies of the Government” with crises of Reconstruction in part because enforcement called for emergency federal military interventions. This occurred most sweepingly in 1867 under the Military Reconstruction Act.⁷¹ The statute was remarkable. It was passed over Andrew Johnson’s veto as a response to the passage of Black Codes in the South and the refusal of southern states to ratify the Fourteenth Amendment.⁷² The fate of Reconstruction lay in the balance.⁷³ The statute broke up the entire South into military districts and conditioned southern states’ readmission to the Union on enfranchising black people, holding new state constitutional

67. See *supra* notes 46-58 and accompanying text.

68. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870) (statement of Rep. Horace Maynard).

69. See *infra* Part III.C.

70. The assurance is consistent with the text of the statute as enacted, see notes 128-138 and accompanying text, below.

71. HYMAN & WIECEK, *supra* note 15, at 442.

72. See Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428, 429.

73. Michael A. Ross, *The Supreme Court, Reconstruction, and the Meaning of the Civil War*, 41 J. SUP. CT. HIST. 275, 279-80 (2016).

conventions, and ratification of the Fourteenth Amendment.⁷⁴ Ordinary civil justice was displaced by federal military governance and trials by military commission were conducted against southerners who violated federal law.⁷⁵ Significantly, the process of readmitting southern states under the statute extended well into 1870 and provoked heated controversy due to evidence that southern states had stacked their new state governments with leaders overtly hostile to Reconstruction even after the Fourteenth Amendment was ratified. Extended debates occurred during the first half of 1870—the same period during which the DOJ bill was before Congress—over the readmission of Virginia and Mississippi, and the seating of senators and congressional representatives from Georgia.⁷⁶

Federal military intervention was also expressly provided for in the First Enforcement Act to address the pervasive effects of Klan violence on the administration of criminal justice. Robert Kaczorowski's work carefully documents and defends the effectiveness of civil and criminal enforcement of civil rights laws in federal court during this period despite enormous practical and political obstacles. But he repeatedly emphasizes that “[m]ilitary action and the imposition of martial law were probably the most effective means of bringing Klansmen to account.”⁷⁷ Klan violence was so pervasive and so life threatening to anyone seeking to prosecute Klan cases that the First Enforcement Act specifically authorized federal military intervention to protect federal judicial process in civil rights enforcement cases.⁷⁸

It is no accident, then, that debate on the DOJ bill turned to its effect on the role of federal legal officers in military interventions in the South. This issue would dominate the remainder of debate and was a centerpiece of discussion the following day just before the bill passed the House. Representative Garfield opened the line of questioning by asking: “While I entirely approve of the bill so far as I have examined it . . . I wish to know what will become of the Judge Advocate General with eight assistant judge advocates. Are they to be transferred?”⁷⁹ With this, an extended colloquy occurred between Jenckes, Garfield, and three other congressmen, all of whom sought clarity, albeit from different political perspectives, on how the bill would affect Judge Advocates General and

74. HYMAN & WIECEK, *supra* note 15, at 442; Military Reconstruction Act of 1867 §§ 1, 5-6.

75. See Alstyn, *supra* note 13, at 236 (discussing the prosecution of William H. McCardle, who “was held in military custody awaiting trial by military commission for four alleged offenses”—disturbing the peace, inciting insurrection and disorder, libel, and preventing reconstruction—“none of which appeared to be military in nature”).

76. DONALD, *supra* note 40, at 424, 426-27.

77. KACZOROWSKI, *supra* note 1, at 64, 91.

78. First Enforcement Act, ch. 114, § 13, 16 Stat. 140, 143 (codified as amended at 42 U.S.C. 1993) (“[I]t shall be lawful for the President of the United States to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to aid in the execution of judicial process under this act.”).

79. CONG. GLOBE, 41st Cong., 2d Sess. 3037 (1870) (statement of Rep. James Garfield).

legal aspects of Reconstruction military enforcement in the South.⁸⁰

Shugerman concludes from this debate that the bill separated military lawyers from DOJ staff and that “the decision to keep military lawyers out of the DOJ had the effect of limiting the DOJ’s role in Reconstruction.”⁸¹ As Shugerman puts it, “Representative Jenckes was adamant that his [committee] had rejected any military role for the Department of Justice, at a time when military lawyers were involved with Reconstruction decisions.”⁸² He contends that Section 6 of the bill, which describes the Attorney General’s authority on questions of military law,⁸³ merely confirmed a practice settled since President Lincoln’s reliance on Attorney General Edward Bates for advice about the constitutionality of unilateral executive suspension of habeas corpus early in the Civil War.⁸⁴ But the floor debate and statute address two distinct elements of military law. They rest on a conflation of the bill’s effect on two distinct elements of military law: (1) the location and immediate supervision of military judges who conduct “courts-martial” of soldiers for violating military codes of discipline, and (2) the supervision of the vast array of other legal matters, such as the authority to conduct trials by military commission of southern civilians, the imposition and maintenance of martial law on civilian populations in the South, and the provision of legal opinions on the validity of other aspects of military governance to enforce Reconstruction.⁸⁵

The bill did not transfer Army Judge Advocates General, who deal with courts-martial proceedings. But the bill did grant the DOJ substantial new authority over the military aspects of Reconstruction enforcement. As the floor debate in Congress demonstrates, military judges authorized to conduct courts-martial to impose military discipline on military personnel had increasingly become involved in many other aspects of the military’s role in Reconstruction.⁸⁶ Debate centered on whether they would retain this broader role, or whether legal questions about the use of the military for Reconstruction enforcement would shift to civilian supervision in the DOJ. Leaving the conduct of courts-martial to Judge

80. See *id.* at 3037-39 (statements of Reps. James Garfield, Thomas Jenckes, John Logan, Horace Maynard, and William Lawrence).

81. Shugerman, *supra* note 2, at 161.

82. *Id.*

83. See An Act to Establish the Department of Justice, ch. 150, § 6, 16 Stat. 162, 163 (1870) (codified as amended at 28 U.S.C. §§ 511-513, 518).

84. Shugerman, *supra* note 2, at 159 (“This provision was not a major change in the status quo, because President Lincoln’s Attorney General Edward Bates was regularly consulted on many legal questions relating to the Civil War.”).

85. See *infra* Part III.C.2.

86. It is also possible that Jenckes himself wished to exploit confusion about these different functions. There is evidence that the bill would have drawn staunch opposition if it had been read to inhibit the power to use the military to enforce Reconstruction (e.g., by reducing the number of its legal officers). See, e.g., William Alan Blair, *The Use of Military Force to Protect the Gains of Reconstruction*, 51 CIV. WAR HIST. 388, 395-96 (2005); KACZOROWSKI, *supra* note 1, at 45.

Advocates General within the domain of the War Department to impose military discipline on Union soldiers while transferring the supervision of other legal issues *away* from War Department legal officers to the DOJ,⁸⁷ gave the new department a central role in the use of the military to support Reconstruction. Indeed, on the second day of debate, Representative William Lawrence, a principal proponent of creating the DOJ, spoke at length on precisely this point.⁸⁸ Before reaching Lawrence's position, however, it is worth making clear how Jenckes and others framed the issue.

1. Jenckes's Separation Thesis for Courts-Martial

Jenckes's assertions of strict separation between the DOJ and military law began with his response to Garfield's question about the transfer of Judge Advocates General. Jenckes insisted that only the naval Judge Advocate General would be transferred to the DOJ under the bill because this position did not involve adjudication of courts-martial, but rather advice on legal matters. Other Judge Advocates General would remain in the War Department. As Jenckes explained: "We do not touch in this bill the Bureau of Military Justice of the Army nor the Judge Advocate General of the Army. They are out of the scope of this civil law business."⁸⁹ Garfield then argued that even though there is "great dissimilarity between military and civil law . . . it seems to me that this department of military justice should be in some appropriate way subordinated to the civil law."⁹⁰ Representative Woodward interposed a broader critique, that the Judge Advocate General of the Army "is a monstrosity which has grown up, and in my opinion it ought to be thrown overboard. . . . Instead of being transferred to the Attorney General's department it should be abolished. I would not disfigure our civil system by retaining or transferring this to it."⁹¹

Jenckes likely sensed the danger of letting debate spiral with respect to Reconstruction enforcement by the military and eliminating military offices, so it is understandable that he strove to offer more precise additional assurances. He could have done so by insisting that centralizing authority over military Reconstruction in the new department would reassert civilian control and ensure greater uniformity and effectiveness of enforcement without reducing the number of Judge Advocates General needed to ensure military discipline. That is what William Lawrence would do the following day to clear matters up.⁹² Instead, Jenckes

87. Unless by another statute specific authority was given to officers in the War or Navy Department. *See* Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141.

88. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3066 (1870) (statement of Rep. William Lawrence).

89. *Id.* at 3037 (statement of Rep. Thomas Jenckes).

90. *Id.* (statement of Rep. James Garfield).

91. *Id.* (statement of Rep. George Woodward). On his biography and politics, see *Woodward, George Washington*, BIOGRAPHICAL DIRECTORY U.S. CONG., <https://bioguide.congress.gov/search/bio/W000730> (last visited May 17, 2026).

92. *See infra* Part III.C.2.

restated the separation argument both more narrowly and emphatically, arguing that the work of the army's Judge Advocates General concerns an "*entirely different branch of law*, and ought to be under a military chief and not a civil law officer."⁹³

That assertion makes sense as applied to the power of courts-martial to discipline military personnel. The military can and traditionally did exercise independent jurisdiction over internal disciplinary matters through courts-martial.⁹⁴ These proceedings are a longstanding exception to the constitutional requirement of Article III court adjudication of federal law questions.⁹⁵ Very often the officers who conducted such trials were neither lawyers nor judges, but rather, as Representative John Logan would emphasize, ordinary military officers: it was "always understood that any intelligent officer in the Army was sufficiently competent to be a judge advocate on a court-martial."⁹⁶ The law that applied in such trials was codified into what we now know as the Uniform Code of Military Justice—a law designed specifically to maintain and enforce military discipline among service members within the military hierarchy.⁹⁷

Jenckes knew this, as is evident from his response to the question why the naval Judge Advocate General, but not the Army Judge Advocate General, was moved into the DOJ by the bill: the naval Judge Advocate General, Jenckes emphasized, "*has nothing to do with courts-martial. . . . He gives advice when the Department [of the Navy] comes into conflict with the civil Departments.*"⁹⁸ Thus, Jenckes's own contributions to the debate show that his separation thesis

93. CONG. GLOBE, 41st Cong., 2d Sess. 3066 (1870) (statement of Rep. Thomas Jenckes) (emphasis added).

94. See Act of July 28, 1866, ch. 299, § 12, 14 Stat. 332, 334 (codified as amended at 10 U.S.C. §§ 3037, 8072) (providing that the bureau of military justice include "one judge-advocate-general"). For a contemporary account of how courts-martial functioned to secure military discipline, see 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 53-54 (2d ed. rev. 1896). The first edition was published in 1866.

95. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (explaining that "Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d Article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other"). *Dynes* also upheld the right of a federal marshal to detain a defendant convicted of desertion by court-martial. See *id.*

96. CONG. GLOBE, 41st Cong., 2d Sess. 3037 (1870) (statement of Rep. John Logan).

97. The Uniform Code of Military Justice was enacted in 1950. See Pub. L. No. 81-506, ch. 169, 64 Stat. 107 (1950) (codified as amended in scattered sections of 10 U.S.C.).

98. CONG. GLOBE, 41st Cong., 2d Sess. 3037 (1870) (statement of Rep. Thomas Jenckes) (emphasis added); 1 WINTHROP, *supra* note 94, at 271 ("In our *naval* service . . . the judge advocates officiating at trials within the United States were, in general, up to a recent period, counsellors at law. Since the passage . . . [of the DOJ bill] the authority to employ counsel for the executive departments, neither the Secretary of the Navy nor the Secretary of War has been authorized to retain at the public expense a civilian lawyer to act as judge advocate of a court-martial." (citations and footnotes omitted)).

concerned courts-martial, not the use of the military for Reconstruction emergencies (including the imposition of martial law and trial by military commission of unreconstructed southerner civilians). This broader part of “military” law could not have been construed as an “entirely separate body of law” because it mediates, in virtually every aspect of its operation, the lines between civil liberties, civil rights, national power, state and local authority, common law, the Suspension Clause, the law of war, and the administration of justice in both criminal and civil cases in state, federal, and military commission courts involving civilians.⁹⁹

The basic distinction in military law between courts-martial and other matters was well understood by other members of the House, as were the significant problems that arose during the Civil War and Reconstruction from ambiguity about whether military legal officers such as Judge Advocates General, or the Attorney General, controlled legal issues surrounding martial law and military commissions.¹⁰⁰ As Representative Logan described, law-trained Judge Advocates General not only came to supervise courts-martial, displacing reliance on ordinary military officers, they grew in number *and*, crucially, arrogated functions relating to Reconstruction, in some cases interfering with Reconstruction enforcement:

Since the war we have had judge advocates from the rank of brigadier general downward Some of these men, however, are judges of civil courts in Virginia, while at the same time judge advocates of the Army, drawing pay, I presume, for both offices. From the facts which have come within my knowledge I think there are too many of them. I believe, too, *that many questions relating to civil matters are referred to the Judge Advocate General to be decided by him. . . . which ought, of course, to have gone to the Attorney General.* In the Army they have got into the habit of referring every legal question, civil as well as military, to the Judge Advocate General. I think the decision of all of these questions should be in one department, so as to subordinate the military to the civil, which is the theory of our Government I hope [Jenckes] will succeed with his measure, and that he will include in it the Judge Advocate General . . . because there are some of them down here who hold judgeships in civil courts, getting pay in that capacity, and who as judge advocates are of no advantage to the Army or the country.¹⁰¹

99. See JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 268-69 (2012) (describing growth of the Judge Advocate General’s office during the Civil War and the distinct use of “courts martial” for the trial of Union soldiers, on the one hand, and “military commissions” mainly for the trial of disloyal “noncombatants and guerillas” in the South and sometimes even the North).

100. For an account of the dramatic, sprawling expansion of Judge Advocate General jurisdiction beyond courts-martial during the Civil War, see Elizabeth D. Leonard’s biography of Judge Advocate General Joseph Holt, *LINCOLN’S FORGOTTEN ALLY* 158 (2011).

101. CONG. GLOBE, 41st Cong., 2d Sess. 3037 (1870) (statement of Rep. John Logan) (emphasis added). Logan was a prewar Democrat and “patronage boss[]” who became a radical Republican. JOHN PICKETT JONES, *JOHN A. LOGAN: STALWART REPUBLICAN FROM ILLINOIS* xi, 2-3 (2001). He both “fought civil service reform” and “stood as a constant defender of the rights of black Americans as well as one of the earliest congressional proponents of women’s suffrage.” *Id.*; S. G. F. Spackman, *American Federalism and the Civil Rights Act*

broader concerns, Jenckes noted that he was open to entertaining an amendment to the bill.¹¹⁰ Thus, both at the outset and when pressed on the matter, Jenckes insisted that the DOJ bill made no incursions on the authority and capacity of military judges to conduct courts-martial of military personnel. His separation thesis did not concern withholding from the DOJ oversight regarding the military's broader role in Reconstruction. This is readily apparent once the difference between courts-martial and other military legal affairs in Reconstruction enforcement is understood.¹¹¹

Garfield and Logan were not the only Representatives concerned about the Civil War expansion in authority of Judge Advocates General beyond courts-martial. In the midst of the exchange between Representatives Logan and Jenckes, Representative Beck pointed out that a Judge Advocate General, not the Attorney General, was recently asked to opine on presidential authority to impose martial law in Tennessee at the request of its governor. The Judge Advocate General's "opinion was laid before the Reconstruction Committee of this House to govern" its opinion on the matter.¹¹² "I think it is clear," Beck admonished, "that *the opinion which should have been given in such a case was that of the Attorney General.*"¹¹³

In the context of Andrew Johnson's efforts to thwart Reconstruction from 1865 to 1868, it is perhaps understandable that the military would have developed a practice of seeking opinions from Judge Advocates General rather than the Attorney General in order to ascertain and faithfully execute the law. Johnson and his Attorney General Henry Stanbery worked systematically to suspend federal enforcement of Reconstruction. Kaczorowski describes the influence of the Johnson administration on civil rights enforcement as "debilitating."¹¹⁴ Stanbery, he asserts:

consistently refused to instruct subordinate legal officers as to their responsibilities under the Civil Rights Act [of 1866] or to answer their questions concerning the meaning and scope of federal civil rights enforcement authority Federal officers were left to act on their own, but in the light of the president's known opposition to civil rights enforcement, politics and self-interest were powerful inducements to inaction.¹¹⁵

110. *Id.*

111. Notice too that for all Jenckes's commitment to cost cutting, he understood that trying to cut military offices would undermine passage of the bill. *See id.* Reform and cost savings were priorities, but his remarks did not explicitly support limiting the government's Reconstruction enforcement powers—military and otherwise.

112. *Id.* (statement of Rep. William Beck). Beck was a Kentucky congressman and a strong opponent of Reconstruction. *See* Spackman, *supra* note 101, at 319.

113. CONG. GLOBE, 41st Cong., 2d Sess. 3037 (1870) (statement of Rep. James Beck) (emphasis added).

114. KACZOROWSKI, *supra* note 1, at 41.

115. *Id.* at 39. Even before Stanbery became Attorney General, there is evidence that Judge Advocates General took on legal tasks which might be considered within the purview of the Attorney General. *See, e.g.,* Michael Hoffman, *Unplanned But Imperative: The Origins of the Judge Advocate General's Civil Authority*, 85 MIL. L. REV. 129, 135 (1979) ("During the Civil War the Judge Advocate General became a regular, rather than occasional

After Grant was elected and he appointed E. Rockwood Hoar as Attorney General, “the effectiveness of civil rights enforcement improved.”¹¹⁶ But confusion about whether Judge Advocates General or the Attorney General should be consulted for legal authority on Reconstruction enforcement lingered. The floor debate on the DOJ bill reveals a desire for clarity on precisely this question. But rather than respond to Beck’s question, which, along with Logan’s evidence, showed that Judge Advocates General were involved in far more than courts-martial, Jenckes yielded to Representative William Lawrence to address the issue. The following day, Lawrence would do so by demonstrating that the bill already addressed Logan and Beck’s desire for clarity about the authority and supervision of Judge Advocates General.

2. Representative Lawrence on the Role of the DOJ in Military Reconstruction Enforcement

William Lawrence had been a proponent of the DOJ bill for years and, like Jenckes, had repeatedly emphasized the problem of unsupervised expenditures on outside counsel.¹¹⁷ His comments in the April 1870 floor debate at the end of the first day reinforced the benefits of economy and anti-patronage: “It will reduce expenditures for legal services to the Government and put an end to a system which might be perverted to purposes of favoritism.”¹¹⁸ Like Jenckes, his point was not that necessary work previously performed by outside counsel should go undone, but that “all legal services should be performed by regularly authorized law officers.”¹¹⁹ Efficiency in meeting the legal needs of the

advisor on civil questions.”); Elizabeth D. Leonard, *Lincoln’s Judge Advocate General: Joseph Holt of Kentucky*, 110 REG. KY. HIST. SOC’Y 403, 407, 420 (2012) (“[B]oth [Judge Advocate General Joseph] Holt’s workload and his sheer power in connection with the interpretation, application, and enforcement of military law over soldiers as well as civilians was immense.”).

116. KACZOROWSKI, *supra* note 1, at 41. Stanbery’s opposition to Reconstruction was strong enough that on his return to private practice he defended Klansmen accused of depredations in South Carolina and helped “challenge the constitutionality of the Enforcement Acts up to the Supreme Court of the United States.” *Id.* at 48.

117. CONG. GLOBE, 41st Cong., 2d Sess. 3037-38 (1870) (statement of Rep. William Lawrence) (describing the resolution Lawrence submitted in 1868 recommending a bill to centralize the legal work of the federal government in a new department). Lawrence also supported civil rights enforcement. See Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 AM. HIST. REV. 45, 53, 60 (1987) (citing CONG. GLOBE, 39th Cong., 1st Sess. 1832, 1836 (1866)); David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 491 (2008).

118. CONG. GLOBE, 41st Cong., 2d Sess. 3038 (1870) (statement of Rep. William Lawrence); see also *id.* at 3038-39 (statement of Rep. William Lawrence) (discussing expenditures on outside counsel).

119. *Id.* at 3039 (statement of Rep. William Lawrence). While the northern press reported the bill as obviously cost saving, see *The New Government Department*, MILWAUKEE DAILY SENTINEL (June 21, 1870), which observed that the new department “will secure system and uniformity of interpretation, while it will also, it is thought, considerably reduce the

government and avoiding patronage, not force reduction, was the stated objective. His second major argument dovetailed with Jenckes's commitment to centralization—the need, as Jenckes had put it, “to make one symmetrical whole of the law department of this Government.”¹²⁰ The general problem as Lawrence described, was that a:

host of officers, giving opinions or deciding questions, are not controlled by any common head to secure uniformity, and the result is that no citizen, no lawyer, can ever learn what has been decided [S]o great is the confusion and conflict that we might as well attempt to read the whirlwind. . . .

The fault is not in the officers who have been called upon to discharge these legal duties, but in the system itself. This bill is necessary, then, to secure uniformity in the legal advice given to the President, heads of departments, bureaus, and officers.¹²¹

When discussion resumed the following day, Lawrence emphasized what Jenckes had left implicit: that the decentralized structure was undercutting Reconstruction enforcement. He made the point by referencing federalism/supremacy conflicts and the Tennessee governor's recent request for federal military intervention raised by Beck:

Here are questions relating to our revenues, affecting the interests of the States, the citizens, and the nation. Here are questions affecting the power of Congress over the States, the duties and obligations of the States to the national Government and their claims on it. . . . [The Tennessee] case is one of many which may arise when the Judge Advocate General may give one opinion and the Attorney General may give another; and thus the peace of these States would be imperiled by these conflicting, contradictory, irreconcilable law opinions, given either under the authority of law or without the authority of law.

If, then, we would preserve uniformity in the legal opinions which are to guide us . . . this bill is a necessity¹²²

The purpose of centralization and uniformity, as Lawrence described, was not abstract harmonization of legal thought within the federal government on matters unconnected to Reconstruction enforcement, or reduction in capacity to meet the federal government's pressing legal needs. It was precisely to render enforcement of federal law in the South, as in other areas of national concern such as revenue collection, more effective. Centralization would reduce conflict, reduced conflict would provide for more effective enforcement, and more effective Reconstruction enforcement would increase the chance of bringing “peace” to the South.

Lawrence also addressed head-on the impact of centralization on the

expenses of the government for legal advice”, the Atlanta Constitution saw the bill as a scheme to *expand* patronage corruption. *A Department of Justice*, ATLANTA CONST. (Apr. 21, 1870) (“[O]n investigation it appears that this measure is simply a scheme to provide for a few more needy and importunate office seekers at the expense of the people.”).

120. CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Thomas Jenckes).

121. *Id.* at 3038 (statement of Rep. William Lawrence).

122. *Id.* at 3066 (statement of Rep. William Lawrence) (emphasis added).

responsibilities of Army Judge Advocates General and the court-martial/martial law distinction. He insisted that army judges would have no power beyond conducting courts-martial:

[T]his bill does not interfere with the Judge Advocate General of the Army or his assistance so far as their official existence is concerned. *This bill, however, does transfer to the law department . . . the cognizance of all subjects of martial law, and the cognizance of all subjects of military and naval law, except that portion of the administration of military justice which relates to military courts-martial, their proceedings, and the supervision of their records.* If a question of martial law is to be determined by the law officers of the Government it will now belong to the Attorney General or to this department of justice.¹²³

Judge Advocates General would no longer opine on these subjects, but instead be limited “as the law under which he was appointed designed he should be, to the mere supervision of the records and proceedings of military courts-martial.”¹²⁴ Even with respect to this function “it will be the duty of the President and Secretary of War to ask the opinion of the Attorney General on all important or doubtful questions. The Judge Advocate General will perform duties administrative in their character and almost exclusively so.”¹²⁵ This is what Republicans who had just passed legislation authorizing federal criminal prosecution and federal military intervention in support of the Reconstruction Amendments would have wanted to hear. With these assurances, debate ended, and the bill was passed.¹²⁶

123. *Id.* (emphasis added).

124. *Id.* This is most likely a reference to a series of earlier statutes setting out the authority of Judge Advocates General during and immediately after the Civil War. *See* Act of July 17, 1862, ch. 201, 12 Stat. 597, §§ 5, 6, 7 (establishing the record keeping functions of the Judge Advocate General for both courts-martial and military commissions and establishing subordinate Judge Advocates in the field “who shall perform the duties of judge advocate for the army to which they respectively belong, under the direction of the judge advocate general”; detailing court-martial procedures); Act of June 20, 1864, ch. 146, 13 Stat. 144, §§ 5, 6 (creating the Bureau of Military Justice within the War Department “during the continuance of the present rebellion” to house records of courts-martial and military commissions, and providing that the Judge Advocate General and an assistant Judge Advocate General shall “receive, revise, and have recorded” such proceedings “and perform such other duties as have heretofore been performed by the judge advocate-general of the armies of the United States”); Act of July 28, 1866, ch. 299, 14 Stat. 332, § 12 (codified as amended at 10 U.S.C. §§ 3037, 8072) (similar). None of these statutes convey express authority over Reconstruction matters that arose during and after the Civil War.

125. *Id.* Evidence that the opinion of the Attorney General was decisive in subsequent crises in which federal military intervention was considered can be found in Simpson, *supra* note 20, at 93-94 (discussing Attorney General Pierrepont’s refusal to send soldiers to Mississippi in 1875).

126. The Senate passed the bill on June 16, 1870, after only cursory discussion. Emphasis was laid on the expense of hiring outside counsel between 1864 and 1869, the fact that retention of outside counsel had not “expedit[ed] the business of the Government,” and “the absolute necessity of harmony in the legal business of the Government.” 41 CONG. GLOBE 4490 (1870) (statement of Rep. James Patterson). As in the House debate, a Senator sought assurance that additional lawyers could be hired if needed. The Senator who moved the bill in the Senate replied that there was authority to do so: “In case such deputies are absolutely

The text of the enacted statute is consistent with the representations made by Lawrence in support of its passage. With respect to centralization of legal functions, Section 1 creates the Department of Justice, places the Attorney General as its “head,” and declares that his duty and salary “shall remain as now fixed by law.”¹²⁷ Section 2 creates the Solicitor General, and two assistant Attorneys General.¹²⁸ Section 3 pulls solicitors from Treasury and the Internal Revenue Department, as well as the naval Judge Advocate General, the law officer of the Department of State, and their staff into the Department of Justice.¹²⁹ By other provisions, the Attorney General is authorized to seek opinions on questions of non-constitutional law from other officers of the Department of Justice;¹³⁰ to “conduct and argue any case in which the government is interested, in any court of the United States, or . . . require the solicitor-general, or any officer of his Department to do so”;¹³¹ to make any regulations needed to govern the DOJ;¹³² and to supervise all district attorneys and other federal attorneys working in all judicial districts.¹³³ The Attorney General is further required to report annually to Congress, including “the statistics of crime under the laws of the United States, and, as far as practicable, under the laws of the several States.”¹³⁴ Correspondingly, the statute requires the heads of all other departments to “call upon the Department of Justice” for legal assistance.¹³⁵ Outside attorneys cannot be retained “at the expense of the United States” unless they “receive a commission . . . as a special assistant to the Attorney-General, or to some one of the district attorneys” and take an oath of office.¹³⁶

In these ways, the statute established a new department and gave it centralized authority over the legal business of the federal government. Crucially, with respect to the role of the military in Reconstruction, the statute provides:

needed . . . they are to have a special commission, and to act under the Attorney General.” *Id.* Sumner, then the leader of Reconstruction enforcement efforts in the Senate, had previously spoken in favor of creating the Department of Justice. *See* James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 500 (1965) (describing Senator Sumner’s effort to enforce laws prohibiting racial discrimination, which included prosecuting violators of such laws in federal court); DONALD, *supra* note 40, at 421, 431; FONER, *supra* note 24, at 454 (quoting Letter from Amos T. Akerman to Charles Sumner (Apr. 2, 1869) (on file with Library of Congress)).

127. An Act to Establish the Department of Justice, ch. 150, § 1, 16 Stat. 162, 162 (1870).

128. *Id.* § 2.

129. *Id.* § 3.

130. *Id.* § 4.

131. *Id.* § 5.

132. *Id.* § 8.

133. *Id.* § 16 (The “Attorney-General shall have supervision of the conduct and proceedings of the various attorneys for the United States in the respective judicial districts, who shall make report to him of their proceedings, and also of all other attorneys and counsel[ors] employed in any cases or business in which the United States may be concerned.”).

134. *Id.* § 12.

135. *Id.* § 17.

136. *Id.*

[W]henever a question of law arises in the administration, either of the War or Navy Department, the cognizance of which is not given by statute to some other officer from whom the head of either of these Departments may require advice, the same shall be sent to the Attorney-General . . . and each head of any Department of the government may require the opinion of the Attorney-General on all questions of law arising in the administration of their respective Departments.¹³⁷

Thus, unless another statute specifically confers authority on a lawyer outside the DOJ, the combined effect of Section 6 and the other provisions of the statute centralizing legal authority in the new department is that only the Attorney General (or his subordinates on delegated authority) may provide advice on questions of military law. This did not interfere with the existing statute authorizing courts-martial by Judge Advocates General, but it did shift responsibility for legal questions surrounding the declaration and administration of martial law that had been so central to Reconstruction enforcement and the uses of the military contemplated by the First Enforcement Act to the DOJ.¹³⁸

In sum, cost savings and anti-patronage were certainly relevant to the creation of the Department of Justice. They were animating interests in Congress, and the text of the statute reflects them.¹³⁹ But when this more cost-conscious,

137. *Id.* § 6.

138. For an example of presidential coordination with the Attorney General on use of the military in Reconstruction efforts after passage of the DOJ bill, see MCFEELY, *supra* note 6, at 370 (describing suspension of habeas corpus and use of the army to make arrests in South Carolina in April 1871 against the Klan). For an example of War Department deference to U.S. Attorneys and Akerman on coordination with the military for help with arrests for prosecution under the First Enforcement Act, see Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-1890*, 53 J. S. HIST. 421, 425 (1987) (describing correspondence from field U.S. Attorney to Ackerman to Secretary of War “to aid and protect you in the execution” of duties of Reconstruction enforcement and emphasizing that “troops were regularly supplied . . . throughout the early 1870s” in northern Mississippi to escort arrested Klan members). Attorney General Akerman would report to Congress at the start of 1872 that insofar as the DOJ statute was designed to “secure uniformity of decision upon all legal questions arising in the Departments” of the federal government, “the principal, perhaps the only, exception to the complete control of the Department of Justice over the Government’s litigation is the control which the Commissioner of Internal Revenue is supposed to have over internal revenue cases.” U.S. DEP’T OF JUST., *supra* note 49, at 3. By 1873, however, there appears to have been drift back toward decentralization. Attorney General Williams complained to Congress that both the Interior Department and Post Office Department had created legal officers called “Assistant Attorney-General[s]” that were “attached to and exclusively perform[ing] duties assigned to the by the heads” of their Departments rather than the DOJ. U.S. DEP’T OF JUST., ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 16 (1872). See also generally Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049 (1978) (discussing the history and role of the DOJ and the Attorney General).

139. The text of the statute also reflects the efficiency goals of its drafters. It sets the salaries of DOJ officers at specific rates, An Act to Establish the Department of Justice § 10, it requires travel expenses for all U.S. attorneys to be reimbursed, but only those “verified by affidavit,” *id.* § 5, it ends treasury department disbursements by locating the power in a clerk supervised by the Attorney General, *id.* § 11, it moves supervision of the accounts of district attorneys, marshals, and clerks from the Secretary of the Interior to the Attorney

centralized approach was defended in Congress, proponents repeatedly stated that more efficient use of resources would *support* effective, uniform enforcement of federal law, not reduce enforcement capacity. The statute recognizes this explicitly by empowering the Attorney General to commission additional officers. And there is ample evidence from debate in the House on the significance of Reconstruction enforcement capacity in particular.

IV. EARLY CIVIL RIGHTS ENFORCEMENT AFTER PASSAGE OF THE DEPARTMENT OF JUSTICE ACT

The effects of congressional underfunding of the federal government as a whole, deeply entrenched southern resistance (fueled by the errors of the Johnson administration), and flagging northern interest in implementation of the Enforcement Acts on the efforts of the DOJ as the 1870s wore on are all well-documented.¹⁴⁰ But the contribution of these forces to the eventual retreat from Reconstruction can be acknowledged without characterizing the creation of the Department as itself an instrument of the retreat. Indeed, the most comprehensive studies show that the department *succeeded* in Reconstruction enforcement immediately after the creation of the Department of Justice. Less than a year after the passage of the DOJ bill and the First Enforcement Act, a broader Second Enforcement Act was enacted creating the civil cause of action for deprivation of civil rights we now know as Section 1983, liability for conspiracies to violate civil rights, and other measures to deal with the Klan.¹⁴¹ Notwithstanding inadequate congressional funding “[t]he total number of Enforcement Acts cases handled by the federal courts rose by a dramatic 630% (from 43 cases to 271 cases)” from 1870 to 1871.¹⁴² At the same time, the conviction rate in 1871 was lower, the rate of *nolle prosequi* was higher, and fewer cases were completed than for other federal crimes.¹⁴³ Although the conviction rates superficially suggest diminished effectiveness, Kaczorowski contends that the “aggregate[.]” data are “misleading,” pointing instead to state-specific data showing that the success of enforcement cases turned heavily on local conditions.¹⁴⁴ Where the local federal prosecutor was committed to civil rights enforcement and the lower federal court judges were responsive to such claims, he finds that criminal prosecutions were “extraordinarily successful.”¹⁴⁵ On the other hand, in areas of the South where the local federal prosecutor was less committed to Reconstruction enforcement or “bungling” in court, where the Klan’s defense counsel were talented and well-funded, where Klan control was extensive enough to endanger witnesses, prosecutors, jurors, and judges, and where lower federal court judges were reluctant

General, *id.* § 15, and, as referenced above, it ends the retention of outside counsel, *id.* § 17.

140. DONALD, *supra* note 40, at 420.

141. Enforcement Act of 1871, ch. 22, 17 Stat. 13.

142. KACZOROWSKI, *supra* note 1, at 70.

143. *Id.*

144. *Id.*

145. *Id.* at 71.

or averse, the record of performance was “poor.”¹⁴⁶

Attorney General Akerman recognized that these factors made a global prosecution strategy inappropriate in places such as South Carolina where Klan resistance was most intense. He therefore ordered local prosecutors to shift to “selective prosecution[.]” focusing on “[r]ingleaders” and those who “had committed ‘acts of deep criminality,’” delaying the trial of inferior Klan members and declining to prosecute marginal participants who confessed their crimes.¹⁴⁷ Kaczorowski concludes that this strategy was successful. Aggressive, properly designed enforcement efforts in 1871 paid dividends in 1872: “A few prosecutions with a high probability of convictions seemed to have had a more beneficial effect than bringing many cases indiscriminately.”¹⁴⁸ Guilty pleas increased, Klan violence fell, and prosecutors believed “they were on the verge of destroying the Klan” despite all the obstacles they had faced.¹⁴⁹ This suggests that the Department of Justice was successful in its most important early enforcement efforts, and that the centralized leadership provided by Ackerman and endorsed by the DOJ statute was influential.

The funding constraints the Department faced during the early 1870s require equally nuanced interpretation. Ackerman overcame his initial reluctance to demand additional resources, and before it closed its purse strings, Congress granted significant funding to commission additional legal officers.¹⁵⁰ Congress added \$1 million dollars to the DOJ’s annual budget in 1871 from an initial \$2 million dollars—a 50% increase for “judicial expenses” to aid Reconstruction enforcement.¹⁵¹ In 1872, “the original appropriation of \$2,000,000 for fiscal 1872 was increased by another \$1.2 million just before the fiscal year ended” and authorized the hiring of more assistant attorneys.¹⁵² These annual seven figure supplemental appropriations dwarf the combined sums Jenckes and others had complained about over the five years preceding enactment of the DOJ bill.¹⁵³

The problem was that even the added resources were never equal to the full magnitude of southern resistance and the entire federal government increasingly faced limitations in funding.¹⁵⁴ Notably, reduced federal resources across the

146. *Id.* at 71-72; *see also* Cresswell, *supra* note 138, at 435-39 (describing sentencing leniency of local federal judge as major factor in reduced effectiveness of successful prosecutions brought by U.S. Attorney in northern Mississippi; the “standard” sentence imposed by Judge Hill involved no imprisonment, but instead a fine of “\$25 in addition to a peace bond . . . the leniency of the judge meant that fear of prosecution was not a substantial deterrent to crime”).

147. KACZOROWSKI, *supra* note 1, at 73.

148. *Id.* at 76-77; *see also* WILLIAM C. HARRIS, *THE DAY OF THE CARPETBAGGER: REPUBLICAN RECONSTRUCTION IN MISSISSIPPI* 399-405 (1979).

149. KACZOROWSKI, *supra* note 1, at 76.

150. *Id.* at 67.

151. *Id.* at 68.

152. *Id.* at 81.

153. *See supra* text accompanying note 66.

154. Cresswell, for example, points to evidence that by 1872 and 1873 it was the

federal government would have plagued enforcement efforts quite irrespective of whether the DOJ statute required the Attorney General to ask for funds to commission legal officers or whether, as under the old system, field District Attorneys had to seek funds from the Treasury Department to retain outside counsel. Indeed, in 1872, the additional funds DOJ received “still fell some \$300,000 short of expenses incurred that fiscal year.”¹⁵⁵ As the year came to a close, Congress refused additional appropriations,¹⁵⁶ forcing greater budgetary restraint just as the Department’s enforcement efforts under Akerman’s replacement, George Williams, were stifling the Klan.¹⁵⁷

The most decisive factor in the Department’s abandonment of civil rights enforcement was the change of heart by Grant and Williams in late 1872 and early 1873—a change of heart tied less, it would seem, to the effectiveness of civil rights enforcement by the Department than to more banal political concerns.¹⁵⁸ Williams began accusing federal prosecutors of “waste” and arguing

War Department making requests of U.S. Attorneys to withdraw troops from Reconstruction enforcement due to “pressure to reduce expenses . . . upon the secretary of war.” Cresswell, *supra* note 138, at 426.

155. KACZOROWSKI, *supra* note 1, at 81. Attorney General Akerman also noted in his 1871 report to Congress that federal courts required additional resources to provide prompt criminal trials of indicted Klan members. U.S. DEP’T OF JUST., *supra* note 49, at 5 (“If it takes a court over one month to try five offenders, how long will it take to try four hundred, already indicated, and many hundreds more who deserve to be indicted?”).

156. See KACZOROWSKI, *supra* note 1, at 86-87.

157. On Grant’s plural reasons for replacing Akerman, see MCFEELY, *supra* note 6, at 373 (describing Secretary of State Hamilton Fish’s lobbying for a more lenient Reconstruction policy in contrast to Akerman’s “zeal,” and, on the other hand, Grant’s deep frustration with Akerman for thwarting powerful railroad owners). George Williams supported Reconstruction as a U.S. Senator and in the first year of his service as Attorney General, continued prosecutions of Klan members. See Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 *FORDHAM URB. L.J.* 155, 182 (1995); Sidney Teiser, *Life of George H. Williams: Almost Chief-Justice, Part II*, 47 *OR. HIST. Q.* 255, 271 (1946) (characterizing Williams as in the early years of Reconstruction before becoming Attorney General as “an ardent and radical, if not rabid, reconstructionist”; noting his introduction of the Tenure of Office Act to limit President Johnson’s anti-Reconstruction policies, his service on the Joint Committee on Reconstruction and its role in the Military Reconstruction Act of 1867, and his role in the impeachment of President Johnson). This support may have been more out of personal ambition and careerism than strong commitment to Reconstruction. MCFEELY, *supra* note 6 at 385 (noting that Williams “was neither learned nor concerned with much of anything except his career and his exceedingly costly wife”); *id.* at 418 (explaining that Williams’s successor, Edward Pierrepont, “was not disposed to lead a major effort to bring civil-rights offenders into court”).

158. Even fairly recent treatments of Grant’s commitment to Reconstruction have oscillated between “criticizing him for backtracking on Reconstruction” to celebrating his “courage to persist for so long in his outspoken concern for black safety and civil rights as he faced a ferocious backlash.” Brooke Allen, Book Note, *The Strangest Story: The Rise, Fall, and Resurrection of Ulysses S. Grant*, 71 *HUDSON REV.* 110, 116 (2018) (quoting RON CHERNOW, *GRANT* 857 (2017)). Brute political calculation may explain matters better than any attempt to divine Grant’s true sentiments on Reconstruction. See Simpson, *supra* note 20, at 98 (“By the 1870s, Republican leaders realized that they could abandon the South while retaining national power: continuing to support Republican regimes in the South might result in the sacrifice of national power (and thus doom those regimes in any case). The choice was

that Reconstruction prosecutions were “frivolous and vexatious.”¹⁵⁹ Kaczorowski finds Williams’ charge against federal prosecutors “contradict[ed]” by data showing that “judicial costs in the South could not have increased very significantly” in 1872 and data showing that there was a greater rate of prosecutions that year as compared to the rate of increase in judicial enforcement expenses.¹⁶⁰ Still, Williams successfully translated his public criticisms into a policy of restricted funding for enforcement and clemency for Klan members.¹⁶¹ “During the spring and summer of 1873 the Justice Department completely abandoned civil rights enforcement. . . . Token cases were to be instituted to maintain the fiction that the national government would protect the rights of its citizens.”¹⁶²

By June of 1873 Williams’s about-face came fully into view. He “ordered the cessation of future arrests under the Enforcement Acts unless he approved them” while also continuing to offer “clemency for past offenses and pardons for convicted offenders.”¹⁶³ Rank and file federal prosecutors were “criticized and censured” for making arrests.¹⁶⁴ “Some tendered their resignations. Others abandoned their efforts to enforce civil rights,” even though earlier enforcement efforts had been so successful “that they virtually destroyed the Ku Klux Klan” in their districts.¹⁶⁵ Civil rights enforcement by the DOJ “did not completely eliminate political terrorism,” but just:

[w]hen they were on the threshold of eliminating [it], the attorney general ordered a halt to Enforcement Acts prosecutions and thus undermined the effectiveness of the civil rights laws. . . . despite the warnings of its legal officers about the effect leniency would have on the resumption of crime and violence.¹⁶⁶

The part played in all of this by the structure of the DOJ statute is not so much funding, or constraints on hiring outside counsel, as centralization and the

clear, and it was not difficult to make, however one felt about the consequences for black freedom.”).

159. KACZOROWSKI, *supra* note 1, at 81.

160. *Id.* at 82.

161. By 1873, Kaczorowski finds, the “reduced effectiveness of federal legal officers reflected Attorney General Williams’s insistence on reduced judicial expenditures and clemency in Enforcement Acts cases.” *Id.* at 86.

162. *Id.* at 89.

163. *Id.* at 90.

164. *Id.* at 91.

165. *Id.* But see Cresswell, *supra* note 138, at 433 (providing evidence that the U.S. Attorney in northern Mississippi was highly effective and that the “height of the Ku Klux prosecutions” there occurred between 1872 and 1874).

166. KACZOROWSKI, *supra* note 1, at 91 (discussing the Grant administration’s retreat from civil rights enforcement). Enforcement efforts were also hampered by the Supreme Court’s decision in the *Slaughter-House Cases*, 83 U.S. 36 (1873), and the collapse of banking known as the Panic of 1873 that caused a long, national economic depression. See KACZOROWSKI, *supra* note 1, at 138-41; Pamela Brandwein, *A Lost Jurisprudence of Reconstruction Amendments*, 41 J. SUP. CT. HIST. 329, 331 (2016) (noting that “after the Panic of 1873, civil rights enforcement became much harder”).

corresponding vulnerability of enforcement priorities to the will of the Attorney General. By centralizing both enforcement and opinion giving in a single office, the commitments of that office holder became more influential. At the time the bill was before Congress, the Attorney General was E. Rockwood Hoar, a moderate Republican but an active proponent of civil rights enforcement who had resuscitated enforcement of the 1866 Civil Rights Act.¹⁶⁷ He resigned just days before the passage of the DOJ bill and was replaced by Ackerman, who had recently been chosen by Grant to serve as the U.S. attorney for Georgia because of his “ardent republicanism.”¹⁶⁸ Ackerman saw the profound threat posed by the Klan to civil rights and the rule of law in the South and was determined to “destroy” the organization.¹⁶⁹ Grant also chose Benjamin H. Bristow as the first Solicitor General. Bristow had already won Grant’s favor “because of his role in party politics” and his aggressive civil rights enforcement record in Louisville, Kentucky.¹⁷⁰ Thus both appointees were “personally and politically committed to the goals of congressional Reconstruction.”¹⁷¹

Grant worried throughout his presidency about being painted as a military despot on Reconstruction enforcement.¹⁷² But given his commitment to the work

167. KACZOROWSKI, *supra* note 1, at 41. Shugerman makes much of the “surprise” resignation, just before passage of the DOJ bill. Shugerman, *supra* note 2, at 148 n.165. But both Akerman and Hoar were serious about civil rights enforcement. As the New York Times put it, Akerman was known as “one of the earliest and staunchest friends of equal and political rights to all men, and has been here several times before the President and Congressional Committees.” *Talk at the Capital About the Resignation of Mr. Hoar*, N.Y. TIMES (June 17, 1870), <https://www.nytimes.com/1870/06/17/archives/washington-talk-at-the-capital-about-the-resignation-of-mr-hoar.html>. In any event, the evidence is that Grant removed Hoar primarily to punish Charles Sumner for opposing a treaty—a rebuke to Sumner because Hoar was also from Massachusetts. McFEELY, *supra* note 6, at 365. Apparently, Grant considered reversing the decision when the story of Hoar’s termination leaked to the press. Hoar resigned to avoid further confrontation. *Id.* at 366. There is also evidence that, despite Hoar’s support for radical Reconstruction, Grant wanted an attorney general who would be even more proactive against the Klan—“carpetbagger senators . . . had asked Grant for an attorney general who would vigorously prosecute those who were terrorizing their constituents.” *Id.* Ackerman’s appointment may have been a surprise to the public—just as Hoar’s removal was—but he was known to Congress and its “influential Radical Republicans.” *See id.* at 367.

168. KACZOROWSKI, *supra* note 1, at 63; *see also* Ted Shepherd, *Reconstruction and Rebirth: Amos Akerman’s Georgia Years*, 8 ORACLE: HIST. J. B.C., no. 1, 2024, at 86, 94-96 (discussing Akerman’s support of black suffrage and office-holding in Georgia constitutional convention and in Georgia courts; protection of black voters on election day; campaign advocacy for equal civil rights in election of 1870; threats to his safety arising from commitment to civil rights).

169. KACZOROWSKI, *supra* note 1, at 63.

170. *Id.*

171. *Id.*

172. McFEELY, *supra* note 6, at 419-20 (explaining that Grant “had always been exceedingly wary of using army men as civilian police”); *cf.* 2 JOHN RUSSELL YOUNG, *AROUND THE WORLD WITH GENERAL GRANT: A NARRATIVE OF THE VISIT OF GENERAL U.S. GRANT, EX-PRESIDENT OF THE UNITED STATES TO VARIOUS COUNTRIES IN EUROPE, ASIA, AND AFRICA*, IN 1877, 1878, 1879, at 362 (1879) (stating that military government was the proper course); Simpson, *supra* note 20, at 99 (“Only prolonged military occupation had a chance of realizing justice for the freedpeople. Yet Grant knew why that never happened: ‘The trouble about

in 1870, it seems plausible that the Forty-First Congress assumed that centralizing enforcement power in the new DOJ under the leadership of Hoar and Ackerman was sound policy. On the other hand, in light of the role Henry Stanbery had played in undermining Reconstruction in the Johnson administration, it was perfectly obvious that enforcement would falter if the commitment of Grant or his Attorney General waned. Debate on the DOJ bill makes clear that the House was aware of this risk. Jenckes argued that under a decentralized system, law officers in the various government departments “in some instances give advice which seems to have been instigated by the heads of the Department, or at least advice which seems designed to strengthen the resolution to which the head of the Department may have come in a particular instance.”¹⁷³ Representative Maynard turned that critique of decentralization around, pointing out that centralizing the opinion function in the office of the Attorney General was no obvious solution to that problem. After all, legal opinions were known to flow from the pen of the Attorney General favoring a president’s preferred policy. Maynard asked: “Does the gentleman think it peculiar to this country for a law officer to give an opinion to sustain the attitude of his superior? Has it not been done more than once in the office of the Attorney General of the United States?”¹⁷⁴

Jenckes’s first tried to deflect by responding as if Maynard had attacked the integrity of lawyers who offer opinions favorable to the position of their superiors when Maynard’s concern was that centralization relocated the problem of bias in opinion writing to the office of an Attorney General who might be excessively loyal to the president. Jenckes insisted that his criticism of partisan opinions was not a “charge against any of these officers,” but rather a “misfortune” arising from decentralization.¹⁷⁵ He argued that the real problem was disuniformity of opinion across departments, not venality or partisanship: “It is a misfortune that there should be different constructions of the laws of the United States by different law officers of the United States.”¹⁷⁶ It is one thing, he added, for a department head to “act according to his own judgment,” quite another to seek to be “fortified” in that action “by the opinion of law officers.” In the latter circumstance, he should be required to go to the fountainhead and receive the opinion of the chief law officer of the Government.¹⁷⁷

Maynard saw through this deflection and restated the fundamental problem:

The gentleman will understand the idea I had in my mind, when I remind him of the anecdote of a former President who sent word to his Attorney General

military rule in the South was that our people did not like it. . . . [But] it would have been better of the North to have postponed suffrage, reconstruction, State governments, for ten years, and held the South in a territorial condition.” (quoting YOUNG, *supra*, at 362-63)).

173. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870) (statement of Rep. Thomas Jenckes).

174. *Id.* (statement of Rep. Horace Maynard).

175. *Id.*

176. *Id.* (statement of Rep. Thomas Jenckes).

177. *Id.*

that if he could not find law for a particular policy he (the President) would find an Attorney General who could find law for it.¹⁷⁸

Jenckes's reply never met this charge—that even the Attorney General is susceptible to conflicts between independent judgment and loyalty to the President. He simply restated that the problem the bill attempts to solve is disuniformity and turned to an example of a district attorney's incompetence in failing to collect on a bond, implying that with proper accountability to and supervision by the Attorney General, revenue collection would be improved.¹⁷⁹ Whatever the merits of Jenckes's reply, the exchange shows that the House considered the risk of centralizing authority in the Attorney General. It accepted that risk in passing the bill.¹⁸⁰

Were the risks of centralization outweighed by its enforcement benefits for Reconstruction? The record of early success in the face of extraordinary obstacles to civil rights enforcement suggests the answer is yes. Ackerman showed that it was possible to achieve what the Enforcement Acts were designed to do with the right leadership of DOJ and the right enforcement strategy.¹⁸¹ The Klan was hobbled. And the record of the debate on the bill in 1870 as well as the vote shows that Reconstruction proponents viewed centralization in the Department of Justice as a way to support effective enforcement of Reconstruction, not retreat—an accelerant, not an obstacle.¹⁸² Still, it took courageous rank and file U.S.

178. *Id.* (statement of Rep. Horace Maynard).

179. *Id.* (statement of Rep. Thomas Jenckes).

180. The Tenure of Office Act of 1867, ch. 154, 14 Stat. 430, was watered down by amendments in 1869, which provided that the President could remove officers without Senate approval when the Senate was in recess and that the Senate had no power of reinstatement. *See* Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7; *see also* GROVER CLEVELAND, *THE INDEPENDENCE OF THE EXECUTIVE* 30-36 (1913). Of course, greater power of presidential appointment and removal free from Senate control would eventually have affected legal officers in a more decentralized model too. Indeed, it is not obvious what model could have prevented retreat from Reconstruction as the North overwhelmingly abandoned its commitment to the project in 1872 and 1873, as the influence of Liberal Republicans increased, and as the economy and federal budget shrunk with the Long Depression. *See* Wells, *supra* note 20, at 623; GILLETTE, *supra* note 21, *passim*. The creation of structurally independent agencies would not begin until 1887 with the Interstate Commerce Commission. *See* Patrick M. Morrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 661 (2017). Attempts to preserve structural independence in the Department of Justice were made in the twentieth century but the most ambitious efforts remain politically and constitutionally controversial. *See* Morrison v. Olson, 487 U.S. 654, 657-58 (1988) (upholding the constitutionality of the independent counsel statute); Bell, *supra* note 138, at 1049 (arguing that the modern DOJ “draws little strength or stability from a clear conception, either within the Department or elsewhere, of the role that the Department should play in our federal government”); John G. Heinberg, *Centralization in Federal Prosecutions*, 15 MO. L. REV. 244, 244 (1950).

181. Not without crises of confidence: During his tenure, Ackerman sought more stringent enforcement of civil rights laws in the South than others in the administration. KACZOROWSKI, *supra* note 1, at 75-76.

182. In practice, centralization allowed Ackerman to exert influence over more reluctant U.S. attorneys in key southern states. *See, e.g.*, Letter from Amos T. Ackerman, U.S. Att’y Gen., to David T. Corbin, U.S. Att’y (Nov. 10, 1871) (on file with Walt Whitman Archive); *see also* KACZOROWSKI, *supra* note 1, at 71 (describing Corbin as a reluctant U.S.

Attorneys to make gains in districts where taking civil rights enforcement seriously meant risking death at the hands of the Klan. Akerman provided clarity of purpose, but results turned on the determination and integrity of counsel at the trial level. Put differently, Jenckes was surely correct to have warned that the DOJ bill did not provide a “perfect system.”¹⁸³ It did not.

The courts possess “neither FORCE nor WILL,” as Hamilton observed in Federalist No. 78, only “judgment”; but the executive branch requires both force and will to “hold the sword of the community.”¹⁸⁴ Whether it wields the sword to see that justice is done—either taking care that “the Laws be faithfully executed”¹⁸⁵—or instead using force to defy the law, has always turned heavily on the character and professionalism of its legal officers.¹⁸⁶ No structure is immune from corruption if these officers are venal, craven, supine, or otherwise more faithful to faction and party. Centralization makes the character and professionalism of the Attorney General singularly important. Indeed, character and professionalism matter most when what justice requires is hotly contested, as it was during Reconstruction.

The irony that federal enforcement of Reconstruction through criminal prosecution was suspended just as DOJ lawyers proved that it could end the Klan’s campaign of terror is cruel indeed. Irony diminishes if the Grant administration’s retreat from Reconstruction in the mid-1870s is made the measure of the DOJ’s founding at the start of the decade, but this writes history in reverse. The more troubling fact is abandonment of a project that was working as Congress intended until civil rights enforcement was sacrificed on the altar of sectional reconciliation.

attorney).

183. CONG. GLOBE, 41st Cong., 2d Sess. 3037 (1870) (statement of Rep. Thomas Jenckes).

184. FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

185. U.S. CONST. art. II, § 3.

186. Here I am in accord with Bruce A. Green and Rebecca Roiphe’s insistence on the importance of professional integrity among government lawyers to maintaining independence, *see generally* Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018), and Shugerman’s emphasis on the significance of the professionalization movement in the legal profession in the 1870s. *See* Shugerman, *supra* note 2, at 123-25.