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# THE CREATION OF THE DEPARTMENT OF JUSTICE: PROFESSIONALIZATION WITHOUT CIVIL RIGHTS OR CIVIL SERVICE

Jed Handelsman Shugerman\*

*This Article offers a new interpretation of the founding of the Department of Justice (DOJ) in 1870 as an effort to shrink and professionalize the federal government. The traditional view is that Congress created the DOJ to increase the federal government's capacity to litigate a growing docket due to the Civil War. More recent scholarship contends that Congress created the DOJ to enforce Reconstruction and ex-slaves' civil rights. However, it has been overlooked that the DOJ Act eliminated about one-third of federal legal staff. The founding of the DOJ had less to do with Reconstruction, and more to do with "retrenchment" (budget cutting and anti-patronage reform). The DOJ's creation was linked with major professionalization efforts, such as the founding of modern bar associations, to make the practice of law more exclusive and more independent from partisan politics. In this new interpretation, the DOJ's creation runs in the opposite*

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\* Associate Professor, Fordham University School of Law. I wish to thank the participants of the faculty workshops at Fordham University School of Law, Georgetown University Law Center, University of Chicago Law School, the University of Toronto Faculty of Law, Benjamin N. Cardozo School of Law, University of Texas Law School, New York University Law School, Boston University School of Law, and Osgoode Hall Law School, as well as my co-panelists at the American Society of Legal History and the Law and Society Conferences, and the participants in the American Bar Foundation/Northwestern University Workshop and the Harvard Junior Faculty Workshop. I am particularly indebted to Bruce Ackerman, David Barron, John Coates, Christine Desan, Sharon Dolovich, Howard Erichson, Richard Fallon, Willy Forbath, Jody Freeman, Glenda Gilmore, Risa Goluboff, Robert Gordon, Annette Gordon-Reed, Carol Igoe, Robert Kaczorowski, Andrew Kent, Michael Klarman, Adriaan Lanni, Richard Lazarus, Ethan Leib, Sandy Levinson, Yair Listokin, Kenneth Mack, Nick Parrillo, Dan Richman, Norman Spaulding, David Wilkins, and John Witt. I want to thank James Kobrick at the Federal Judicial Center, and the archivists at the Library of Congress and at Harvard's Houghton Library. Molly Cohen, Stephen Dee, Ross MacConnell, Andrew Mamo, and Michael Neff provided excellent research assistance for this project, and I am grateful to the editors of the *Stanford Law Review* for their thorough research. My deepest gratitude goes to Danya Handelsman for her boundless support and wisdom.

*direction from one historical trend, the growth of the federal government's size. Instead, it was at the very leading edge of two other major trends: the professionalization of American lawyers and the rise of bureaucratic autonomy and expertise. This story helps explain a historical paradox: how the uniquely American system of formal presidential control over prosecution evolved alongside the norms and structures of professional independence.*

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## INTRODUCTION

The Department of Justice (DOJ) was created in 1870, after almost a century of disorganization and confusion among the federal government's lawyers. It has been treated like common sense that the DOJ was created to increase the federal government's power in the wake of the Civil War and to enforce civil rights during Reconstruction.<sup>1</sup> For example, one recent book located the DOJ's creation in the general trend of building the modern federal bureaucracy "[t]o [e]nlarge the [m]achinery of [g]overnment,"<sup>2</sup> and a set of recent articles explained the DOJ as a Reconstruction project for the protection of ex-slaves' civ-

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1. See, e.g., Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 179-85 (1938). See generally HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* (1937); JAMES S. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE: ITS HISTORY AND FUNCTIONS* (1904); ALBERT LANGELUTTIG, *THE DEPARTMENT OF JUSTICE OF THE UNITED STATES* (1927). For other histories suggesting that the DOJ was created to manage a growing postwar docket and to improve law enforcement, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 193 (2008); and ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876*, at 39-40 (Fordham Univ. Press 2005) (1985). More generally, William Nelson has argued that the rise of American bureaucracy after the Civil War was a turn toward the protection of individual rights and minorities. See WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900*, at 5, 7 (1982).

2. WILLIAMJAMES HULL HOFFER, *TO ENLARGE THE MACHINERY OF GOVERNMENT: CONGRESSIONAL DEBATES AND THE GROWTH OF THE AMERICAN STATE, 1858-1891* (2007).

il rights.<sup>3</sup> This Article contends that the act creating the DOJ, the Act to Establish the Department of Justice (DOJ Act),<sup>4</sup> had different purposes and opposite effects. 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.”<sup>5</sup> The DOJ Act essentially cut the equivalent of about sixty district judges or 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.<sup>6</sup>

The founding of the DOJ actually undermined Reconstruction, and it had more to do with “retrenchment” (budget cutting and fiscal conservatism) and anti-patronage reform. This Article’s new interpretation contends that the DOJ’s creation was actually the leading edge of another significant development in American legal history: *the professionalization of American legal practice*. Many legal historians have identified the 1870s as a major turning point toward the modern legal profession.<sup>7</sup> From the 1860s through the 1870s,

3. Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 438 (2011) [hereinafter Spaulding, *Independence and Experimentalism*]; Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1937, 1959-60 (2008) [hereinafter Spaulding, *Professional Independence*]. Former Solicitor General Seth Waxman wrote a piece linking Congress’s creation of the DOJ and the Solicitor General’s office to the enforcement of the Reconstruction Amendments and claiming that “a ‘civil rights champion’ . . . is precisely what Congress and the President wanted.” Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1297, 1300-01 (2000) (footnote omitted).

4. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

5. CONG. GLOBE, 41st Cong., 2d Sess. 3035-36 (1870) (a total of \$733,209 paid from 1864 through 1869, plus between \$100,000 and \$200,000 in outstanding claims).

6. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162, 162-65 (1870). The DOJ Act barred other departments from employing their own attorneys and prohibited the new Department of Justice from paying attorneys’ fees to anyone other than the district attorneys (U.S. Attorneys) or assistant district attorneys (Assistant U.S. Attorneys or AUSAs). The annual salary of a district judge was \$3500 at the time, and the annual salary of the Assistant Attorney General was \$5000. See DEP’T OF JUSTICE, REGISTER OF THE DEPARTMENT OF JUSTICE AND THE JUDICIAL OFFICERS OF THE UNITED STATES (Washington, D.C., Gov’t Printing Office 1st ed. 1871) [hereinafter DEP’T OF JUSTICE, 1871 REGISTER]; DEP’T OF JUSTICE, REGISTER OF THE DEPARTMENT OF JUSTICE AND THE JUDICIAL OFFICERS OF THE UNITED STATES (Washington, D.C., Gov’t Printing Office 2d ed. 1872) [hereinafter DEP’T OF JUSTICE, 1872 REGISTER]; DEP’T OF JUSTICE, REGISTER OF THE DEPARTMENT OF JUSTICE AND THE JUDICIAL OFFICERS OF THE UNITED STATES (Washington, D.C., Gov’t Printing Office 3d ed. 1873) [hereinafter DEP’T OF JUSTICE, 1873 REGISTER]; REGISTER OF THE DEPARTMENT OF JUSTICE AND THE JUDICIAL OFFICERS OF THE UNITED STATES (Washington, D.C., Gov’t Printing Office 4th ed. 1874) [hereinafter DEP’T OF JUSTICE, 1874 REGISTER].

7. See NELSON, *supra* note 1, at 124-48; Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 70-71 (Gerald L. Geison ed., 1983); Robert W. Gordon, *The American Legal Profession, 1870-2000*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA

a cadre of Republican reformers was working on a combination of the DOJ Act, civil service reform, bureaucratic independence, and the founding of modern bar associations.<sup>8</sup> One of the most significant developments of the antebellum era was the rise of party machines and political patronage, from President Jackson's and President Van Buren's Democrats in the 1820s, to the Whigs in the late 1830s, and eventually to the Republicans, as well.<sup>9</sup> As soon as the Civil War ended, a new reform movement emerged, focusing on professionalization and civil service (restructuring government employment by merit, competitive testing, and job security, rather than political patronage).

In the 1860s and 1870s, Republican lawyers led the reform effort to professionalize the bench and bar. It has been overlooked that the congressman who led the DOJ effort, Thomas Jenckes, was also known as the "Father of the Civil Service,"<sup>10</sup> and that his allies led the bar association movement. A substantial part of this Article is based on Representative Jenckes's voluminous papers and letters, which are now housed at the Library of Congress. These professionalization efforts reflected a coherent agenda of (1) separating law from partisan politics; (2) establishing norms of expertise; (3) creating institutions for regulating legal practice; and (4) making these positions more exclusive. Reformers perceived that outside counsel positions were manipulated for patronage, a problem that infected other, nonlegal government offices. Moreover, the reformers perceived the legal profession as tarnished by too much democracy and low professional standards. Accordingly, they founded the bar association

73, 73 (Michael Grossberg & Christopher Tomlins eds., 2008); Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 55-57 (Gerard W. Gawalt ed., 1984); Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA*, *supra*, at 3, 3; John A. Matzko, "The Best Men of the Bar": *The Founding of the American Bar Association*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA*, *supra*, at 75, 75.

8. The primary leaders were: Thomas Jenckes, a Republican congressman from Rhode Island, a patent lawyer, and a leader of civil service reform, who led the DOJ Act and the civil service reform effort in Congress; Dorman Eaton, a New York lawyer and another civil service reform leader, who worked on the founding of the Association of the Bar of the City of New York; and William Evarts, a New York Republican who was Attorney General before founding the Association of the Bar of the City of New York in 1870, and then the American Bar Association in 1878. *See infra* Part II.

9. *See generally* CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (1963); WILLIAM DUDLEY FOULKE, *FIGHTING THE SPOILSMEN: REMINISCENCES OF THE CIVIL SERVICE REFORM MOVEMENT* 3-6 (1919); JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012); MARTIN TOLCHIN & SUSAN TOLCHIN, *TO THE VICTOR . . . : POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE* (1971); PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* (1958).

10. *E.g.*, R.I. STATE BUREAU OF INFO., *THE BOOK OF RHODE ISLAND* 51 (1930); MAX J. SKIDMORE, *IDEOLOGIES: POLITICS IN ACTION* 203 (1989).

in order to “maintain the honor and dignity of the profession of law.”<sup>11</sup> Like the new bar associations, the Department of Justice offered a leaner and cleaner organization of government lawyers, rather than a disorganization of government lawyers that had been bigger and meaner, in the sense of unregulated patronage. The DOJ was a different kind of state building: not growth in the size of a bureaucracy, but more managing, disciplining, and limiting the bureaucracy.

The DOJ’s creation was also a first step in another major trend: *the rise of bureaucratic autonomy and expertise*. This Article is at least a beginning of an answer to a historical puzzle: the Department of Justice is structurally accountable to presidential power to direct and fire officials, and yet it has developed strong norms of professional independence, despite episodes of presidential intervention (e.g., Watergate and the Bush firings). The DOJ’s creation reflects an early commitment to those norms of autonomy and expertise. In the debates over the DOJ Act, reformist Republicans argued that the system of spreading law officers throughout the various departments undermined their independence and undercut their power to restrain executive action. These lawyers had been handpicked by the department heads, so they were “yes-men” for the legal answers that the department heads wanted to hear. The opinions from these departmental law officers and from outside counsel were “designed to strengthen the resolution” of the department heads for their preferred course, to “sanction” their actions, even though “there was no authority in any law” for those actions.<sup>12</sup> In addition, congressmen described the “outside counsel” as “departmental favorites,” hired by executive officers at their own discretion, and creating even deeper problems of sycophancy, cronyism, and lawlessness.<sup>13</sup>

The Attorney General’s opinions would become more authoritative within the executive branch, to be “followed by all the officers of the Government until [they are] reversed by the decision of some competent court.”<sup>14</sup> Executive officers—and even the President—would no longer be able to find legal “shelter” from the law officers for their questionable actions.<sup>15</sup> This perspective fit an earlier interpretation that the Attorney General was supposed to be “quasi judicial,” more independent from executive and partisan politics, and more powerful in limiting the actions of executive officers.<sup>16</sup> The reformers’ vision

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11. GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870-1970*, at 35 (1970).

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

13. *Id.* at 3039 (statement of Rep. William Lawrence); *id.* at 4490 (statement of Sen. Thomas Bayard).

14. *Id.* at 3036 (statement of Rep. Thomas Jenckes).

15. *Id.*

16. See CALEB CUSHING, *A REPORT OF THE ATTORNEY GENERAL, SUGGESTING MODIFICATIONS IN THE MANNER OF CONDUCTING THE LEGAL BUSINESS OF THE GOVERNMENT: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. EXEC. DOC. NO. 33-95*, at 6 (1854). This discussion resonates with the contemporary debate over internal separation of

was to increase professional independence by increasing bureaucratic accountability to the Attorney General, not to the President. Instead of cementing presidential power over government lawyers and merging law and politics,<sup>17</sup> the DOJ Act was itself a structural reform aiming to protect professional independence and separate law from politics.<sup>18</sup>

The professionalization and civil service movements make more sense out of the DOJ's creation than the interpretations based on post-Civil War expansion of the federal government or Reconstruction enforcement of civil rights. Representative Jenckes and the other reformers paid little attention to Reconstruction or to black civil rights. The DOJ Act's drafters emphasized repeatedly that it would cut spending, increase efficiency, and create no new law positions except for the Solicitor General's office.<sup>19</sup> The DOJ Act then played a role in frustrating the Reconstruction effort. U.S. Attorneys in the South were fighting an uphill battle on civil rights in the early 1870s, because they were underfunded by Congress and had so few personnel to help with litigation.<sup>20</sup> The DOJ Act's restrictions prevented federal officials from hiring more prosecutors in the South.<sup>21</sup> The first two Attorneys General who ran the new

powers within the executive branch. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 139-40* (2010); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

17. Spaulding, *Professional Independence*, *supra* note 3, at 1937.

18. Daniel Carpenter's account of the rise of bureaucratic autonomy in the late nineteenth century in other departments emphasized the importance of bureaucrats maintaining "networks" with party politicians and ties with electoral coalitions. This study of the DOJ's creation shows an opposite strategy of removing government lawyers from party networks and insulating them from regular politics. See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 29-30 (2001).

19. See CONG. GLOBE, 41st Cong., 2d Sess. 3034-37 (1870); see also CONG. GLOBE, 40th Cong., 2d Sess. 1272 (1868). The Civil Rights Act of 1866 and the Enforcement Act of 1870 permitted circuit judges to appoint more U.S. Commissioners, but these officers did not have close to the same powers over prosecution and litigation as the district attorneys or assistant district attorneys. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 987 & n.247 (2000) (describing the duties of U.S. Commissioners). Hoffer suggests that the DOJ Act's sponsors could eliminate outside counsel because those expenses were "no longer necessary with in-house counsel." HOFFER, *supra* note 2, at 105. However, "in-house counsel" existed before 1870 as U.S. Attorneys and Assistant U.S. Attorneys, and the DOJ Act did not increase those offices, nor did their numbers increase over the early 1870s. See *infra* Appendix.

20. KACZOROWSKI, *supra* note 1, at 40, 65-68, 72, 82 (showing that U.S. Attorneys were processing more prosecutions, but with smaller budgets and fewer personnel).

21. In the former Confederate states, the number of AUSAs was 8 in 1871; 16 in 1872; 13 in 1873; and 14 in 1874. There were about forty more assigned throughout this period to the states that supported the Union. DEP'T OF JUSTICE, 1871 REGISTER, *supra* note 6; DEP'T OF JUSTICE, 1872 REGISTER, *supra* note 6; DEP'T OF JUSTICE, 1873 REGISTER, *supra* note 6; DEP'T OF JUSTICE, 1874 REGISTER, *supra* note 6.



Department of Justice complained that they had too few lawyers and too few resources to take on the KKK in the early 1870s.<sup>22</sup> Those years witnessed the retreat from Reconstruction.

My argument is not that Congress generally did not care about civil rights in this era, but rather, that the framers of the DOJ Act itself were indifferent to Reconstruction, and some were even hostile towards it. They were not focused on increasing federal power or on civil rights in the South, even as other congressmen worked on other legislation intended to protect civil rights. Congress, of course, is a “they,” not an “it.”<sup>23</sup> Congress was difficult to manage without any staff, especially after the passing of key Radical Republican leaders.<sup>24</sup>

This Article touches on the Republican reformers’ parallel anti-patronage civil service goals from 1865 through 1871, because this context is important for this Article’s positive argument about professionalization and retrenchment. The reformers’ goals in enacting civil service reform mirror the goals of the DOJ Act: reducing the size of the bureaucracy by about a third, and yielding more exclusivity, efficiency, and expertise.<sup>25</sup> But the details of the civil service reform efforts will be part of a future article that will address two puzzles: Why is the United States unique among Western democracies in not addressing prosecutors with civil service reform? And if civil service reformers led the creation of the Department of Justice, why didn’t they include civil service reforms as part of this professionalization project? Representative Jenckes, the “Father of the Civil Service,” succeeded in passing a DOJ Act professionalizing government lawyers, but curiously, he did not push to include civil service

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22. KACZOROWSKI, *supra* note 1, at 67, 80-81.

23. See Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

24. The Radical Republicans’ ability to control Congress slipped due to many factors, but it should not be overlooked that Thaddeus Stevens, the de facto majority leader for the Radical Republicans, died in August 1868. The debates indicate that there was a lot of confusion and spotty attendance, so some Radical leaders might have overlooked the detailed effects of the DOJ Act, just as historians have. Some Radical Republicans might have assumed that the DOJ Act might produce more efficient enforcement, without realizing how deep the cuts were, or with an assumption that Congress would increase spending in the future. At best, the Radical Republicans in Congress in 1870 were naïve or overlooked these details. Alternatively, the votes for the Enforcement Acts and the DOJ Act reflect a consistent pattern in the 1870s: the Republican Congress enacted civil rights legislation on the books, but provided “inadequate financing,” was “reluctant” in its support of national civil rights, and was “penurious” with appropriations for courts and the federal judiciary. See KACZOROWSKI, *supra* note 1, at 40, 65-68, 82.

25. See DEP’T OF JUSTICE, 1871 REGISTER, *supra* note 6. To get a sense of the scope of the DOJ’s cut of outside counsel, the total number of positions for lawyers in the entire Department of Justice (not including “outside counsel”) around 1870 was about 105. There were about ten “Main Justice” lawyers in Washington, plus fifty-five district attorneys and thirty-seven assistant district attorneys. The outside counsel had been the equivalent of about fifty more lawyers. See *supra* note 5 and accompanying text.

reforms in the DOJ Act.<sup>26</sup> Representative Jenckes and the Republican Congress achieved many of their professionalization goals in their DOJ Act without relying on civil service provisions.

The organization of this Article is more thematic than chronological. Part I lays out the bizarre decentralized history of government lawyers and prosecution (both state and federal and public and private) in antebellum America. Part II provides the context of professionalization and the founding of the Association of the Bar of the City of New York at the same time by Representative Jenckes's allies. Part III tracks the passage of the DOJ Act from 1868 to 1870. This Part also tracks the passage and revision of the Tenure of Office Act around the same time and notes why the DOJ Act lacked civil service reforms. Part IV and the Conclusion offer observations on the DOJ's shortcomings and false start in the 1870s, but also its long-term success in cultivating norms of professional independence. The DOJ Act might have been more aspirational than successful in creating professional independence, but it laid a foundation for the evolution of those norms. This story helps explain a historical paradox: how the uniquely American system of formal presidential control over prosecution evolved alongside the norms and structures of professional independence.

## I. GOVERNMENT LAWYERS AND PROSECUTION IN THE EARLY REPUBLIC

There has been remarkably little historical research into the DOJ's founding and early years. Other scholars have demonstrated that the Founding era created an incredibly decentralized system of federal law enforcement.<sup>27</sup> Jerry

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26. See CALABRESI & YOO, *supra* note 1, at 195 (stating that the DOJ was a "triumph" for the unitary executive); Spaulding, *Independence and Experimentalism*, *supra* note 3, at 438; Spaulding, *Professional Independence*, *supra* note 3, at 1937, 1957.

27. One element of federal law enforcement centralization is the role of prosecutors. On the issue of prosecutorial independence, in *Morrison v. Olson*, the Supreme Court upheld the Independent Counsel Act, while Justice Scalia dissented, relying partly on historical interpretation to conclude: "Government investigation and prosecution of crimes is a quintessentially executive function." 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). On the differing historical interpretations, compare *id.* at 726, 729, 734, with *id.* at 674-75 (majority opinion). To the contrary, various scholars have shown a lack of consensus concerning both the unitary executive and the executive function of prosecution. See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 281 (1989) (noting the decentralized system of district attorneys and the role of private citizens and state officials prosecuting crimes); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 (1994); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1077 (1990); see also Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 476 (1989); Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363

Mashaw has recently revealed how much administrative law took shape before the Civil War.<sup>28</sup> Nevertheless, the story of the chaotic and politicized disorganization of government lawyers before the Civil War and the DOJ's creation soon after remind us of the significance of the postwar reorganization efforts.

First, it is important to note that the federal government had a minor role in criminal law in this era. In some cases, Congress used criminal fines to achieve its limited regulatory goals, but it relied heavily on state officials and state courts, as well as private plaintiffs.<sup>29</sup> When Congress used criminal fines to enforce the Embargo Act of 1807, the government found that it had too few district attorneys, with too little time, to prosecute offenders, and the embargo was made a mockery.<sup>30</sup> It is also surprising to find early observations that the federal judges themselves led what appeared to be prosecutions during the Whiskey Rebellion of 1794, and initiated Alien and Sedition Acts prosecutions in conducting grand juries.<sup>31</sup>

The Judiciary Act of 1789 designated that the President would appoint a "meet person learned in the law" in each judicial district to "act as attorney for the United States in such district." The Judiciary Act also permitted the President to appoint a "meet person, learned in the law" to

act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.<sup>32</sup>

However, the Act did not mention any authority of the Attorney General over the district attorneys. Over the next eight decades, the Attorney General exercised no control over them. There was no consensus that government prosecution was "a quintessentially executive function," as Justice Scalia has concluded.<sup>33</sup> A significant number of the prosecutions were undertaken by private parties during this period.<sup>34</sup> In the colonial era, county prosecutors were select-

(2001) (noting that district courts are currently empowered by statute to appoint interim U.S. Attorneys, and tracing the history of independent government lawyers).

28. See generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

29. *Id.* at 68, 83; see also *id.* at 99, 138-39.

30. *Id.* at 93, 101.

31. MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 12-13 (1977); Letter from Alexander Hamilton to George Washington (Nov. 19, 1794), in ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION 491 (Richard B. Morris ed., 1957).

32. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93.

33. See *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

34. See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880* (1989); Robert M. Ireland, *Privately Funded Prosecution of*

ed by judges or nominated by judges.<sup>35</sup> In the early Republic, state constitutions often placed attorneys general and prosecutors under the judiciary articles of their constitutions.<sup>36</sup> Some of the state constitutions assigned the power of appointment to the legislature with no role for the governor.<sup>37</sup>

The U.S. Constitution did not specify the President's removal power, but the First Congress gave the President the power to dismiss executive officers at will (known as "the decision of 1789"<sup>38</sup>). The Attorney General's office was created by the Judiciary Act of 1789, and a draft of the Act gave the Supreme Court the power to appoint the Attorney General and district judges the power to appoint district attorneys.<sup>39</sup> These provisions were deleted, but a vestige of the earlier model remained: deputy marshals were appointed by the President, but they were removable by the courts.<sup>40</sup> The Act created the offices of Attorney General and district attorneys, but did not designate them as "principal" officers nor explicitly set a process for hiring and firing.<sup>41</sup> The Judiciary Act set forth the Attorney General's responsibilities: to advise the President and department heads on legal matters and to represent the United States at the

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*Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995); Michael T. McCormack, Note, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 SUFFOLK U. L. REV. 497, 501-02 (2004); Allen Steinberg, "The Spirit of Litigation": Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia, 20 J. SOC. HIST. 231, 235 (1986). It is not clear, however, that "public prosecution" carried the same meaning it does today. Carolyn Ramsey, for instance, suggests that public prosecutions might not have been publicly funded: "Before mid-[nineteenth] century, activities like searching for evidence, drafting legal documents, and empanelling a jury corresponded to a fee schedule; the complaining witness paid the District Attorney for services rendered." Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1326 (2002).

35. See JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 20 (1980).

36. See, e.g., GA. CONST. of 1798, art. III, § 3; GA. CONST. of 1789, art. III, § 5; ILL. CONST. of 1848, art. V, § 21; IND. CONST. of 1851, art. VII, § 11; LA. CONST. of 1812, art. IV, § 7; MD. CONST. of 1776, § XL (listing Attorney General's office in the same sentence as judges and chancellors); TENN. CONST. of 1834, art. VI, § 5; VA. CONST. of 1830, art. V, § 8. *But see* MD. CONST. of 1851, art. V (listing "State's attorney[s]" in a separate article).

37. See, e.g., TENN. CONST. of 1834, art. VI, § 5; VA. CONST. of 1830, art. V, § 8.

38. See *Myers v. United States*, 272 U.S. 52, 146 (1926).

39. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923).

40. See Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87; Krent, *supra* note 27, at 286.

41. See Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87; see also JULIUS GOEBEL, JR., *ANTECEDENTS AND BEGINNINGS TO 1801*, in 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1, 490 (Paul A. Freund ed., 1971).

United States Supreme Court.<sup>42</sup> But there were also signs that Congress envisioned having power over the Attorney General, too.<sup>43</sup>

The First Congress created four positions that would form the first cabinet: Secretary of State, Secretary of War, Secretary of the Treasury, and Attorney General. The First Congress also created the State Department, the War Department, and the Treasury Department, but did not give the Attorney General a department or any staff.<sup>44</sup> The first Attorney General, Edmund Randolph, asked President Washington for at least one clerk, but the bill died, and it took twenty-seven years for the Attorney General to be given a clerk.<sup>45</sup> Congress set his salary significantly lower than the other cabinet members, and the office's salary was brought up to par only after 1853.<sup>46</sup> Attorney General Randolph had to find private legal work on the side:

I am a sort of mongrel between the State and the U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former,—perhaps in a petty mayor's or county court. . . . Could I have foreseen it, [it] would have kept me at home to encounter pecuniary difficulties there, rather than add to them here.<sup>47</sup>

Until 1854, each Attorney General maintained a substantial private practice, and many did not even live in Washington, D.C. Until 1819, the Attorney General did not even have his own clerk, and until 1821, an office.<sup>48</sup> The Attorney General functioned more like a part-time White House Counsel or a one-person Office of Legal Counsel, and he did not supervise the work of the district attorneys. Edmund Randolph recommended to Congress that it give the Attorney General supervision of district attorneys. President Washington submitted his proposal to the House of Representatives, but it went no further.<sup>49</sup>

In the very beginning, the Attorney General had no power over the district attorneys or their appointment process.<sup>50</sup> In 1797, Congress gave the Comptroller of the Treasury significant prosecutorial authority over district attorneys in

42. LANGELOTTIG, *supra* note 1, at 2; Lessig & Sunstein, *supra* note 27, at 16.

43. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 581.

44. *Id.* at 569.

45. Key, *supra* note 1, at 176; *see also* LANGELOTTIG, *supra* note 1, at 2, 6.

46. *See* Act of Mar. 3, 1853, ch. 97, § 4, 10 Stat. 189, 212; NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 56 (1992).

47. BAKER, *supra* note 46, at 51 (alterations in original) (internal quotation marks omitted).

48. *Id.* at 56.

49. 3 ANNALS OF CONG. 289 (1791); *id.* at 53, 329-30 (1792); LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 168 (1956).

50. *See* DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 6 (1980); Bloch, *supra* note 43, at 567.

directing suits over revenue and debts.<sup>51</sup> In practice, district attorneys were not really supervised at all. Active supervision was impossible over such long distances, with such limited transportation and communication.<sup>52</sup> They also had too little work to require much attention. Over time, the Treasury Department increased its prosecutorial role, with the power to initiate civil and criminal proceedings to collect debts. The Comptroller, Collector of Customs, and tax collectors exercised federal power on the ground with increasingly heavy workloads. Throughout most of the nineteenth century, federal district attorneys were not paid a salary, but were paid by fees (per conviction until 1853).<sup>53</sup> Congress did not adopt a fixed salary for district attorneys until 1896.<sup>54</sup> This decentralization in the eighteenth and nineteenth centuries undercuts Justice Scalia's history of prosecution in *Morrison v. Olson*.<sup>55</sup>

In 1820, Congress switched the control of district attorneys from the Comptroller to a new office, the Agent of the Treasury.<sup>56</sup> When President Jackson took office, he called on Congress to increase the authority of the Attorney General, but instead, Congress created the office of Solicitor of the Treasury and specifically gave it authority over the district attorneys.<sup>57</sup> From 1797 through 1870, the Treasury Department had either sole or primary supervision over district attorneys.

As the Treasury Department took over the supervisory role, district attorneys took over traditional roles that had been served by Treasury officials and thus played a more significant role in collecting revenue.<sup>58</sup> The Attorney General's office even moved into the Treasury Department<sup>59</sup> and stayed there because the Treasury Department had so clearly taken the lead in law enforcement. Compared to their modern descendants, district attorneys of the antebellum era were more like Treasury officials, or today's IRS lawyers, and had limited jurisdiction.<sup>60</sup>

51. Act of Mar. 3, 1797, ch. 20, §§ 1, 3, 1 Stat. 512, 512, 514-15; LANGELUTTIG, *supra* note 1, at 4.

52. See Lessig & Sunstein, *supra* note 27, at 70.

53. NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940*, at 263-64, 273 (2013).

54. *Id.* at 273. Parrillo finds that the move from fee to salary was intended to encourage prosecutorial discretion, and in fact, it did. See *id.* at 279.

55. See *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

56. See Act of May 15, 1820, ch. 107, 3 Stat. 592.

57. EASBY-SMITH, *supra* note 1, at 11; see also CUMMINGS & MCFARLAND, *supra* note 1, at 146; LANGELUTTIG, *supra* note 1, at 4-5.

58. See Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 75 (1983).

59. See Bloch, *supra* note 43, at 619 n.188.

60. Nicholas Parrillo finds that there were far fewer federal prosecutions per capita in the early Republic than after the Civil War. PARRILLO, *supra* note 53, at 275.

In the mid-nineteenth century, there were some attempts to foster professional independence. William Wirt served as Attorney General for twelve years under Presidents Madison and Monroe and tried to create a *stare decisis* practice of respecting the opinions of past Attorneys General, a way of restraining the office in order to promote a culture of professionalism and non-partisanship. Attorney General Wirt said of his office:

I do not consider myself as the advocate of the government . . . but as a judge, called to decide a question of law with the impartiality and integrity which characterizes the jurist. I should consider myself as dishonoring the high-minded government, whose officer I am, in permitting my judgment to be warped in deciding any question officially by the one sided artifice of the professional advocate.<sup>61</sup>

This tradition continued for a while, but eroded in light of Attorney General Roger Taney's association with Andrew Jackson.<sup>62</sup> President Jackson had clashed with some members of his cabinet early in his tenure, and then required more allegiance from his appointees thereafter. It eroded further during the Civil War, when President Lincoln's Attorney General, Edward Bates, appeared to be working to justify the administration's wartime policies rather than serving independently and impartially.<sup>63</sup>

There were also a few calls for creating a law department under the Attorney General as the government lawyers' workloads increased. Each department had its own lawyers, and coordinating legal efforts had become a problem. In 1830, President Jackson called for placing all the law officers in the executive branch under the supervision of the Attorney General, but Congress rejected the idea.<sup>64</sup> President Polk proposed a similar change in 1845, but the Whigs in Congress attacked it as a Trojan horse for creating jobs for Democrats, and it died.<sup>65</sup> In 1849, Congress established the Interior Department, a new catchall department that loosely shared supervision of the district attorneys with the Treasury Department. Alexander H.H. Stuart, one of the first to hold the office of Secretary of the Interior, resented this responsibility. Secretary Stuart called for a "Department of Justice" to take over those duties from him.<sup>66</sup> Momentum was building for restructuring, but every effort triggered stronger and stronger opposition.

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61. CUMMINGS & MCFARLAND, *supra* note 1, at 90 (quoting Letter from William Wirt to John C. Calhoun (Feb. 3, 1820)).

62. *See id.* at 84-119.

63. *See* Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 585 & n.32 (2009).

64. S. DOC. NO. 21-1, at 28 (1830); Andrew Jackson, Second Annual Message (Dec. 6, 1830), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908, at 500, 527-28 (James D. Richardson ed., 1908); *see also* CUMMINGS & MCFARLAND, *supra* note 1, at 147.

65. *See* CUMMINGS & MCFARLAND, *supra* note 1, at 147-48.

66. *Id.* at 148-49.

Caleb Cushing, President Pierce's Attorney General, made a public call for a new law department in 1854. Attorney General Cushing was regarded as having helped professionalize the Attorney General's office by fully devoting himself to the office and halting his private practice.<sup>67</sup> He wrote to the President and Congress that when the Attorney General is asked to give legal advice, "he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation."<sup>68</sup> This comment reflected a perspective that the Attorney General should exercise professional independence from the administration, framed as a more "judicial" role. In the same message, Attorney General Cushing also had endorsed accountability to the President.<sup>69</sup> Attorney General Cushing reflected an internally divided view about his own office—and also foreshadowed the tensions between the independence and accountability of the future law department. Regardless of Attorney General Cushing's framing, Congress rejected the proposed department in 1854.<sup>70</sup> One reason for these failed attempts was political inertia. Another reason was that officials in the Treasury Department resisted changes that would reduce their personnel and power.

Whereas there was a stalemate in peacetime, the Civil War created openings and demands for change. A few months after Fort Sumter, the first change was Congress granting the Attorney General supervision over district attorneys.<sup>71</sup> Four days later, Congress passed a second statute stating that the district attorneys were still under the command of the Treasury Department, too.<sup>72</sup> Thus, the district attorneys had to report to three different supervisors: the Solicitor of the Treasury, the Secretary of the Interior, and the Attorney General. The same legal framework also allowed district attorneys and other departments to hire outside counsel,<sup>73</sup> as Congress grasped that the war would spike the amount of government litigation.

Even after Congress gave the Attorney General more supervisory power, practice did not change much, however. The Attorney General still had no department and no staff to help him supervise district attorneys. During the war, Attorney General Edward Bates had plenty of direct responsibilities and no extra time to supervise anything other than the most significant cases. The district attorneys still did not know whether they were supposed to report to the Attorney General, the Solicitor of the Treasury, or the Secretary of the Interior. The heads of other departments still gave directions to the district attorneys, as well,

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67. See LANGELOTTIG, *supra* note 1, at 7.

68. CUSHING, *supra* note 16, at 6.

69. See *id.* at 11-12.

70. CUMMINGS & MCFARLAND, *supra* note 1, at 149-53.

71. Act of Aug. 2, 1861, ch. 37, 12 Stat. 285.

72. Act of Aug. 6, 1861, ch. 65, 12 Stat. 327.

73. Act of Aug. 2, 1861, ch. 37, §§ 2-3, 12 Stat. 285, 285-86.



and those departments continued to have their own law offices and to hire their own special counsel.<sup>74</sup>

The war had created a deluge of legal cases and controversies for each department, and the conflicts between departments and offices multiplied.<sup>75</sup> By the end of the war, the federal courts' dockets had a backlog of war-related cases (treason, confiscation, and revenue cases) on top of their usual business.<sup>76</sup> The Civil War had indeed triggered a change in the organization of federal law enforcement: increased spending on outside counsel in an ad hoc way. This direct effect of the war and Reconstruction then led to a backlash against the hiring of outside counsel. Thus, it is true that the Civil War and increasing litigation led to the DOJ, but not in the direct sense that historians have assumed; it was a backlash against the actual measures for meeting those demands and a step of institutional "learning."

## II. PROFESSIONALIZATION IN THE LATE 1860S AND 1870

The Civil War and Reconstruction have been overemphasized as the context for the Department of Justice. The professionalization movement of the 1860s and 1870s has been overlooked. This Part offers the background of the rise of the bar associations—and the connections between that effort, the civil service movement, and Thomas Jenckes himself—before the next Part traces Representative Jenckes's work on the DOJ Act in the late 1860s through its passage in 1870. The subsequent Part tracks Representative Jenckes's simultaneous efforts for civil service reform. In 1870, elite New York lawyers founded the Association for the Bar of the City of New York—the first modern bar association and a major turning point in the professionalization of American law. These elite lawyers later formed the American Bar Association in 1878, and they were linked to Representative Jenckes and the Attorney General's office. The goals were strikingly similar: to make public or private lawyering more exclusive and less embroiled in partisan politics and patronage.

Entire books and articles could be written about the major steps toward the professionalization of American law in the late 1860s and the 1870s. In fact, some have been.<sup>77</sup> The increasing professionalism of the Attorneys General was not an isolated development. The state bench was also professionalizing in

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74. CUMMINGS & MCFARLAND, *supra* note 1, at 219.

75. *Id.* at 218-20.

76. *Id.* at 192-94, 197-200, 218-21.

77. See, e.g., MARTIN, *supra* note 11; EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK (1953); see also Wayne K. Hobson, The American Legal Profession and the Organizational Society, 1890-1930, at 210-61 (May 1977) (unpublished Ph.D. dissertation, Stanford University) (on file with Crown Library, Stanford Law School).

the 1870s.<sup>78</sup> Christopher Columbus Langdell introduced his case method of "legal science" to Harvard Law School in 1870, as a "scientific morality" spread throughout various academic disciplines.<sup>79</sup> The large corporate law firm emerged in the 1870s.<sup>80</sup> The 1870s also witnessed the emergence of the modern—and exclusive—bar association.

Lawyers had made significant advances in professionalism in the 1840s and 1850s, especially in the founding of many legal periodicals and their sustainability thereafter.<sup>81</sup> Soon after the Civil War, lawyers began organizing the first formal bar associations and reforming the judiciary. In fact, 1870 was a watershed year with the establishment of the Association of the Bar of the City of New York (now known as the New York City Bar Association). Dorman Eaton, who was Representative Jenckes's ally in the fight for civil service reform, was also one of the central figures in both the judicial reform effort and the creation of the Association of the Bar of the City of New York.<sup>82</sup> From 1873 through 1875, Eaton would serve as Chairman of the United States Civil Service Commission, whose creation Representative Jenckes pushed through Congress in 1871. Eaton would also draft the groundbreaking Pendleton Civil Service Act of 1883,<sup>83</sup> and he published some of the most important books and articles on civil service reform in this era, including *Civil Service in Great Britain*.<sup>84</sup>

These twin movements in New York (bar organization and judicial reform) were a reaction to scandals over partisanship and patronage. "Bench and bar settle deeper in the mud every year and every month. They must be near bottom now," wrote one leading New York lawyer, George Templeton Strong, in 1868.<sup>85</sup> In the 1860s, New York politics and New York judges were perceived as the most corrupt in the country. Machine politicians controlled offices throughout the state with patronage. An infamous example of partisan corruption was the Erie Railroad scandal of the late 1860s, involving Tammany Hall, tycoon Cornelius Vanderbilt, the legendarily unscrupulous financier Jay Gould,

78. See SHUGERMAN, *supra* note 9, at 144-50; Kermit L. Hall, *Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861-1899*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA*, *supra* note 7, at 29, 42.

79. See NELSON, *supra* note 1, at 6, 141-42; G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 26-27 (1980).

80. Hobson, *supra* note 7, at 3, 5.

81. See MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 142-43 (1976).

82. MARTIN, *supra* note 11, at 40-43.

83. See ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883*, at 201 (1968).

84. DORMAN B. EATON, *CIVIL SERVICE IN GREAT BRITAIN: A HISTORY OF ABUSES AND REFORMS AND THEIR BEARING UPON AMERICAN POLITICS* (N.Y., Harper & Bros. 1880).

85. *Id.* at 3 (internal quotation marks omitted).

and trial court judge Albert Cardozo.<sup>86</sup> Cardozo resigned in 1872, and many other judges were tainted in similar scandals.<sup>87</sup> In the late 1860s, elite New York City lawyers led a fight to lengthen state judges' terms to increase their job security and to insulate them from partisan politics. The established bar had strong influence over New York's constitutional convention in 1867, and judicial reform was a top priority.<sup>88</sup> Judge Charles Daly, a Democrat elected to the Court of Common Pleas in New York City and a delegate at the 1867 convention, declared from experience: "The real evil at present is that, after [a judge] goes upon the bench, he depends for his continuance there upon . . . all the influences which affect political parties."<sup>89</sup> In 1869, the voters separately ratified the convention's judiciary article, but rejected the other parts. Lawyers subsequently pushed for an amendment to return from judicial elections to judicial appointments, but the voters rejected that measure in 1873.<sup>90</sup> Other states also lengthened the terms of judges around this time, including Maryland, California, Wisconsin, Missouri, and Pennsylvania.<sup>91</sup> In the early 1870s, Pennsylvania elites also focused on combating corruption and separating the courts from excessive electoral politics. These leaders called for a new constitutional convention in 1873, in which the tenure of state supreme court justices was lengthened from fifteen to twenty-one years.<sup>92</sup> There was bipartisan consensus that it was necessary to insulate judges from the pressures of campaigning and patronage politics.<sup>93</sup>

Dorman Eaton and William Evarts, the recent Attorney General and one of the highest profile lawyers in America, led the movement in 1869 and 1870 to organize the New York City bar as part of the fight against corruption in business and politics.<sup>94</sup> The simultaneity of their various reform projects gives additional context to the goals of the leading lawyers at the time. In December 1869, New York City lawyers circulated a petition later known as the "call for

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86. See GEORGE H. DRURY, *THE HISTORICAL GUIDE TO NORTH AMERICAN RAILROADS* 129-30 (Bob Hayden ed., 1985); Renée Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 *GEO. MASON L. REV.* 109, 116-18, 120, 145-46, 155 (2007).

87. See Lerner, *supra* note 86, at 116-18, 120, 123, 127-30, 157-58.

88. See *id.* at 132.

89. 3 *PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, HELD IN 1867 AND 1868, IN THE CITY OF ALBANY* 2365 (Albany, Weed, Parsons & Co. 1868); see also Lerner, *supra* note 86, at 135.

90. Lerner, *supra* note 86, at 143-44, 156-58.

91. SHUGERMAN, *supra* note 9, at 150-54.

92. 4 *DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA* 486 (Harrisburg, Benjamin Singerly 1873); see also Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 *GEO. L.J.* 1349, 1383-84 (2010).

93. See Mahlon H. Hellerich, *The Origin of the Pennsylvania Constitutional Convention of 1873*, 34 *PA. HIST.* 158, 158, 166 (1967).

94. MARTIN, *supra* note 11, at 14-47.

organization,” which stated that the undersigned believed “that the organized action and influence of the Legal Profession, properly exerted, would . . . sustain the profession in its proper position in the community, and thereby enable it, in many ways, to promote the interests of the public.”<sup>95</sup> By January 1870, the letter had more than 200 signatures. William Evarts had recently returned to New York from Washington after serving as President Johnson’s Attorney General, with a reputation for nonpartisanship and professionalism. He was one of the most respected lawyers in the country, and the organizers of the letter campaign quickly offered him the presidency of their emerging organization.<sup>96</sup> The first organizational meeting was held on February 1, 1870.<sup>97</sup>

At that first meeting, the attendees gave speeches attacking the Jacksonian era for opening up the bar too broadly. Before 1846, the bar was limited to those who had passed a series of examinations over a period of six to ten years. In 1846, the Radical Barnburner faction of the Democratic Party controlled the state constitutional convention and adopted judicial elections. After 1846, the waiting period was eliminated, and “[a]ny male citizen” who had “the requisite qualifications of learning” could practice law in all New York courts.<sup>98</sup> Those qualifications were lower than they had been before. The more elite lawyers at the 1870 meeting blamed the Radicals’ 1846 constitution for delivering

almost a death blow to the legal profession. Disastrous effects could not but flow from the organic changes made by that instrument. . . . [W]hen the gates of the Bar were thrown entirely open; when those honorable distinctions which formerly existed in the profession were abolished . . . and when every man, from the merest tyro to the greatest and most renowned amongst us, was put on the same footing, it became a necessary result that without some link which should connect and bind the more worthy of the profession together, [the 1846 constitution] must accept its destiny and be eventually destroyed.<sup>99</sup>

William Evarts gave a rousing speech on cleaning up the legal profession from patronage, corruption, and politics, referring to the Erie scandal directly. He concluded by stating that the aim of the new organization was to “restore the honor, integrity and fame of the profession,” staking out an ambitious goal beyond merely creating a library and a social club.<sup>100</sup> Later, Samuel Tilden (who would become the Democrats’ presidential nominee in 1876) gave another inspired speech to the members echoing William Evarts:

Sir, the City of New York is the commercial and monetary capital of this continent. If it would remain so, it must establish an elevated character for its

95. *Id.* at 15.

96. *Id.* at 15, 27.

97. MARTIN, *supra* note 11, at 29.

98. N.Y. CONST. of 1846, art. VI, § 8; *see also* Jed Handelsman Shugerman, *The Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1111-15 (2010).

99. MARTIN, *supra* note 11, at 33 (citing 1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK REPORTS 8 (1870)).

100. *Id.* at 34 (internal quotation mark omitted).

Bar, and a reputation throughout the whole country for its purity in the administration of justice. [Applause.] . . . [I]t is impossible for New York to remain the centre of commerce and capital for this continent, unless it has an independent Bar and an honest judiciary. [Great applause.]<sup>101</sup>

The organizers of the new bar association were signaling that they were defying party politics. One of the organizers paid a steep price. Dorman Eaton, Representative Jenckes's fellow crusader for civil service reform, was almost beaten to death by assassins hired by his political opponents soon after these meetings. The *New York Times* blamed one of the Erie Railroad executives and "Boss Tweed," the infamous New York party boss. The attack was more likely the result of Eaton's anticorruption efforts against the city sanitation offices, but nevertheless, the causes were interrelated.<sup>102</sup> Eaton eventually recovered, and gave up his law practice to pursue political reform full time. The New York City Bar Association thrived, doubling its membership by the middle of 1871, even though the dues were expensive.<sup>103</sup> Meanwhile, the organization increasingly turned its resources to legal and political reform to combat partisan influence, particularly over the courts.<sup>104</sup>

In the next few years, other lawyers followed the New York City bar's lead. During the 1870s, bar associations formed in six major cities and seven states.<sup>105</sup> Then the American Bar Association (ABA) was established in 1878. William Evarts was also one of the core founders of the ABA, along with the DOJ's first Solicitor General, Benjamin Bristow.<sup>106</sup> Of course, those events occurred after the DOJ was established, but the post-Civil War years have long been recognized by historians as a turning point in the professionalization of American law, and the DOJ's founding was on the leading edge of those efforts.<sup>107</sup>

The common theme of these professionalization movements in the 1860s and 1870s was, to a degree, to separate lawyers from regular partisan politics. Additionally, elite lawyers, in their minds, were also trying to restore a measure of honor or prestige to the legal profession by making it more exclusive. From a different perspective, they were trying to preserve a traditional and estab-

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101. *Id.* at 38 (first and fourth alterations in original) (citing 1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK REPORTS at 20-21). For the same dynamic in the twentieth century, see generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

102. MARTIN, *supra* note 11, at 40-41.

103. *Id.* at 42-43.

104. *Id.* at 46-47.

105. J. Gordon Hylton, *The Bar Association Movement in Nineteenth Century Wisconsin*, 81 MARQ. L. REV. 1029, 1029-30 (1998).

106. SUNDERLAND, *supra* note 77, at 3-4.

107. See generally ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES* (1953).

lished bar elite from popularization and challenges from outside groups. The effort to eliminate "outside counsel" from the federal government also made the ranks of government lawyers smaller, more regulated, and more exclusive.

### III. DEPARTMENT OF JUSTICE ACT

#### A. *The DOJ Act's Beginnings and the Tenure of Office Act, 1865-1869*

The Civil War and Reconstruction had produced a flood of government litigation (civil as well as criminal) that was mostly unrelated to civil rights cases.<sup>108</sup> The war's upheaval and the government's interventions created a huge number of captured and abandoned property disputes, customs cases, and revenue cases.<sup>109</sup> The federal government had instituted a series of new taxes to finance the war, and although it dropped some of those taxes when the war ended, it maintained the excise tax on tobacco and liquor, and relied upon many more criminal prosecutions to enforce them.<sup>110</sup> The legal system was overloaded, and the federal government relied heavily on outside counsel on a fee basis.<sup>111</sup>

Congress's first solution to the wartime increase in legal casework in 1861 was to create the Assistant U.S. Attorney position, and, as noted above, to open up discretion to hire more outside counsel.<sup>112</sup> Then, in 1866, Congress created new law officers in several departments within the War Department, the State Department, and the Treasury Department.<sup>113</sup> But again, members of Congress recognized that the multiplying number of separate law offices was exacerbating a coordination problem. In 1867, when the State Department requested its own solicitor's office, Senator Lyman Trumbull of Illinois replied that the Attorney General's office should be an independent department with the singular responsibility for interpreting the law for all the departments to reduce "difficulty, expense and uncertainty."<sup>114</sup> Congress gave the State Department a new solicitor's office anyway, but the Senate Judiciary Committee began a study of the problem. Then the task was referred to Jenckes's Joint Select Committee on

108. Robert Kaczorowski found a relatively small amount of civil rights litigation by federal district attorneys before and after the DOJ's founding, although the litigation did increase in 1871, and these cases were high profile and work intensive. KACZOROWSKI, *supra* note 1, at 70-72.

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

110. PARRILLO, *supra* note 53, at 273-74.

111. See *infra* note 200 and accompanying text.

112. See Act of Aug. 2, 1861, ch. 37, §§ 2-3, 12 Stat. 285, 285-86.

113. CUMMINGS & MCFARLAND, *supra* note 1, at 220-21.

114. CONG. GLOBE, 39th Cong., 1st Sess. 2640 (1866) (statement of Sen. Lyman Trumbull); CUMMINGS & MCFARLAND, *supra* note 1, at 221.

Retrenchment, a joint committee of the two Houses charged with reducing government waste and inefficiency.<sup>115</sup>

Representative Jenckes, a member of the Joint Select Committee on Retrenchment, introduced a bill to establish a “department of justice.”<sup>116</sup> Because Representative Jenckes is the main protagonist in both the DOJ story and the civil service story, some background about him and the civil service movement is necessary. Before Representative Jenckes became involved in the DOJ Act, he was singularly focused on civil service reform. Stephen Skowronek, in *Building a New American State*, wrote, “A civil service career system is one of the hallmarks of the modern state. Its chief characteristics are political neutrality, tenure in office, recruitment by criteria of special training or competitive examination, and uniform rules for the control of promotion, discipline, remuneration, and retirement.”<sup>117</sup> Civil service reform was meant to make administration less partisan, more professional, and more efficient. Representative Jenckes also believed it would cut waste and allow the government to employ fewer people—consistent with retrenchment. Moreover, civil service was an opportunity for the entrenchment of sympathetic Republicans. Congress’s Joint Select Committee on Retrenchment drafted and oversaw the DOJ Act and the civil service bills at the same time. This was a remarkable opportunity for reform, reorganization, and experimentation.<sup>118</sup>

Representative Jenckes came from an established New England family and was well educated in math, science, and literature.<sup>119</sup> He was a successful patent lawyer in Rhode Island. He had been a conservative Whig, and he had opposed the “Dorr Rebellion” in 1840s Rhode Island, an uprising of pro-democracy forces against the powerful Whig elite, which had used restrictive voter eligibility laws to retain power.<sup>120</sup> Representative Jenckes was one of many reformist Republicans who grew alienated by President Grant and his supporters blocking reform, engaging in partisan patronage, and tolerating corruption. Starting in 1870, these disillusioned reformers began leaving his

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115. CUMMINGS & MCFARLAND, *supra* note 1, at 223.

116. *Id.*

117. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 47 (1982) (citing MAX WEBER, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196, 196-244 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

118. CUMMINGS & MCFARLAND, *supra* note 1, at 223-29.

119. Ari Hoogenboom, *Thomas A. Jenckes and Civil Service Reform*, 47 *MISS. VALLEY HIST. REV.* 636, 636 (1961); Sidney S. Rider, *PROVIDENCE J.*, Nov. 5, 1875, reprinted in *IN MEMORIAM: THOMAS ALLEN JENCKES* 3-4 (1876). Hoogenboom’s article was extremely helpful for introducing me to Representative Jenckes and his papers. Hoogenboom focused on Representative Jenckes’s civil service efforts, without identifying his work on the DOJ Act.

120. Rider, *supra* note 119, at 6. It was the Dorr War that produced the litigation on the Constitution’s Republican Form of Government Clause and the Supreme Court’s decision in *Luther v. Borden* giving it a narrow interpretation. 48 U.S. 1, 42-43 (1849).

administration and opposing his agenda in Congress.<sup>121</sup> Many of these “best men” reformers had abandoned Reconstruction by 1868, and shifted their focus to reform and business growth.<sup>122</sup> They aimed to create “an independent party composed exclusively of good men,” in the words of Henry Cabot Lodge.<sup>123</sup> In the 1872 election, they bolted to form the “Liberal Republican” Party, combining with Democrats to support reformer Horace Greeley against President Grant. Representative Jenckes aligned himself with the Republicans who would soon form the Liberal Republicans and “Half-Breeds” who opposed the pro-patronage “Stalwart” Republicans. They were known as the urban reformist “Mugwumps” in the 1880s, before they evolved into an elite, urban professional branch of the Progressive movement at the turn of the century.<sup>124</sup> Representative Jenckes and other Liberal Republicans did not care as much about black civil rights as the Radicals, and many Liberal Republicans believed that black civil rights were a distraction and a waste of resources.<sup>125</sup> In Congress, Representative Jenckes did support stronger wording for the Fifteenth Amendment’s guarantee of voting rights,<sup>126</sup> but there is not much other evidence that he cared about the enforcement of black civil rights. After Representative Jenckes died, a dozen friends and allies put together a memorial to highlight his accomplishments. In these memorials, his friends noted his reputation for being “cold and unsocial,” or “cold and frigid.”<sup>127</sup> But they repeatedly praised his deep commitment to the legal profession and patent law.<sup>128</sup> Friends described him as having “left a name among the great lawyers of the country.”<sup>129</sup> As a young twenty-three-year-old lawyer, he argued a case before Su-

121. See generally EARLE DUDLEY ROSS, *THE LIBERAL REPUBLICAN MOVEMENT* (1919); JEAN EDWARD SMITH, *GRANT* (2001).

122. JOHN G. SPROAT, “THE BEST MEN”: LIBERAL REFORMERS IN THE GILDED AGE 11-44 (1968).

123. NELSON, *supra* note 1, at 89 (internal quotation marks omitted).

124. See NELSON, *supra* note 1, at 89, 158-59; ROSS, *supra* note 121; SPROAT, *supra* note 122, at 11-44; VAN RIPER, *supra* note 9. See generally Allan Peskin, *Who Were the Stalwarts? Who Were Their Rivals? Republican Factions in the Gilded Age*, 99 POL. SCI. Q. 703 (1984).

125. See generally ANDREW L. SLAP, *THE DOOM OF RECONSTRUCTION: THE LIBERAL REPUBLICANS IN THE CIVIL WAR ERA* (2006).

126. See CONG. GLOBE, 40th Cong., 3d Sess. 728 (1869) (statement of Rep. Thomas Jenckes).

127. B.F. Thurston, Remarks at the Meeting of the Providence County Bar in Memory of Thomas A. Jenckes (Nov. 13, 1875), in *IN MEMORIAM: THOMAS ALLEN JENCKES*, *supra* note 119, at 33, 34; see also James H. Parsons, Remarks at the Meeting of the Providence County Bar in Memory of Thomas A. Jenckes (Nov. 13, 1875), in *IN MEMORIAM: THOMAS ALLEN JENCKES*, *supra* note 119, at 27, 29.

128. See Chief Justice Thomas Durfee, Remarks at the Meeting of the Providence Rhode Island Supreme Court in Memory of Thomas A. Jenckes (Nov. 20, 1875), in *IN MEMORIAM: THOMAS ALLEN JENCKES*, *supra* note 119, at 49, 49-51; Thurston, *supra* note 127, at 33-34.

129. Rider, *supra* note 119, at 5.



preme Court Justice Joseph Story, and he rose to prominence in the legal community.<sup>130</sup> Newspapers praised his efforts to craft a compromise on bankruptcy reform, a project of modernizing the law.<sup>131</sup> A fellow lawyer, B.F. Thurston, wrote, “No man among us more thoroughly loved the profession of the law for its own sake than he. . . . [Representative Jenckes did not] prostitute his profession for its baser rewards. He cared more for the triumph than for the spoils of the victory.”<sup>132</sup> The Chief Justice of the Rhode Island Supreme Court eulogized, “Immediately upon coming to the bar, he took rank among the leaders of the profession,” and surpassed them. He praised Representative Jenckes’s legal skills, but noted, “Mr. Representative Jenckes was more than a lawyer. He had the capacities and the aspirations of a statesman and a legislator.”<sup>133</sup> But not one memorial or newspaper discussed Representative Jenckes’s views on ex-slaves or civil rights.<sup>134</sup> His letters and other writings say little of these matters. When Representative Jenckes argued for civil service reform, he connected the professionalization of government to the protection of property rights, but he did not mention the rights of former slaves, or Reconstruction.<sup>135</sup>

Representative Jenckes’s Joint Select Committee on Retrenchment—the committee that drafted the DOJ Act and led the civil service effort—lacked any members who cared deeply about black civil rights. Its chairman, Senator James W. Patterson, offered the DOJ Act in the Senate. Leonard White, a leading historian on American administrative history, observed that Senator Patterson and his committee focused only on cutting budgets, abolishing offices, and eliminating fraud and waste.<sup>136</sup> The committee included four senators and seven representatives (including Representative Jenckes).<sup>137</sup> They were

130. *See id.* at 4-5.

131. *See id.* at 12.

132. Thurston, *supra* note 127, at 33-34.

133. Durfee, *supra* note 128, at 49-51.

134. *See* IN MEMORIAM: THOMAS ALLEN JENCKES, *supra* note 119.

135. *See* CONG. GLOBE, 39th Cong., 2d Sess. 837-41 (1867) (statement of Rep. Thomas Jenckes). Representative Jenckes stated that with civil service reform, “property will be more secure; personal rights more sacred.” *Id.* at 841. One might imagine that the use of the phrase “personal rights” was a reference to the rights of ex-slaves, but in the context of the rest of his writings, this interpretation is unlikely.

136. *See* LEONARD D. WHITE, THE REPUBLICAN ERA, 1869-1901, at 85-86 (1958).

137. The senators were George Edmunds (R-VT); George Williams (R-OR); James Patterson (R-NH); and Charles Rollin Buckalew (D-PA). The representatives were Charles Henry Van Wyck (R-NY); Samuel J. Randall (D-PA); Martin R. Welker (R-OH); George Armstrong Halsey (R-NJ); John Forbes Benjamin (R-MO); and Jacob Benton (R-NH). OFFICIAL CONGRESSIONAL DIRECTORY, 40th Cong., 2d Sess. 44, 49 (1868). Senator Patterson apparently had no interests aside from budgetary issues (and apparently benefiting his own personal budget). *See* WHITE, *supra* note 136, at 85-86. Senator Edmunds was well known as a “Half-Breed,” opposed to the Radicals and “Stalwarts” who had supported Reconstruction. *See* SPROAT, *supra* note 122, at 132; Richard E. Welch, Jr., *George Edmunds of Vermont: Republican Half-Breed*, 36 VT. HIST. 64 (1968); Selig Adler, The Senatorial Career of George Franklin Edmunds, 1866-1891 (1934) (unpublished Ph.D. dissertation abstract, Uni-

centrists, fiscal conservatives, and future Half-Breeds, and no one was committed to black civil rights.<sup>138</sup> If you came to Washington to shrink the federal government and to scale back Reconstruction, you probably were interested in getting on the Joint Select Committee on Retrenchment.

Early in 1868, Representative Jenckes's Joint Select Committee on Retrenchment was working on its law department bill as two other committees, the House Judiciary Committee and the Senate Judiciary Committee, were working on their own law department bills.<sup>139</sup> However, the battle between Andrew Johnson and Congress pushed all other legislative efforts aside. In the fall of 1866, President Johnson had just campaigned against congressional Republicans in a vicious string of speeches known as the "Swing around the Circle."<sup>140</sup> President Johnson began purging Republicans and using offices for his own patronage purposes. He was also interfering with Secretary of War Edwin Stanton, and he was undermining the Freedman's Bureau and its attempts to enforce ex-slaves' civil rights.<sup>141</sup> When U.S. Attorneys stepped up

versity of Illinois) (on file with Perry-Castañeda Library, University of Texas at Austin). He later engineered the Compromise of 1877, which formally ended Reconstruction. See Norbert Kuntz, *Edmunds' Contrivance: Senator George Edmunds of Vermont and the Electoral Compromise of 1877*, 38 VT. HIST. 305, 315 (1970). Senators Buckalew and Randall were conservative Democrats opposed to Reconstruction. See Albert Virgil House, Jr., *The Political Career of Samuel Jackson Randall* 9, 16-17 (Aug. 13, 1934) (unpublished Ph.D. dissertation, University of Wisconsin), available at <http://digital.library.wisc.edu/1793/406>; William Willits Hummel, *Charles R. Buckalew: Democratic Statesman in a Republican Era* (1963) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with Wells Library, Indiana University). Senator Van Wyck's early political career was marked by enthusiasm for the Union cause and voluntary military service, but that did not always translate into enthusiasm for Reconstruction. He focused primarily on anticorruption and fiscal issues in Congress. Marie U. Harmer & James L. Sellers, *Charles H. Van Wyck—Soldier and Statesman II*, 12 NEB. HIST. MAG. 190, 194, 203 (1929).

138. Only one, Senator George Williams had any significant record promoting Reconstruction in the 1860s, but his record on race was mixed at best. The leading historian on this episode concluded that Senator Williams was a partisan who was insincere about civil rights issues and used budgetary limits as an excuse to curtail the federal presence in the South. See KACZOROWSKI, *supra* note 1, at 76, 86. He helped draft the Fifteenth Amendment, but later disclaimed any credit for it, saying he had "misgivings about the advisability of incorporating into the Constitution of the United States a fixed and unchangeable rule as to suffrage." Oscar C. Christensen, *The Grand Old Man of Oregon: The Life of George H. Williams* 26 (Aug. 1937) (unpublished M.S. thesis, University of Oregon) (on file with Jackson Library, Stanford University) (internal quotation marks omitted). He also voted with Democrats and against Republicans to expedite Virginia's readmission into the Union. Senator Williams replaced Amos Akerman as Attorney General under President Grant, and was chosen largely for his political role in Grant's reelection campaign. He subsequently led the DOJ's retreat from civil rights prosecutions in 1872-73. See KACZOROWSKI, *supra* note 1, at 76, 86.

139. See CUMMINGS & MCFARLAND, *supra* note 1, at 222-23.

140. See William C. Harris, *Andrew Johnson's First "Swing Around the Circle": His Northern Campaign of 1863*, 35 CIVIL WAR HIST. 153 (1989).

141. See KACZOROWSKI, *supra* note 1, at 30-31.

their efforts to enforce civil rights laws in Kentucky, President Johnson's Attorney General Henry Stanbery cut them off, too.<sup>142</sup> In March 1867, Congress overrode a veto to pass the Tenure of Office Act, shielding President Lincoln's appointees from removal without the Senate's consent. All civil officers who had been appointed with Senate confirmation were entitled to their office until the Senate confirmed the President's nominee to replace him. Cabinet members would retain their offices during the full four-year term of the President who had appointed them, plus one additional month, unless the Senate consented to their removal (thus entrenching President Lincoln's cabinet through April 1869).<sup>143</sup> The Tenure of Office Act also required evidence of misconduct, crime, incapacity, or legal disqualification for recess suspensions, and even then, the statute required Senate concurrence after the recess in order to remove the officer.<sup>144</sup>

The Tenure of Office Act demonstrated that congressional Republicans did not see themselves as bound by the historical precedent from the First Congress, as they overrode the statutes passed by this Congress that had given the President discretion to fire principal officers.<sup>145</sup> In 1867, the congressional Republicans referred explicitly to "the decision of 1789" during the Tenure of Office Act debates, but they said that Congress's decision then was a mistake of "infancy and inexperience, resting mainly, perhaps, on its unbounded confidence in the personal virtues of its first Chief Magistrate," George Washington.<sup>146</sup> They cited Alexander Hamilton's *The Federalist No. 77* in favor of the Senate's power "to displace as well as to appoint," and they cited Daniel Webster's call in 1835 to "reverse the decision of 1789." They cited Justice Story calling Congress's decision in 1789 an "extraordinary" case of allowing "a bare majority" of Congress to confer a constitutionalized power, and Chancellor Kent's opinion that the decision was merely "loose, incidental, and declaratory."<sup>147</sup> They decided to give the Senate increased power over dismissal to check the President's power—and the statute included no sunset provision or a time limit for its applicability. Representative Jenckes himself included parallel language from the Tenure of Office Act in his civil service bills to protect his civil service commissioners in 1866 and 1867.<sup>148</sup> Andrew Johnson attempted to remove Secretary of War Edwin Stanton and to declare the Reconstruction Acts void. He was impeached by the House, and his Senate trial consumed the rest

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142. *See id.* at 41-42.

143. *See* Act of Mar. 2, 1867, ch. 154, 14 Stat. 430.

144. *See id.*

145. *See Myers v. United States*, 272 U.S. 52, 112-15, 175-76 (1926).

146. CONG. GLOBE, 39th Cong., 2d Sess. 18 (1866).

147. *Id.* at 18-19.

148. *See* H.R. 113, 40th Cong. § 2 (1867); H.R. 889, 39th Cong. § 2 (1866); H.R. 673, 39th Cong. § 2 (1866).

of Congress's attention from March through May 1868. As soon as the trial ended, the 1868 presidential campaign consumed the rest of the year.<sup>149</sup>

After the new Congress assembled in 1869, the House moved immediately to repeal the Tenure of Office Act in its entirety, arguing that it was only a temporary measure for an exceptional circumstance. In a sign of the underlying motivation for the repeal, the fight was led by Representative Benjamin Butler, a Radical who had a reputation for protecting party patronage.<sup>150</sup> The Tenure of Office Act was an obstacle to the spoils system by allowing the Senate to block the rotation of offices. The House voted 138 to 16 in favor of repeal, a sweeping bipartisan consensus.<sup>151</sup> Among the small number who voted to retain the Tenure of Office Act were Representative Jenckes and a handful of civil service reformers.<sup>152</sup> It may seem odd that a supporter of "retrenchment," reorganization, efficiency, and budget cutting would support the Tenure of Office Act, which gave public employees extra job security and took away flexibility in cutting inefficient officers or unnecessary offices. But congressmen in these years identified the Tenure of Office Act as a "restraint[] in the disposition of executive patronage."<sup>153</sup> In defending the Tenure of Office Act, they asked, "[I]s it not desirable that the executive patronage should be rather diminished than increased?"<sup>154</sup>

It may seem inconsistent to modern eyes for the supporters of retrenchment and budget cutting to embrace the job security measures for federal employees (both the Tenure of Office Act or civil service protections), but there were different baselines and priorities in 1869. Nineteenth-century patronage machines relied on "rotation in office" to keep a steady stream of partisan supporters moving in and out of government jobs.<sup>155</sup> Civil service reformers believed retrenchment and efficiency depended upon slowing down nineteenth-century patronage machines, even if it made it more difficult to fire incompetent ap-

149. The lame duck session after the presidential election got bogged down in a budget dispute. The House Judiciary Committee's law department bill was presented as a cost-cutting measure, but more accurately, it gave the Attorney General the discretion to make cuts, rather than imposing cuts directly. When Attorney General Henry Stanbery replied that he would recommend no cuts, the bill died. CUMMINGS & MCFARLAND, *supra* note 1, at 224.

150. See HOOGENBOOM, *supra* note 83, at 58.

151. CONG. GLOBE, 41st Cong., 1st Sess. 40 (1869).

152. See HOOGENBOOM, *supra* note 83, at 58.

153. CONG. GLOBE, 42d Cong., 2d Sess. 3411 (1872). Other than this brief moment, almost nothing was said about civil service reform in the debates—at least in the House—with the exception of Representative Logan:

[The Senate's amendment to the Tenure of Office Act] doubly gives them the power which they have wrenched from the coordinate branches of the Government in reference to patronage. I do not claim that this is a contest for patronage, but it is a struggle for power on the part of the Senate, and nothing else.

CONG. GLOBE, 41st Cong., 1st Sess. 285 (1869) (statement of Rep. John Logan).

154. CONG. GLOBE, 42d Cong., 2d Sess. 3411 (1872).

155. FISH, *supra* note 9, at 79, 83, 116; see also HOOGENBOOM, *supra* note 83.

pointees. Reformers believed the Tenure of Office Act would check executive discretion, slow down the distribution of patronage, and protect competent appointees from partisan firings.<sup>156</sup>

In President Grant's first annual message to Congress, he called for the Senate to pass the repeal bill: "What faith can an Executive put in officials forced upon him, and those, too, whom he has suspended for reason?"<sup>157</sup> The Senate, however, was not interested in giving up its power over dismissals, even if a Republican was in the White House. Senator Roscoe Conkling of New York explained,

I wish to leave the President-elect free to the full and useful exercise of the good judgment and good qualities which we all ascribe to him. At the same time, I wish . . . to preserve the position which the Senate has maintained in the last and most dire exigency known in our jurisprudence.<sup>158</sup>

Playing hardball, President Grant announced that if the Senate would not repeal the law, he would leave all of President Johnson's appointees in office, and he would only nominate candidates for vacancies that happened to arise due to death or resignation. President Grant knew that the senators would be deterred once they realized that he was serious about keeping the holdovers from the hated Johnson Administration and that there would be no new spoils for the Republican Party.<sup>159</sup> The Republican senators were suddenly in a more compromising mood. They drafted a revision that removed the language specifying a Senate vote for cabinet members, implicitly giving back to the President the power to dismiss them at will. Their revision dropped the requirement that the President show cause. However, they retained the requirement of Senate concurrence on dismissals for any officer who had already been confirmed by the Senate.<sup>160</sup> For example, all U.S. Attorneys, solicitors, and other principal law officers remained protected under the revised Act. Like the original 1867 Act, the revision was designed to protect high-ranking officers from presidential removal—even the previous administration's holdover officers. President Grant and the Senate understood that the Tenure of Office Act was a significant political tool, and the Act would become controversial again, especially in the 1880s.<sup>161</sup> The significance of this Act in the DOJ's story is that it meant that

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156. FISH, *supra* note 9, at 193-200.

157. Ulysses S. Grant, First Annual Message (Dec. 6, 1869), in 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, at 3981, 3992 (James D. Richardson ed., N.Y., Bureau of Nat'l Literature, Inc. 1897).

158. CONG. GLOBE, 40th Cong., 3d Sess. 1415 (1869) (statement of Sen. Roscoe Conkling).

159. SMITH, *supra* note 121, at 479.

160. *See* Act of Apr. 5, 1869, ch. 10, §§ 1-2, 16 Stat. 6, 6-7.

161. A future article will show how the Tenure of Office Act caused a showdown between the Republican Senate and President Grover Cleveland, the first Democrat elected to the White House after the Civil War. Jed Handelsman Shugerman, *The Unexpected Origins of the American Administrative State: The Interstate Commerce Commission, the Tenure of*

the DOJ was not created in the context of unitary executive power over district attorneys and other principal law officers, giving them a degree of political protection and independence.

B. *The Passage of the DOJ Act, 1870*

The traditional accounts of the DOJ's creation emphasize that the Civil War had produced a wave of government litigation: cases involving treason, government revenues, confiscation, "titles to property," personal liberty, and "all the numerous litigations which can arise under the law of war."<sup>162</sup> More recent articles by Norman Spaulding suggested that Congress established the DOJ to enforce Reconstruction and civil rights.<sup>163</sup> Spaulding then presented an intriguing puzzle: why would a Republican Congress give the President and Attorney General so much power over a new law department immediately after President Andrew Johnson and Attorney General Henry Stanbery had just precipitated arguably the greatest constitutional crisis concerning executive power in American history up until that point?<sup>164</sup> In light of "the centralization of control over the legal work of the executive branch in the office of the Attorney General," Spaulding wondered why "no major structural reforms were established to protect the independence of the office and prevent the embarrassment of law by politics."<sup>165</sup> To the contrary, I suggest that the drafters of the DOJ

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Office Act, and Increasing Political Accountability (unpublished manuscript) (on file with author). The Senate's power under the revised statute was significant at other moments, as well.

162. See LANGELUTTIG, *supra* note 1, at 10-11; see also CUMMINGS & MCFARLAND, *supra* note 1, at 220.

163. Spaulding, *Professional Independence*, *supra* note 3, at 1937, 1959-60; see also Waxman, *supra* note 3, at 1297, 1300-05 (describing the creation of the Solicitor General's office in the DOJ Act of 1870 a "child" of the Civil War, and a "sibling" or "twin" of the Reconstruction Amendments). In some accounts, a link can be inferred from the narrative, and there is no clarification to disclaim a link. See CUMMINGS & MCFARLAND, *supra* note 1, at 188-217; KACZOROWSKI, *supra* note 1.

164. Spaulding, *Professional Independence*, *supra* note 3, at 1957, 1959-60; see also Spaulding, *Independence and Experimentalism*, *supra* note 3, at 438 ("The Attorney General was given centralized authority over the legal work of the federal government. Combined with the appointment and removal power, this cemented the President's authority not only to superintend but to control the legal work of the federal government.").

165. Spaulding, *Professional Independence*, *supra* note 3, at 1937. Part of Spaulding's answer is that the Fourteenth Amendment had already been ratified, and Republicans in Congress trusted President Grant and his Attorney General Amos Akerman, "a 'vigorous' supporter of the Republican cause." *Id.* at 1963-64 (quoting CUMMINGS & MCFARLAND, *supra* note 1, at 227). First, regarding Amos Akerman, he indeed would become a famous champion of civil rights enforcement, but he had not even been nominated for the office of Attorney General until the DOJ Act had passed through the House and was just a couple of weeks away from President Grant's signature. When the bill was drafted, debated, and voted upon, a very different Attorney General was in office: Ebenezer Hoar, an anti-patronage champion. Amos Akerman was nominated for the office only after a surprise resignation by

Act believed that the creation of a department under the Attorney General was itself the structural reform that would promote professional independence by removing federal lawyers from the politicized departments and placing them under more professional leadership.

There are several problems with the conventional explanations. First, as for the interpretation that the DOJ was designed to increase the federal government's capacity to manage a growing legal caseload, the deep cut of outside counsel without replacements undermines this suggestion. It is possible that professionalizing and restructuring government lawyers might have increased efficiency, so that a smaller team of lawyers could have been more effective than the preexisting system. However, the elimination of outside counsel was no small cut. It was a deep, dramatic cut, and it sharply limited the flexibility of executive departments and even the Attorney General to respond to new legal work. It is hard to imagine that Congress was really focused on big-picture efficiency if the DOJ Act weakened the federal government's ability to enforce the new federal taxes on income, liquor, and tobacco. The "efficiency" of the DOJ Act was more of an antiwaste, anti-patronage, and downsizing reform. The DOJ Act probably produced a less efficient system, if one balances the benefits of limiting patronage against the costs of decreased law enforcement capacity and decreased tax revenue.

As for the civil rights interpretation, there is little evidence that the DOJ was intended to bolster civil rights enforcement. In the debates, congressmen made no mention of how the new department would help (or even hinder) federal law officers enforce civil rights legislation. The members of the Joint Select Committee on Retrenchment generally were unsympathetic to Reconstruction and to civil rights enforcement, and they cared much more about limiting the federal government and cutting the federal budget. Again, the details

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the previous Attorney General, long after the DOJ Act had passed through the House. On June 17, 1870, a headline of the *New York Times* announced that Akerman's nomination was a "[u]niversal [s]urprise." *Talk at the Capital About the Resignation of Mr. Hoar*, N.Y. TIMES, June 17, 1870, at 1. Second, the DOJ Act did not give President Grant any new powers over law officers; it primarily gave new authority to Attorney General Hoar, who was known to be independent from President Grant. Third, Spaulding suggests that Congress designed the DOJ on a centralized model because it "did not endorse" the unitary executive theory. Spaulding refers implicitly to the Tenure of Office Act of 1867 as a sign that the unitary executive had been in doubt, but does not go beyond one sentence on that topic. His 2011 article states that the Attorney General's new authority combined with the President's "removal power" to give them centralized control over the law officers. But in fact, the 1869 amendments to the Tenure of Office Act blocked his removal power, except with respect to the Attorney General. He otherwise notes the impeachment of President Johnson and the election of President Grant as further evidence of the rejection of the unitary executive. It is unclear why President Grant's election reflects a view on the unitary executive. Spaulding relies on an 1854 letter by Cushing, a pro-slavery Democrat, which is not particularly relevant to the Republicans of 1870. Spaulding, *Professional Independence*, *supra* note 3, at 1964-67.

of the DOJ Act itself, in eliminating outside counsel, undercut the notion that the DOJ was meant to supply additional lawyers to prosecute Reconstruction. Moreover, it is very important to note that in the congressional debates, Republicans who supported Reconstruction did not argue that the new department would strengthen federal law enforcement in the South. Few Democrats who opposed Reconstruction raised such concerns, and the authors of the DOJ Act assured them that the new department would not cover military lawyers and would not have jurisdiction over military questions at a time when the military continued to play a significant role in the South.<sup>166</sup> The opposition to the bill was "largely perfunctory."<sup>167</sup>

One assumption in these earlier accounts has been that a new law department was designed to strengthen President Grant's power. The first problem with this explanation is that the reformist Republicans who drafted and backed the bill had grown skeptical of President Grant, as he was favoring the Radicals and was not fulfilling any of the reformers' hopes that he would limit patronage in his administration.<sup>168</sup> But even if Republicans trusted President Grant, the DOJ Act did not change the President's formal control over either the Attorney General or other principal law officers. The revised Tenure of Office Act gave President Grant more control over cabinet officials, but it continued to block his power to fire U.S. Attorneys and other principal officers. Putting the lawyers in one department arguably might give a President more ability to monitor those lawyers, but the Act's authors believed that one centralized department would unify, strengthen, and protect those lawyers.

The congressmen who crafted the DOJ Act framed centralization as a way to promote independence, professionalism, and legal checks within the executive branch. It has been suggested that the DOJ was designed to cement the President's authority to control the government's legal work.<sup>169</sup> However, the congressional debates do not reflect this goal. Before the DOJ was created, department heads controlled the law officers and hired their own outside counsel.

Representative Jenckes and others offered stories of rampant factional battles and cronyism in the various departments, especially the Treasury Department.<sup>170</sup> The Treasury Department was a gold mine for patronage: it had a combination of many offices, access to money and taxation, and lots of power.

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166. Military Reconstruction was over by the end of 1870, but the military still had a role in the South. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988). The Attorney General would still play a role in these questions at the top of the legal hierarchy, but the DOJ itself would not. If the DOJ was supposed to administer Reconstruction, surely it would have been given some institutional control of military lawyers.

167. CUMMINGS & MCFARLAND, *supra* note 1, at 225.

168. ROSS, *supra* note 121, at 6-7; SPROAT, *supra* note 122.

169. Spaulding, *Independence and Experimentalism*, *supra* note 3, at 438; see also Spaulding, *Professional Independence*, *supra* note 3, at 1957.

170. H.R. REP. NO. 40-47, 4-7 (1868).



The stories of corruption were particularly relevant to the founding of the DOJ because the Treasury Department had command over U.S. Attorneys, and the Treasury Department's legendary spoils framed the debate and heightened the urgency of reform. The office of the Attorney General was squeaky clean and professional, particularly when contrasted with Treasury.

During the Grant Administration, reformers focused on the problems under Treasury Secretary George Boutwell. Secretary Boutwell had a reputation for high-minded ideals,<sup>171</sup> but the position of Treasury Secretary demanded political realism and Secretary Boutwell was a target of criticism. Henry Brooks Adams, the grandson of President John Quincy Adams and the great-grandson of President John Adams, reported that the Treasury Department was filled with "plunderers," "terror," and "distrust[]," and was plagued by a battle over spoils and incompetence. Treasury Secretary George Boutwell "inaugurated another inquisition of his own, by which he might test the political fidelity of his subordinates."<sup>172</sup> According to Adams, Secretary Boutwell distributed the spoils of the Treasury Department from the moment he took office. Secretary Boutwell was an opponent of civil service reform, arguing that the President should have political discretion to remove officers and replace them with his own administration.<sup>173</sup> The *Nation*, the publication of the reformist Republicans, complained that Secretary Boutwell, though highly competent in fiscal management, was also a devoted distributor of patronage, saturated with the spirit of "practical politics," and an obstacle to reform.<sup>174</sup> It described him as a "thorough-bred politician of the old school," "thick as . . . thieves" with other patronage politicians, a partisan who would block reform.<sup>175</sup> Adams claimed that Secretary Boutwell later expressed that he was "profoundly disappointed and disgusted with the mistakes which they had made" in removing qualified public servants.<sup>176</sup> One reason that a law department was defeated in the years before the Civil War was that the earlier Secretaries of the Treasury and of the Interior were protecting their turf; they did not want to relinquish control over district attorneys and law officers and the political power that came with additional offices. Secretary Boutwell was a lawyer himself, and he was actually sympathetic to the professionalization of lawyers, and thus may have tolerated reform and reorganization more than his predecessors.<sup>177</sup>

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171. THOMAS H. BROWN, *GEORGE SEWALL BOUTWELL: HUMAN RIGHTS ADVOCATE* (1989).

172. Henry Brooks Adams, *Civil-Service Reform*, 109 N. AM. REV. 443, 454-55 (1869).

173. See 2 GEORGE S. BOUTWELL, *REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS* 135-36 (1902); *Mr. Boutwell's Last Excuse*, NATION, Dec. 15, 1870, at 397.

174. *Mr. Boutwell and Mr. Wells*, NATION, June 23, 1870, at 398 (internal quotation marks omitted); see also *The Treasury Report*, NATION, Dec. 15, 1870, at 396.

175. BROWN, *supra* note 171, at 92, 96 (internal quotation marks omitted).

176. Adams, *supra* note 172, at 455.

177. In his later writings, Secretary Boutwell hailed the professional values of lawyers as vital for the survival of the Republic. One indication of his view was his book *The Law-*

Meanwhile, the Attorney General's office had almost no employees, so it was not perceived as corrupted by spoils and faction. Moreover, the recent Attorneys General had a strong reputation for professionalism, ethics, and opposition to patronage.<sup>178</sup> Centralizing the law officers under the Attorney General meant more independence, not less, in the context of the late 1860s.

With a new administration and a new Congress, the reformers put the law department back on the agenda. While Representative Jenckes was back to work on the DOJ Act in the Joint Select Committee on Retrenchment, Representative William Lawrence of Ohio was working on a similar law department bill in the House Judiciary Committee. Representative Lawrence had a much stronger track record for supporting civil rights and voting rights, including his role in drafting parts of the Fourteenth Amendment.<sup>179</sup> Yet he also focused on cutting spending, reducing debt, and lowering taxes. Lawrence proposed eight separate bills in the Forty-First Congress that had fiscally conservative goals while he was working with Representative Jenckes on the DOJ Act.<sup>180</sup> He eventually let Representative Jenckes and the Joint Select Committee on Retrenchment take the lead in the effort. Moreover, one of Representative Lawrence's primary arguments for his DOJ Act was that it would reduce spending, not only by eliminating outside counsel, but also by eliminating several full-time salaried offices.<sup>181</sup> It is worth noting that at the same time, Representative Jenckes was making an argument for civil service reform that had a striking parallel to the DOJ Act. Representative Jenckes predicted that, with the passage of civil service reform, "the number of offices may be diminished one third, and the efficiency of the whole force of the civil service increased one half, with a corresponding reduction of salaries for discontinued offices."<sup>182</sup> Representative Jenckes's law department bill also cut approximately one-third of federal legal personnel. Representative Jenckes proposed a bill in 1869, a

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*yer, the Statesman, and the Soldier*, in which he put the learned trial lawyer Rufus Choate on relatively equal footing with Daniel Webster, Abraham Lincoln, and Ulysses Grant, and extolled the virtues and duties of the legal profession. In fact, Secretary Boutwell approvingly cited at length Choate's defense of judicial independence at the 1853 Massachusetts Constitutional Convention, and he praised a government of impartial legal "principles" and "rule of the lawyer . . . of such as have legal perceptions and that training which enables them to apply legal principles in public affairs." GEORGE S. BOUTWELL, *THE LAWYER, THE STATESMAN, AND THE SOLDIER* 17, 25 (N.Y., D. Appleton & Co. 1887).

178. See *infra* text accompanying notes 202-16.

179. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1003 (1995).

180. See H.R. 2995, 41st Cong. (1871); H.R. 2892, 41st Cong. (1871); H.R. 2132, 41st Cong. (1870); H.R. 2131, 41st Cong. (1870); H.R. 1566, 41st Cong. (1870); H.R. 1346, 41st Cong. (1870); H.R. 286, 41st Cong. (1869); H.R. 239, 41st Cong. (1869).

181. CONG. GLOBE, 40th Cong., 2d Sess. 1271-73 (1868) (statement of Rep. William Lawrence).

182. CONG. GLOBE, 39th Cong., 2d Sess. 837-41 (1867) (statement of Rep. Thomas Jenckes).

predecessor to the DOJ Act, that would bar the hiring of outside counsel.<sup>183</sup> However, his bill stalled not because Radicals flagged this problem, but rather, because the legislative agenda was full in 1869.<sup>184</sup>

In 1870, Representative Jenckes reported a new bill, the eventual DOJ Act—now referring to a “Department of Justice”—from the Joint Select Committee on Retrenchment alone. The Attorney General, as department head, would supervise all district attorneys and all other law officers who had been stationed in other departments. The DOJ Act created a new office, “the solicitor-general,” to try cases. Borrowing language from the original Judiciary Act of 1789, it required the Solicitor General and the assistants to the Attorney General to be “learned in the law.”<sup>185</sup> The Attorney General would be empowered to make rules and regulations for the new department. The DOJ Act set the salaries of the high-ranking officials, continuing the shift away from fees. It also set the Solicitor General’s salary at almost the same level as the Attorney General.<sup>186</sup> But it is easy to overlook arguably the most dramatic and immediately significant change: the Act would prohibit the use of outside counsel, both within the Department of Justice and in other departments.<sup>187</sup>

No congressman made any argument about how the new Department of Justice would affect the enforcement of the Thirteenth, Fourteenth, or Fifteenth Amendments, or the enforcement of the new civil rights laws. In 1870, Republicans held seventy percent of the House and eighty-four percent of the Senate. In May 1870, both Houses would vote for the Enforcement Act of 1870 by over two-to-one margins.<sup>188</sup> There 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. It is certainly possible that some Radical Republicans voted for the bill with civil rights enforcement in mind, but they kept this thought to themselves.

The discussion of the DOJ Act emphasized efficiency, budgetary savings, and reorganization—the classic themes of “retrenchment.” Representative Jenckes drew attention to the district attorneys having to answer to a messy three-pronged bureaucracy: “In every case they look for their guidance and for the settlement of their accounts to the Attorney General’s Office, the office of the solicitor of the Treasury, and the Department of the Interior.”<sup>189</sup> Representative Jenckes recounted that the district attorneys had been practically un-

183. H.R. 379, 41st Cong. (1869); H.R. 371, 41st Cong. (1869).

184. See CUMMINGS & MCFARLAND, *supra* note 1, at 223.

185. Act to Establish the Department of Justice, ch. 150, §§ 1-3, 16 Stat. 162, 162 (1870).

186. *Id.* §§ 8, 10, 16 Stat. at 163.

187. See *id.* § 14, 16 Stat. at 164.

188. CONG. GLOBE, 41st Cong., 2d Sess. 3809, 3884 (1870).

189. *Id.* at 3036 (statement of Rep. Thomas Jenckes).

supervised since the Founding and that law officers had proliferated in each department and frequently issued conflicting or redundant opinions.<sup>190</sup>

Representative Jenckes turned to the questions of professional independence and legal restraints within the executive branch, too. Representative Jenckes contended that when each department had its own law officers, the department head would ask for a particular conclusion and would get it from his own law officers, which in turn was "designed to strengthen the resolution" of the department head and embolden him to act, sometimes illegally. Representative Jenckes offered anecdotes in which law officers under a department head "seem to sanction" the head's actions, even though "there was no authority in any law" for those actions.<sup>191</sup> Representative Horace Maynard, a Unionist Republican from Tennessee, offered a different anecdote:

Has [that demand] not been done more than once in the office of the Attorney General of the United States? . . . I remind [Representative Jenckes] of the anecdote of a former President who sent word to his Attorney General 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.<sup>192</sup>

Representative Maynard was likely referring to the apocryphal story of Andrew Jackson demanding that his Attorney General, Roger Taney, approve of his demand to withdraw all federal deposits from the Bank of the United States—which is not the only apocryphal quotation attributed to Andrew Jackson and his lawlessness ("John Marshall has made his decision; now let him enforce it!"<sup>193</sup>). Maynard was a strong Unionist Republican from Tennessee who had opposed his fellow Tennessean Andrew Johnson, so his speech seemed to reflect a continuing skepticism of partisan abuses of presidential power.<sup>194</sup>

Representative Jenckes more or less conceded this possibility, but he regarded the creation of the Department of Justice as a way to minimize these political manipulations among the many departments themselves. Representative Jenckes argued that the Attorney General would impose professional norms on the law officers, insulated from departmental politics. The Attorney General would impose "a unity of decision, a unity of jurisprudence, if I may use that expression, in the executive law of the United States." Representative Jenckes sought a quasi-judicial binding role for the department. "Whether the opinion of the Attorney General be right or wrong, it is an opinion which ought to be followed by all the officers of the Government until it is reversed by the decision of some competent court."<sup>195</sup> Representative Jenckes's conception of the

190. *Id.*

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

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

193. DAVID LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE AMERICAN REPUBLIC 365 (1948).

194. See OLIVER P. TEMPLE, NOTABLE MEN OF TENNESSEE 137-49 (1912).

195. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870).

Attorney General's independent authority echoed an earlier Attorney General, Caleb Cushing, who described the office in 1854 as "quasi judicial."<sup>196</sup>

Representative Jenckes conceded that even under the DOJ Act,

It is true that the head of a Department or the President may act on his own responsibility, but he cannot in such a case shelter himself behind the opinion of a solicitor. This bill proposes to transfer these several solicitors from the Departments in which they are now located and to place them under the control of the Attorney General . . . .<sup>197</sup>

Representative Jenckes offered an image of the current arrangement: department heads and the President using the decentralized solicitors in the departments as legal "shelter." The DOJ Act would flip that metaphor: the Attorney General would shelter the solicitors in the new Department of Justice from political pressure. Executive officials seeking legal advice would have to turn to the Attorney General, who would control the process of referring questions to law officers or relevant departments. "When the opinions come back to the Attorney General they are to be recorded in his office, and when approved, they are to be the executive law for all the inferior officers of the Government."<sup>198</sup> Representative Jenckes was offering a distinctly independent role for the Attorney General, preventing even the President from taking "shelter" behind law officers. The Attorney General would decide "executive law" for inferior officers, but Representative Jenckes was also implying that the Attorney General would decide executive law outside the command of the President. Of course, the President could fire the Attorney General at will after 1869, but Representative Jenckes was suggesting that, as long as the Attorney General was still in office, the Attorney General had independent legal authority.

Representative Jenckes also emphasized that the federal government's "law business . . . greatly outgrew the capacity" of the law officers, requiring the federal government to hire so many "outside counsel" attorneys that they outnumbered the federal government's commissioned law officers.<sup>199</sup> Representative Jenckes and his fellow committee members presented figures to show how expensive outside counsel's fees were (over \$733,000 over the previous six years),<sup>200</sup> and they argued that placing all law officers in one department would eliminate the need for outside counsel by reducing redundancy. This claim should have generated more skepticism: it was very unlikely that any reorganization could allow for the elimination of so many law personnel. More likely, the reformers were troubled by the case-by-case fee system relative to full-time

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196. CUSHING, *supra* note 16, at 6. As mentioned above, this discussion resonates with the contemporary debate over internal separation of powers within the executive branch. See POSNER & VERMEULE, *supra* note 16, at 139-40; Katyal, *supra* note 16, at 2316.

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

198. *Id.*

199. *Id.* at 3035.

200. *Id.* at 3035-36.

commissions with salaries, and by the cronyism of the hiring of these full-time lawyers. Cutting off outside counsel might not allow the federal government to litigate its cases as effectively, but it was more important to wipe the slate clean of the politics of ad hoc hiring, and to clear the way for more professional norms.

The status of outside counsel was particularly significant to the argument for independence, not just the efficiency argument. One can imagine that outside counsel could have represented an advance in favor of independence, given that they were much like independent contractors, compared to full-time government lawyers. To the contrary, outside counsel had become even more identified with cronyism and departmental sycophancy. Representative William Lawrence, the chair of the House Judiciary Committee, which had been working on a similar bill, condemned the "danger of favoritism" in the loose discretion in hiring outside counsel.<sup>201</sup>

By cutting off outside counsel and removing the law officers from the various departments, the supporters of the Department of Justice believed that they were insulating law officers from everyday patronage politics. Newspaper accounts of the DOJ focused on the DOJ Act as an anti-patronage reform, as well as a cost-cutting measure.<sup>202</sup> Cost cutting and anticorruption are not inherently the same thing, but in the context of the mid-nineteenth century, reformers linked the two problems and focused on eliminating waste and partisanship. The Treasury Department's long history of being a home to power, money, and patronage made it a less-than-attractive home for professionalizing law officers. The Attorney General's office was more attractive because he had been held above the fray: Congress had given him no offices to supervise directly and no spoils to distribute. The Attorney General was thus untarnished and uncorrupted by patronage politics, and the Attorney General's office represented an opportunity to start a law department afresh. The key to the change was reframing the office as one of legal specialization under the Attorney General, rather than being located in a department that specialized in policy and/or politics. Under the Act, the law officers would shift their political accountability from the various department heads to the Attorney General and the President, providing a mix of legal professionalism and political accountability.

This was not just hopeful, naïve speculation. In understanding how the creation of a law department would produce more bureaucratic independence, it is important to recognize how a series of Attorneys General had been cultivating professionalism and independence for decades, and particularly from 1868 to 1870. The Attorney General's office had made important strides in the direction of professionalization, especially in the hands of William Wirt during a pivotal

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201. *Id.* at 3038-39 (statement of Rep. William Lawrence).

202. *See, e.g., A Department of Justice*, N.Y. TIMES, May 13, 1870, at 4; *General*, DESERET NEWS (Salt Lake City), May 11, 1870, at 2; *The Department of Justice*, N.Y. TIMES, July 10, 1870, at 4.

twelve-year period (1817-1829). In the 1850s, Caleb Cushing began the tradition of Attorneys General ceasing to practice law privately after appointment in order to take on the office full time. The office also had setbacks under Presidents Jackson, Lincoln, and Johnson. However, as Congress was debating the Department of Justice, the Attorneys General had been renowned as non-partisan and anti-patronage. In 1868, William Evarts was appointed Attorney General toward the end of Andrew Johnson's administration after Evarts successfully defended President Johnson in his Senate impeachment proceedings. William Evarts had been a federal assistant district attorney in New York as a Whig, and then he was an early leader of the Republican Party. He earned wide-ranging respect in both parties for his nonpartisanship, professionalism, and skill by defending the despised President Johnson. For eight years during the Civil War and after, he was a main negotiator for the Union on war-related cases.<sup>203</sup> When the Senate rejected President Johnson's first choice for Attorney General after his trial, Republicans recommended William Evarts, and he was confirmed by a vote of 29-5. As a Republican Attorney General serving out the remainder of President Johnson's term, he received credit for his non-partisan service.<sup>204</sup> William Evarts would then become a leading founder of the Association of the Bar of the City of New York—and its first president—in 1870, and later would lead the call for founding the American Bar Association in 1878.<sup>205</sup> William Evarts was among the leading figures of the professionalization of law in the 1870s.

The trend in favor of professionalization in the Attorney General's office continued when President Grant appointed William Evarts's cousin Ebenezer Hoar in 1869. Ebenezer Hoar had served as a judge on the Massachusetts Court of Common Pleas from 1849 to 1853, and then as a justice on the Massachusetts Supreme Judicial Court from 1859 to 1869.<sup>206</sup> He had been regarded as a leader of the Massachusetts bar, bringing order to a mix of strong-willed personalities.<sup>207</sup> One contemporary wrote that "[t]he activities of Judge Hoar cen-

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203. Representative William Lawrence, a supporter of the DOJ Act, complained that the outside counsel system had allowed the federal government to pay \$47,500 to William Evarts over eight years, but considering Evarts's workload over those eight years as war negotiator and President Johnson's defense counsel, that fee is more or less in line with what principal law officers made in salary per year. See HOFFER, *supra* note 2, at 106.

204. CHESTER L. BARROWS, WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN 178-79 (1941); BRAINERD DYER, THE PUBLIC CAREER OF WILLIAM M. EVARTS 101-12 (1933); MARK GROSSMAN, *William Maxwell Evarts, 1818-1901*, in 1 ENCYCLOPEDIA OF THE UNITED STATES CABINET 77, 77 (2000); WILLIAM HENRY SMITH, HISTORY OF THE CABINET OF THE UNITED STATES OF AMERICA 129 (1925).

205. MARTIN, *supra* note 11, at 23, 26, 27; SUNDERLAND, *supra* note 77, at 3.

206. Resolution, Meeting of the Bar of the Massachusetts Commonwealth in Memory of Ebenezer Rockwood Hoar (Mar. 9, 1895), in TRIBUTES OF THE BAR AND OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH TO THE MEMORY OF EBENEZER ROCKWOOD HOAR 8 (Walbridge Abner Field ed., Cambridge, John Wilson & Son Univ. Press 1895).

207. *Id.* at 18.

tered largely in his profession; but they reached far beyond it."<sup>208</sup> He earned a reputation for nonpartisanship for opposing the impeachment of President Johnson, but that also stirred ill will among some Radical Republicans. A historian of the Department of Justice regarded Ebenezer Hoar as "one of the most effective department heads" in its history, and he was famous for fighting relentlessly against patronage appointments and unqualified judicial nominees.<sup>209</sup> Henry Adams contrasted Treasury Secretary Boutwell's moral "pliability" with Ebenezer Hoar's "dogged obstinacy" when it came to cleaning up the government.<sup>210</sup> Secretary Boutwell was the "product of caucuses and party promotion," while Ebenezer Hoar held "his moral rules on the sole authority of his own conscience, indifferent to opposition whether in or out of his party" and belonged "to a class of men who had been gradually driven from politics, but whom it is the hope of reformers to restore."<sup>211</sup>

Historians have agreed with Adams's basic assessment of both men in their conduct in the Grant Administration: Treasury Secretary Boutwell was the partisan, and Attorney General Hoar was the professional.<sup>212</sup> Attorney General Hoar had few officers to supervise, and therefore few offices to fill, but nevertheless, the spoils politicians were trying to drive him out of office.<sup>213</sup> Attorney General Hoar carefully vetted all judicial nominations with high standards, and he rejected many of the senators' preferred candidates.<sup>214</sup> His contemporaries remarked that he had "pulverize[d] . . . weak natures," that he was an "unforgiving foe of sham, trickery, and injustice," that he was "absolutely uncompromising" with his enemies, and that he had opposed patronage with an "unaccommodating . . . temperament."<sup>215</sup> Charles Francis Adams recalled that when Ebenezer Hoar became Attorney General, he had a large patronage to distribute, but with his "rugged honesty" against "jobbery," he fought against patronage politics and "snubbed seventy senators."<sup>216</sup> As a result of William Evarts and Ebenezer Hoar, standing on the shoulders of several strong antebellum predecessors, the office of Attorney General had become more credible as

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208. *Id.* at 38.

209. 1 GROSSMAN, *supra* note 204, at 80 (internal quotation mark omitted); *see also* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 127 (3d ed. 1992); 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 223-24 (1923).

210. Adams, *supra* note 172, at 456.

211. *Id.*

212. *See* SPROAT, *supra* note 122, at 13, 190-91.

213. MOORFIELD STOREY & EDWARD W. EMERSON, EBENEZER ROCKWOOD HOAR: A MEMOIR 182-83 (1911).

214. SMITH, *supra* note 121, at 507.

215. FIELD, *supra* note 206, at 18, 46, 52.

216. STOREY & EMERSON, *supra* note 213, at 197-98.



a professional and less political position at the time Congress was debating the creation of the Department of Justice.<sup>217</sup>

The DOJ Act came up for a vote in the House on April 28, 1870, and the House decisively defeated a motion to table it, 73 to 34 (with no roll call). In the vote on the DOJ Act itself, the House again rejected a motion for a roll call vote by a vote of 87 to 20, and the DOJ Act passed smoothly.<sup>218</sup> On June 16, the Senate also approved the DOJ Act also without a roll call.<sup>219</sup> The lack of roll call votes makes it difficult to trace the DOJ Act's support among the parties and factions, but the floor debate indicates that Democrats supported the Act and its goals. If the DOJ Act was supposed to promote Reconstruction, it would be hard to imagine why Democrats would support it. No Democrat explicitly opposed the DOJ Act on the floor, and the few Democrats raising questions about it seem to have been reassured by the Republicans who clarified that the DOJ would have limited powers and few offices.

Several Democrats who spoke in the debate supported the DOJ Act because it promised to cut patronage during a Republican administration and also shrink that administration's enforcement powers. Democrats supported the DOJ Act because of its abolition of outside counsel and cutting of costs,<sup>220</sup> and they were careful to make sure that the new department would have no role in military affairs.<sup>221</sup> If the DOJ had been intended to enforce Reconstruction in the 1870s, it would have been given at least some control over military lawyers, because so much of Reconstruction continued to require the military. The floor debates show a deliberate decision to separate the new department's civil role from the military. The DOJ Act stated that whenever the Departments of War or the Navy had a question of law, the question should be sent to the Attorney General, and he may dispose of it "as he may deem proper."<sup>222</sup> 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.<sup>223</sup> More discussion focused on whether the DOJ Act would move the military lawyers directly into the DOJ. Congressmen pressed Representative Jenckes about whether any of the Judge Advocates General or other military lawyers would be moved into the new Department of Justice. The DOJ Act would move the Judge Advocate General of the Navy, renamed the Naval

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217. It turns out that Ebenezer Hoar's brother George and William Evarts would defy partisanship later. In the Senate, they crossed partisan lines to support the repeal of the Tenure of Office Act in 1887. See Shugerman, *supra* note 161, at 16-19.

218. CONG. GLOBE, 41st Cong., 2d Sess. 3067 (1870).

219. *Id.* at 4517.

220. *Id.* at 4490 (statement of Sen. Thomas Bayard); *id.* at 3038 (statement of Rep. Samuel Cox).

221. *Id.* at 3037 (statement of Rep. James Beck); *id.* (statement of Rep. George Woodward).

222. Act to Establish the Department of Justice, ch. 150, § 6, 16 Stat. 162, 163 (1870).

223. See CUMMINGS & MCFARLAND, *supra* note 1, at 188-204.

Solicitor, to the Department of Justice. This created some confusion about whether the Department of Justice would be taking on military lawyers generally, but Representative Jenckes was clear that it would not: "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."<sup>224</sup> He explained that the Judge Advocate General of the Navy was different from other military law officers, because his duties are "purely civil. He has nothing to do with courts-martial. . . . He gives advice when the [Navy] Department comes into conflict with the civil Departments."<sup>225</sup>

The floor debate briefly focused on Reconstruction events. A congressman pressed Representative Jenckes to give the Attorney General or the new department a bigger role in legal questions about Reconstruction. This congressman mentioned that the Governor of Tennessee had recently asked the President for troops and authority to use them. "That communication was referred to the Judge Advocate General, and his opinion was laid before the Reconstruction Committee of this House to govern theirs. I think it is clear that the opinion which should have been given in such a case was that of the Attorney General."<sup>226</sup> Representative Jenckes again replied that his Joint Select Committee on Retrenchment

preferred to confine the bill entirely to the officers who belong to civil Departments, and not to transfer to the department of justice any military office. . . . The committee had this matter fully under consideration, and went into it very carefully. They found two systems existing entirely distinct. They did not wish to mingle the military law and the civil.<sup>227</sup>

The next day, William Lawrence, the Chairman of the House Judiciary Committee, returned to the floor to emphasize the DOJ Act's goals of efficiency and uniformity, but he returned to the recent Tennessee incident. He agreed that the Governor's "application was very properly referred by the President to the Secretary of War, and he referred it to the Judge Advocate General of the Army," who was "correct" in deciding not to send troops.<sup>228</sup> According to Representative Lawrence, this anecdote illustrated the potential for confusion:

But I think I need not pursue this branch of the subject further . . . . I would have preferred that the Judge Advocate General of the Army and so many of his assistants as were necessary should have been transferred to the department of justice . . . . [However], this bill does not interfere with the Judge Advocate General of the Army or his assistants . . . .<sup>229</sup>

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

225. *Id.*

226. *Id.* (statement of Rep. James Beck).

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

228. *Id.* at 3066 (statement of Rep. William Lawrence).

229. *Id.*

Representative Lawrence divulged that if the DOJ Act did make any such changes, “the bill would have encountered the opposition of some of the officers of the Bureau of Military Justice and their friends.”<sup>230</sup> Representative Lawrence also noted that the House Judiciary Committee’s earlier version of the DOJ Act would have included “a bureau of military and naval law,”<sup>231</sup> among other bureaus, within the new department, but these bureaus were dropped from the eventual DOJ Act.<sup>232</sup> Representative Lawrence was satisfied that the DOJ Act would give the Attorney General and the DOJ authority over legal questions involving the Departments of War and the Navy, even if it did not provide a more direct enforcement role. Another congressman asked Representative Jenckes if he agreed that the DOJ Act would not be able to pass if it transferred military lawyers. Representative Jenckes replied evasively, “[t]hat matter is not within the domain of our committee, but belongs to the Committee on Military Affairs.”<sup>233</sup> The implication from Representatives Lawrence and Jenckes was that there was powerful opposition to transferring military lawyers. Moreover, there was strong opposition to giving the DOJ a more direct, hands-on role in military law, aside from counseling the President or the Secretaries of War and the Navy on related legal questions. In the middle of these discussions about military lawyers, Representative Jenckes invited his colleagues to offer amendments to the DOJ Act if they wanted the new department to have a role in military affairs.<sup>234</sup> There is no record of any congressmen offering any such amendment to the bill, a rather telling sign of consensus on the matter.<sup>235</sup>

Considering how much of Reconstruction had been related to the military, the decision to keep military lawyers out of the DOJ had the effect of limiting the DOJ’s role in Reconstruction. Congress was in the process of debating and passing the Enforcement Act of 1870, which would have expanded the district attorneys’ role in Reconstruction and civil rights enforcement, but it also expanded the military’s role.<sup>236</sup> President Grant would soon rely on the Enforcement Acts to declare martial law in parts of the South.<sup>237</sup> Representative Jenckes was adamant that his Joint Select Committee on Retrenchment had rejected any military role for the Department of Justice, at a time when military lawyers were involved with Reconstruction decisions.

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230. *Id.*

231. *Id.*

232. *See id.*

233. *Id.* at 3067 (statement of Rep. Thomas Jenckes).

234. *Id.* at 3037.

235. Representative George Woodward, a Pennsylvania Democrat opposed to Reconstruction, offered an amendment to abolish the offices of the Judge Advocates General entirely, but that appeared to move in the opposite direction of law enforcement, and it was offered too late procedurally. *Id.* at 3067 (statement of Rep. George Woodward).

236. Enforcement Act of 1870, ch. 114, §§ 8, 13, 16 Stat. 140, 142, 143.

237. *See* ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 454, 457, 458 (1988); SMITH, *supra* note 121, at 547.

Spaulding suggested that Congress was willing to give the Attorney General's office so much authority over the new department because Republicans had put the Fourteenth Amendment in place and trusted the man in that office, Amos T. Akerman—"a 'vigorous' supporter of the Republican cause."<sup>238</sup> However, Akerman had not been nominated to become Attorney General while Congress was debating the DOJ Act. The main debates over the DOJ were in April 1870, while Attorney General Hoar was still in office. Ebenezer Hoar was a known crusader against corruption, not known so much for his leadership on civil rights.

President Grant had nominated Ebenezer Hoar for the Supreme Court in December 1869, but too many senators resented the man who had blocked their preferred appointments, and they rejected him in February 1870 by a vote of 33-24. Senator Simon Cameron of Pennsylvania, one of the most legendary party machine managers of the nineteenth century, remarked, "What could you expect of a man who had snubbed seventy Senators!"<sup>239</sup> The *American Law Review* reported on the vote that the Republican senators did not trust Attorney General Hoar to represent the party agenda on the Court, and commented that Hoar was regarded as "more of a lawyer than of a partisan."<sup>240</sup> The journal called Attorney General Hoar's rejection "a scandal" and "an insult to the legal profession."<sup>241</sup>

After his rejection, Attorney General Hoar knew he had lost political standing. He secretly offered to resign, but President Grant refused the offer, and Attorney General Hoar then settled back into his office with no plans to leave. Ebenezer Hoar's biographers wrote that he "did not allow himself to be disturbed by the defeat of his nomination, but serenely continued his work as Attorney-General, as his correspondence shows."<sup>242</sup> He devoted himself to the office, until mid-June 1870, when the news of his resignation in the newspapers shocked his close friends and allies in Washington.<sup>243</sup> When his friends visited him to ask if the news was true, he explained that President Grant recently had asked for his resignation with no explanation. When Attorney General Hoar

238. Spaulding, *Professional Independence*, *supra* note 3, at 1963-64 (quoting CUMMINGS & MCFARLAND, *supra* note 1, at 227).

239. Charles Francis Adams, Remarks at the Meeting of the Massachusetts Historical Society in Memory of Ebenezer Rockwood Hoar (Feb. 14, 1895), in *TRIBUTES OF THE BAR AND OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH TO THE MEMORY OF EBENEZER ROCKWOOD HOAR*, *supra* note 206, at 60 (internal quotation marks omitted); GROSSMAN, *supra* note 204, at 80; *see also* JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 75 (1953); BROOKS D. SIMPSON, *THE POLITICAL EDUCATION OF HENRY ADAMS* 61 (1996); STOREY & EMERSON, *supra* note 213; Jacob Dolson Cox, *How Judge Hoar Ceased to be Attorney-General*, *ATLANTIC MONTHLY*, Aug. 1895, at 162, 162.

240. *Summary of Events*, 4 *AM. L. REV.* 380, 394-95 (1869).

241. *Id.* at 395.

242. STOREY & EMERSON, *supra* note 239, at 202.

243. *Id.* at 208.

asked for the reasons, President Grant explained that he needed to balance his cabinet with a Southern Republican. At that stage, President Grant did not have anyone lined up, and Attorney General Hoar offered to help sort through the options, partly because the Attorney General wanted to block congressional Republicans from using the opening for patronage or partisanship.<sup>244</sup>

President Grant signed the DOJ Act on June 22, 1870, and the Department of Justice opened formally a little more than a week later, on July 1, 1870.<sup>245</sup> Attorney General Hoar's resignation occurred long after the DOJ Act had passed the House and came just a week before final passage. Contemporaries reported that Attorney General Hoar's resignation was "a surprise,"<sup>246</sup> and that Akerman's nomination was met with "profound astonishment."<sup>247</sup> The *New York Times* reported that Amos Akerman, an obscure district attorney in Georgia, was a "[u]niversal [s]urprise" as the new nominee.<sup>248</sup> Spaulding is right that key Republicans trusted the particular person in the Attorney General's office during the period from 1869 to 1870, but it was not Radical Republicans trusting the incoming Amos Akerman. It was Representative Jenckes and the reformist Republicans trusting the incumbent Ebenezer Hoar and his reputation for cleaning up government.

The DOJ's creation was a retrenchment project of centralization, efficiency, and accountability. By putting all law officers in one department, Representative Jenckes and the other congressmen believed that they were removing those law officers from the agendas, patronage, and politics within each separate department, and they hoped that the new institution would strengthen legal professional norms. The recent Attorneys General bolstered this hope with their commitment to nonpartisanship, anti-patronage, and legal qualifications. The debate over outside counsel also related more to the management of lawyers outside of Washington. Eliminating outside counsel decreased "favoritism" and increased legal checks on the growing departments.

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244. *Id.* at 210-11. A fellow reformist cabinet secretary, Jacob Cox, recounted that President Grant was facing resistance in the spring of 1870 against his plan to annex San Domingo, adding to his desire to reshape his cabinet. Cox, *supra* note 239, at 162-73.

245. CUMMINGS & MCFARLAND, *supra* note 1, at 225. An interesting historical footnote: when the DOJ first opened, one of its employees was poet Walt Whitman, who was a clerk in the Attorney General's office. President Grant's Attorney General Ebenezer Hoar and Whitman got along very well. Attorney General Hoar came from the same Massachusetts elite circles and was the father of a transcendentalist friend of Ralph Waldo Emerson who had been engaged to Whitman's brother Charles. Whitman remained in the Attorney General's office until 1872 or 1873. JEROME LOVING, WALT WHITMAN: THE SONG OF HIMSELF 291, 336 (1999); see also PHILIP CALLOW, WALT WHITMAN: FROM NOON TO STARRY NIGHT 331 (1992); cf. CUMMINGS & MCFARLAND, *supra* note 1, at 228 & n.27.

246. Hamilton Fish, Diary Entry (June 17, 1870), in 20 THE PAPERS OF ULYSSES S. GRANT 170, 171 (John Y. Simon ed., 1995).

247. *Resignation of Attorney-General Hoar*, N.Y. TRIB., June 17, 1870, at 1.

248. *Talk at the Capital About the Resignation of Mr. Hoar*, *supra* note 165.

In the end, the DOJ Act's most significant change was the abolition of outside counsel. It provided no funding for hiring new lawyers, and as it turns out, few were hired. The only new position that the Act created was that of Solicitor General. Representative Jenckes and the Act's framers intended it to cut costs and create a smaller, more professional, more independent class of government lawyers by reorganizing them under the Attorney General. That professionalization was its own form of civil service reform, while other civil service reforms fought an uphill battle in the same Congress.

C. *Why the "Father of the Civil Service" Failed to Install Civil Service in the DOJ*

The DOJ Act was designed to increase professionalization and independence, which helps to explain the puzzle of why Representative Jenckes, Congress's leading civil service reformer, did not push harder to apply these reforms specifically in the DOJ Act. First, the design of the department itself was intended to decrease patronage "favoritism" and increase professionalism, even without a civil service component. The recent Attorneys General, William Evarts and Ebenezer Hoar, having demonstrated that they shared the reformers' values, had earned the reformers' trust, lessening the need for other structural reforms. Second, the DOJ Act already offered some relevant professional standards for hiring. The DOJ Act required that the officer be "learned in the law," which reflected the more informal modes of legal education at that time. While civil service proposals required competitive examinations in basic skills like arithmetic, reading, and accounting, law officers required a more advanced set of skills, and examinations would be very difficult to administer. Formal state bar examinations were decades away.

Third, the high-ranking law officers were somewhat protected from firing by the revised Tenure of Office Act. The Senate made it clear that it was not going to surrender this power in 1869, and, one year later, Congress established the Department of Justice. Thus, when the DOJ opened for business, it turned out that its high-ranking officers and its district attorneys were not formally under strong, centralized presidential control. Later in 1870, the House vote was just as heavily in favor of repeal, 159-25.<sup>249</sup> And again, Representative Jenckes and a handful of civil service reformers voted against repeal, and the Senate voted to maintain its own power to protect principal officers from presidential power.<sup>250</sup> At the time, there was a rough fit between the DOJ and the Tenure of Office Act: many of the law officers were subject to Senate confirmation and would also be under Senate protection. This process may have seemed more relevant than basic civil service exams and firing "for cause."

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249. CONG. GLOBE, 41st Cong., 3d Sess. 66 (1870).

250. *Id.*

It would have been possible for Representative Jenckes to insert into the DOJ Act the same language from the Tenure of Office Act requiring Senate consent for removals. After all, Congress had inserted this specific language in 1863 to protect the Comptroller of the Currency,<sup>251</sup> and such separate language was later the issue in *Myers v. United States*.<sup>252</sup> Representative Jenckes himself had included such language in his own civil service bills to protect his civil service commissioners in 1866 and 1867.<sup>253</sup> However, Representative Jenckes dropped this provision after the Tenure of Office Act passed, suggesting that he considered it unnecessary—or at least not worth the cost—to repeat the protections that the Tenure of Office Act already provided. By the time Representative Jenckes was drafting the DOJ Act in late 1869 and 1870, the House had already voted overwhelmingly to repeal the Tenure of Office Act, so he would have been aware that providing the same Senate powers could trigger resistance in the House. For these reasons, Representative Jenckes had less reason to push for civil service examinations or job security in the DOJ Act.

#### IV. A FALSE START

Even though Congress passed the DOJ Act, the new department faced three debilitating practical problems. These problems further reveal that the DOJ Act was not meant to increase federal power or expand federal law enforcement. First, Congress failed to provide for a building. The Joint Select Committee on Retrenchment was the architect of the department in the metaphorical sense, not the literal sense. The DOJ needed bricks and mortar to become an institution. The law officers remained in their offices spread out through the various departments, and the departments maintained more direct day-to-day influence over those law officers as a result. The Attorney General could not overcome this basic geography, especially in an era of limited technology and communication. The Attorney General and other DOJ officers were dispersed in other department buildings, temporary offices in other federal buildings, and rented office space in private buildings until 1935, when the first Department of Justice building was completed during the FDR Administration.<sup>254</sup>

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251. See Act of Feb. 25, 1863, ch. 58, § 1, 12 Stat. 665, 665-66.

252. 272 U.S. 52, 107, 294-95 (1926). The statute protecting the Postmaster General and his assistants, which would later be struck down in *Myers*, was passed in 1872, after Representative Jenckes was out of Congress. See Act of June 8, 1872, ch. 335, § 2, 17 Stat. 283, 284.

253. See H.R. 113, 40th Cong. § 2 (1867); H.R. 889, 39th Cong. § 2 (1866); H.R. 673, 39th Cong. § 2 (1866).

254. LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* 54 (1967); *U.S. Department of Justice Building (Robert F. Kennedy Building)*, Washington DC, U.S. GEN. SERVS. ADMIN., <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/321> (last visited Dec. 18, 2013).

Second, Congress neglected to repeal the statutes still on the books assigning supervisory roles over the law officers to the various departments. These holdover statutes gave the other departments enough legal cover to continue directing the law officers still housed in their buildings. From 1874 to 1875, Congress engaged in a law reform project of publishing the Revised Statutes of the United States, a modernizing effort similar to codification. Instead of using this opportunity to clarify that the DOJ Act superseded the earlier statutes and gave the Attorney General full control, the congressional committee decided to publish both the DOJ Act's provisions and the earlier laws as well.<sup>255</sup> George Boutwell, the former Treasury Secretary with a partisan reputation, was a senator from Massachusetts at the time and may have either had his revenge on Representative Jenckes or mistakenly undid his work, as he served as chairman of the committee assembling the Revised Statutes. As a result, the confusion over bureaucratic line of command persisted for decades.

Third was appropriations and personnel—or rather, the lack thereof. The district attorneys complained about their lack of resources for civil rights prosecutions. Amos Akerman had to refuse requests for additional lawyers; appropriations were dwindling, and “strictest economy [was] a necessity.”<sup>256</sup> Recognizing that the current conditions were preventing these trials from moving forward, Attorney General Akerman wrote in his annual report for 1871 that “the judicial machinery of the United States must be increased.”<sup>257</sup> Attorney General Akerman complained repeatedly that the infrastructure of federal prosecution and federal courts prevented the enforcement of civil rights law. Robert Kaczorowski's research shows that U.S. Attorneys were actually processing more civil rights cases in the early 1870s, but they did so with smaller budgets.<sup>258</sup> There was one moment late in 1871 when Attorney General Akerman requested more funding for these prosecutions, and Congress delivered. Kaczorowski observed that, for a time, the federal authorities “were winning the war against the Klan,” despite their limited resources.<sup>259</sup> However, a political backlash against this spending further curtailed enforcement.<sup>260</sup>

Akerman's successor was George Williams, a senator who had been a member of the Joint Select Committee on Retrenchment that drafted the DOJ Act. Contemporaries wondered whether President Grant appointed Williams less for his help in a civil rights campaign than for his help on his 1872 reelection campaign.<sup>261</sup> Williams also cited the lack of funding for civil rights prose-

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255. Key, *supra* note 1, at 181-92.

256. KACZOROWSKI, *supra* note 1, at 67 (internal quotation mark omitted).

257. *Id.* at 72-73.

258. *Id.* at 65-68, 72, 82.

259. *Id.* at 76.

260. *See id.* at 69.

261. *Id.* at 80-81. This move previewed a recurring practice of Presidents appointing their campaign managers as Attorneys General. *See infra* note 277.



cutions, but he may have been insincere and merely using the funding problems as an excuse to cut back.<sup>262</sup> One must wonder whether the DOJ's lack of resources was a feature of the DOJ Act's design, rather than a bug. Civil rights cases had initially proceeded in the South despite Congress and the DOJ Act, not because of them. In 1872 and thereafter, Congress used its budgetary control to limit federal prosecutions and to hasten a retreat from further enforcement.<sup>263</sup> The DOJ Act allowed Congress to have more control over federal lawyers by taking away discretionary funding from the executive branch for hiring outside lawyers. Thus, when Congress cut funding, the President was left with few alternatives.

In 1871, Congress did appropriate more money for hiring commissioners and marshals, and the records reflect an increase in their numbers, but the number of U.S. Attorneys and Assistant U.S. Attorneys did not increase.<sup>264</sup> Few assistants were assigned to ex-Confederate states. In the DOJ's first full year of existence, in 1871, only eight of the thirty-seven assistant district attorneys were in the ex-Confederate South, and only one assigned to Kentucky, two to Tennessee, and one to South Carolina, despite U.S. Attorneys aiming for a large number of prosecutions of the KKK in those states in 1871.<sup>265</sup> Providing so few AUSAs to help out, the new DOJ did not provide much additional support. Considering that the DOJ statute prohibited the hiring of outside counsel, these numbers of AUSAs reflect a sharp limitation on federal enforcement.

In 1872, the number of AUSAs in the former Confederate states increased to sixteen out of a total of fifty-five, still a small number.<sup>266</sup> There were far more federal commissioners in the South, with enforcement powers and duties to assist in investigation and criminal process, but no authority to litigate cases. This commitment of resources reflects a Republican commitment to temporary peacekeeping and a politically self-interested show of force to protect voters on election day—when Republicans had a vested political interest in securing Republican votes. But the lack of assistance for the district attorneys reflects less of a commitment to enforcing black civil rights on other days of the year that did not have elections. Very soon after, President Grant diverted more of these resources away from elections in the South and towards elections in Northern cities.<sup>267</sup> New York was a crucial swing state in the second half of the nineteenth century, and Democrats controlled New York City. Republicans appar-

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262. KACZOROWSKI, *supra* note 1, at 85-87.

263. *Id.* 80-92.

264. *See infra* Appendix.

265. *See* KACZOROWSKI, *supra* note 1, at 68.

266. DEP'T OF JUSTICE, 1871 REGISTER, *supra* note 6; DEP'T OF JUSTICE, 1872 REGISTER, *supra* note 6.

267. *See* KACZOROWSKI, *supra* note 1, at 68.

ently needed federal law enforcement more in New York than in the South.<sup>268</sup> The distribution of offices reflected a lack of interest in long-term civil rights enforcement, and that situation was produced by the structure of the DOJ Act. If the DOJ Act had established more U.S. Attorneys' Offices in the South as designated by statute, it would have required new statutes or repeal to roll those offices back and dismantle Reconstruction, which would have been more difficult.

One might note that the federal government seems to have begun enforcing civil rights laws around the time of the DOJ's creation, and one might wonder if the DOJ played a role in this change. First, the increase in enforcement actually preceded the DOJ's creation, turning on the individuals in office more than on institutional arrangements. Kaczorowski observed that federal prosecutions were successful in 1870, which was before the DOJ was created, but declined after 1871. Benjamin Bristow, while serving as the U.S. Attorney for Kentucky in the late 1860s, was responsible for aggressive enforcement.<sup>269</sup> He became the first Solicitor General in the DOJ under Attorney General Amos Akerman.<sup>270</sup> The rising number of prosecutions in 1871 and 1872 was more the result of President Grant's temporary support for civil rights enforcement, his selection of Amos Akerman and Benjamin Bristow, and the passage of the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871.<sup>271</sup> The creation of the DOJ, on the one hand, contributed by creating the office of the Solicitor General. On the other hand, there is no evidence in the congressional debates of any intent for the Solicitor General to have this role in civil rights, and, in the end, the DOJ Act limited the resources available to Amos Akerman and Benjamin Bristow.<sup>272</sup> If Congress had not passed the DOJ Act, federal law officers would have had the power to hire additional lawyers on a fee basis to support federal prosecutions, without Congress's approval. The DOJ Act blocked that flexibility.

Even with the revised Tenure of Office Act insulating principal law officers from the President, the officers still followed the President's agenda (and perhaps followed the national turn in public opinion against Reconstruction as well). As soon as President Grant decided to back away from Reconstruction enforcement in 1873, the U.S. Attorneys followed his direction and ceased prosecutions.<sup>273</sup> The retreat from Reconstruction suggests that the DOJ was re-

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268. Scott C. James & Brian L. Lawson, *The Political Economy of Voting Rights Enforcement in America's Gilded Age: Electoral College Competition, Partisan Commitment, and the Federal Election Law*, 93 AM. POL. SCI. REV. 115, 120, 124 (1999); David Quigley, *Constitutional Revision and the City: The Enforcement Acts and Urban America, 1870-1894*, 20 J. POL'Y HIST. 64 (2008).

269. KACZOROWSKI, *supra* note 1, at 41-42.

270. *Id.* at 63.

271. *See id.* at 80-92.

272. *Id.* at 67, 80-81.

273. *See KACZOROWSKI, supra* note 1, 80-92.

sponsive to the President, but it is important to keep in mind that the creation of the DOJ was not to prevent law officers from being responsive to presidential control. The goal was to strike a balance in favor of some insulation from capture, not to obstruct uniform administrative decisions and law enforcement. The revised Tenure of Office Act in 1869 had returned the Attorney General to the unitary design, and President Grant's Attorneys General followed his directives, as did the district attorneys and other DOJ lawyers.

Moreover, Representative Jenckes's decision not to insert his favorite civil service protections into his DOJ Act also turned out to be fateful. The lower-level civil service protections, after initial setbacks, became permanent and broadened over time, while the upper-echelon protection of the Tenure of Office Act became even less popular and was repealed in 1887.<sup>274</sup> Once Representative Jenckes's robust civil service plans were defeated, reformers turned to much more modest and limited reforms in 1871 and 1883. By contrast, European civil service reform had a stronger beginning, covered some law officers by the early twentieth century,<sup>275</sup> and has expanded to cover prosecutors today. Unlike their European counterparts, America's civil service reformers did not gather momentum in the 1870s; they hit stiff resistance. Today, most Western democracies protect their prosecutors and law officers with more political independence, in contrast with the United States.<sup>276</sup>

#### CONCLUSION

The most important change effected by the DOJ Act was the elimination of outside counsel. This change left Attorneys General and U.S. Attorneys frustrated with their lack of resources for enforcing civil rights in 1871 and 1872. The DOJ Act's effect was to make the work of federal law enforcement and of Reconstruction more difficult. The only new position that the statute created was the Solicitor General.

The DOJ Act did not change much else. The reorganization of existing legal offices was a change on paper but not much of a change in practice. It did not budget for a new building for the new department (the DOJ did not have a

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274. FISH, *supra* note 9, at 206-07, 209-28; *see also* Shugerman, *supra* note 217.

275. LEONARD D. WHITE ET AL., *CIVIL SERVICE ABROAD: GREAT BRITAIN, CANADA, FRANCE, GERMANY* 3, 61, 90, 204 (1935).

276. In Canada and England, the office of attorney general is a political position, but the parallel offices to the U.S. Attorneys (England's Crown Prosecution Service, Director of Public Prosecutions, and Chief Crown Prosecutors; and Canada's crown attorneys or crown counsel) are civil servants insulated from politics. In Continental Europe, prosecutors are quasi-judicial officers under the inquisitorial model, organized as a professional bureaucracy with high job security (sometimes with life tenure). Jed Handelsman Shugerman, *The Founding of the DOJ and the Failure of Civil Service Reform, 1865-1870*, at 2 & nn.3-4 (2012) (unpublished manuscript), available at <http://www.law.uchicago.edu/files/files/Shugerman%20DOJ%20and%20Civil%20Service%202%205.pdf>.

building until 1935). The Attorney General and his assistants kept their offices inside the Treasury Department building. Solicitors and other law officers remained dispersed in other government buildings around Washington. The statute did not give the Attorney General new authority over the U.S. Attorneys. Under an 1861 statute, the Attorney General shared supervisory power with the Treasury Department, and the correspondence from the archives indicates that Attorneys General had been exercising that power. The DOJ Act gave the Attorney General sole authority over U.S. Attorneys. The Act did not change the President's power over U.S. Attorneys or other law officers who had been confirmed by the Senate. Before and after the passage of the DOJ Act, principal law officers were still protected by the Tenure of Office Act. It was no easier for the President to direct the far-flung U.S. Attorneys, and in reality, it was no easier for the President to direct other law officers who were still dispersed around Washington. It did not give the new department authority over military affairs. And it did not appropriate funding for hiring more Assistant U.S. Attorneys or other government lawyers.

The DOJ Act could be described as mostly aspirational, falling short of its drafters' goals and thus arguably more of a false start toward independence. Nevertheless, even with such a slow start and without structures of professional independence, the Department of Justice, over the long term, developed the norms of professional independence envisioned by Representative Jenckes and its congressional architects. The focus on the role of the Attorney General is at best a distraction. William Evarts, Ebenezer Hoar, and Amos Akerman may have been professional models in the late 1860s and early 1870s, but, often in the DOJ's history, other Attorneys General have served as Presidents' campaign managers or have been partisan insiders.<sup>277</sup> This trend was not as apparent in the late nineteenth century, but it also seems that the Attorneys General from 1872 through the Progressive Era did not have the same professional status or nonpartisan commitments as William Evarts and Ebenezer Hoar. Instead of the Attorney General, the key to the DOJ's norms of independence appears to have been the creation of a centralized law department as an institutional base for mid-level career government lawyers below the Attorney General. A law department had shifted focus from the political business of other departments to a department with at least an aspiration of commitment to the rule of law, even if political pressures created some conflicts with those

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277. George Williams was one example under President Grant, and President Harrison's Attorney General William Miller was also a partisan insider and campaign advisor. But this trend seems to have truly emerged in 1919 with A. Mitchell Palmer under President Wilson, followed by President Harding's campaign manager Harry Daugherty, President Franklin Roosevelt's Attorney General Homer Cummings, President Truman's campaign manager J. Howard McGrath, President Eisenhower's political advisor Herbert Brownell, and President Nixon's campaign manager John Mitchell. See CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 51 (1992).

aspirations. The elimination of outside counsel led to a more centralized, stable, and professionalized organization of government lawyers.

The next step of this research is to focus on how professional norms developed in what is now called “Main Justice,” as well as in the U.S. Attorneys’ Offices spread across the country. This research will focus on the Southern District of New York from 1870 through the 1930s, a period during which it developed into a flagship of professionalism and independence in the federal government. By design, the centralization of the DOJ was supposed to separate federal lawyers from local partisan politics, and that dynamic seems to have played out in key places. For example, in New York City, the local Democrats dominated city politics and patronage machines throughout the late nineteenth century and early twentieth century. In the late nineteenth century, Republican Presidents used the Department of Justice not as much to police the South as to police Northern Democratic cities. Even though this dynamic was driven by partisan politics, the centralization of law enforcement reduced the political influence of local parties and increased the role of national elites in law enforcement—a development that would shift the balance of power to more establishment lawyers and a national professional class.

The seeds for these developments were planted in the DOJ’s founding. Professionalization was part of the DOJ’s design in 1870, but it took many more years to develop. The theory underlying the DOJ’s creation was that government lawyers would gain autonomy by being removed from partisan networks and that this separation would allow government lawyers to adhere to their own professional norms. The lawyers would hold each other accountable—another example of independence and accountability as relative terms. Lawyerly independence depended upon professional accountability (as opposed to political accountability). It took time for these norms to develop, but they were part of Representative Jenckes’s original vision for a leaner and cleaner system of federal law enforcement: retrenchment more than Reconstruction and professional independence more than political accountability.

## APPENDIX: ASSISTANT U.S. ATTORNEYS, 1871-1876

The following chart shows the number of Assistant U.S. Attorneys from 1871 to 1876. The Assistant U.S. Attorney position was created by Congress in 1861 at the outset of the war.<sup>278</sup> There are apparently no records establishing the number of AUSAs between 1861 and 1870, but the *Register of the Department of Justice and the Judicial Officers of the United States* tracked their names and districts starting in 1871. The records from 1871 to 1876 show neither a large number of AUSAs when the DOJ was up and running nor a significant increase in the number of AUSAs to make up for the elimination of outside counsel. Outside counsel in the 1860s had been roughly the annual equivalent of sixty district judges or forty Assistant Attorneys General. The number of AUSAs in the South was very small initially, indicating that the DOJ was not staffed to bolster the enforcement of Reconstruction: only eight in total for the former Confederate states, and just four in the border states. The number of AUSAs in the South grew a bit in 1872, and then declined. Many districts had no AUSAs, and aside from a handful of exceptions, most districts had no more than one AUSA. Their numbers increased mostly in the Northeast.<sup>279</sup>

TABLE 1  
Number of AUSAs

	1871	1872	1873	1874	1876
Northeast	5	6	7	9	10
New York	6	12	12	12	13
Border	4	5	5	4	4
Old Confederacy	8	16	13	14	17
Midwest	12	14	14	14	20
West	2	2	2	3	3
Total	37	55	53	56	67

278. See Act of Aug. 2, 1861, ch. 37, § 2, 12 Stat. 285, 285.

279. See DEP'T OF JUSTICE, 1871 REGISTER, *supra* note 6; DEP'T OF JUSTICE, 1872 REGISTER, *supra* note 6; DEP'T OF JUSTICE, 1873 REGISTER, *supra* note 6; DEP'T OF JUSTICE, 1874 REGISTER, *supra* note 6; DEP'T OF JUSTICE, REGISTER OF THE DEPARTMENT OF JUSTICE AND THE JUDICIAL OFFICERS OF THE UNITED STATES (Washington, D.C., Gov't Printing Office 6th ed. 1876).