The Creation of the Department of Justice:

Professionalization Without Civil Rights or Civil Service

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Abstract

This Article offers a new interpretation of the founding of the Department of Justice 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 as a result of the Civil War, and 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 bill 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 fiscal conservatism) and anti-patronage reform. The DOJ's creation was contemporaneous with major professionalization efforts (especially the founding of modern bar associations) to make the practice of law more exclusive and more independent from partisan politics. A small group of reformers worked on a combination of the DOJ bill, civil service reform, bureaucratic independence, and founding modern bar associations in the late 1860s through 1870.

This Article also explains why the Department of Justice did not include civil service reforms as part of this professionalization project, even though the same reformers were fighting for broad civil service legislation at exactly the same time. The same Congressman who led the DOJ effort in 1870, Thomas Jenckes, was also known as "the father of the Civil Service" and simultaneously fought for civil service reform. Jenckes succeeded in passing a DOJ bill to professionalize government lawyers by reorganizing them under a more professional and independent Office of the Attorney General, rather than through civil service reform. Meanwhile, reformers fell short in their civil service campaign for other kinds of federal employees, reflecting a view that government lawyers were different from other government officials in the post-Civil War era.

In this new light, the DOJ's creation conflicts with one historical trend, the growth of 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 was created in 1870, after almost a century of disorganization and confusion among the federal government's lawyers. It has seemed 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.[1] For example, one recent book located the DOJ's creation in the general trend of building the modern federal bureaucracy, "to enlarge the machinery of government,"[2] and a set of recent articles explained the DOJ as a Reconstruction project for the protection of ex-slaves' civil rights.[3] This Article contends that the bill creating the DOJ had different purposes and opposite effects. It has been overlooked that the DOJ bill eliminated the primary tool of the federal government for keeping up with a surge in post-war litigation: outside counsel. From 1865 to 1869, the federal government had paid over $800,000 to such "outside counsel."[4] The DOJ bill 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.[5]

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[1] This Article is part of a book project on the history of the Department of Justice up to the New Deal era. The only monograph on the history of the Department of Justice was written in 1937 by the U.S. Attorney General and his Assistant Attorney General, shaped by the political battles over federal power at that time, and it is transparently a defense of the New Deal by illustrating how the federal government has played a role in economic regulation since the Founding. HOMER CUMMINGS AND CARL MCFARLAND, FEDERAL JUSTICE (1937). A short book from 1904 and a dissertation from 1927 offer formal organizational accounts of the Department. JAMES EASBY-SMITH, THE DEPARTMENT OF JUSTICE; ITS HISTORY AND FUNCTIONS (1904); Albert George Langeluttig, "The Department of Justice of the United States," (PhD, Johns Hopkins, 1927). See also Sewell Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 167 (1938). For other histories suggesting that the DOJ was created to manage a growing post-war docket and to improve law enforcement, see ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, THE DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876, at 39-40 (1982); STEPHEN CALABRESI AND CHRISTOPHER YOO, THE UNITARY EXECUTIVE, 193 (2008). 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. NELSON, ROOTS OF AMERICAN BUREAUCRACY, 5, 7; see also William Nelson, *The Impact of the Antislavery on Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

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

[3] Norman Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1937, 1959-60 (2008); Norman Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 438 (2011). Former Solicitor General Seth Waxman recently wrote a piece titled "Twins at Birth: Civil Rights and the Role of the Solicitor General," linking Congress's creation of the DOJ and the Solicitor General's office to the enforcement of the Reconstruction amendments, and claiming "[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, 1300-05 (2000).

[4] CONG. GLOBE, 41st Cong., 2d Sess., 3036 (April 27, 1870).

[5] 16 Stat. 162, § 17 (1870). Congress's Act to Establish a Department of Justice barred other departments from employing their own attorneys and prohibited the new Department of Justice from paying attorney fees to anyone other than the district attorneys or assistant district attorneys. The annual salary of a district judge was $3500 at the time, and that the annual salary of the assistant attorney general was $5000.

The founding of the DOJ had less to do with Reconstruction, and 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.[6] From the 1860s through the 1870s, a cadre of Republican reformers was working on a combination of the DOJ bill, civil service reform, bureaucratic independence, and the founding of modern bar associations.[7] One of the most significant developments of the antebellum era was the rise of party machines and political patronage, from Jackson's and Van Buren's Democrats in the 1820s, to the Whigs in the late 1830s, and eventually to the Republicans, as well.[8] I have documented a reformist backlash against patronage before the Civil War in a wave of state constitutional conventions in the 1840s and 1850s.[9] As soon as the Civil War ended, a new reform movement reemerged, focusing on civil service and professionalization.

In the 1860s and 1870s, Republican lawyers led the effort to lengthen the terms of state judges in a push to promote judicial independence and the professionalization of the bench against corruption.[10] The Association of the Bar of the City of New York was founded in 1870, and the American Bar Association was founded in 1878. It has also been overlooked that the congressman who led the DOJ effort, Thomas Jenckes, was also known as "the father of the civil service," and that his allies led the bar association movement. A substantial part of this Article is based on Jenckes's voluminous papers and letters at the Library of Congress. The reformist Republicans' professionalization efforts reflected a coherent agenda of 1) separating law from partisan politics; 2) establishing norms of expertise; 3) creating institutions for regulating law practice; and 4) making

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[6] WILLIAM NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 124-148; Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, in NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA (Gerard W. Gawalt, ed., 1984); Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915*, in NEW HIGH PRIESTS; John A. Matzko, "'The Best Men of the Bar': The Founding of the American Bar Association," in NEW HIGH PRIESTS; Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*," in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA (ed. Gerald L. Geison, 1983); Robert W. Gordon, *The American Legal Profession, 1870-2000*, in 3 CAMBRIDGE HISTORY OF AMERICAN LAW (Michael Grossberg & Christopher Tomlins, ed., 2008).

[7] The primary leaders were: Thomas Jenckes, a Republican congressman from Rhode Island and a patent lawyer, and a leader of civil service reform, who led the DOJ bill and the civil service reform effort in Congress; Dorman Eaton, a New York lawyers and another civil service reform leader, who worked on the founding of the Association of the Bar of the City of New York (founded in 1870); and William Evarts, a New York Republican who was U.S. 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.

[8] CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE; MARTIN AND SUSAN TOLCHIN, TO THE VICTOR…; FOULKE, FIGHTING THE SPOILSMEN (1919); VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE (1958)

[9] SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012) (Chapter 4: Panic and Trigger; Chapter 5: The American Revolutions of 1848).

[10] JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 148-150 (2012); Jed Handelsman Shugerman, *The Twist of Long Terms*, 98 GEO. L. J. 1349 (2010). Some states lengthened judicial terms as a partisan entrenchment strategy, but several others did so for anti-corruption and professionalization purposes.

these positions more exclusive. Reformers perceived that outside counsel positions were manipulated for patronage, just as reformers also perceived other government offices were used for patronage, and just as they perceived that the legal profession had been tarnished by too much democracy, lowered standards, and a loss of "honor."[11] 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 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 an 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. In the DOJ debates, 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 hand-picked 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.[12] 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.[13]

The DOJ bill was a structural reform to minimize political manipulations in the various departments. The recent Attorneys General between 1868 and 1870 had been more professional and more independent from partisan politics, and the expectation was that the Attorney General would impose professional norms on the law officers and would insulate them from departmental politics. The Attorney General's opinions would become more authoritative upon the executive branch, to be "followed by all officers of the government until it is reversed by some competent court."[14] Executive officers – and even the President – would no longer be able to find legal "shelter" from the law officers for their questionable actions.[15] This perspective fit an earlier interpretation that the Attorney General was supposed to be "quasi-judicial," more independent from executive and partisan politics, more powerful in limiting the actions of executive officers.[16] The

[11] GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870-1970, at 3.
[12] Id. at 3036 (Jenckes).
[13] CONG. GLOBE, 41st Cong., 2d Sess., 3039 (April 27, 1870). CONG. GLOBE, 41st Cong., 2d Sess., 4490 (Bayard) (June 16, 1870).
[14] CONG. GLOBE, 41st Cong., 2d. Sess., 3036 (April 27, 1870).
[15] CONG. GLOBE, 41st Cong., 2d. Sess., 3036 (April 27, 1870).
[16] Caleb Cushing, A Report of the Attorney General, Suggesting Modifications in the Manner of Conducting the Legal Business of the Government, H.R. Exec. Doc. No. 33-95, at 6 (1854). This

reformers' vision was to increase professional independence by increasing bureaucratic accountability to the Attorney General, not to the President. This development is consistent with the emphasis on expertise, professional independence, and "rule of law" principles in the rise of the administrative state, in contrast with political accountability. Instead of "cementing" presidential power over government lawyers and merging law and politics,[17] the DOJ bill was itself a structural reform aiming to protect professional independence and separate law from politics. 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 politics and ties with electoral coalitions.[18] This study of the DOJ's creation shows an opposite strategy of removing government lawyers from party networks and insulating them from regular politics.

The professionalization/civil service movement makes 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. Jenckes and the other reformers paid little attention to Reconstruction or to black civil rights. The DOJ came out of the Retrenchment Committee, whose goal was to cut a war-time government back to a smaller peace-time government. The bill's drafters emphasized repeatedly that their bill would cut spending, would increase efficiency, and would create no new law positions except for the Solicitor General's Office.[19] This Article confirms Robert Kaczorowski's research showing that 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 little personnel to help with litigation.[20] Throughout the early 1870s, the number of DOJ lawyers remained stable and even decreased in 1873. There were never many

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discussion resonates with the contemporary debate over internal separation of powers within the executive branch. See ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 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 at 1937.

[18] See DANIEL P. CARPENTER, REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928 (2001). Carpenter emphasizes expertise, that the bureaucrats develop a reputation for providing "unique" and indispensible services. This account of the DOJ is consistent with the importance of reputation and specialization, but the architects of the DOJ found it necessary to remove law officers from partisan departments in order protect their professional role and their expertise.

[19] CONG. GLOBE, 41st Cong., 2d Sess., 3034-37. See also Cong. Globe, 40th Cong., 1st Sess., 1272 (Feb. 19, 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. Hoffer suggests that the DOJ bill's sponsors could eliminate outside counsel because those expenses were "no longer necessary with in-house counsel." HOFFER, TO ENLARGE THE MACHINERY OF GOVERNMENT, 105. However, "in-house counsel" existed before 1870 as U.S. attorneys and assistant U.S. attorneys, and the DOJ bill did not increase those offices, nor did their numbers increase over the early 1870s. REGISTER OF THE DEPARTMENT OF JUSTICE, 1871, 1872, 1873, 1874. Hoffer suggests that the bill's supporters concealed this intent and instead offered efficiency arguments, but it is hard to square this underlying intent with the actual effect of the bill in sharply reducing the number of government lawyers, and the overall effect of the number of DOJ lawyers staying at that lower level throughout Reconstruction.

[20] KACZOROWSKI, at 40, 65-68, 72, 82 (showing that U.S. Attorneys were processing more prosecutions, but with smaller budgets and little personnel).

assistant U.S. attorneys assigned to the South from 1871 to 1874.[21] The first two Attorneys General who ran the new Department of Justice complained that they had too few lawyers and too few resources to take on the KKK and civil rights enforcement.[22] Those years witnessed the retreat from Reconstruction. [See Appendix 1 and 2 for a summary of the DOJ bill and a chart showing the relatively small and stable number of Assistant U.S. Attorneys throughout the 1870s].

My argument is that this problem resulted directly from Congress's DOJ statute itself by eliminating the discretionary hiring of outside counsel and by providing no additional funding for full-time lawyers to make up for that loss. The DOJ statute stripped executive branch officers of their power to hire contract lawyers, and gave Congress more control to limit law enforcement spending. And thus, it is less surprising that Congress followed through by restricting spending on lawyers in the South in the 1870s. The argument is not that Congress generally did not care about civil rights in this era, but rather, that the framers of the DOJ bill itself were not focused on increasing federal power or on civil rights in the South, even as other congressmen worked on other legislation that intended to protect civil rights. The new Department was designed to have fewer lawyers and less flexibility in order to restrict discretionary patronage. I am not suggesting that Congress had one monolithic view (Congress, of course, is a "they," not an "it" [23]). Congress was difficult to manage without any staff, especially after the passing of key Radical leaders.[24]

This Article focuses closely on the Republican reformers' parallel anti-patronage civil service goals from 1865 through 1871, because this detailed context is vital for this Article's positive argument about professionalization and retrenchment. Their goals in enacting civil service reform mirror the DOJ bill: reducing the size of the bureaucracy by about a third, and yielding more exclusivity, efficiency, and expertise.[25] In addition to

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[21] In the former Confederate states, the number of AUSA's was 12 in 1871; 18 in 1872; 13 in 1873; and 14 in 1874. There were about 40 more assigned to the former Union states throughout this period. REGISTER OF THE DEPARTMENT OF JUSTICE IN 1871; REGISTER OF THE DEPARTMENT OF JUSTICE IN 1872. REGISTER OF THE DEPARTMENT OF JUSTICE IN 1873; REGISTER OF THE DEPARTMENT OF JUSTICE IN 1874.

[22] KACZOROWSKI, 67, 80-81.

[23] Kenneth Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

[24] The Radicals' 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 Radicals, 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 bill, just as historians have. Some Radicals might have assumed that the DOJ bill 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 statute reflect a consistent pattern in the 1870s: the Republican Congress enacted civil rights legislation on the books, but it limited the funding for the actual enforcement of those laws. See KACZOROWSKI, 40, 65-68, 82.

[25] REGISTER OF THE DEPARTMENT OF JUSTICE (1871). To get a sense of 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 55 district attorneys (U.S. attorneys) and 39 assistant district attorneys (AUSA's). The outside counsel had been the equivalent of about 50 more lawyers.

offering a new interpretation of the DOJ as small-government professionalization, this Article also addresses a puzzle: if civil service reformers led to the creation of the Department of Justice, why didn't they include civil service reforms as part of this professionalization project? The story of civil service reform and Presidential control raises a question about a peculiar American practice. Every few years, high-profile scandals remind us that the modern Department of Justice is not independent from the rest of the executive branch. In 2006, eight federal U.S. Attorneys were relieved of their duties allegedly for partisan reasons. U.S. Attorneys and the political appointees in "Main Justice" can be removed by the President for any reason.[26] The President's control of the DOJ also has played an important role as Presidents pursued policy goals at key moments in American history. The DOJ's accountability to the chief executive stands in sharp contrast with the organization of government lawyers and prosecutors in most of the states[27] and many other western democracies. 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, its Director of Public Prosecutions and its Chief Crown Prosecutors;[28] and Canada's Crown Attorneys or Crown Counsel) are civil servants insulated from politics.[29] When Canada created its own Department of Justice in 1868, the statute included a provision that covered its officers by the Civil Service Act passed the same year, and many Canadian provinces followed with the same civil service provisions for their own law departments.[30] In many European countries, prosecutors are semi-judicial officers under the inquisitorial model, organized as a professional bureaucracy with high job security (sometimes with life tenure).[31] The federal government of the United States is unusual in making federal prosecutors and law officers formally accountable to the chief executive. This Article tracks how Jenckes, "the father of the Civil Service," succeeded in passing a DOJ bill professionalizing government lawyers, but curiously, he did not push to include civil service reforms in the DOJ bill.[32] Why didn't Congressman Jenckes and the Republican Congress combine the creation of the DOJ with civil service reform?

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[26] 28 U.S.C. §§ 541 (appointed by the President with the advice and consent of the Senate).

[27] In forty-six states, the Attorney General and district attorneys are independent from the Governor, because they are elected separately. Only four states currently have appointed district attorneys: Connecticut, Delaware, New Jersey, and Rhode Island. Every state admitted to the Union after the 1850s has opted for popular elections for district attorneys. Joan E. Jacoby, *The American Prosecutor: From Appointive to Elective Status*, PROSECUTOR, Sept.-Oct. 1997, at 25, 28 & n.12; Michael Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L. J. 1528 (2012).

[28] "Crown Prosecution Service,"
http://www.cabinetoffice.gov.uk/ministerial_responsibilities/non_ministerial_dept.aspx.

[29] See, e.g., Crown Attorneys Act, C.C.S.M. c. C330 (Manitoba).

[30] Department of Justice Act, 1868, Section 5, 31 Vic., c. 39; Canada Civil Service Act, 1868, Can. Stat., 31 Vic. c. 34; PHILIP C. STENNING, APPEARING FOR THE CROWN, 72; ROBERT MCGREGOR DAWSON, CIVIL SERVICE OF CANADA 20 (1929).

[31] Peter Morre, *Position of the Public Prosecution Office*, in THE ROLE OF THE PUBLIC PROSECUTION IN A DEMOCRATIC SOCIETY 44 (1997) (describing the protection of German prosecutorial independence, including lifetime appointment with removal only for cause); Erik Luna and Marianne Wade, *Prosecutors as Judges*, 67 WASH & LEE L. REV. 1413 (European prosecutors and civil service).

[32] CALABRESI AND YOO, THE UNITARY EXECUTIVE: FROM WASHINGTON TO BUSH 195 (2008) (the DOJ was a "triumph" for the unitary executve); Norman Spaulding, *Professional Independence in the Office of the*

The organization of this Article is more thematic than chronological, focusing first on the antebellum arrangement of government lawyers and then the passage of the DOJ statute, so that the Department of Justice timeline is clear. The Article then offers broader context, delving into the more detailed background of the civil service fight in Congress, the Tenure of Office Act developments, and the bar professionalization movement. (A purely chronological organization would jump around too much between narratives and arguments). Part I lays out the bizarre decentralized history of government lawyers and prosecution (state and federal, public and private) in antebellum America. Part II tracks the passage of the Department of Justice bill from 1868 to 1870. This Part also tracks the passage and revision of the Tenure of Office Act around the same time. Part III adds the context of professionalization and the founding of the Association of the Bar of the City of New York at the same time by Jenckes's allies. Part IV then shifts back to the late 1860s to focus on Jenckes and his civil service reform movement as crucial background for his DOJ bill, which helps explain his general anti-patronage agenda and also why the DOJ bill did not include its own civil service measures. Part V addresses the DOJ's creation in the context of historical debates about presidential power.[33] The Article concludes with 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 statute might have been more aspirational than successful in creating professional independence, but it lay 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 is 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.[34] Jerry Mashaw has recently revealed

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Attorney General, 60 STAN. L. REV. 1931, 1937, 1957 (2008); Norman Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 438 (2011).

[33] For some of the literature on the unitary executive theory and history, see STEPHEN CALABRESI AND CHRISTOPHER YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2010); Elena Kagan, *Presidential Administration* 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 (1994); Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2011) (suggesting that the rise of czars creates a need for more transparency about Presidential influence over agencies, for relaxing administrative constraints, and for courts to take Presidential preferences into account); Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008). For critiques of the theory, see Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009), Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313 (2010).

[34] 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." Morrison v. Olson, 487 U.S. 654, 706 (1988). On the differing historical interpretations, compare *id*. at 674 (Rehnquist, C.J.,) with id. at 726, 729, 734 (Scalia, J., dissenting). To the contrary, various scholars have shown a lack of consensus for a unitary executive or for the executive function of prosecution. Lawrence

how much administrative law took shape before the Civil War. Nevertheless, the story of the chaotic and politicized disorganization of government lawyers before the War and the DOJ's creation soon after the war remind us of the significance of the post-War reorganization efforts.[35]

First, it is important to note that the federal government had a minor role in criminal law in this era. Over time, 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.[36] 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 a mockery.[37] Other major expansions of criminal law were short-lived, such as the Alien and Sedition Act. 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 Act prosecutions in conducting grand juries.[38]

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 each 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."[39] However, the statute 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

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Lessig & Cass 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); Harold Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989) (noting the decentralized system of district attorneys and the role of private citizens and state officials prosecuting crimes); see also Gerhard Casper, *The American Constitutional Tradition of Shared and Separated Powers: An Essay in Separation of Powers*, 30 WM. & MARY L. REV. 211 (1989); William Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts,* 57 GEO. WASH. L. REV. 474 (1989). William Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts,* 57 GEO. WASH. L. REV. 474 (1989); see also Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of the U.S. Attorneys*, 86 MINN. L. REV. 363 (2001) (arguing that the statute empowering district court to appoint interim U.S. Attorneys, and tracing the history of independent government lawyers).

[35] JERRY MASHAW, THE CREATION OF THE ADMINISTRATIVE CONSTITUTION (2012).

[36] JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 68, 83; see also 99, 138-39 (2012).

[37] MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 93, 101.

[38] Dangel, *Is Prosecution a Core Executive Function?,* 99 YALE L.J. 1069, 1087 (1990) (citing FRANKEL & NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 12-13 (1977); MORRIS, ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION 491 (1957).

[39] Judiciary Act of 1789, Sec. 35.

Scalia has concluded.[40] A significant amount of the prosecutions were by private parties in this era.[41] In the colonial era, county prosecutors were selected by judges or nominated by judges. [42] In the Founding era, state constitutions often placed attorneys general and prosecutors under the judiciary article of their constitutions.[43] This practice continued into the early republic.[44] Some of the state constitutions assigned the power of appointment to the legislature with no role for the governor,[45] and some assigned selection to the judges.[46]

The Constitution did not specify the President's removal power, but the First Congress adopted this practice (known as "the Decision of 1789"). The office of Attorney General was created by the Judiciary Act of 1789, and the first draft of the Act gave the Supreme Court the power to appoint the Attorney General and gave district judges the power to appoint district attorneys.[47] 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.[48] District attorneys had not been designated "principal" officers by the Constitution nor the first Congress, but the statute set the same process for hiring and firing: Senate confirmation, Presidential removal at will.[49] 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 U.S. Supreme Court.[50] But there were also signs that Congress envisioned having power over the Attorney General, too.[51]

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[40] Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

[41] ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE (1989); Allen Steinberg, *The Spirit of Litigation': Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 20 JOURNAL OF SOCIAL HISTORY 235 (1986); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth Century United States,* 39 AM. J. LEG. HISTORY 43 (1995); Michael T. McCormack, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 SUFFOLK UNIVERSITY L. REV. 501 (2004). 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 empaneling a jury corresponded to a fee schedule; the complaining witness paid the District Attorney for services rendered." Carolyn Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIMINAL L. REV. 1309 (2001).

[42] JOAN JACOBY, THE AMERICAN PROSECUTOR: SEARCH FOR IDENTITY.

[43] Delaware, Georgia, New Jersey, North Carolina. Maryland's constitution did not have specific articles grouped the prosecutors with the judges.

[44] Tennessee, Ohio, Louisiana, Indiana Illinois, Michigan.

[45] New Hampshire, Virginia, North Carolina, New York, Tennessee

[46] Georgia, Connecticut, Virginia

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

[48] Judiciary Act of 1789, ch. 20, 27; Krent, *supra*, at 286.

[49] JULIUS GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, at 490; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923).

[50] Lessig and Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). Langeluttig, "The Department of Justice of the United States," 2.

[51] 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.

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 – no assistants and no clerks.[52] Congress set his salary significantly lower than the other cabinet members, and the office's salary was brought up to par only after 1853.[53] The first Attorney General, Edmund Randolph, had to find private legal work on the side: "I am a sort of a mongrel between the State and the U.S.; called an officer of some rank under the latter, and yet thrust out to get livelihood in the former – perhaps in a petty mayor's or county court… Could I have foreseen it, would have kept me at home to encounter pecuniary difficulties there, rather than add to them here."[54] Until 1854, each Attorney General maintained a substantial private practice, and many did not even live in Washington at all. Until 1819, the Attorney General did not even have his own office or a clerk.[55] 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 should give the Attorney General supervision of district attorneys. President Washington submitted his proposal favorably to the House of Representatives, but it went no further.[56]

In the very beginning, the State Department oversaw the selection and appointment of district attorneys, and the Attorney General played no role in this process.[57] In 1797, Congress gave the Comptroller significant prosecutorial authority over district attorneys in directing suits over revenue and debts.[58] In practice, district attorneys were not really supervised at all. Active supervision was impossible over such long distances, with such limited transportation and communication.[59] 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 of the Treasury, 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).[60] Congress did not adopt a fixed salary for

[52] Albert George Langeluttig, "The Department of Justice of the United States," 2.
[53] Act of March 3, 1853, ch. 97, sec. 4; 10 Stat. L. 212.
[54] NANCY BAKER, CONFLICTING LOYALTIES 51 (quoting letter from Randolph, 1790).
[55] BAKER, 56.
[56] 2 ANNALS OF CONGRESS, p. 53, 289, 329 (1789); LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY, 167-68, 408 (1948).
[57] DANIEL MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 6 (1980); 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, 567.
[58] Act of March 3, 1797, ch. 20, § 1 and 3; 1 Stat. L. 312; Langeluttig, at 4.
[59] Lessig & Sunstein, at 70.
[60] Nicholas Parrillo, *Against the Profit Motive* (Chapter 7: Criminal Prosecution: Cash for Convictions), (forthcoming 2013).

district attorneys until 1896.[61] In the early nineteenth century, federal district attorneys had few cases, so they had to focus chiefly on their private practice.[62]

In 1820, Congress switched the control of district attorneys from the Comptroller to a new office, the Agent of the Treasury.[63] 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.[64] The Attorney General issued an opinion in 1831 that the President had the power to direct district attorneys to discontinue cases.[65] In practice, the President did not exercise this power, and the Attorney General did not have that power at all. From 1797 through 1870, Treasury 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 they played a more significant role in collecting revenue.[66] The Attorney General's office even moved into the Treasury Department 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.[67]

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. Wirt wrote, "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 judician, 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."[68] This tradition continued for a while, but eroded in light of Attorney General Roger Taney's association with Andrew Jackson.[69] Jackson had clashed with some members of his cabinet early on, and then required more allegiance from his appointees thereafter. It eroded further during the Civil War, when Lincoln's

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[61] *Id*. Parrillo finds that the move from fee to salary was intended to encourage prosecutorial discretion, and in fact, it did: there was "a sudden drop of 42% between fiscal 1895-96 and fiscal 1896-97. This is by far the largest single fluctuation, up or down, in the whole period. It coincides perfectly with salarization."
[62] CUMMINGS & MCFARLAND, FEDERAL JUSTICE.
[63] Act of May 15, 1820, ch. 107, § 1; 3 Stat. L. 592.
[64] LEONARD WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829, at 340 (1951), EASBY-SMITH, DEPARTMENT OF JUSTICE; ITS HISTORY AND FUNCTIONS 11 (1904).
[65] *The Jewels of the Princess of Orange*, 2 U.S. Opinions Atty. Gen. 482 (1831).
[66] Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 75 (1983).
[67] Nicholas Parrillo finds that there were far fewer federal prosecutions per capita in the early republic than after the Civil War. *Against the Profit Motive*, ch. 7, p. 31-32 (manuscript on file with the author).
[68] CUMMINGS & MCFARLAND, 90 (Wirt to Calhoun, Feb. 3, 1820).
[69] CUMMINGS & MCFARLAND, 84-119.

attorney general Edward Bates appeared to be working to justify the administration's war-time policies, rather than serving independently and impartially.

There were also a few calls for creating a law department under the attorney general as the government lawyers' workload increased. Each department had its own lawyers, and coordinating legal efforts had become a problem. In 1830, Jackson called for placing all the law officers in the executive branch under the supervision of the attorney general, but Congress rejected the idea.[70] 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.[71] In 1849, Congress established the Interior Department, a new catch-all department that loosely supervised the district attorneys, but one of the first Secretaries of the Interior resented this responsibility. That secretary, Alexander H.H. Stuart, called for a "Department of Justice," and a new bill with even more support was introduced, yet it also died.[72] Momentum was building for restructuring, but every effort triggered stronger and stronger opposition.

Caleb Cushing, President Pierce's Attorney General, made a public call for a new law department in 1854. Cushing was regarded as having helped professionalize the Attorney General's office by being the first to cease his private practice. 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."[73] 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, Cushing also had endorsed accountability to the President:

> Ultimate discretion, when the law does not speak, must reside, as to all executive matters, with the President, who has the power to appoint and remove, and whose duty it is to take care that the laws be faithfully executed. [This theory] requires unity of executive action, and, of course, unity of executive decision; which, by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons wholly independent of one another, without corporate conjunction, and released from subjection to one determining will.[74]

Cushing reflected an internally divided view about his own office – and also foreshadowed the tensions between independence and accountability of the future law department. Regardless of Cushing's framing, Congress rejected the proposed department in 1854.

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[70] President's Annual Message of Dec. 6, 1830, 2 RICHARDSON 527-28; Sen. Doc. I., No. 1, 21st Cong., 2d Sess., 28; *see also* CUMMINGS & MCFARLAND, 147.
[71] CUMMINGS & MCFARLAND, 148.
[72] Id., 149-50.
[73] Caleb Cushing, A Report of the Attorney General, Suggesting Modifications in the Manner of Conducting the Legal Business of the Government, H.R. Exec. Doc. No. 33-95, at 6 (1854).
[74] Caleb Cushing, A Report of the Attorney General, Suggesting Modifications in the Manner of Conducting the Legal Business of the Government, H.R. Exec. Doc. No. 33-95, at 11-12 (1854).

Whereas there was a stalemate in peacetime, the Civil War created openings and demand for changes. A few months after Fort Sumter, the first change was Congress granting the Attorney General supervision over district attorneys.[75] Four days later, Congress passed a second statute stating that the district attorneys were still under the command of the Treasury Department, too.[76] Thus, the district attorneys had to report to three different supervisors in three different departments: the Solicitor of the Treasury, the Interior Department, and the Attorney General. The same statutes also allowed district attorneys and other departments to hire outside counsel, as Congress grasped that the war would spike the amount of government litigation. Meanwhile, the Confederate government created its own Department of Justice by statute in 1861, with the Attorney General as the head. One of the primary purposes of the Confederates' Department of Justice was to defend the CSA from suits in U.S. courts.[77]

Even after the 1861 statute gave the Attorney General more supervisory power, the 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 or the Treasury Department. The Secretary of the Interior retained control of the attorneys' accounts and the appointments of the district attorney's deputies, substitutes, and other lesser offices. The heads of other departments still gave directions to the district attorneys, as well, and those departments continued to have their own law offices and to hire their own special counsel.

The war had created a deluge of legal cases and controversies for each department, and the conflicts between departments and offices multiplied.[78] By the end of the war, the federal courts' dockets had a backlog of war-related cases (treason, confiscation, revenue cases) on top of their usual business. 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.

II. Department of Justice Bill

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

[75] Act of August 2, 1861, ch. 37; 12 Stat. L. 285.
[76] Act of August 6, 1861, ch. 65; 12 Stat. L. 327.
[77] WILLIAM ROBINSON, JUSTICE IN GREY
[78] CUMMINGS & MCFARLAND 218-20.

The Civil War and Reconstruction had produced a flood of government litigation (civil as well as criminal), mostly unrelated to civil rights cases.[79] The war's upheaval and the government's interventions created a huge amount of captured and abandoned property disputes, customs cases, and revenue cases.[80] 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 those taxes.[81] The legal system was overloaded, and the federal government relied heavily on outside counsel on a fee basis.

Congress's first solution to the war-time 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.[82] Then, in 1866, Congress created new law officers in several departments (within the War Department, the State Department, and the Treasury Department). But again, members of Congress recognized that multiplying 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." Congress gave the State Department a new solicitor's office anyway, but the Judiciary Committee began a study of the problem. Then the task was referred to his Joint Committee on Retrenchment, a joint Senate-House committee charged with reducing government waste and inefficiency.

Congressman Thomas Jenckes, a member of the Retrenchment Committee, introduced a bill to establish a "department of justice." Because Jenckes is the main protagonist in both the DOJ story and the civil service story, some background about Jenckes and the civil service movement is necessary. Before Jenckes became involved in the DOJ bill, 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."[83] Civil service was meant to make administration less partisan, more professional, and more efficient. 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

[79] 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 1870 and 1871, and these cases were high profile and work intensive. KACZOROWSKI, POLITICS OF JUDICIAL INTERPRETATION.
[80] CONG. GLOBE, 41st Cong., 2d Sess., 3035 (April 27, 1870) (Jenckes).
[81] Nicholas Parrillo, *Against the Profit Motive* (book manuscript on file with author, forthcoming 2013) (Chapter 7: Criminal Prosecution).
[82] 12 Stat. 285 (1861). The 1896 statute regarding AUSA's refers to the Revised Statutes of 1875, section 363, which refers to the 1861 law (12 Stat. 285). The DOJ bill's authors explained repeatedly that they were creating no new legal positions, and the 1870 bill (Section 17) refers to "assistant district attorneys," more evidence that the office had been created in 1861.
[83] STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 47 (1982) (citing Max Weber, "Bureaucracy," MAX WEBER: ESSAYS IN SOCIOLOGY, 196-244).

Retrenchment drafted and oversaw the DOJ bill and the civil service bills at the same time. This was a remarkable opportunity for reform, reorganization, and experimentation. Republican reformers regularly charged that political patronage had benefited the South and their Northern sympathizers-enablers, so there was additional political opportunity for reform.

Jenckes came from an established New England family and was well educated in math, science, and literature.[84] 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 apportioned the state to retain power.[85] Jenckes was one of many reformist Republicans who grew alienated by Grant and his supporters blocking reform, engaging in partisan patronage, and tolerating corruption. Starting in 1870, reformers grew disillusioned with Grant, started leaving his administration and opposing his agenda in Congress.[86] Many of these "best men" reformers had abandoned Reconstruction by 1868, and shifted their focus to reform and business growth.[87] They aimed to create "an independent party composed exclusively of good men," in the words of Henry Cabot Lodge in 1874.[88] In the 1872 election, they bolted to form the "Liberal Republican" Party, combining with Democrats to support reformer Horace Greeley against Grant. Jenckes aligned himself with the Republicans who would soon form the Liberal Republicans and "Half-Breeds" who opposed the pro-patronage "Stalwart" Republicans. In the 1880s, 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.[89]

Liberal Republicans did not care as much about black civil rights as Radicals, and in fact, some Liberal Republicans believed that black civil rights were a distraction and a waste of resources. In Congress, Jenckes did support stronger wording for the Fifteenth Amendment's guarantee of voting rights,[90] but there is not much other evidence that Thomas Jenckes cared about the enforcement of black civil rights. After he died, a dozen friends and allies put together a memoriam to highlight his accomplishments. In these memorials, his friends noted his reputation for being "cold and unsocial," or "cold and frigid."[91] But they repeatedly praised his deep commitment to the legal profession and

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[84] *Providence Journal*, Nov. 5, 1875, IN MEMORIAM: THOMAS JENCKES (1875); Ari Hoogenboom, *Thomas A. Jenckes and Civil Service Reform*, 47 MISSISSIPPI VALLEY HISTORICAL REVIEW 636 (1961). Hoogenboom's article was extremely helpful for introducing me to Jenckes and his papers. Hoogenboom focused on Jenckes's civil service efforts, without identifying his work on the DOJ bill.

[85] PROVIDENCE JOURNAL, Nov. 5, 1875, IN MEMORIAM, p. 6. It was the Dorr War that produced the litigation on the Constitution's "republican form of government" clause and the Supreme Court decision *Luther v. Borden* in 1849, giving a narrow interpretation of the clause. 48 U.S. 1 (1849).

[86] ROSS, THE LIBERAL REPUBLICAN MOVEMENT; McFeeley, Grant; Smith, Grant.

[87] SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE, 11-44.

[88] NELSON, RISE, 89; SPROAT, 53 (citing Henry Cabot Lodge papers).

[89] SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE 11-44(1968); ROSS, THE LIBERAL REPUBLICAN MOVEMENT; NELSON, ROOTS OF AMERICAN BUREAUCRACY, p. 89, 158-59. ARI HOOGENBOOM, OUTLAWING THE SPOILS; VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE (1958); FOULKE, FIGHTING THE SPOILSMEN (1919).

[90] Congressional Globe, 40th Cong., 3d Sess. 728 (1869).

[91] "Resolutions of the Providence County Bar," IN MEMORIAM: THOMAS JENCKES 22 (1875); *see also id*. at 29,

patent law.[92] Friends described him as having "left a name among the great lawyers of the country."[93] As a young 23-year-old lawyer, he caught the attention of Justice Story with a particularly impressive oral argument.[94] Newspapers praised his efforts to craft a compromise on bankruptcy reform, a project of modernizing the law.[95] A judge on the Rhode Island Supreme Court wrote, "No man among us more thoroughly loved the profession of the law for its own sake than he…. [Jenckes] did not prostitute his profession for its baser rewards. He cared more for the triumph than the spoils of the victory."[96] 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 Jenckes's legal skills, but noted, "Mr. Jenckes was more than a lawyer. He had the capacities and the aspirations of a statesman and a legislator."[97] But not one memorial or newspaper discussed Jenckes's views on ex-slaves or civil rights.[98] His letters and other writings say little of these matters. When 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.[99]

Jenckes's Retrenchment Committee shared the same perspective. The DOJ bill was produced by the Joint Committee on Retrenchment, which lacked any members who cared deeply about black civil rights. Its chairman, Sen. James W. Patterson, offered the bill in the Senate, and his remarks also focused only on efficiency and uniformity. Leonard White, a leading historian on American administrative history, observed that Patterson and his committee focused only on cutting budgets, abolishing offices, and eliminating fraud and waste.[100] Their DOJ bill certainly cut back on the law enforcement by eliminating hundreds of thousands of dollars on outside counsel, without permanent replacements. The DOJ bill created only one new office, the Solicitor General. The committee included four Senators and seven Congressmen (including Jenckes).[101] Only

[92] Id. at 33-34, 49-51
[93] *Providence Journal*, Nov. 5, 1875, IN MEMORIAM, 6
[94] *Providence Journal*, Nov. 5, 1875, IN MEMORIAM, p. 4-5.
[95] Id. at 12.
[96] Id. at 34 (Hon. B.F. Thurston).
[97] Proceedings in the Supreme Court of Rhode Island, Nov. 20, 1875, in id. at 50 (Remarks of Chief Justice Durfee).
[98] IN MEMORIAM: THOMAS JENCKES (1875)
[99] CONG. GLOBE, 39th Congress, 2d Sess., 837-41 (1867).
[100] LEONARD D. WHITE, REPUBLICAN ERA, 1869-1901, at 85-86.
[101] In addition to Jenckes, the Senators were George Edmunds (Republican from Vermont); George Williams (Republican from Oregon), James Patterson (Republican from New Hampshire); Charles Rollin Buckalew (Democrat of Pennsylvania); and the Congressmen were Charles Henry Van Wyck (Republican from New York); Samuel J. Randall (Democrat from Pennsylvania), Martin R. Welker (Republican from Ohio), George Armstrong Halsey (Republican from New Jersey), John Forbes Benjamin (Republican of Missouri), and Jacob Benton (Republican from New Hampshire). Edmunds was well known as a "Half-Breed," opposed to the Stalwarts who had supported Reconstruction. Richard E. Welch, Jr., "George Edmunds of Vermont: Republican Half-Breed," 36 VERMONT HISTORY 64 (1968). Patterson apparently had no interests aside from budgetary issues (and apparently benefiting his own personal budget). LEONARD D. WHITE, REPUBLICAN ERA, 1869-1901, at 85-86. Buckalew and Randall were conservative Democrats opposed to Reconstruction. William W. Hummel, "Charles R. Buckalew: Democratic Statesman in a Republican Era," (PhD diss., U. of Pittsburgh, 1964); House, "The Political Career of Samuel J. Randall,"

one, Senator George Williams, Republican from Oregon, had any significant record promoting Reconstruction in the 1860s, but his record on race was mixed, at best. At Oregon's constitutional convention in 1857, Williams was anti-slavery, but he also supported exclusion of blacks and Chinese from the territory.[102] 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."[103] He also voted with Democrats and against Republicans to expedite Virginia's readmission into the Union.[104] Williams would replace Amos Akerman as Attorney General under Grant, and he had been chosen more for his political role in Grant's re-election campaign. Williams would lead the DOJ's retreat from civil rights prosecutions in 1872-73. The leading historian on this episode concluded that 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.[105] Another congressman on the committee, Charles Van Wyck, was a general in the war and a Radical in Congress, but he focused primarily on anti-corruption and fiscal issues in Congress.[106] The leading historian on the "best men" called Vermont Senator George Edmunds, another committee member and a former chairman of the committee, a cranky "champion of the Republican reformers."[107] Historians have described him as a leading "Half-Breed," opposed to "party spoilsmen."[108] He supported civil rights legislation in the 1870s, but he was also fiercely centrist, and was most noted for battles with the Stalwarts.[109] He later engineered the Compromise of 1877, creating the bipartisan electoral commission that gave the presidency to Rutherford Hayes, but also formally ended Reconstruction.[110] The committee was full of centrists, fiscal conservatives, and future Half-Breeds, but it is hard to find anyone on the committee who cared nearly as much about civil rights.

Early in 1868, Jenckes's Joint Select Retrenchment Committee 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.[111] However, the battle between Andrew Johnson and Congress pushed all other legislative efforts aside. In the fall of 1866, Johnson had just campaigned against the Congressional

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8-12 (PhD diss., U. of Wisconsin, 1937). 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. Nebraska History Journal.

[102] Oscar C. Christensen, *The Grand Old Man of Oregon: The Life of George H. Williams*, 11 (U. of Oregon Thesis Series, 1937) (citing Oregon Statesman, Sept. 22, 1857)

[103] Id. at 26-27.

[104] Id. at 27.

[105] Kaczorowski, 68, 80-82.

[106] Marie U. Harmer & Peter L. Sellers, *Charles H. Van Wyck: Soldier and Statesman, Part II*, 12 NEBRASKA HISTORY MAGAZINE 194, 203 (1929)

[107] Sproat, "The Best Men," 132.

[108] Richard E. Welch, Jr., "George Edmunds of Vermont: Republican Half-Breed," 36 VERMONT HISTORY 64 (1968).

[109] Selig Adler, "The Senatorial Career of George Franklin Edmunds, 1866-1891."

[110] Norbert Kuntz, "Edmunds' Contrivance: Senator George Edmunds of Vermont and the Electoral Compromise of 1877," 38 VERMONT HISTORY 305 (1970).

[111] CUMMINGS & MCFARLAND, FEDERAL JUSTICE, 222-23

Republicans in a vicious string of speeches known as the "Swing around the Circle." Johnson began purging Republicans and using offices for his own patronage purposes. He was also interfering with War Secretary Edwin Stanton at this time, and he was undermining the Freedman's Bureau and its attempts to enforce ex-slaves' civil rights.[112] When U.S. attorneys stepped up their efforts to enforce civil rights laws in Kentucky, Johnson and his Attorney General Henry Stanbery cut them off, too.[113] In March 1867, Congress overrode a veto to pass the Tenure of Office Act, shielding 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 Lincoln's cabinet through February 1869).[114] The 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.[115]

The Tenure of Office Act demonstrated that the Congressional Republicans did not see themselves as bound by the historical precedent from the First Congress. They overrode the statutes that had given the President discretion to fire principal officers.[116] 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.[117] They cited Hamilton's *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 Chancellor Kent calling Congress's decision in 1789 as an "extraordinary" case of allowing "a bare majority" of Congress to confer a constitutionalized power, and calling that decision merely "loose, incidental, and declaratory."[118] 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. 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.[119] 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

[112] ROBERT KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION, 30-31, 49.
[113] Id. at 53.
[114] Tenure of Office Act, 14 Stat. 430, Section 1 (March 2, 1867).
[115] Id. at Section 2.
[116] Myers v. U.S. (1926).
[117] CONG. GLOBE, 39th Cong., 2d Sess., 18 (Dec. 5, 1866) (Williams).
[118] Id. at 19.
[119] H.R. 673, Section 2, 39th Cong., 1st Sess. (June 13, 1866); H.R. 889, 39th Cong., 2d Sess. (Dec. 13, 1866); H.R. 113, Section 2, 40th Cong., 1st Sess., (July 8, 1867)

consumed the rest 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.[120]

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. Several Congressmen made principled arguments for the repeal and returning back explicitly to "the decision of 1789." But in a sign of the underlying motivation for the repeal, the fight was led by Benjamin Butler, a Radical who had a reputation for protecting party patronage.[121] 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.[122] Among the small number of voters to retain the Act were Jenckes and a handful of civil service reformers.[123] 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."[124] In defending the Tenure of Office Act, they asked, "[I]s it not desirable that the executive patronage should be rather diminished than increased?"[125]

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. These reformers believed retrenchment and efficiency depended upon slowing down nineteenth-century patronage machines and their reliance on "rotation of office," even if it made it more difficult to fire incompetent appointees. Reformers believed the Tenure of Office Act would check executive discretion, slow down the distribution of patronage, and protect competent appointees from partisan firings.

In 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 a reason?"[126] The Senate, however, was not interested in

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[120] The lame duck session after the presidential election got bogged down in a budget dispute. The House Judiciary Committee's 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. NEW YORK TRIBUNE, Dec. 12, 1868.

[121] Hoogenboom, 58.

[122] *Cong. Globe*, 40th Cong., p. 40, (March 10, 1869).

[123] Hoogenboom, 58.

[124] *The Congress. Globe*, 42nd Cong., 2nd Sess, 3411 (Holman). 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 Logan: "It [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.

[125] *Cong. Globe*, 42nd Cong., 2nd Sess, 3411.

[126] RICHARDSON, MESSAGES AND PAPERS FROM THE PRESIDENT, IX, 3992.

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 emergency known in our jurisprudence."[127]

Playing hardball, Grant announced that if the Senate would not repeal the law, he would leave all of Johnson's appointees in office, and he would only nominate candidates for vacancies that happened to arise due to death or resignation. Grant knew that the Senators would be deterred once they realized that Grant was serious about keeping the hold-overs from the hated Johnson administration, and that there would be no new spoils for the Republican party.[128] 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 for Senate concurrence on dismissals for any officer who had been confirmed by the Senate earlier.[129] 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 hold-over officers. Grant and the Senate understood that the Tenure of Office Act was a significant political tool, and the revised Act would become controversial again, especially in the 1880s.[130] The significance of this Act in the DOJ's story is that it meant that 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 Bill, 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."[131] More recent articles by Norman Spaulding suggested that Congress established the DOJ to enforce Reconstruction and civil rights.[132]

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[127] CONG. GLOBE, 40th Cong., 3d Sess., 1415 (Conkling).
[128] JEAN EDWARD SMITH, GRANT 479.
[129] 16 Stat. 6 (1869).
[130] A next article, "The Unexpected Origins of the American Administrative State," 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 since before the Civil War. The Senate's power under the revised statute was significant at other moments, as well.
[131] Langeluttig 10-11, CUMMINGS AND MCFARLAND, 220.
[132] Norman Spaulding, *Professional Independence*, 60 STAN. L. REV. at 1959-60 (2008); Norman Spaulding, *Independence and Experimentalism*, 63 STAN. L. REV. 409, 438 (2011). Spaulding had just noted that, among other factors increasing the federal government's legal work, Congress had passed the Reconstruction Amendments, civil rights laws, and enforcing legislation, creating "a dynamic new relationship between the states and the national government in order to protect the rights of newly freed blacks in the South - a relationship that highlighted the importance of coordination to ensure consistent enforcement efforts by district attorneys in Southern states." Spaulding, *Professional Independence*, 60

Spaulding then presented an intriguing puzzle: why would a Republican Congress create a centralized law department more accountable to the President and Attorney General immediately after President Andrew Johnson and Attorney General Henry Stanbery had just created arguably the greatest constitutional crisis over executive power? Spaulding noted that Congress's centralized plan was "to say the least, somewhat surprising…. If ever the conduct of an Attorney General should have provoked Congress to check the influence of political accountability to the President and incorporate structural guarantees of independence, one would have expected this of the Reconstruction congresses."[133] Spaulding wrote that this perplexing decision in 1870 was the foundation for centralized control over the Department of Justice: "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."[134] Spaulding wondered why, given "the centralization of control over the legal work of the executive branch in the office of the Attorney General, no major structural reforms were established to protect the independence of the office and prevent the embarrassment of law by politics…"[135] To the

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STAN. L. REV. at 1959-60. Spaulding explained that the DOJ was created in 1870 "not only from the heat of the Civil War, with all the complexities thereby implicated in the intersection of law and executive action in a time of war, but from new demands placed on federal law enforcement by the political and legal work of Reconstruction." Spaulding, 60 STAN. L. REV. at 1937. See also Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1297, 1300-05 (2000) (describing the creation of the Solicitor General's office in the Department of Justice Act of 1870 a "child" of the Civil War, and a "sibling" or "twin" of the Reconstruction Amendments; "[A] 'civil rights champion' … is precisely what Congress and the President wanted. They wanted the Civil War Amendments and the legislation implementing those Amendments enforced, particularly in the South; and they wanted an expansive interpretation of these laws defended in the courts, particularly in the Supreme Court. That, as I see it, is how the civil rights mandate of the Solicitor General was set in train."). In some histories, a link could be inferred from the narrative, and there is no clarification to disclaim a link. HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 188-217 (1937); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS 1866-1876 (1982).

[133] Spaulding, *Professional Independence,* 60 STAN. L. REV. 1931, 1959-60 (2008).

[134] Spaulding, *Independence and Experimentalism*, 63 STAN. L. REV. 409, 438 (2011). See also Spaulding, *Professional Independence*, at 1957 ("One of the most striking facts about the endorsement of centralized bureaucratic control over federal legal work in the creation of the Department of Justice in 1870 is how little was done to adjust the role of presidential political influence and accountability. Indeed, to a certain extent, centralized control diminished independence from the President by rendering the lines of political accountability more direct.").

[135] Spaulding at 1937. Part of Spaulding's answer was that the Fourteenth Amendment had already been ratified, and Republicans in Congress had trusted President Grant and his Attorney General Amos Akerman, "a 'vigorous' supporter of the Republican cause." Spaulding, at 1964-64. First, in terms of Akerman: Akerman 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 bill had passed through the House and was just a couple of weeks away from 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. Akerman was nominated for the office only after a surprise resignation by the previous Attorney General, long after the bill had passed through the House. On June 17, 1870, the *New York Times* headline announced that Akerman's nomination was a "universal surprise." "Talk at the Capitol About the Resignation of Mr. Hoar; Amos Akerman, of Georgia, Appointed as His Successor; Universal Surprise at the Choice," N.*Y. Times,* June 17, 1870. Second, the Department of Justice statute did not give President Grant any new powers over law officers; it primarily gave new authority to Attorney General Hoar, who

contrary, I suggest that the drafters of the DOJ bill 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 that the pre-existing 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 bill weakened the federal government's ability to enforce the new federal taxes on income, liquor, and tobacco. The "efficiency" of the DOJ bill was more of an anti-waste, anti-patronage, down-sizing reform. The DOJ bill 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 no 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 Retrenchment Committee members 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 of the bill 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, the authors of the DOJ bill were adamant that the new department would not cover military lawyers and would not have

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was known to be independent from 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. In fact, the revised statute blocked his removal power, except with respect to the Attorney General. He otherwise notes the impeachment of Johnson and the election of Grant as further evidence of the rejection of the unitary executive. It is unclear why Grant's election reflects a view on the unitary executive. After that single paragraph, Spaulding relies predominantly (almost three pages) on an 1854 letter from Attorney General Caleb Cushing to show that the concept of the unitary executive was marginal. However, a letter from 1854 is not persuasive evidence of the mentality in 1870; a letter from a pro-slavery Democrat is not necessarily reflective of the views of Reconstruction Republicans; and a letter from the Attorney General is not necessarily representative of Congress's perspective. Moreover, this particular letter has many passages that explicitly embrace the unitary executive theory. Caleb Cushing, A Report of the Attorney General, Suggesting Modifications in the Manner of Conducting the Legal Business of the Government, H.R. Exec. Doc. No. 33-95, at 11-12 (1854).

jurisdiction over military questions at a time when the military continued to play a significant role in the South.[136]

One assumption in these earlier accounts has been that a new law department was designed to strengthen Grant's power. The first problem with this explanation is that the reformist Republicans who drafted and backed the bill had grown skeptical of Grant, as Grant was favoring the Radicals and was not fulfilling any of the reformers' hopes that he would limit patronage in his administration.[137] But even if Republicans trusted Grant, the DOJ bill 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 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 bill's authors believed that one centralized department would unify, strengthen, and protect those lawyers.

The Congressmen who crafted the DOJ bill framed centralization as a way to promote independence, professionalism, and legal checks within the executive branch. It was not designed to "cement" the President's authority to control the government's legal work.[138] Before the DOJ was created, department heads controlled the law officers and hired their own outside counsel. Contemporary accounts focused in particular on the spoils in the Treasury Department, which had primary supervision over the district attorneys for decades. 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. Centralizing the law officers under the Attorney General meant more independence, not less, in the context of 1870.

In 1869, Congress passed a new Judiciary Act, also known as the Circuit Judges Act, which created the federal circuit judges.[139] The Circuit Courts existed before, but they did not have their own judges; the Supreme Court Justices rode circuit, sitting with district court judges. This move was both an expansion of the federal judiciary, and also an entrenchment of Republican appointees. In the same year, Congress also passed a bill that reaffirmed that district attorneys could hire outside counsel to work with them and the assistant district attorneys.[140] Presumably these outside counsel would have been very helpful in enforcing civil rights laws. But Jenckes's 1869 bill proposed to bar this

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[136] Military Reconstruction was over by the end of 1870, but the military still had a role in the South. 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 role over military lawyers.

[137] ROSS, THE LIBERAL REPUBLICAN MOVEMENT, 6-7; SPROAT, THE BEST MEN.

[138] Norman Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 438 (2011). See also id. at 1957 ("One of the most striking facts about the endorsement of centralized bureaucratic control over federal legal work in the creation of the Department of Justice in 1870 is *how little was done to adjust the role of presidential political influence and accountability*. Indeed, to a certain extent, centralized control diminished independence from the President by rendering the lines of political accountability more direct.") (emphasis added).

[139] 16 Stat. 44(1869).

[140] 12 Stat. 285 (1869), reinstating a statute from Aug. 2, 1861, Section 2.

practice, so Jenckes was running against the grain of Congress at that moment. However, his bill stalled not because Radicals flagged this problem, but rather, because the legislative agenda was full in 1869.[141]

At the same time, Congressman William Lawrence of Ohio was working on a similar law department bill in the Judiciary Committee. Lawrence had a much stronger track record for supporting civil rights and voting rights, including his role in drafting parts of the Fourteenth and Fifteenth Amendments. Yet he also focused on cutting spending, reducing debt, and lowering taxes. Lawrence proposed nine separate bills in the 41st Congress that had fiscally conservative goals while he was working with Jenckes on the DOJ bill.[142] Moreover, one of Lawrence's primary arguments for his DOJ bill was that it would reduce spending, not only by eliminating outside counsel, but also by eliminating several full-time salaried offices.[143] It is worth noting that at the same time, Thomas Jenckes was making an argument for civil service that had a striking parallel to the DOJ bill. Jenckes predicted that, with the passage of civil service, "the number of offices may be diminished by one-third, and the efficiency of the whole force of the civil service increased by one-half, with a corresponding reduction in salaries for discontinued offices."[144] Jenckes's Department of Justice bill also cut approximately one-third of federal legal personnel.

In 1870, Jenckes reported a new bill for a "department of justice" from the Retrenchment Committee 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 bill created a new office, "the solicitor general of the United States," 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."[145] The Attorney General would be empowered to make rules and regulations for the new department. The bill set the salaries of the high-ranking officials, continuing the shift away from fees. The final law set the solicitor general's salary at almost the same level as the attorney general, and gave significant raises to the assistant attorneys general and the solicitor of internal revenue.[146] But it is easy to overlook arguably the most dramatic and immediately significant change: the bill would prohibit the use of outside counsel, both within the Department of Justice and in other departments.[147]

The discussion of the bill emphasized efficiency, budgetary savings, and reorganization – the classic themes of "retrenchment." 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

[141] H.R. No. 371, 41st Cong. 1st Sess. (Jenckes); H.R. No. 379, 41st Cong., 1st Sess., (Lawrence).
[142] H.R. No. 239, H.R. No. 286, 41st Cong., 1st Sess.; H.R. No. 1312; H.R. No. 1346; H.R. 1566; H.R. No. 2131; H.R. No. 2132, 41st Cong., 2d Sess.; H.R. No. 2995; H.R. No. 2892, 41st Cong., 3d Sess.
[143] Cong. Globe, 40th Cong., 2d Sess., 1272 (Lawrence).
[144] CONG. GLOBE, 39th Congress, 2d Sess., 837-41 (1867).
[145] An Act to Establish the Department of Justice, 41st Cong. Ch. 150, Section 2; 16 Stat. 162 (1870).
[146] An Act to Establish the Department of Justice, 41st Cong. Ch. 150, Section 10; 16 Stat. 162 (1870).
[147] CONG. GLOBE, 41st Cong, 2d Sess., April, 26, 1870, p. 2995; CONG. GLOBE, 41st Cong, 2d Sess., Appendix, p. 668, 41st Cong. Ch. 150, Section 17; 16 Stat. 162 (1870)

General's Office, the office of the solicitor of the Treasury, and the Department of the Interior."[148] Jenckes recounted that the district attorneys had been practically unsupervised since the Founding and that law officers had proliferated in each department and issued conflicting or redundant opinions.

Jenckes turned to the questions of professional independence and legal restraints within the executive branch, too. 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. 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.[149] Rep. Horace Maynard, a Tennessee Unionist Republican, 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 [Congressman 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 a law for it."[150] Maynard was 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!"). Maynard was a strongly pro-Union 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.[151]

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. 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." 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 officers of the government until it is reversed by some competent court."[152] Jenckes's conception of the Attorney General's independent authority echoed the earlier attorney general, Caleb Cushing, who described the office in 1854 as "quasi-judicial."[153]

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[148] CONG. GLOBE, 41st Cong., 2d Sess., 3036 (April 27, 1870).
[149] Id. at 3036 (Jenckes).
[150] Id. (Rep. Maynard).
[151] OLIVER P. TEMPLE, NOTABLE MEN OF TENNESSEE, FROM 1833 TO 1875, at 137-149 (1912).
[152] CONG. GLOBE, 41st Cong., 2d. Sess., 3036 (April 27, 1870).
[153] Caleb Cushing, A Report of the Attorney General, Suggesting Modifications in the Manner of Conducting the Legal Business of the Government, H.R. Exec. Doc. No. 33-95, at 6 (1854). This discussion resonates with the contemporary debate over internal separation of powers within the executive branch. See ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 139-40 (2010); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

Jenckes conceded that even under his bill, "[i]t 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…"[154] Jenckes offered an image of the current arrangement: department heads and the President using the decentralized solicitors in the departments as legal "shelter." The new bill 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 inferior officers of the Government."[155] 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 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 Jenckes was suggesting that, as long as the Attorney General was still in office, the Attorney General had independent legal authority.

Jenckes also emphasized that the federal government's "law business… greatly outgrew the capacity" of the law officers, requiring the federal government so many "outside counsel" attorneys that they outnumbered the federal government's commissioned law officers.[156] Jenckes and his fellow committee members presented figures to show how expensive outside counsels' fees were (over $800,000 over the previous five years), 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 much law personnel. More likely, the reformers were troubled by the case-by-case fee system relative to full-time commissions with salaries and by the cronyism of their hiring. Cutting off outside counsel might not allow the federal government to litigate its cases as well, 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 in the argument for the independence, not just the efficiency argument. One can imagine that outside counsel could have represented an advance in favor of independence, 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. Congressman William Lawrence, the chair of the Judiciary Committee who had been working on the DOJ bill, condemned the "danger of favoritism" in the loose discretion in hiring outside counsel.[157] Senator Thomas Bayard, a Delaware Democrat, praised the bill

[154] CONG. GLOBE, 41st Cong., 2d. Sess., 3036 (April 27, 1870).
[155] Id.
[156] CONG. GLOBE, 41st Cong., 2d Sess., 3035 (April 27, 1870).
[157] CONG. GLOBE, 41st Cong., 2d Sess., 3039 (April 27, 1870).

for ending "the sporadic system of paying fees to persons, not to speak disrespectfully of them, who may be called departmental favorites."[158] In their framing, the mix of departmental law officers and outside counsel was enablement and cronyism, not a system of legal guidance.

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 bill as an anti-patronage reform, as well as a cost-cutting measure.[159] Cost-cutting and anti-corruption 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. Jenckes and others offered stories of rampant factional battles and cronyism in the various departments, especially the Treasury Department.[160] Treasury was a gold mine for patronage: it had a combination of many offices, access to money and taxation, and lots of power. The stories of corruption were particularly relevant to the founding of the DOJ, because the Treasury Department had command over the 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. Boutwell had a reputation for high-minded ideals,[161] but the position of Treasury Secretary demanded political realism, and Boutwell was a target of criticism. Henry Brooks Adams, the grandson and great-grandson of the Presidents Adams and later, author of *The Education of Henry Adams*, was a young journalist in 1869 reporting on political corruption. He reported that the Treasury Department was filled with "plunderers," "terror" and "distrust," and was plagued by a battle over spoils and incompetence. Secretary George Boutwell "inaugurated another inquisition of his own, by which he might test the political fidelity of his subordinates."[162] According to Adams, Boutwell distributed the spoils of office in Treasury from the moment he took office. Boutwell was an opponent of civil service reform, arguing that presidents should have political discretion to remove officers and replace them with his own administration.[163] *The Nation*, the publication of the reformist Republicans, complained that 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.[164] It described him as a "thorough-bred politician of

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[158] CONG. GLOBE, 41st Cong., 2d Sess., 4490 (Bayard) (June 16, 1870).
[159] *The Department of Justice*, N.Y. TIMES, July 10, 1870, p. 4; *A Department of Justice*, N.Y. TIMES, May 13, 1870, p. 4; *General*, DESERET NEWS, May 11, 1870.
[160] Jenckes, *Civil Service in the United States* (1868).
[161] THOMAS H. BROWN, GEORGE SEWELL BOUTWELL: HUMAN RIGHTS ADVOCATE (1989).
[162] Henry Brooks Adams, "Civil Service Reform" *North American Review* (pamphlet), 15, Oct. 1869 (Rare Books, LOC).
[163] BOUTWELL, REMINISCENES OF SIXTY YEARS IN PUBLIC AFFAIRS 135-36 (1902); "Mr. Boutwell's Last Excuse," THE NATION, No. 285, p. 397 (1870).
[164] *Mr. Boutwell and Mr. Wells*, THE NATION, No. 260, p. 398 (1869); see also *The Treasury Report*, THE NATION, No. 285, p. 396 (1870).

the old school," "thick as thieves" with other patronage politicians, a partisan who would block reform.[165] Boutwell later admitted that he was "profoundly disappointed and disgusted with the mistakes which they had made."[166]

One reason that a law department was defeated in the years before the Civil War was that the earlier Treasury Secretaries or Interior Secretaries were defending their turf over district attorneys and law officers. Boutwell's words of regret about his earlier patronage might have led him to tolerate the reform. Boutwell was also sympathetic to the professionalization of lawyers. He was a lawyer himself, and in his later writings, he hailed the professional values of lawyers as vital for the survival of the republic. One indication of his view was his book *The Lawyer, 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.[167] In fact, Boutwell approvingly cited at length Choate's defense of judicial independence in the 1853 Massachusetts Constitutional Convention,[168] 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."[169] In practice, Boutwell at first had been a partisan Stalwart Treasury Secretary, but in principle, he later became a supporter of professionalism and impartiality, which may have led him to tolerate the DOJ proposal.

In any event, Treasury'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 an opportunity to start a law department afresh.[170] The key to the change was reframing their office as a legal specialization under the Attorney General, rather than being located in a department that specialized in policy and/or politics. In terms of politics, the law officers would shift their political accountability from the various department heads to the Attorney General and the President, a mix of legal professionalism and political accountability.

This was not just hopeful naïve speculation. A key to understanding how the creation of a law department would produce more bureaucratic independence is an understanding how many Attorneys General had been cultivating professionalism and independence for decades, and particularly in 1868 to 1870. The Attorney General's office had made important strides in the direction of professionalization, especially in the hands of William Wirt for a pivotal twelve-year period (1817-1829). In the 1850s, Caleb

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[165] Brown, at 92, 96.
[166] Henry Brooks Adams "Civil Service Reform" *North American Review* (pamphlet), 15, Oct. 1869 (Rare Books, LOC).
[167] GEORGE BOUTWELL, THE LAWYER, THE STATESMAN, AND THE SOLDIER
[168] Id. at 17
[169] Id. at 25
[170] Henry Brooks Adams, "Civil Service Reform," *North American Review* (pamphlet), 17, Oct. 1869 (Rare Books, LOC).

Cushing began the tradition of Attorneys General ceasing their private practices after their appointment in order to take on the office full-time. The office also had setbacks under President Andrew Jackson, President Lincoln, and President 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 Johnson in his Senate impeachment proceedings. Evarts had been a federal assistant district attorney in New York as a Whig, and then he was an earlier leader of the Republican Party. He earned wide-ranging respect in both parties for his non-partisanship, professionalism, and skill by defending the despised Andrew Johnson. For eight years during the Civil War and after, he was a main negotiator for the Union on war-related cases. [171] When the Senate rejected Johnson's first choice for Attorney General after his trial, Republicans recommended Evarts, and he was confirmed by a vote of 29-5. As a Republican Attorney General serving out the remainder of Johnson's term, he received credit for his non-partisan service.[172] 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.[173] Evarts was among the leading figures of the professionalization of law in the 1870s.

The trend in favor of professionals in the Attorney General's office continued when President Grant appointed Evarts's cousin Ebenezer Rockwood Hoar in 1869. Hoar had served as a judge on the Massachusetts Court of Common Pleas from 1849 to 1853, and then on the Massachusetts Supreme Judicial Court Justice from 1856 to 1869.[174] He had been regarded as a leader of the Massachusetts bar, bringing order to a mix of strong-willed personalities.[175] His contemporaries wrote that "the activities of Judge Hoar centered largely on the legal profession, but they reached far beyond it."[176] He earned a reputation for non-partisanship for opposing the impeachment of Johnson, but that also stirred ill-will among some Radical Republicans. A historian of the Department of Justice regarded Hoar as "one of the most effective" in its history, and he was famous for fighting relentlessly against patronage appointments and unqualified judicial nominations. Henry Adams contrasted Treasury Secretary Boutwell's moral "pliability" with Hoar's "dogged obstinacy" when it came to cleaning up the government. Boutwell was the "product of caucus and party promotion," while Hoar held "his moral rules on the sole authority of his own conscience, indifferent to opposition whether in or out of his

[171] Congressmen William Lawrence, a supporter of the DOJ bill, complained that outside counsel system had allowed the federal government to pay $47,500 to 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 also Hoffer, To Enlarge the Machinery of Government, 106.

[172] "William Evarts," 1 ENCYCLOPEDIA OF THE UNITED STATES CABINET 77-79 (2000); CHESTER L. BARROWS, WILLIAM M. EVARTS (1941); DYER, THE PUBLIC CAREER OF WILLIAM M. EVARTS (1933). WILLIAM SMITH, HISTORY OF THE CABINET OF THE UNITED STATES OF AMERICA 129 (1925).

[173] SUNDERLAND, 3; MARTIN, CAUSES AND CONFLICTS, 23, 26, 27.

[174] WALBRIDGE A. FIELD, TRIBUTES OF THE BAR AND OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH TO THE MEMORY OF EBENEZER ROCKWOOD HOAR, 8 (1895).

[175] "Address of Governor Greenhalge," in Field, Tributes, at 18.

[176] "Address of Joseph B. Warner, Esq." in Field, Tributes, at 38.

party.… Judge Hoar belonged in fact to a class of men who had been gradually driven from politics, but whom it is the hope of reformers to restore."[177]

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.[178] Adams observed that 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.[179] Hoar carefully vetted all judicial nominations with high standards, and he rejected many of the Senators' preferred candidates.[180] His contemporaries remarked that Hoar had "pulverized weak natures," he was an "unforgiving foe of sham, trickery, and injustice… absolutely uncompromising with his enemies," he had opposed patronage with an "unaccommodating temperament."[181] Charles Francis Adams recalled that when Hoar became head of the Department of Justice, "he had a large patronage to distribute," but with his "rugged honesty" against "jobbery," he fought against patronage politics and "snubbed seventy Senators." As a result of Evarts and Hoar, standing on the shoulders of several strong antebellum predecessors, the office of Attorney General had become more credible as a professional and less political position at the time Congress was debating the Department of Justice.[182]

Jenckes's DOJ bill faced little opposition. The House bill came up for a vote 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 bill itself, the House again rejected a motion for a roll call vote, and the bill passed smoothly.[183] On June 16, the Senate also approved the bill also without a roll call.[184] Grant signed the bill on June 22, 1870, and the Department of Justice opened formally a little more than a week later, on July 1, 1870. 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.[185]

The DOJ's creation was a retrenchment project of centralization, efficiency, and accountability. The supporters of the DOJ bill hoped that centralizing these officers would foster more uniformity and accountability. But in the broader context of other developments in Congress and the executive branch, it becomes clear that its creators

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[177] Henry Brooks Adams "Civil Service Reform," *North American Review* (pamphlet), p. 16, Oct. 1869 (Rare Books, LOC).
[178] SPROAT, "THE BEST MEN," 13, 190-91.
[179] Id. at 17.d
[180] JEAN EDWARD SMITH, GRANT 507 (2001).
[181] "Address of Attorney General Knowlton," in FIELD, TRIBUTES, at 43, 46, 51, 60, 80
[182] It turns out that Evarts and Ebenezer's brother George would defy partisanship later. In the U.S. Senate, they crossed partisan lines to support the repeal of the Tenure of Office Act in 1887.
[183] CONG. GLOBE, 41st Cong., 2d Sess., 3067 (April 28, 1870)
[184] CONG. GLOBE, 41st Cong., 2d Sess., 4517 (June 16, 1870).
[185] Grant's attorney general Ebenezer Hoar and Whitman got along very well. Hoar came from the same Massachusetts elite circles, and Hoar was the father of a transcendentalist friend of Emerson who had been engaged to Whitman's brother Charles. Hoar and Whitman got along well. Whitman remained in the Attorney General's office until 1872 or 1873. Jerome Loving, *Walt Whitman: The Song of Himself*, 291, 336 (1999); Philip Callow, *From Noon to Starry Night: A Life of Walt Whitman* 331 (1992).

intended to promote independence, legal authority, and professionalism at the same time. The debate focused on the department law officers in Washington, D.C. and the creation of what one would call "Main Justice" today. By putting all law officers in one department, Jenckes and the other congressmen believed that they were removing those law officers from the agendas, the patronage, and the politics within each separate department, and they hoped that the new institution would strengthen legal norms. The recent Attorney Generals bolstered this hope with their commitment to non-partisanship, anti-patronage, and legal qualifications. The debate over outside counsel also related more to the management of lawyers outside Washington, D.C. Eliminating outside counsel decreased "favoritism" and increased legal checks on the growing departments.

There is little evidence in the debates connecting the DOJ proposal to the improved enforcement of civil rights law during Reconstruction. 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."[186] However, Akerman had not been nominated to become Attorney General while Congress was debating the DOJ bill. The main debates over the DOJ were in April 1870, while Hoar was still in office. Hoar was the known crusader against corruption, not known so much for his leadership on civil rights.

Grant nominated Hoar for the U.S. 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 from a man who had snubbed seventy Senators!"[187] The *American Law Review* reported on the vote that the Republican Senators did not trust Hoar to represent the party agenda on the Court, and commented that Hoar was regarded as "more of a lawyer than of a partisan."[188] The *American Law Review* called Hoar's rejection "a scandal" and "an insult to the legal profession."[189]

After his rejection, Hoar knew he had lost political standing. Hoar secretly offered to resign, but Grant refused the offer, and Hoar then settled back into his office with no plans to leave. Hoar's biographers wrote that Hoar "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."[190] 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

[186] Spaulding at 1964-64.
[187] "Ebenezer Rockwood Hoar," 1 ENCYCLOPEDIA OF THE UNITED STATES CABINET 79-81 (2000); Edward Waldo Emerson, EBENEZER ROCKWOOD HOAR: A MEMOIR (1911); Jacob Dolson Cox, "How Judge Hoar Ceased to be Attorney General," ATLANTIC MONTHLY, Vol. 76, p. 162 (1895); see also "Address of Charles Francis Adams," in FIELD, TRIBUTES, 60.
[188] "Summary of Events," 4 AMERICAN LAW REVIEW 380 (Jan 1870).
[189] Id.
[190] MOORFIELD STOREY AND EDWARD W. EMERSON, EBENEZER ROCKWOOD HOAR: A MEMOIR, 202, 207 (1911).

Washington.[191] When his friends visited him to ask if the news was true, he explained that Grant recently had asked for his resignation with no explanation. When Hoar asked for the reasons, President Grant explained that he needed to balance his cabinet with a Southern Republican. At that stage, Grant did not have anyone lined up, and Hoar offered to help sort through the options, partly because Hoar wanted to block Congressional Republicans from using the opening for patronage or partisanship.[192]

Hoar's resignation occurred long after the Department of Justice bill had passed the House and was just a week away from final passage. The newspapers reported that Hoar's resignation was "unexpected," and that Akerman's nomination was met with "profound astonishment."[193] The *New York Times* reported that Akerman, an obscure district attorney in Georgia, was a "universal surprise" as the new nominee.[194] Spaulding is right that key Republicans in 1869-1870 trusted the particular person in the Attorney General's office, but it was not Radical Republicans trusting the incoming Akerman. It was Jenckes and the reformer Republicans trusting the incumbent Hoar and his reputation for cleaning up government.

No Congressman made any argument about how the new Department of Justice would affect the enforcement of the Thirteenth, Fourteenth or Fifteenth Amendments, nor the enforcement of the new civil rights laws. In 1870, Republicans held 70 percent of the House seats and 84 percent of the Senate seats. In May 1870, both Houses would vote for the Enforcement Act by over two-to-one margins.[195] 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 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.

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 remained military. Yet there was only limited discussion of how the new department would relate to military lawyers, and most importantly, those debates show a deliberate decision to separate the new department's civil role from the military. The DOJ bill stated that whenever the War or Navy Department had a question of law, the question should be sent to the Attorney General, and he may dispose of it "as he may deem

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[191] STOREY & EMERSON, HOAR: A MEMOIR, 208

[192] Id. at 210-211. A fellow reformist cabinet secretary, Jacob Cox, recounted that Grant was facing resistance in the spring of 1870 against his plan to annex San Domingo, adding to Grant's desire to reshape his cabinet. Jacob Dolson Cox. *How Judge Hoar Ceased to be Attorney General,* ATLANTIC MONTHLY (July 1895), at 162-173.

[193] "Telegraph to the Tribune," NEW-YORK TRIBUNE*,* June 17, 1870 (Hoar's retirement was "unexpected," and Akerman's nomination triggered "profound astonishment"). The retirement and nomination occurred long after the House vote on the bill, and around the time it was passed by the Senate.

[194] On June 17, 1870, the *New York Times* headline announced that Akerman's nomination was a "universal surprise." "Talk at the Capitol About the Resignation of Mr. Hoar; Amos Akerman, of Georgia, Appointed as His Successor; Universal Surprise at the Choice," N.*Y. Times,* June 17, 1870. See also "Telegraph to the Tribune," *New-York Tribune,* June 17, 1870 (Hoar's retirement was "unexpected," and Akerman's nomination triggered "profound astonishment").

[195] CONG. GLOBE, 41st Cong., 2d Sess., 3809 (May 25, 1870), 3884 (May 27, 1870).

proper." [196] This provision was not a major change in the status quo, because Lincoln's Attorney General Edward Bates was regularly consulted on many legal questions relating to the war.[197] More discussion focused on whether the bill would move the military lawyers directly into the DOJ. Congressmen pressed Jenckes about whether any of the Judge Advocates General or other military lawyers would be moved into the new Department of Justice. The bill would move the *naval* Judge Advocate General to the Department of Justice, renamed the naval solicitor. This created some confusion about whether the Department of Justice would be taking on military lawyers generally, and 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."[198] He explained that the naval Judge Advocate General 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."[199]

One aspect about Reconstruction was mentioned during these debates, and it was discussed only briefly. A congressman pressed 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."[200] Jenckes again replied that his Retrenchment committee "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."[201]

The next day, William Lawrence, the chair of the House Judiciary Committee, returned to the floor to emphasize the bill'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. According to Lawrence, this anecdote illustrated the potential for confusion. "But I think I need not pursue this branch of the subject any 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…" Lawrence divulged that if the bill did make any such changes, "the bill would have encountered the

[196] An Act to Establish the Department of Justice, 41st Cong. Ch. 150, § 6; 16 Stat. 162 (1870).
[197] CUMMINGS AND MCFARLAND, FEDERAL JUSTICE 188-217.
[198] CONG. GLOBE, 41st Cong., 2d Sess., 3037 (April 27, 1870).
[199] Id.
[200] Id. at 3037.
[201] Id.

opposition of some of the officers of the Bureau of Military Justice and their friends."[202] Lawrence also noted that the Judiciary Committee's earlier version of the bill would have included "a bureau of military and naval law," among other bureaus, within the new department, but these bureaus were dropped from the Retrenchment Committee's bill. Lawrence was satisfied that the bill would give the Attorney General and his department authority over legal questions involving the War and Navy Departments, even if it did not provide a more direct enforcement role. Another Congressman asked Jenckes if he agreed that the bill would have been defeated if it transferred military lawyers. Jenckes replied evasively, "That matter is not within the domain of our committee, but belongs to the Committee on Military Affairs."[203] The implication from 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 Navy on related legal questions. In the middle of these discussions about military lawyers, Jenckes invited his colleagues to offer amendments to the Retrenchment Committee's bill if they wanted the new department to have a role in military affairs.[204] There is no record of any Congressmen offering any such amendment to the bill, a rather indicative sign of consensus on the matter.[205]

Considering how much of Reconstruction had been military, the decision to keep the 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, too.[206] Grant would soon rely on the Force Acts to declare martial law in parts of the South.[207] Jenckes was adamant that his Retrenchment Committee had rejected any military role for the Department of Justice, at a time when military lawyers were involved with Reconstruction decisions.

Committees were self-selective, and the senators and congressmen who gravitated to the Retrenchment Committee cared about retrenchment (i.e., budget cutting), not Reconstruction (which was expensive). Jenckes himself had no record on race or civil rights. Jenckes and his committee focused on government reform and efficiency, so they designed a civil service that would restrain Grant and future presidents in hiring and firing – in a way that privileged technocratic skill. Jenckes and his committee were not focused on entrenching pro-civil rights lawyers in the government, which explains why they did not push to use civil service job protections as a tool for that goal. William Lawrence, the congressman on the House Judiciary Committee who had shared the effort for the Department of Justice before 1870, had more of a record promoting voting rights

[202] Id. at 3066 (April 28, 1870).
[203] Id. at 3067 (April 28, 1870)
[204] Id. at 3037.
[205] Congressman George Woodward, a Pennsylvania Democrat opposed to Reconstruction, offered an amendment to abolish the JAGs' office entirely, but that appeared to move in the opposite direction of law enforcement, and it was offered too late procedurally. Id. at 3067 (April 28, 1870).
[206] The Enforcement Act of 1870, 16 Stat. 140, § 8, 13 (1870).
[207] ERIC FONER, RECONSTRUCTION 454-59 (1988); SMITH, GRANT, 547.

and civil rights, but he never linked these concerns, either.[208] By 1870, he had taken a backseat to Jenckes and the Retrenchment Committee's efforts.

To wrap up this section on the DOJ, here are some of what the Department of Justice statute did *not* change. It did not budget for a new building for a new department (the DOJ did not have a building until 1934). The Attorney General and his assistants kept their offices inside the Treasury building. Solicitors and other law officers remained dispersed in other departmental 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 Treasury, and the correspondence from the archives indicates that Attorneys General had been exercising that power. The 1870 DOJ statute gave the Attorney General's sole authority over U.S. Attorneys. The statute did not change the President's power over United States Attorneys or other law officers who had been confirmed by the Senate. Before and after the passage of the DOJ bill, 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 perhaps most importantly, it did not create new offices aside from the Solicitor General, nor did it appropriate funding for hiring more assistant U.S. Attorneys or other government lawyers. Here is what the legislation did change: it eliminated outside counsel, perhaps the most important concrete change in the statute. As the Conclusion will explain, these changes left Attorneys General and U.S. Attorneys frustrated with their lack of resources for enforcing civil rights in 1871 and 1872. The DOJ bill's effect was to make the work of federal law enforcement and of Reconstruction more difficult.

III. Professionalization in the late 1860s and 1870

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.[209] The increasing professionalism of the Attorneys General was not an isolated development. The state bench was professionalizing in the 1870s.[210]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.[211] The large corporate law firm emerged in the 1870s.[212] The 1870s also witnessed the emergence of the modern – and exclusive – bar association.

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[208] CONG. GLOBE, p. 505, April 5, 1869.
[209] See, e.g., GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1997); Edson Sunderland, History of the American Bar Association and Its Work (1953). See also, Wayne Hobson, "The Bar Association Movement, 1870-1900," in *The American Legal Profession and the Organizational Society, 1890-1930* (PhD, Stanford, 1977).
[210] SHUGERMAN, THE PEOPLE'S COURTS; Kermit Hall, C*onstitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges*, *1861–1899*, *in* THE NEW HIGH PRIESTS 29, 42 (Gerald W. Gawalt ed., 1984).
[211] NELSON, RISE OF AMERICAN BUREAUCRACY 4, 95-96; G. EDWARD WHITE, TORT LAW IN AMERICA 26-27.
[212] Hobson, "Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915."

Lawyers had made significant advances in professionalism in the 1840s and 1850s, especially in the founding of many legal periodicals and their sustainability thereafter.[213] Soon after the Civil War, lawyers began organizing the first formal bar associations and reforming the judiciary. In fact, 1870 was also 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 Jenckes's ally in the fight for civil service reform, was also one of the central figures in both the judicial reform effort and in the creation of the Association of the Bar of the City of New York.[214] From 1873 through 1875, Eaton would serve as chairman of the United States Civil Service Commission, which Jenckes pushed through Congress in 1871. Eaton would also draft the groundbreaking Pendleton Civil Service Act of 1883, and he published some of the most important books and articles on civil service reform in this era, including *Civil Service in Great Britain*.

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.[215] 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 the Erie Railroad scandal of the late 1860s, involving Tammany Hall, tycoon Cornelius Vanderbilt, the legendarily unscrupulous financier Jay Gould, and trial court judge Albert Cardozo. Cardozo resigned in 1872, and many other judges were tainted in similar scandals.[216] 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 the New York's Constitutional Convention in 1867, and judicial reform was a top priority.[217] 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."[218] In 1869, the voters separately ratified the convention's Judiciary Article, but rejected the other parts.[219] Lawyers pushed for an amendment to return from judicial elections to judicial appointments, but the voters rejected that measure. Other states also lengthened the terms of judges around this time, including Maryland, California, Wisconsin, Missouri, and Pennsylvania.[220] 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

[213] MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY (1976).
[214] MARTIN, CAUSES AND CONFLICTS, 40-43.
[215] MARTIN, 3.
[216] 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, 123, 127-30, 145-46, 157-58 (2007).
[217] *Id.* at 132.
[218] 3 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2365 (Albany, Weed, Parsons *& Co.* 1868).
[219] Lettow Lerner at 143-44, 156–59.
[220] SHUGERMAN, THE PEOPLE'S COURTS, 150-54.

convention in 1873, in which the tenure of state supreme court justices was lengthened from fifteen to twenty-one years.[221] There was bipartisan consensus that it was necessary to insulate judges from the pressures of campaigning and patronage politics.[222]

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.[223] 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 organization," which stated that the undersigned believed "that the organized action and influence of the Legal Profession, properly exerted, would … sustain the profession to its proper position in the community, and thereby enable it, in many ways to promote the interests of the public…"[224] By January 1870, the letter had more 200 signatures. Evarts had recently returned to New York from Washington after serving as Johnson's Attorney General, with a reputation for non-partisanship 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.[225] The first organizational meeting was February 1, 1870. 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 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 "any male citizen" who had "the requisite qualifications of learning" could practice law in all New York courts. 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 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."[226]

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

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[221] 4 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 486 (Harrisburg, Benjamin Singerly 1873).
[222] *See* Mahlon H. Hellerich, "The Origin of the Pennsylvania Constitutional Convention of 1873," 34 *Penn. Hist.* 158 (1967).
[223] GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1997).
[224] MARTIN, 14.
[225] MARTIN, 27.
[226] 1 *Association of the Bar of the City of New York Reports* 2, p. 8 (MARTIN 33).

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. Later, Samuel Tilden (who would be Democrats' presidential nominee in 1876) gave another inspired speech to the members echoing 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 Bar, and a reputation throughout the whole country for its purity in the administration of justice [Applause.] … It 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].[227]

The organizers of the new bar association were signaling that they were taking on party politics. One of the organizers paid a steep price. Dorman Eaton, 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 anti-corruption efforts against the city sanitation offices, but nevertheless, the causes were interrelated.[228] Eaton eventually recovered, and gave up his law practice to pursue political reform full-time. The city bar association thrived, doubling its membership by the middle of 1871, even though the dues were expensive.[229] Meanwhile, the organization increasingly turned its resources to legal and political reform to combat partisan influence, particularly over the courts.[230]

In the next few year, other lawyers followed the New York bar's lead. In the early and mid-1870s, bar associations formed in six major cities and in six states.[231] Then the American Bar Association was established in 1878. Evarts was also one of the core founders of the ABA, along with the DOJ's first Solicitor General, Benjamin Bristow.[232] 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.[233]

The common themes in 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 established bar elite from popularization and

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[227] 1 *Association of the Bar of the City of New York Reports* 2, p. 20-21 (MARTIN 38). For the same dynamic in the twentieth century, see JERALD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).
[228] MARTIN 40
[229] MARTIN 43
[230] MARTIN 46-47.
[231] J. Gordon Hylton, *The Bar Association Movement in Nineteenth-Century Wisconsin*, 81 MARQUETTE L. REV. 1029, 1030 (1998).
[232] SUNDERLAND, HISTORY OF AMERICAN BAR ASSOCIATION, 4
[233] ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953).

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.

IV. Jenckes and the Civil Service Reform Movement

A. Civil Service and Entrenchment: An Introduction

Now that we have traced the DOJ bill's passage and the bar association movement, let's take a step back into the 1860s for the civil service reform effort. The details of the civil service reform movement and Jenckes's role from 1865 to 1871 are crucial for understanding Jenckes's DOJ project in the same years, and are crucial for understanding why he did not insert civil service protections directly into the DOJ bill itself. This Article identifies an historical puzzle: If Congressional Republicans were so focused on entrenching civil rights amendments and statutes, why didn't Congressman Jenckes ("The father of the civil service") and the Republican Congress combine the creation of the DOJ with civil service reform to entrench their government lawyers? Law officers should have been the low-hanging fruit for civil service professionalization (a system of competence examinations plus job security). Moreover, the Republicans in Congress had good reason to entrench other Republicans in the new DOJ. They had just emerged from a partisan fight with one intransigent anti-civil rights Democratic President (Andrew Johnson), and they could foresee future conflicts with Democratic presidents. Republicans were in the middle of entrenching civil rights by constitutional amendment and by statute, and they were also in the middle of entrenching Republicans in Article III courts and expanding federal jurisdiction. In the 1880s and 1890s, Democrats and Republicans would take advantage of civil service rules to entrench their appointees. Why not in 1870? The basic answers are that many Radical Republicans favored civil service reform during a Democratic administration, but turned against it as soon as Grant was elected. They were skeptical that civil service examinations would be a tool of the elite and aristocratic, to the advantage of Liberal Republicans and some Democrats. The exams elevated technical skills over political and substantive values, limiting presidential discretion both for political ends and for the ends of Reconstruction. Powerful business interests also opposed civil service reform. Moreover, district attorneys, the solicitor general, other solicitors, and the assistant attorneys general were already protected from presidential firing. The revised Tenure of Office Act of 1869 required Senate agreement to dismiss all principal officers below the cabinet level. There was less of a need to pursue other ways of establishing civil service for law officers because the DOJ bill structurally advanced their goals of promoting a degree of independence and professionalism within the executive. The congressional debates over the DOJ reflect a belief in independent professional discretion for government lawyers, whereas the debates over other government offices reflect an endorsement of presidential authority.

B. Early Attempts During the Johnson Administration, 1865-1869

Civil service reform drew much more attention and heat in the years after the Civil War than the effort to create a law department. The significance of the civil service proposals is that some of them would have covered principal officers (such as the district

attorneys and other law officers) directly, but they did not pass. Even though those bills for principal officers failed, a successful start for civil service reform on a more modest scale would have created the potential for later expansion to government lawyers, which is what wound up happening in Europe and Canada long-term. On another level, these debates reveal a sharp contrast between support in Congress for lawyers' independence from politics versus congressional opposition to other officers' political independence.

From the 1850s through the 1870s, Great Britain and other European countries were making significant strides in civil service reform in terms of competitive examinations and job security.[234] By 1868, some European civil service systems covered a number of government lawyers,[235] and even more by the early twentieth century.[236] One year after the British North American Act of 1867 established Canada's federal government, the Canadian Parliament passed the Department of Justice Act in 1868, creating the office of Attorney General. Section 5 of the Act allowed the Governor to appoint officers subject to the Civil Service Act of 1868.[237] The Civil Service Act required examinations and evidence of moral character for appointments, but did not formally increase job security.[238] Americans studied the European models and attempted to import them to the U.S., part of a long-term trans-Atlantic trend of American reformer (and later Progressives) studying and adopting European models.[239]

There were many reasons that Jenckes and the Republicans might have seized this opportunity to plug civil service reform into the DOJ bill or to have extended their civil service bills to cover law officers. The job security offered by civil service protection would have been a chance to entrench their law enforcement officers.[240] The Democrats

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[234] STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 47-51 (1982); "Civil Service in the United States," H.R. Report No. 47, (to accompany H.R. No. 948), 40th Cong., 2d Sess., May 25, 1868, p. 90-92, 123, 127-60 (focusing on England, France, and Prussia, and noting about a dozen other European countries).

[235] "Civil Service in the United States," H.R. Report No. 47, (to accompany H.R. No. 948), 40th Cong., 2d Sess., May 25, 1868, p. 90-92, 127-60.

[236] LEONARD WHITE, ET AL., CIVIL SERVICE ABROAD: GREAT BRITAIN, CANADA, FRANCE, GERMANY, 3, 61, 90, 204 (1935); "Civil Service in the United States, H.R. Report No. 47, 40th Cong., 2d Sess., 123, 127-29, 133, 139, 153; cf. Gavin Drewry, *Lawyers and Statutory Reform in Victorian Government*, in GOVERNMENT AND EXPERTISE: SPECIALISTS, ADMINISTRATORS, AND PROFESSIONALS, 1860-1919 (Roy MacLeod, ed.) (1988).

[237] Department of Justice Act, 1868, Section 5, 31 Vic., c. 39; Canada Civil Service Act, 1868, Can. Stat., 31 Vic. c. 34; PHILIP C. STENNING, APPEARING FOR THE CROWN, 72; ROBERT MCGREGOR DAWSON, CIVIL SERVICE OF CANADA, 20; Quebec: "An Act Respecting the Organization of the Civil Service," 31 Vict., Cap. 8, Sec. 2, 3, and 6 (1868); "Manitoba: "An Act Respecting the Department of the Attorney-General," 48 Vict. Ch. 5, Section 1 (1885); See also Newfoundland: "An Act Respetcing the Department of Justice," 61 Vict., Cap. 18, Section 1 (1898); British Columbia: "An Act Respecting the Department of the Attorney-General," 62 Vict., Ch. 5, Section 2 (1899) (but all officers holding office during pleasure, and connection to civil service testing unstated).

[238] DAWSON, CIVIL SERVICE OF CANADA, 20. When Quebec organized its own law department, it placed these offices under the civil service, too. STENNING, APPEARING FOR THE CROWN, 80.

[239] DANIEL RODGERS, ATLANTIC CROSSINGS

[240] Other scholars have pointed out the attractiveness and the historical significance of entrenchment in legal institutions over time. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001); Jack M. Balkin & Sanford Levinson, *The Process of*

had reemerged in 1868 as a competitive threat, and as soon as Democrats could sweep the South again, they had a clear path to the White House.[241] Civil service reforms would have been an attractive rationale for entrenching Republicans in the new Department of Justice, protected from a future Democratic President. The Republicans were using other entrenchment methods: constitutional amendments, civil rights statutes, Article III appointments. Democratic and Republican presidents would later use civil service protections to entrench their cronies after the passage of the Pendleton Act in 1883. But the Republicans in the 1860s and 1870s did not use civil service protections to achieve these goals.

The strongest explanation for why civil service fell short for the DOJ is the factional division within the Republican Party emerging in the late 1860s that would shape the party for the rest of the century: Radicals vs. reformers, and the emerging "Stalwarts" vs. "Half-Breeds." Radical Republicans were more willing to use patronage and partisanship to achieve some of their primary goals: reconstructing the South with their partisans who were devoted to their cause; making deals in order to pass their signature civil rights legislation; and finding government jobs for ex-slaves.[242] Reformers wanted civil service exams because they prioritized technical skills over political commitments. Radicals feared those exams for the same reason: exams would give the privileged and elite an advantage, and they foresaw Liberal Republicans and Democrats getting federal jobs instead of Radicals. This shift would undermine the Radicals' focus on Reconstruction and their hold on power. Business groups were mixed: commercial and banking groups enthusiastically supported civil service reform to achieve impartiality, efficiency, uniformity and reliability. Then other business interests – mostly industry and manufacturing – opposed those efforts in order to hold off a perceived threat of regulation and anti-monopoly, and to protect their ability to influence the government through political channels. Industry seems to have won this fight, and executive discretion and patronage prevailed in the 1860s-1870s.

There was little progress for civil service before the Civil War. The "spoils" system of political patronage had been a key part of the democratic transformation and the "Jacksonian" revolution. The two-party system functioned partly because of the spoils system, and it was deeply established through the 1840s and 1850s. There were some inklings of reform (led by Senator Daniel Webster of Massachusetts) in the 1850s, with the emergence of service examinations and classifications, but they had little effect. Congress passed an act in 1853 establishing "pass examinations" for some federal offices, which meant that applicants simply had to pass a relatively low threshold on an examination in order to qualify. This system preserved a significant amount of discretion for department heads, because they had a pool of qualified applicants from which to choose. This discretion permitted officers to continue selecting applicants based upon

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Constitutional Change: From Partisan Entrenchment to the National Surveillance State, 75 FORDHAM L. REV. 489 (2006).

[241] In 1868, Democrats won New York and two other northern states, and narrowly lost three other Northern states. If the Democrats had swept the solid South (which was becoming increasingly likely in the future), they would have won the 1868 election. ROSS, THE LIBERAL REPUBLICAN MOVEMENT, 5.

[242] KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE FOR EQUALITY IN WASHINGTON, D.C. (2010).

other qualifications (experience, reliability, leadership, etc.), upon substantive policy commitments, and upon patronage and spoils. The "pass" model was therefore different from the "competitive" ranking model in later years, which limited hiring and promotion strictly to the ranking.

The 1860s marked the beginnings of a broader civil service campaign for a combination of reasons: the identification of party patronage with the Democrats and the "slave power conspiracy"; Republican Party patronage emerging as a new problem as the party turned from insurgent challenger to establishment party relying on patronage; and the parallel rise of a reformist movement in the Republican Party.[243] One purpose of these efforts was to create a more professional and efficient bureaucracy, and a related purpose was to attack the corruption of the spoils system. The federal government had grown steadily over the nineteenth century, but the growth during the Civil War was particularly stunning. In order to hire so many people so fast, the federal government relied even more heavily on connections and patronage, and there was also a series of political removals of Democrats, framed as rooting out the "disloyal," but in many cases, the firings were really a way to open up offices for Republican job-seekers.

Jenckes arrived in the House in 1862, and later said that he was "struck at one of the great difference between the military and naval administrations and that of the civil departments." The military and the navy had their own academies at West Point and Annapolis, their own examinations, and more emphasis on training and qualifications in promotion. Jenckes quoted a contemporary of this period in a later report, and it captured his view about what he observed in government service: "The government formerly served by the elite of the nation, is now served to a very considerable extent by its refuse… [Now,] the fact of a man's holding office under the government is presumptively evidence that he is one of three characters, namely, an adventurer, an incompetent person, or a scoundrel…."[244] Jenckes then set out to study European nations' civil service reforms, and he focused on the British system in particular.[245]

Reconstruction gave them an enormous boost by creating a compelling new purpose for civil service reform: limiting Andrew Johnson's control over Lincoln's appointees and other executive officials. Lincoln was assassinated in April 1865, giving the presidency to Johnson, a Tennessee Unionist Democrat. Johnson openly sympathized with the South, supported leniency for ex-Confederates, wanted to void military Reconstruction, and opposed the Republican Congress. Johnson had not yet interfered

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[243] ARI HOOGENBOOM, OUTLAWING THE SPOILS; PAUL VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE (1976).

[244] "Civil Service Report," Accompanying No. 948, May 25, 1868.

[245] CONG. GLOBE, 39 Cong., 2d Sess. 1034 (Feb. 6, 1867). In 1864, he began drafting a bill. Hugh Burgess to Thomas Jenckes, September 30, 1864, Thomas Jenckes Papers, Library of Congress. Around the same time, Sen. Charles Sumner of Massachusetts proposed a bill in 1864 that would have required civil service exams for all appointments, except for those designated by law to be appointed by the President and confirmed by the Senate, which means that Sumner's bill would not have applied to the district attorneys. The bill would have prevented the covered appointees from being dismissed without "good cause," and eighty percent of all promotions had to be based on seniority. "Reform in the Civil Service, Bill in the Senate, April 30, 1864," *The Works of Charles Sumner*.

with civil service appointees in 1865, but Jenckes and other Republicans saw such problems on the horizon.

In December 1865, Jenckes introduced his first civil service bill. The 1865 bill would have created a civil service commission, whose commissioners would be appointed by the President with Senate confirmation. The commission would create examinations and formulate the rules for their administration.[246] The candidate with the best score would have the first claim to the appointment, and would hold the appointment "during good behavior." The commission would define what constituted "misconduct," and would create a trial process for employees accused of misconduct.[247] These rules applied only to inferior officers, so they would not have applied to district attorneys.[248] But his bill contained a section that would have allowed the president to apply the civil service commission's examinations to candidates for principal offices.[249] Over the next six years, some of his bills or his allies' bills and friendly amendments would have applied the full protections to most principal officers (including district attorneys), but most would not.[250] Jenckes's general preference was to extend civil service as widely as possible, to everything but the judicial, diplomatic, and cabinet level.[251] However, he often compromised by excluding principal officers from the job protection coverage of his bills, and instead included a clause that would allow the President or the Senate to require civil service examinations for principal officers.[252] Jenckes's efforts were recognized by the *New York Times*, which reported that his bill was "too good and too much in advance of our civilization to pass as yet."[253] Unfortunately for Jenckes, his proposal did not attract more interest in Congress, which had a busy agenda already.

In June 1866, Jenckes pushed again with a few changes reflective of Congress's escalating fight with President Johnson. First, Jenckes himself included language to

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[246] H.R. No. 60, 39th Cong., Sess. 1, § 2 (Dec. 20, 1865).
[247] Id. at § 6.
[248] H.R. No. 60, §1, CONG. GLOBE, 39th Cong. 1st Sess., 98 (Dec. 20, 1865).
[249] H.R. No. 60, Id., at § 12.
[250] H.R. No. 673, amendment by Rep. Humphrey to Rep. Jenckes's bill, June 13, 1866
[251] Thomas Jenckes, "Civil Service Reform in the United States," H.R. Report No. 47 (1868); H.R. No. 2633, 41st Cong., 3d Sess., Jan. 9, 1871.
[252] A Bill to Regulate the Civil Service of the United States and Promote the Efficiency Thereof, Senate No. 430, 39th Cong., 1st Sess. (1865). The bill required all applicants to take open competitive examinations, and only the most qualified were eligible for appointments (more of a strict "competitive" model than a looser "pass" model). Promotions were limited to the senior employee in the next level below or limited to special examination. Performance on examinations could also be an important factor in defining "seniority." The bill would create an administrative board made up of three civil service commissioners, who would be appointed by the President and confirmed by the Senate for five-year terms. They could be removed by the President only "with the assent of the Senate," which would be a check on President Johnson's power. The commissioners would administer the examinations and would create the rules for the removal of civil servants (defining "for cause" and establishing proceedings for trial to establish "cause.") The bill also gave department heads the discretion to require all incumbent civil servants to take the examination and remove the subpar, and it gave the President the discretion to require the testing of applicants for senate-confirmation level appointments. The administrative costs would be covered by the applicants' fees.
[253] Hoogenboom, at 639; *New York Times*, Jan. 7, 1866; "The Public Service – Competitive Examinations," N.Y. TIMES, Jan. 18, 1866; 2 NATION 65 (Jan. 18, 1866).

protect his civil service commissioners from being fired by the President.[254] Jenckes's civil service bill was a precursor and possibly even the source for the Tenure of Office Act's language. A civil service ally added his own bill to extend civil service protection to all officers confirmed by the Senate, removable only "for misconduct or inability."[255] These bills stalled. Jenckes tried again in December 1866, with the same provision requiring Senate consent for dismissing commissioners, just as the Tenure of Office bill was introduced and moved toward passage.[256] Jenckes added another pro-Senate twist: the Senate could require examinations of all presidential appointees, which would have included district attorneys.[257]

Just as the Tenure of Office Act was leading to an epic clash between the Republican Congress and President Johnson, Jenckes framed his civil service bill as a way to combat "the centralization of all appointing as well as executive power" in the presidency. He blamed another presidential Andrew, Andrew Jackson, for the rise of patronage, the "frauds," "ulcers" and "disease" of spoils, and the "public sale of offices could hardly be worse." He regretted that, as a result of corruption, "The employés in the public service have not equal standing in the community with those in corresponding positions employed by private persons or corporations." Jenckes directed more of his fire toward Andrew Johnson. Jenckes rejected President Johnson's claim "to exercise over these chiefs the power of removal without the assent of the Senate," and called the centralization of appointment and removal power under the President "[o]ne of the greatest evils which can endanger the existence of a republic."[258] Jenckes denied that the Framers of the Constitution intended to give the President such power.

Jenckes argued that civil service reform and expertise would bolster the protection of property rights, but he did not mention the rights of former slaves.[259] Jenckes believed the government would run more efficiently and effectively with civil service replacing spoils. One of Jenckes's bottom lines was exactly that: the budgetary bottom line of efficiency. Once civil service would bring in more "skill, ability, fidelity, zeal, and integrity," and once there was "a healthy system of appointment and discipline," Jenckes predicted that "the number of offices may be diminished by one-third, and the efficiency of the whole force of the civil service increased by one-half, with a corresponding reduction in salaries for discontinued offices."[260] It is worth noting that Jenckes's Department of Justice bill also cut approximately one third of federal legal personnel.

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[254] Those commissioners would have five-year terms "unless sooner removed by the President, *by and with the advice and consent of the Senate*." The first Tenure of Office bills were offered in the next session of Congress in December 1866, and those bills included the same language of Senate protection. H.R. 673, Section 2, 39th Cong., 1st Sess. (June 13, 1866); H.R. 889, 39th Cong., 2d Sess. (Dec. 13, 1866); H.R. 113, Section 2, 40th Cong., 1st Sess., (July 8, 1867).
[255] H.R. 673, Amendment, 39th Cong., 1st Sess. (June 13, 1866) (Humphrey).
[256] H.R. 889, 39th Cong., 2d Sess. (Dec. 13, 1866).
[257] CONG. GLOBE, 39th Cong., 2d Sess., 109 (Dec. 13, 1866), 835-36 (Jan. 29, 1867).
[258] Id.
[259] CONG. GLOBE, 39th Congress, 2d Sess., 837-41 (1867).
[260] CONG. GLOBE, 39th Congress, 2d Sess., 837-41 (1867).

Newspapers praised Jenckes's bill as a remedy for "Mr. Johnson's folly."[261] Nevertheless, Radical Republicans led the opposition to his bill. They argued it would be "anti-democratic" to take away the President's discretion over his administration's personnel. They argued that changes between administrations "are the great safety-valve of a republican government. … The health of the nation requires that the stable shall be occasionally cleaned out."[262] The speeches against Jenckes's bill embraced presidential power – that the President had control over all of the executive offices and should be able to appoint and remove officers in order to achieve his policies. Even in the midst of their battle with Johnson, Radical Republicans were defending the President's power to remove officers. They seemed to be confident that their Tenure of Office bill would solve the immediate problems with President Johnson. They may have believed sincerely that democratic control of offices was generally necessary, or they may have privately supported the partisan advantages of patronage. But the specific design of Jenckes's bill might have worried them: The competitive exam model would have privileged the technical experts and the more scholarly candidates, at the expense of those who shared Republican principles. Jenckes had a choice of various civil service models, and he chose one that appeared to advance a technocratic elite. He repeatedly used the phrase "merit" to describe the civil service system. His bill would have given current and future administrations less power to choose job applicants who shared their political goals, and the Radicals may have feared that the types of elites who would perform the best on the service exams might be less likely to share the Radicals' values.

The Radicals also mocked Jenckes's many references to England, France, and Prussia, highlighting the "aristocratic" leanings of creating an insulated European bureaucracy. One of the leading Radicals, Thaddeus Stevens, moved to table the bill, and his motion prevailed in a narrow 71-67 vote in February 1867. Jenckes had the support of 47 Republicans and 22 Democrats, but was opposed by 56 Republicans and 11 Democrats.[263] The most salient divisions were not partisan, but more rural vs. urban. Urban congressmen lined up in favor of civil service reform, while rural congressmen generally opposed it, especially in the more populist west, where there was the most skepticism of technocratic exams.

Jenckes had lost a close vote, but he gained momentum and broadened his support in the business world. Jenckes and his Retrenchment Committee had made a pro-business, pro-efficiency, anti-waste pitch for civil service. Jenckes emphasized how civil service reform would achieve those goals – and in doing so, it would also lead to lower taxes. Civil service reform would reduce corruption and be more friendly and reliable for business.[264] Major newspapers started taking notice of Jenckes's bill, and businessmen started organizing and mobilizing for the reform.[265] New York businessmen who were

[261] NATION, Vol. 4, p. 101 (Feb. 7, 1867).
[262] CONG. GLOBE, 39 Cong., 2d Sess., 1034 (Feb. 6, 1867) (Rep. Woodbridge).
[263] CONG. GLOBE, 39 Cong., 2d Sess., 1036 (Feb. 6, 1867). Jenckes actually changed his vote from nay to yea (in favor of tabling) during the roll call vote once he had lost the vote. Id. at 1036.
[264] Id.
[265] Joseph Rosengarten to Jenckes, Jan 31, 1867 (#1) and (#2), George W. Danielson to Jenckes, Jan 30, 1867, Jenckes Papers, Library of Congress; See also E.B. Ward to Jenckes, April 6, 1868. James A. Dupee to Jenckes, April 7, 1868, April 13, 1868.

angry about the corrupt customs houses and Boss Tweed lined up with Jenckes. The National Manufacturers Association and the Boston Board of Trade also rallied for the bill in 1868.[266]

Although Jenckes was fortunate in having Andrew Johnson frame the problem with presidential power, Johnson was too much of a good thing. Instead of Johnson's obstructionism opening the door to Jenckes's reform, it led to an impeachment battle that sidelined other legislative efforts – including both Jenckes's civil service bill and his law department bill. One businessman encouraged Jenckes to "press your bill to its passage as soon as this impeachment trial is over."[267] Running out of time, Jenckes took his shot in July 1868 that was even more anti-Johnson.[268] Because the House leadership opposed him, he needed to win a two-thirds vote in order to suspend the rules for his bill to be considered. He won a bipartisan majority, but fell short of two thirds.[269]

C. The Stumbles of the Civil Service Efforts, 1869-70

The inauguration of President Ulysses S. Grant offered a glimmer of hope for reformers. Of course, the end of Johnson's presidency decreased some of the motivation for changes to the executive branch. But Jenckes and his allies were even more optimistic, because they believed that Grant would support their efforts.[270] A businessman reported that after the election, some who had "little hope a few months ago are quite sanguine now for an early favorable result."[271] Jenckes's bill won a new round of endorsements from newspapers from coast to coast, and Jenckes was optimistic when he returned to Congress in 1869.[272]

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[266] Nathaniel Gale to Jenckes, Jan 3, 11, 16, 22, 27, and Feb. 4, 1868, Jenckes Papers, Library of Congress; James A. Dupee to Jenckes, April 7, 1868, April 13, 1868; Stebbens letter.

[267] E.B. Ward to Jenckes, April 6, 1868, Jenckes Papers.

[268] In May 1868, Jenckes called for Congress to return to the issue. He had revised his bill to be even more anti-Johnson by giving control of the Civil Service Department not to the president, but to the vice president, or in case of a vacancy in vice president's office to the President of the Senate. H.R. 948, Section 1, 40th Cong., 2d Sess. (March 23, 1868). Uncoincidentally, the vice president's office was vacant in 1868, meaning Republican Senator Benjamin Wade would have been in line to head the Civil Service Department. Because the Tenure of Office Act was still in place, the President would need Senate approval to remove the commissioners. Jenckes also presented the results from a survey of current federal employees that showed their overwhelming support for his proposal.CONG. GLOBE, 40 Cong., 2d Sess., 2466-70 (May 14, 1868). Bing to Jenckes, Dec. 4, 1867, Jenckes Papers.

[269] CONG. GLOBE, 40th Cong., 2d Sess., 4003 (July 13, 1868).

[270] Jenckes's close ally, Julius Bing, wrote to Jenckes that with "[t]he election of Gen. Grant & Colfax, I think the prospects of our success are brighter now than they were at any previous time." Julius Bing to Jenckes, Oct. 27, 1868, Jenckes Papers; see also John W. White to Jenckes, Feb. 17, 1869.

[271] Gale to Jenckes, Nov. 25, 1868, Jenckes Papers.

[272] He considered using the lame duck session to take a shot, but time was too limited, and his supporters were more optimistic about the leanings of the incoming Congress. Villard to Jenckes, Feb. 5, 1869 ("It is my firm conviction that it will be wiser not to push the bill to an issue during the present session of Congress, [the lame duck session] but to defer, the final decision upon it until the next one. Even if the bill could be got through the House, which the short time left seems to me to render exceedingly problematical. I cannot see the least chance of having it acted upon in the Senate. The best course for you appears to me to be to make as strong an argument as possible for it before the adjournment and then let the measure rest until it can be reviewed in the next Congress. This opinion, permit me to add, is shared by the friends of

But Grant's victory turned out to be a bigger problem for Jenckes. With a reliable Republican in the White House, many Republicans in Congress changed their position on patronage and presidential power over appointments.[273] It also turned out that Grant and his supporters were more willing to take advantage of patronage politics than observers had expected. Some of the Congressmen who had supported Jenckes during Johnson's term flipped their position after Grant took over and criticized Jenckes's proposal on the House floor. They suddenly claimed that the civil service would become a "favored class" of life-tenured "aristocrats," producing "centralization and tyranny." [274]

Congressional Republicans had shifted in favor of presidential power in 1869. They argued that the president represented "the people" and "the will of the majority," so the president should have the power to choose his personnel.[275] The Radicals added more detailed criticism of the bill, asking whether the examinations could be manipulated for political, regional or class purposes (for example, emphasizing knowledge of ancient Greek, rather than practical skills). They worried whether a generalist commission of three or four appointees would have any specialized knowledge of each department, let alone each specialized area of each department, to be able to design examinations for those offices. They argued that the department heads and their officers would know the qualifications better than these commissioners.[276] They argued that such a system would reward "men of mere books," and would exclude "men of practical ability."[277] They warned that the proposal would benefit young and inexperienced scholars from a life of privilege, and it would exclude civil war veterans who had demonstrated courage, loyalty, and leadership.[278]

In addition to Grant's election, there were two factors shifting political support against civil service. First, the Grand Army of the Republic, an organization of Union veterans, was increasing its demand for federal offices. The Grand Army opposed civil

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your bill, whom I have consulted in New York and have since I last saw. Our Association is now rapidly extending its organization throughout the country and we propose with the aid of our branches, to carry on a regular campaign for reform in the civil service.")

[273] Villard to Jenckes, July 26, 1869, Jenckes Papers, Library of Congress.

[274] Cong. Globe, 40th Cong., 3d Sess., 262 (Jan. 8, 1869).

[275] Id. at 263. One claimed that past administrations were full of secessionists, when "the confederate flag was worshipped in every nook and corner of public buildings." Logan said the executive branch was full of disloyal spies "who in 1861-62 came near delivering this city into the hands of the enemy, and almost succeeded in the time in dealing the death-stroke to this country." Id. See also CONG. GLOBE, 40th Cong., 3d Sess., 747 (Jan. 30, 1869) (Woodward). They acknowledged that the Constitution permitted the courts and the department heads to make appointments, but only for their own departments, and not to be able to control other departments. "The Constitution never meant that the Department of State, for instance, was to select officers for the Treasury Departments, nor vice versa. Courts were to select officers incidental to them but not for other Departments." Id. Jenckes's plan also was unconstitutional in giving the Vice President the executive power of appointment, because the Vice President was a legislative office (as President of the Senate), and he should not have executive authority until he would actually be President. CONG. GLOBE, 40th Cong., 3d Sess., 747 (Jan. 30, 1869).

[276] Id. at 748.

[277] CONG. GLOBE, 41st Cong., 2d Sess., 3222 (May 4, 1870) (Maynard).

[278] Id. at 3223. They feared that the Senators or the President might use these examinations for partisan purposes if they were hostile to the other branch or to the nominee, and that they might design an examination to embarrass a nominee. Id.

service reform when it threatened its access to spoils. Their supporters in Congress argued that civil service examinations could exclude many Civil War veterans, the experienced leaders who had served the Union loyally.[279] The second problem was that more industrial and manufacturing interests emerged as opponents of civil service reform.[280] The initial supporters from the business world generally were urban merchants, bankers, and brokers, who made up about half of the membership of civil service reform organizations.[281] They believed that an independent civil service would be more professional, reliable, uniform, and efficient, which would have made for a better business environment (in the same way that reliability and uniformity are considered pro-business aspects of the rule of law). Businessmen engaged in trade and banking were relatively more reliant on the federal government's bureaucracy, especially customhouses and the post office. They were the most outraged by the spoils system as the growing flow through customs and the mail increased hiring. Dorman Eaton, one of the leaders of both the civil service movement and the bar professionalization movement, later complained of the spoils system: "The primary needs of the merchants and the great interests of national commerce [have] been constantly surrendered to the demands of party."[282]

However, industry was not supportive. Some manufacturers' associations had endorsed Jenckes's agenda, but they soon backed away. Industry perceived that the reformist Republicans were also supporting antimonopoly policies, and that they seemed hostile to big industry. Indeed, some reformers were publicly criticizing industrial monopolies along with partisan spoils as another source of corruption and inefficiency. The leaders of the civil service reform warned that partisan patronage weakened the government, to the advantage of industry's "new money power." The reform wing was also identified with strengthening the administrative state to regulate industry. A few years later, a leading civil service reformer complained that the party spoils system "is utterly unfit for the exercise of any control over large capitalists, or if it does obtain the necessary ability, it does not obtain the character necessary to resist the temptations which capital, when it thinks itself harassed, is always ready to use for its deliverance."[283] Some reformers were aiming for more than just administrative efficiency; they were seeking a more powerful regulatory state with the expertise to craft rules and the

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[279] In 1869, in his series of stories about the Treasury Department's political chaos, Henry Adams described how the Grand Army of the Republic had turned the Treasury Department upside down with intrigue and witch-hunts. The union veterans accused the Treasury Department of being full of pro-Southern sympathizers. Adams insinuated that the Grand Army stirred up these allegations in order to create government job openings for its members. Henry Brooks Adams, "Civil Service Reform," *North American Review*, Oct. 1869, Rare Books, Library of Congress; Cong. Globe, 41st Cong., 2d Sess., 3223 (May 4, 1870) (Maynard).

[280] Hoogenboom, 647

[281] EDWARD C. KIRKLAND, DREAM AND THOUGHT IN THE BUSINESS COMMUNITY, 1860-1900 (1956), 139-40; SKOWRONEK, BUILDING A NEW AMERICAN STATE 51; Ari Hoogenboom, *Analysis of the Civil Service Reformers*, 23 THE HISTORIAN 54 (1960);

[282] Dorman Eaton, "Civil Service Reform in the New York City Post Office and Custom House," House Executive Documents, 46th Cong., 3d Sess. (1881); CONG. RECORD, 47th Cong., 1st Sess., 79-85 (1881).

[283] E.L. Godkin, "The Monopolists and the Civil Service," 32 *The Nation* 453 (June 1881); SKOWRONEK 53.

independence from capture in order to enforce those rules.[284] Or at least industry perceived that these first steps of reform would lead inevitably to a more statist, regulatory bureaucracy. It is unsurprising that industry and manufacturing would have been increasingly skeptical of these reformers and their efforts to build a leaner, meaner federal bureaucracy. They worried that civil service reform would cut off their political influence and access. Moreover, with Grant in office, the commercial interests that had been supportive of civil service were then shifting to other priorities in 1869 and 1870: revenue reform, taxes, and free trade. Civil service reform was overshadowed in those years.

C. Jenckes's Last Stand: A Limited Civil Service Bill Passes, 1871

After his success navigating the DOJ bill through Congress in the spring of 1870, Jenckes found himself in a different political battle: a struggle to retain his own seat in Congress in November 1870. Surprisingly, Jenckes's letters reveal that, as he faced a strong challenge from within his own party, he engaged in patronage politics to win back influential Republicans' support. He maneuvered to give an appointment to Jonathan Chace, a leader of a powerful Republican faction, as postmaster, but to do so, he moved the location of the office so that Jenckes could leave the incumbent Republican postmaster with the title. In a twist of fate, Chace would go on to represent Rhode Island in the Senate in the 1880s, and he was one of the four decisive Republican votes to repeal the Tenure of Office Act in 1887. Jenckes's letters reveal other confidential machinations over patronage behind the scenes with detailed discussions about which supporters should take which offices.[285]

These efforts at filling Rhode Island officers did not succeed in keeping Jenckes in office. He lost his seat in November 1870. In fact, the Republicans lost many seats that fall, partly because of a backlash against the Grant administration's corruption. Even though Jenckes lost his race, he now had three advantages: there would soon be a lame duck session of Congress in which many other lame duck Congressmen who had lost their seats might feel more free to support good government reform; Jenckes himself was a lame duck, so he was liberated from party restraints and could pursue reform more aggressively; and most importantly, the Republicans had learned that they faced a significant image problem on corruption, and Grant himself needed to address it immediately if he wanted to be reelected in 1872.

In the third session of the Forty-First Congress (the lame duck session starting in December 1870), Jenckes offered his most ambitious bill yet. Almost all government officers (except for cabinet-level department heads, ministers abroad, judges, and court clerks) would have to take competitive examinations to qualify. Incumbent officers also had to take the tests, and if they scored below a certain threshold, they would be removed automatically.[286] Jenckes's earlier bills would have introduced examinations for the

[284] SKOWRONEK, BUILDING A NEW AMERICAN STATE 51-53.
[285] Charles Adams to Jenckes, May 23, 1870; J.W. Marshall to Jenckes, June 21, 1870; George Manchester to Jenckes, April 25, 1870; George Manchester to Jenckes, July 23, 1870, Jenckes Papers, Library of Congress. Hoogenboom, at 655; CONG. REC., 49th Cong., 2d Sess., 216 (1887).
[286] CONG. GLOBE, 41st Cong., 3d Sess., 378 (Jan. 9, 1871).

district attorneys only by the President's discretion or the Senate's discretion, but this new bill would mandate competitive exams for all incumbent district attorneys and new nominees for district attorney. Eighty percent of offices would be covered by this strict "competitive exam" model, and only twenty percent would be open to discretionary hires.

Other reformers presented their own bills, but none passed. These reformers realized that their efforts were too divided, and there was very little time left in the short session before the Forty-First Congress came to a close. They gathered together to draft a single bill that was more likely to pass. They authored a short and concise joint resolution that would authorize the President to appoint a commission that would prescribe rules for examining applicants. Grant approved of this proposal, and it moved quickly through the lame duck session of Congress because it was attached as a rider on an appropriations bill. In the middle of the night, the Senate voted for the rider, 32 to 24, and it was rushed over to the House at 3 A.M., just before the Forty-First Congress was set to expire.[287] In the House, Radical Republican leaders continued their opposition, deriding it as "the most obnoxious bill" of all the civil service bills, because the reformers had used the appropriations process to ram it past an opposed House majority. The Liberals outmaneuvered the Radicals, and the appropriations bill with the civil service rider passed with many begrudging Radical votes.[288]

Jenckes left Congress after achieving some success on his highest priority. In June 1871, the Committee formulated its first rules and procedures with Jenckes's help. Initially, the civil service rules applied very broadly and covered the Department of Justice and its district attorneys. The statute permitted the President to create and maintain a commission, but the problem was that the statute did not require the President to continue it. The Liberal Republicans ran against Grant in the 1872 presidential campaign and lost. Grant had already turned against the Liberals, and he had no further use for their commission. Grant's "Stalwart" Republicans in the House responded by refusing to fund the Commission, effectively winding it down into irrelevance. Grant suspended it in 1874.[289]

Jenckes's concrete achievement had little impact, but it also laid a foundation for the more gradual successes of civil service reform, starting with the Pendleton Act of 1883. The Pendleton Act initially required examinations for only ten percent of federal offices, but it allowed each President thereafter to extend civil service protection to some of his own appointees. Over the next two decades, each outgoing President entrenched a number of his allies by switching their offices from political to civil service. By the end of the century, the civil service had expanded incrementally but steadily to cover 46 per cent of federal offices. But most of these offices were postal or other lower level offices.[290] The relative weakness of the American civil service compared to Europe has

[287] CONG. GLOBE, 41st Cong., 3 Sess., 1935, 1997 (March 3, 1871); LEONARD WHITE, REPUBLICAN ERA, 281.
[288] CONG. GLOBE, 41st Cong., 3d Sess. 1935-36 (March 3, 1871) (voting 90-20 in favor).
[289] JEAN SMITH, GRANT; HOOGENBOOM, OUTLAWING THE SPOILS; SKOWRONEK, BUILDING A NEW AMERICAN STATE; LEONARD WHITE, 283.
[290] SKOWRONEK, BUILDING A NEW AMERICAN STATE 68-71

partly been explained by the power of American party machines.[291] Ironically, the expansion of civil service was driven by patronage partisanship – but that growth was so delayed and limited that it lost its window of opportunity to cover government lawyers.[292]

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

One of my initial questions was why neither the Radicals nor the reformers saw civil service reform as an opportunity to entrench sympathetic Republicans in the federal government. The Radicals did not support civil service examinations, which would have limited their discretion in hiring, whether that discretion would be used to hire candidates with substantive commitments to Reconstruction, or to hire for patronage to shore their political support. Radicals were also less interested in civil service entrenchment, because entrenchment limited the rotation in office necessary for distributing their patronage. Jenckes and other civil service reformers wanted entrenchment, but only if it meant entrenching the most efficient, skilled officers. They were unwilling to compromise on scaling back examinations, because the result would be entrenching the spoils hires. Reformers were not interested in leaving room for so much political discretion on the hiring end, and they were not so committed to Reconstruction that they would make compromises for the sake of civil rights entrenchment. Thus, neither faction was willing to make compromises with each other necessary for entrenchment.

These developments help to explain the puzzle of why Jenckes, Congress's leading civil service reformer, did not push harder to apply these reforms specifically in the DOJ bill. 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, Evarts and Hoar, had earned more trust that they shared the reformers' values, lessening the need for other structural reforms. Second, the DOJ bill already offered some relevant professional standards for hiring. The DOJ bill 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, accounting, etc., law officers required a more advance 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 turns 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. And again, 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.[293] At the time, there was a rough fit between the DOJ and the Tenure of Office Act: many of the

[291] RODNEY LOWE, THE OFFICIAL HISTORY OF THE BRITISH CIVIL SERVICE 17-40 (2011)
[292] SKOWRONEK, BUILDING A NEW AMERICAN STATE; HOOGENBOOM, OUTLAWING THE SPOILS.
[293] CONG. GLOBE, p. 66, (Dec. 12, 1870)

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."

It would have been possible for Jenckes to have inserted into the DOJ bill 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 (and such separate language was later the issue in *Myers v. United States*).[294] Jenckes himself had included such language in his own civil service bills to protect his civil service commissioners in 1866 and 1867. However, 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 Jenckes was drafting the Department of Justice bill in late 1869 to 1870, the House already voted overwhelmingly to repeal the Tenure of Office Act, so Jenckes would have been aware that repeating the same Senate powers could trigger resistance in the House. For these reasons, Jenckes had less reason to push for civil service examinations or job security in the Department of Justice bill.

V. A False Start

Even though Congress passed the DOJ bill, the new department faced three debilitating practical problems. The first was that Congress provided for no building. The Retrenchment Committee was the architect of the department in the metaphorical sense, not the literal sense. 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 Department of Justice officers were dispersed in other department buildings, temporary offices in other federal buildings, and in rented office space in private buildings, until 1935, when the first Department of Justice building was completed during the FDR administration.[295]

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. In 1874-75, Congress engaged in a law reform project of publishing its Revised Statutes, a modernizing effort similar to codification. Instead of using this opportunity to clarify that the DOJ statutes superseded the earlier statutes and gave the Attorney General full control, the Congressional committee decided to publish both the DOJ statute's provisions and the earlier laws, as well. George Boutwell, the former Treasury Secretary with a partisan reputation, became a Senator

[294] 12 Stat. 666, Sec. 1 (1863). The statute protecting Postmaster General and his assistants that would later be struck down in Myers v. U.S. was passed in 1872, after Jenckes was out of Congress. 17 Stat. 284, Sec. 2 (1872).

[295] "U.S. Department of Justice Building," GSA website. http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/321; HUSTON, THE DEPARTMENT OF JUSTICE, 54.

from Massachusetts, and either had his revenge on Jenckes or mistakenly undid his work. It turns out that Boutwell served as chairman of the committee assembling the Revised Statutes, recreating the administrative confusion over the U.S. Attorneys. As a result, the confusion over bureaucratic line of command persisted for decades.[296]

The third was appropriations and personnel – or rather, the lack thereof. The district attorneys complained about their lack of resources for civil rights prosecutions. Akerman had to refuse requests for additional lawyers, because his appropriations were dwindling, and "strictest economy is a necessity."[297] Recognizing that the current conditions were preventing these trials from moving forward, Akerman wrote in his annual report for 1871 that "the judicial machinery of the United States must be increased."[298] Akerman complained repeatedly that the infrastructure of federal prosecution and federal courts prevented the enforcement of civil rights law. Robert Kaczorowski's research showed that U.S. Attorneys were processing more civil rights cases in the early 1870s, but they did so with smaller budgets.[299] There was one moment late in 1871 when Attorney General Akerman requested more funding for these prosecutions, and Congress delivered. He observed that, for a time, the federal authorities "were winning the war against the Klan," despite their limited resources.[300] However, Kaczorowski also documents a political backlash against this spending, which curtailed further enforcement.[301]

Akerman's successor was George Williams, a Senator who had been a member of the Retrenchment Committee that drafted the DOJ bill. Williams earlier had been a major supporter of military Reconstruction during Andrew Johnson's presidency, but those commitments had waned in the 1870s. Contemporaries wondered whether Grant appointed Williams less for his help in a civil rights campaign than for his help on Grant's 1872 re-election campaign.[302] (This move previewed a recurring practice of Presidents appointing their campaign managers as Attorneys General). Williams also cited the lack of funding for civil rights prosecutions, but he may have been insincere and was merely using the funding problems as an excuse to cut back.[303] One must wonder whether the DOJ's lack of resources was a feature of the Retrenchment committee's design, rather than a bug. Civil rights cases had proceeded initially in the South despite Congress and the DOJ statute, 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.[304]

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[296] Sewell Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 167, 181-192 (1938).
[297] KACZOROWSKI, 67.
[298] Id. at 73
[299] Id. at 65-68, 72, 82..
[300] Id. at 76.
[301] Id. at 69.
[302] KACZOROWSKI 80-81.
[303] Id. at 85-87.
[304] Kaczorowski, "Chapter 5, The Department of Justice and the Retreat from Civil Rights Enforcement," in Id.

Congress did appropriate more money for hiring commissioners and marshals in 1871, and the records reflect an increase in their numbers, but the number of U.S. attorneys and assistant U.S. attorneys did not increase [See the chart at the end of this Article]. Few assistants were assigned to ex-Confederate states: Only twelve of the 55 assistant district attorneys in 1871 were in the ex-Confederate South, and in 1872, that number increased to 18 out of a total of 59, still a small number.[305] 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 peace-keeping and a show of force to protect voters on election day -- when Republicans had a vested political interest in Republican votes. But the lack of assistance for the district attorneys reflects less of a commitment to enforcing civil rights on other days of the year that did not have elections. Very soon after, Grant diverted more of these resources away from elections in the South, and towards elections in northern cities.[306] New York was the most significant swing state in the second half of the nineteenth century, and Democrats controlled New York City. Republicans needed federal law enforcement more in New York than in the South.[307]

One might note that the federal government seems to have begun enforcing civil rights laws around the time of the Department of Justice'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 prosecutions declined after 1871. Benjamin Bristow, then the U.S. Attorney in Kentucky in the late 1860s, was responsible for aggressive enforcement.[308] He became the first Solicitor General in the Department of Justice under Attorney General Amos Akerman, and he led a series of prosecutions in 1871 and 1872.[309] The rising number of prosecutions in 1871 and 1872 were more the result of Grant's temporary support for civil rights enforcement, his selection of Akerman and Bristow, and the passage of the Enforcement Act of 1870 and the KKK Act of 1871. The creation of the DOJ on the one hand contributed by creating the office of Solicitor General with higher salary. On the other hand, there is no evidence in the Congressional debates of an intent for the SG to have this role in civil rights, and in the end, the DOJ bill limited the resources available to Akerman and Bristow.[310] If Congress had not passed the DOJ statute, 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 statute blocked that flexibility.

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[305] REGISTER OF THE DEPARTMENT OF JUSTICE IN 1871; REGISTER OF THE DEPARTMENT OF JUSTICE IN 1872.
[306] KACZOROWSKI, 68.
[307] 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 (1999); David Quigley, *Constitutional Revision and the City: The Enforcement Acts and Urban America, 1870-1894*, 20 J. POLICY HIST. 64 (2008).
[308] KACZOROWSKI, 40-41.
[309] KACZOROWSKI, 63.
[310] KACZOROWSKI, 67, 80-81.

There is little evidence that the Attorney General was able to exert more control over U.S. Attorneys after the creation of the DOJ. Before 1870, the correspondence from the Attorneys General or the Assistant Attorneys General to the U.S. Attorneys reflected a clear position of authority. U.S. Attorneys were writing letters for advice and direction, and the Attorneys General and Assistant Attorneys General replied with commands. It is difficult to know whether these commands were actually followed on the ground, but the point is that these letters revealed the kind of communication reflective of a bureaucratic hierarchy. Before 1870, Attorneys General or their assistants wrote 73 letters to U.S. Attorneys in 1868, and that number increased to 132 from Hoar or his assistants in 1869.[311] In the first half of 1870 (before the DOJ opened its doors), that number was consistent, with 63 letters. Over the second half of 1870, with the new statute in effect, the pace remained steady with 55 letters.[312] At least in terms of capacity to issue letters and commands, the DOJ bill does not appear to have changed the bureaucratic control of the Attorney General.

As it turns out, as Grant became exhausted by Reconstruction, the DOJ's law officers still followed the White House. 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 Grant decided to back away from Reconstruction enforcement in 1873, the U.S. Attorneys followed his direction and ceased the prosecutions.[313] The retreat from Reconstruction suggests that the DOJ was responsive 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 Grant's Attorneys General followed his directives, as did the district attorneys and other DOJ lawyers.

Moreover, Jenckes's decision not to insert his favorite civil service protections into his DOJ bill 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. Once 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,[314] and 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 Americans.

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[311] Letters Sent by Attorney General: General and Miscellaneous, M699, M701 (microfilm records).
[312] Letters Sent by Attorney General: General and Miscellaneous, M699, M701 (microfilm records).
[313] KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION.
[314] LEONARD WHITE, ET AL., CIVIL SERVICE ABROAD: GREAT BRITAIN, CANADA, FRANCE, GERMANY, 3, 61, 90, 204 (1935).

VI. Conclusion

The DOJ bill could be described as mostly aspirational, falling short of its drafters' goals, 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 developed over the long term the norms of professional independence envisioned by Jenckes and the department's congressional architects. The focus on the role of the Attorney General is at best a distraction. Evarts, Hoar, and Akerman may have been professional models in the late 1860s and early 1870s, but often in the DOJ's history, other Attorneys General had served as the President's campaign manager or had been partisan insiders.[315] 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 non-partisan commitments as Evarts and Hoar. Instead of the Attorney General, the key to the DOJ's norms of independence appear to have been the creation of a centralized law department as an institutional base for professionals below the Attorney General and for mid-level career government lawyers. 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 aspirations. The elimination of outside counsel led to 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 out across the country. This research will focus on the Southern District of New York from 1870 through the 1930s, as 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 to a national professional class. The next step of this research is to focus on mid-level lawyers in the emerging "Main Justice" in Washington, D.C., and on federal law enforcement in major cities in the late nineteenth century and the early twentieth century.

[315] George Williams was one example under Grant, and Benjamin Harrison's Attorney General Miller also was a partisan insider and campaign advisor. But the trend of prominently partisan Attorney Generals seems to have emerged in 1919 with A. Mitchell Palmer under Woodrow Wilson, followed by Harding's campaign manager Daugherty, Franking Roosevelt's Attorney General Homer Cummings, Truman's campaign manager James McGrath, Eisenhower's political advisor Herbert Brownell, and Nixon's campaign manager John Mitchell.

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 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 Congressman 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 1: Summary of an Act to Establish a Department of Justice (1870)

Offices:

1. Department established with Attorney General as the head (Section 1)

2. Solicitor General created (Section 2)

3. Two Assistant Attorneys General (continued from earlier statute) (Section 2)

4. From Treasury to DOJ:

    Solicitor of Treasury and his assistants (Section 3)

    Solicitor of Internal Revenue (Section 3)

5. From Navy Dept. to DOJ

    Naval Solicitor (Section 3)

6. From State Dept. to DOJ

    Examiner of Claims (Section 3)

Duties and Powers:

Section 4: Attorney General may refer legal questions to subordinates.

Section 5: Attorney General may argue cases (in which the government has an interest) in any court in the United States, or require the Solicitor General to argue such cases.

Section 6: A head of any Department may ask the Attorney General for a legal opinion. When a legal question arises in the War or Navy Department, if a statute does not assign the question to another legal officer, then the question shall be sent to the Attorney General.

Section 7: The duties of the Auditor of the Post Office are moved to an official in the DOJ to be named later.

Section 8: The Attorney General may make all necessary rules and regulations for the department.

Section 9: When the offices listed in Sections 2 and 3 become vacant, the new officers shall continue to be appointed by the President with advice and consent of the Senate.

The inferior officers (clerks, etc.) shall be appointed and removable by the Attorney General.

Section 10: Annual salaries set: Solicitor General, $7,500; Assistant AG's: $5,000; Solicitor of Internal Revenue, $5,000; other officers continue at previous salary; and Attorney General may hire four clerks.

Section 11, 12: Process of funding, annual reports

Section 13: The Treasury Department will provide offices in its building (or nearby buildings) for the DOJ officers.

Section 14: Attorney General may require any DOJ officer to perform departmental duties. No fees shall be paid to any other attorney for any service required of DOJ officers.

Section 15: Supervision of expenses shifts from Interior Department to Attorney General.

Section 16: Attorney General shall supervise the United States attorneys.

Section 17: It shall not be lawful for any department to employ attorneys at the expense of the United States (i.e., outside counsel). No fees may be paid to counsel for government lawyers aside from the district attorneys or assistant district attorneys.

Section 18: The Attorney General will publish his opinions.

Not moved to DOJ: Judge Advocates General

Appendix 2: Assistant United States Attorneys

The following chart shows the number of Assistant U.S. Attorneys from 1871 to 1876. The Assistant U.S. Attorney position created by Congress in 1861 (12 Stat. 285), at the outset of the war. There are apparently no records establishing the number of AUSA's between 1861 and 1870, but the *Register of the Department of Justice* tracked their names and districts starting in 1871. The records from 1871 to 1876 do not show a significant increase in the number of AUSA's to make up for the elimination of outside counsel, which had been the equivalent of sixty district judges or forty assistant attorneys general. The number of AUSAs in the South declined in the mid-1870s, and grew mostly in the Northeast, but only incrementally. Many districts had no AUSA's, and aside from a handful of exceptions, most districts had no more than one AUSA.

Number of AUSA's

	1871	1872	1873	1874	1876
Northeast (but not NY)	5	6	8	10	13
NY	6	12	12	12	13
Border	4	4	4	5	6
Old Confederacy	11	18	13	14	15
Midwest	10	15	14	12	15
West	2	2	2	3	3