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Cover Page Footnote

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FEDERAL ENFORCEMENT OF CIVIL RIGHTS DURING THE FIRST RECONSTRUCTION

Robert J. Kaczorowski*

Introduction

The movie, "Mississippi Burning,"¹ dramatizes the story of the F.B.I.'s investigation into the murders of three civil rights workers in Jessup County, Mississippi. This story was one of a number of similar stories of the 1960s that arose out of the attempt by Presidents John F. Kennedy and Lyndon B. Johnson to enforce the civil rights of citizens living in the South by marshalling the power of federal law enforcement and the military.² This effort represented a remarkable interposition of the nation's power to enforce citizens' rights and to protect them from the violent resistance of terrorist groups such as the Ku Klux Klan.

Although most Americans believe that these government activities were unprecedented, a similar application of federal executive power to enforce civil rights occurred in the 1870s. President Ulysses S. Grant was the first American president systematically to use such power to protect the personal safety and to enforce the fundamental rights of American citizens in the interest of racial equality.³ Indeed, the Grant Administration's civil rights enforcement policy was, in certain respects, far more remarkable than that of a century later. The first Ku Klux Klan was just as ruthless as its twentieth-century counterpart, but even more pervasive.⁴ How-

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1. MISSISSIPPI BURNING (Orion Pictures 1988).

2. See CIVIL RIGHTS AND THE SOUTH, A SYMPOSIUM (Leonard W. Levy ed., 1971); LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT (Donald B. King & Charles W. Quick eds., 1965); SOUTHERN JUSTICE (Leon Friedman ed., 1965).

3. See ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985) (providing a legal, administrative, and political history of the national government's efforts to enforce civil rights during Reconstruction).

4. ALLEN TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971) (providing the best account of the Ku Klux Klan during Reconstruction). See also ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877 (1988) (providing the best general history of the Reconstruction); DAVID MARK CHALMERS, HOODED AMERICANISM: THE HISTORY

ever, the Grant Administration did not enjoy the resources which were available to Kennedy's and Johnson's administrations.⁵ This essay recounts the heroic efforts of federal legal officers and judges to enforce citizens' rights during the 1870s.

Part I sets forth the historical events giving rise to the enforcement effort of the Grant Administration. Part II details the problems which the federal executive branch faced when it aggressively prosecuted civil rights violations. Part III details the problems which the federal judiciary faced in administering the civil rights prosecutions brought by the executive branch. Part IV details the national political problems that eventually ended effective enforcement of federal civil rights laws. This Essay concludes that, notwithstanding the problems faced by the federal executive and judicial branches which hindered effective enforcement of civil rights, federal legal officers succeeded in destroying the Ku Klux Klan. Nonetheless, national political developments finally ended any hope of vindicating the civil rights of blacks until the twentieth century.

I. Historical Background

The presidential campaign of 1868 resulting in the election of President Grant revealed that the American Civil War had not really ended in 1865, but that it had resumed as a guerilla war.⁶ During the presidential campaign, the Ku Klux Klan emerged as a paramilitary wing of the Democratic Party⁷ and embarked on a campaign of terror for the purpose of destroying the Republican Party in the Southern states and reducing Southern blacks to the

OF THE KU KLUX KLAN (3d ed. 1987) (providing a history of the Klan in the twentieth century).

5. WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-1879* (1979) (an excellent history of the Grant Administration, including Grant's Southern policy, although I do not agree with all of Gillette's conclusions). *See also* KACZOROWSKI, *supra* note 3, at 83-115 (documenting the persistence of inadequate financial and human resources to enforce civil rights during Reconstruction, the insurmountable obstacles federal legal officers encountered, and the ultimate failure of will permanently to secure citizen's rights); TRELEASE, *supra* note 4; MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1987) (providing one of the best accounts of civil rights enforcement during the Kennedy and Johnson years); DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1986) (providing an excellent account of enforcement of civil rights during the administrations of Presidents Kennedy and Johnson).

6. *See* KACZOROWSKI, *supra* note 3, at 50-72; TRELEASE, *supra* note 4, at 113-75.

7. KACZOROWSKI, *supra* note 3, at 53-55.

control of white supremacists.⁸ After Grant's election, Klan terrorism became more pervasive, more systematic and more effective in terrorizing black and white Republicans in the South. The Klan overwhelmed civil government and the administration of civil and criminal justice in portions of the Southern states⁹. Southern Republicans were at the mercy of roving bands of Klansmen who attacked them with virtual impunity.¹⁰ Klan violence took the forms of beatings, whippings, lynchings, shootings, rapes and torture.¹¹ The savagery of these crimes moved United States Circuit Court Judge Hugh Lennox Bond, whose native state was Maryland, to report to his wife that he "never believed such a state of things existed in the U.S."¹² Fearful for his own safety, he confided: "I will tell you all when I come home what I am afraid to pour out on paper."¹³ Victims of Klan violence were unable to look to local law enforcement officers because local officers often were Klansmen who participated in the terrorism. Even when local officials wanted to bring the criminals to justice, fear or weakness prevented them from doing so. Often, the enormous number of Klansmen who engaged in a single incident of terrorism overwhelmed the meager resources of local governments.¹⁴ For example, one incident in York County, South Carolina involved almost three thousand Klansmen.

Congress chose to combat this civil insurrection with federal legal process.¹⁵ In statutes enacted in 1870¹⁶ and 1871,¹⁷ Congress

8. *Id.*

9. *Id.*

10. *Id.* at 54.

11. *Id.*

12. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Feb. 9, 1871), in HUGH LENNOX BOND PAPERS, The Maryland Historical Society [hereinafter BOND PAPERS]; Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (June 14, 1871), in BOND PAPERS, *supra* (providing an account by Judge Bond to his wife of a woman who had been dragged from her cabin, beaten, and "her hair singed off her privates."); Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (n.d.), in BOND PAPERS, *supra* (this, and other crimes, led him to conclude, "I do not believe that any province in China has less to do with Christian civilization than many parts of these states.").

13. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Feb. 9, 1871), in BOND PAPERS, *supra* note 12.

14. Letter from Daniel T. Corbin, U.S. Att'y, S.C., to George H. Williams, U.S. Att'y Gen. (Nov. 21, 1872), in SOURCE CHRONOLOGICAL FILE, National Archives [hereinafter SOURCE CHRONOLOGICAL FILE] (M.D. Ala.); Letter from Daniel T. Corbin, U.S. Att'y, S.C., to George H. Williams, U.S. Att'y Gen. (Dec. 15, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* (M.D. Ala.).

15. See JOINT SELECT COMMITTEE ON THE CONDITIONS OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, 42d Cong., 2d Sess., H.R. REP. NO. 22 and S. REP. NO. 41

established that the Department of Justice and the federal judiciary would serve as bulwarks against the Klan. Indeed, in many Southern states federal attorneys, marshalls and judges, assisted by small military forces, provided virtually the only police protection and criminal justice available to blacks and white Republicans. Federal judges and Justice Department lawyers embarked on an heroic, albeit short-lived, effort to secure the personal safety and enforce the fundamental rights of American citizens. The effort was more dangerous and far more difficult during Reconstruction than during the 1960s.¹⁸

II. The Federal Executive Branch

Congress created the Department of Justice in 1870 in large part for the purpose of providing more effective protection against Klan terrorism.¹⁹ In 1870, President Grant appointed Amos T. Akerman as Attorney General. Akerman was a principal organizer of the Republican Party in his native state of Georgia. As a scalawag, he knew firsthand what Republicans in the South were subjected to, and he was determined to come to their aid.²⁰ At the same time, Grant appointed Benjamin Helm Bristow as Solicitor General. Prior to his appointment, Bristow served as the United States Attorney for the District of Kentucky. With the cooperation of Federal Judge Bland Ballard, Bristow provided virtually the only justice black Kentuckians obtained in the 1860s.²¹ By appointing Akerman and Bristow, both noted defenders of federal

(13 vols.) [hereinafter KKK REPORT] (contains complete documentation of the investigation of the extent of Klan terrorism in the South by a special committee created by Congress comprised of members of both the House and the Senate. Both Houses of Congress published the committee's hearings and the evidence received in the 13 volume report).

16. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870).

17. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871).

18. KACZOROWSKI, *supra* note 3, at 49-115.

19. 1 ALBANY L.J. 355 (May 7, 1870); 5 AM. L. REV. 159-81 (Oct. 1870).

20. See KACZOROWSKI, *supra* note 3, at 54.

"Scalawag" is a "term of opprobrium applied by conservative southerners to native whites who joined with the freedmen and the carpetbaggers in support of Republican policies during Radical Reconstruction. . . . Comprising approximately 20 percent of the white electorate, they often provided the crucial margin of victory for the Republicans." CONCISE DICTIONARY OF AMERICAN HISTORY 931 (1983). "Carpetbagger" is a derogatory term referring to "[n]ortherners who went to the South at the end of the Civil War and became active in politics as Republicans." *Id.* at 164.

21. KACZOROWSKI, *supra* note 3, at 12, 52-53, 80. Bristow and other federal legal officers were assisted by a Louisville, Kentucky lawyer by the name of John Marshall Harlan. For his civil rights work during this period, Grant appointed Harlan to the United States Supreme Court. *Id.* at 143, 201.

civil rights, to the two highest law enforcement positions in the federal executive branch, President Grant signalled his commitment to the vigorous enforcement of federal civil rights.

Reports of Klan terrorism poured into the newly created Department of Justice from federal legal officers in the Southern states.²² These reports revealed that the Klan was organized, drilled and armed. They described the Klan as a paramilitary group fighting a rearguard action on behalf of "the old disunion secession doctrine that led the South into" the Civil War.²³ These reports persuaded Attorney General Akerman that "these combinations amount to war, and cannot be crushed on any other theory."²⁴ Judge Bond, as an on-the-scene observer, believed that martial law was the only effective way to combat the Klan.²⁵ Congress, however, decided to combat the Klan through ordinary criminal process, notwithstanding its authorization of the President to declare martial law in the event this became necessary.²⁶

Within a month of taking office in June 1870, Akerman instructed federal legal officers to prosecute every reported violation of federal civil rights laws.²⁷ He believed that only the most vigorous enforcement of federal law "against all parties who may be guilty" had any hope of stopping Klan violence.²⁸ His experiences in Southern states taught him that "[t]he policy of coaxing those of our people who are unfriendly to the Government has utterly

22. See *id.* at 49-78 (providing a discussion of the reports and citations to the voluminous correspondence among United States Attorneys General and United States attorneys, federal marshals, federal judges, and political leaders).

23. Letter from John A. Minnis, U.S. Att'y, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 28, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Ala.).

24. Letter from Amos T. Akerman, U.S. Att'y Gen., to B.D. Silliman (Nov. 9, 1871), 1 Letterbooks 90-93, in AMOS T. AKERMAN PAPERS, Alderman Library, University of Virginia [hereinafter AKERMAN PAPERS].

25. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Sept. 20, 1871), in BOND PAPERS, *supra* note 12.

26. Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13.

27. *Circular Relative to Rights of Citizens to Vote in the Several States*, (July 28, 1870), in CIRCULARS OF THE ATTORNEYS GENERAL, National Archives [hereinafter CIRCULARS]; *Circular Relative to the Enforcement of the Fourteenth Amendment*, (July 6, 1871), in CIRCULARS, *supra*. See also Letter from Amos T. Akerman, U.S. Att'y Gen., to Robert A. Hill, U.S. Dist. Judge, Miss. (Sept. 12, 1871), 1 Letterbooks 70-71, in AKERMAN PAPERS, *supra* note 24 (demonstrating a good example of Akerman's urgings to federal officials).

28. Letter from Amos T. Akerman, U.S. Att'y Gen., to E.P. Jacobson, U.S. Att'y, Miss. (Aug. 18, 1871), 1 Letterbooks 44-46, in AKERMAN PAPERS, *supra* note 24 (It was his "opinion that nothing is more idle than an attempt to conciliate by kindness" the malcontents in the Southern States).

failed hitherto.”²⁹ Klansmen “take all kindness on the part of the Government as evidence of timidity, and hence are emboldened to lawlessness by it,” he informed a United States attorney.³⁰ Although he believed it to be “impossible for the Government to win their affection,” it could nonetheless “command their respect by the exercise of its powers.”³¹ Federal judges had a particularly important role: it was their business “to terrify evil doers.”³² Solicitor General Bristow shared this view and urged federal legal officers to prosecute even men of the highest social standing, making examples of them.³³ “The higher the social standing and character of the convicted party,” he instructed the United States attorney for the District of North Carolina, “the more important is a vigorous prosecution and prompt execution of judgment.”³⁴

Although some of the obstacles to civil rights enforcement were common to the 1870s and the 1960s, in other respects, far more dangerous and trying obstacles existed in the 1870s. A gross insufficiency in personnel and funding impeded enforcement in the 1870s,³⁵ but not the 1960s. Federal judges and prosecutors in the 1870s suffered from inadequate resources to investigate, prosecute and try crimes. They did not possess a federal agency with the law enforcement expertise and professionalism of the modern Federal Bureau of Investigation; nor did they have access to a large standing military force, or to the virtually unlimited financial resources that were available to federal officials in the 1960s. The geographical area assigned to a United States attorney was formidably large for an era when the remote areas in which many crimes were committed were not easily or rapidly accessible. A single incident might involve hundreds of suspects. Forced to travel hundreds of miles to the scene of a crime and to spend weeks working on their cases, federal prosecutors were simply overwhelmed.³⁶ They often

29. Letter from Amos T. Akerman, U.S. Att’y Gen., to John H. Caldwell (Nov. 10, 1871), 1 Letterbooks 113-17, in AKERMAN PAPERS, *supra* note 24.

30. Letter from Amos T. Akerman, U.S. Att’y Gen., to E.P. Jacobson, U.S. Att’y, Miss. (Aug. 18, 1871), 1 Letterbooks 44-46, in AKERMAN PAPERS, *supra* note 24.

31. *Id.*

32. *Id.*

33. Letter from Benjamin H. Bristow, Solicitor Gen., to D.H. Starbuck, U.S. Att’y, N.C. (Oct. 2, 1871), Instruction Book B2, at 388-89, reel 2, in INSTRUCTIONS TO U.S. ATTORNEYS AND MARSHALLS, 1867-1904, microfilm copy, National Archives [hereinafter INSTRUCTIONS].

34. *Id.*

35. See KACZOROWSKI, *supra* note 3, at 79-96.

36. See Letter from John A. Minnis, U.S. Att’y, Ala., to Amos T. Akerman, U.S. Att’y Gen. (Sept. 8, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Ala.); Letter from John A. Minnis, U.S. Att’y, Ala., to Amos T. Akerman, U.S. Att’y

worked every day and night of the week in preparing a case for trial. They would participate in trial during the day, and because they did not have the secretaries and law clerks which today are available to Justice Department lawyers, 1870s prosecutors would use the nights to record the evidence presented each day. When a grand jury was in session, prosecutors presented evidence to gain indictments during the day, and at night they would prepare their evidence and strategy for the next day. Moreover, at the very time that they were trying defendants indicted by prior grand juries, federal prosecutors were forced to prepare new cases to present to the current grand jury.³⁷

For example, United States Attorney for the District of Tennessee R. McPhail Smith, warned newly appointed United States Circuit Court Judge, Halmer H. Emmons, not to expect too much when Smith appeared before him: "I fear that it will not be in my power to get up for you anything like the preparation you will desire." Smith explained:

I have no means of assembling my witnesses & conferring with them prior to the trial of cases. We have usually relied, in criminal cases at least, upon eliciting from witnesses, whose testimony obtained the indictment before the grand jury, the details of the case for the first time when upon the stand.³⁸

U.S. Attorney Smith did not even have an assistant to take notes during grand jury hearings and criminal trials. Judge Emmons defended him against the attacks of other federal officials who accused him of inefficiency and a "want of zeal." He informed

Gen. (Sept. 13, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Ala.); Letter from Major W. Brown to Amos T. Akerman, U.S. Att'y Gen. (Nov. 14, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.C.); Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Sept. 17, 1871), in BOND PAPERS, *supra* note 12; Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Dec. 18, 1871), in BOND PAPERS, *supra* note 12.

37. Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Sept. 13, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (n.d.), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 11, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.); Letter from Daniel T. Corbin, U.S. Att'y, S.C., to Amos T. Akerman, U.S. Att'y Gen. (Nov. 3, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.C.); Letter from Daniel T. Corbin, U.S. Att'y, S.C., to Amos T. Akerman, U.S. Att'y Gen. (Nov. 20, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.C.).

38. Letter from R. McPhail Smith, U.S. Att'y, Tenn., to Halmer H. Emmons, U.S. Cir. Judge, Tenn. (Apr. 12, 1871) (box 1, folder 1), in HALMER H. EMMONS PAPERS, Burton Historical Collection, Detroit Public Library [hereinafter EMMONS PAPERS].

Attorney General Akerman of the impossible conditions under which the federal prosecutor labored and concluded:

I am only surprised at the progress he has made in securing testimony, scattered as it is over the district, in so many of the hundreds of cases under his charge. As a matter of course, he cannot unaided prepare as they should by any considerable number of them upon the facts, and have one moment left for legal examination.³⁹

Requests for assistance poured into the office of the Attorney General. Federal prosecutors pleaded for assistant counsel, investigators, clerks and stenographers to help them prepare their cases. They also asked for military support in making arrests, in holding prisoners for trial and in protecting government witnesses and federal officials during trials.⁴⁰ The Attorney General continuously lobbied Congress for greater financial support. Nevertheless, ap-

39. Letter from Daniel T. Corbin, U.S. Att'y, S.C., to George H. Williams, U.S. Att'y Gen. (Nov. 21, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.C.). See Letter from R. McPhail Smith, U.S. Att'y, Tenn., to Halmer H. Emmons, U.S. Cir. Judge, Tenn. (June 9, 1871) (box 2, folder 2), in EMMONS PAPERS, *supra* note 38; Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Sept. 13, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from Allen P. Huggins to Amos T. Akerman, U.S. Att'y Gen. (June 28, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.).

The enormous expansion of federal court dockets as a result of Civil War and Reconstruction legislation hindered enforcement of federal civil rights by the federal executive branch. The increase in the business of the federal courts was due to the enactment of revenue laws and the civil rights statutes. KACZOROWSKI, *supra* note 3, at 60. By 1871, Attorney General Akerman confided to a friend: "I am on the rack from morning till night, and frequently far into the night, and yet, with all that, I can hardly keep down this pile of business." Letter from Amos T. Akerman, U.S. Att'y Gen., to John N. Montgomery (Aug. 21, 1871), 1 Letterbooks 47-49, in AKERMAN PAPERS, *supra* note 24. He explained that the rising case-load resulted from the great expansion of federal jurisdiction. Moreover, he cited the mistrust of state courts felt by many litigants. Letter from Amos T. Akerman, U.S. Att'y Gen., to James Jackson (Nov. 20, 1871), 1 Letterbooks 149-60, in AKERMAN PAPERS, *supra* note 24.

40. See, e.g., Letter from Benjamin H. Bristow, Solicitor Gen., to Amos T. Akerman, U.S. Att'y Gen. (Aug. 8, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (Ky.); Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (n.d.), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from Amos T. Akerman, U.S. Att'y Gen., to E.P. Jacobson, U.S. Att'y, Miss. (Aug. 15, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Sept. 13, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from Robert A. Hill, U.S. Dist. Judge, Miss., to Amos T. Akerman, U.S. Att'y Gen. (June 23, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Aug. 21, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 11, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.); Letter from D.H. Star-

propriations remained insufficient, even when Congress made special allocations for civil rights enforcement.⁴¹ The contradiction in the administration's civil rights enforcement policy quickly became apparent. While the Attorney General admonished federal prosecutors vigorously to enforce federal civil rights laws, he also informed them that "the strictest economy is a necessity."⁴² This problematical policy placed federal legal officers in an untenable position. One lamented: "Attorney General it is too bad to let us fight this thing against all the public opinion as single handed as we are. We need more force enough to inspire respect and command order."⁴³

Another obstacle to 1870s prosecutions was the fact that federal officers lived in the communities in which they worked and therefore were more vulnerable to intimidation than were their 1960s counterparts. Similarly, the identities of the victims and of the perpetrators of Klan crimes presented an obstacle to the enforcement of civil rights in the 1870s. The Klan preyed upon the most vulnerable and defenseless citizens of the South. Justice Department lawyers reported that victims often were so "ignorant, poor and timid" that they lacked "the knowledge, the means, [and] the courage to bring [complaints] to the notice of the proper authorities."⁴⁴ Many of the victims of Klan crimes were poor, black rustics on the margin of society. Even when the victims possessed the knowledge and means to initiate prosecutions, they often were reluctant to file charges or to testify against their assailants because of the odds against conviction.

Many Klansmen were respected members of the community whose Klan activity was perceived by the majority of white southerners as an attempt to restore the proper order of Southern society. Defendants frequently enjoyed the advantages of wealth, political influence and social prominence. They used their influence against federal prosecutors.⁴⁵ The governor of North Caro-

buck, U.S. Att'y, N.C., to Amos T. Akerman, U.S. Att'y Gen. (July 9, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.C.).

41. KACZOROWSKI, *supra* note 3, at 84-85, 101-02.

42. Letter from Amos T. Akerman, U.S. Att'y Gen., to Robert A. Hill, U.S. Dist. Judge, Miss. (July 27, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.).

43. Letter from Allen P. Huggins to Amos T. Akerman, U.S. Att'y Gen. (n.d.), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.).

44. Letter from Amos T. Akerman, U.S. Att'y Gen., to J. Caldwell (July 22, 1871), Instruction Book B2, at 289-90, reel 2, in INSTRUCTIONS, *supra* note 33.

45. Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (July 5, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.);

lina, for example, intervened in federal prosecutions in that state. First, he delayed them. Then, after the initial trials resulted in convictions, he and other Southern white leaders pressed the sentencing judge to suspend the sentences of those convicted. The sentencing judge resisted such undue pressure only through the intervention of the United States Attorney General.⁴⁶ Because of these disparities in local power, federal legal officers often were unable to obtain the cooperation of bystander witnesses or victims. This lack of cooperation, and even outright obstruction, disheartened federal legal officers and reduced their incentive to enforce civil rights statutes.⁴⁷

Law enforcement was further hindered by the way in which many Southern whites viewed the Republican-dominated federal government, the Republican Party's local constituency and the Klan.⁴⁸ Most Southern whites considered the Republican Party in the South to be illegitimate. Its illegitimacy was due, in part, to the party's constituency of former slaves, scalawags and carpetbaggers.⁴⁹ Federal legal officers were perceived by many white Southerners as agents of these disparaged groups and the cause of civil disorder. They were disrupting Southern society by imposing a federal legal regime through military force, thus defeating democratic political processes.⁵⁰

Effective law enforcement ultimately depends on the support and cooperation of the members of a community. However, many Southerners believed that resistance to federal law enforcement was required to defend legitimate law and order. In this view, the Klan was not a criminal organization, but rather a group of patriots striving to restore power to the legitimate leaders of Southern

Letter from John A. Minnis, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Nov. 26, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Ala.); Letter from John A. Minnis, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 1, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Ala.). See Letter from E. Camp to Halmer H. Emmons, U.S. Cir. Judge, Tenn. (Nov. 11, 1871) (box 1, folder 4), in EMMONS PAPERS, *supra* note 38 (showing that sometimes federal officers risked dismissal for political reasons).

46. Letter from D.H. Starbuck, U.S. Att'y, N.C., to Benjamin H. Bristow, Solicitor Gen. (Oct. 5, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.C.); Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Sept. 28, 1871), in BOND PAPERS, *supra* note 12.

47. See *supra* note 36.

48. Letter from Richard Busteed, U.S. Dist. Judge, Ala., to George H. Williams, U.S. Att'y Gen. (Mar. 29, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.).

49. *Id.*

50. *Id.*

white communities. They excused the Klan's guerilla tactics of force and terror as a necessary defense of local autonomy against a despotic central government possessing vastly greater regular forces. Thus, local residents actively and passively impeded federal law enforcement: they alerted suspects when federal agents attempted an arrest, enabling armed resistance or flight. They even attacked federal officers after arrests had been made, permitting suspects to escape.⁵¹ On occasion, federal officers making an arrest were themselves arrested and jailed by local officials.⁵² Victims of Klan violence who filed complaints and testified in federal prosecutions suffered similar mistreatment.⁵³ Federal prosecutions of Klansmen and local retaliation through state legal process extended the Civil War struggle between the North and the South, and between national sovereignty and state rights, to federal and local courthouses and jails.

While local communities rallied to assist suspects in avoiding arrest, they also helped Klansmen who were brought to trial. Fund drives raised money to hire the best lawyers to defend " 'our boys' that have been kidnapped by the Yankees."⁵⁴ "Money seems like water for 'our boys,' " sarcastically complained a federal marshall in Mississippi.⁵⁵ Supporters "will go to any extreme to get them clear," he reported to Attorney General Akerman in June 1871.⁵⁶ Indeed, they did. Wade Hampton, for example, led a campaign that raised \$10,000 and retained President Andrew Johnson's Attorney General, Henry Stanbery, and the leading constitutional authority of the United States Senate, Senator Reverdy Johnson of

51. Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (July 18, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.).

52. Letter from G. Wiley Wells, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (July 15, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.).

53. Letter from F. Tukey to Amos T. Akerman, U.S. Att'y Gen. (Dec. 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (Va.). See Letter from H.H. Wells, U.S. Att'y, Va., to George H. Williams, U.S. Att'y Gen. (Jan. 23, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (Va.); Letter from H.H. Wells, U.S. Att'y, Va., to George H. Williams, U.S. Att'y Gen. (Feb. 11, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (Va.); Letter from H.H. Wells, U.S. Att'y, Va., to George H. Williams, U.S. Att'y Gen. (Feb. 20, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (Va.) (discussing the Washington Fauntleroy case).

54. Letter from Allen P. Huggins to Amos T. Akerman, U.S. Att'y Gen. (June 28, 1871), in SOURCE CHRONOLOGICAL FILE *supra* note 14 (N.D. Miss.).

55. *Id.*

56. *Id.*

Maryland.⁵⁷ These highly skilled attorneys defended Klansmen in federal prosecutions at Columbia, South Carolina and challenged the federal court's jurisdiction all the way to the United States Supreme Court on the grounds that the federal civil rights statutes were unconstitutional. The Court avoided a decision on the merits by dismissing the appeal on procedural grounds.⁵⁸ Leading members of the local bar frequently donated their services to defend other Klansmen standing accused of federal civil rights violations. Typically, Klansmen were represented by the best lawyers available.⁵⁹

Federal civil rights prosecutions in the 1870s were also impeded by the way in which federal courts were administered. Federal judges "rode the circuit" among different towns and cities in their judicial districts, meeting infrequently and for relatively brief periods of time. It was difficult to get witnesses to leave their homes to travel daunting distances. An additional disincentive was the possibility that the federal judge would be too pressed for time to try the case at the scheduled time and site. The sheer number of docketed prosecutions would have required months to try before judges sitting continuously in accordance with modern practice.⁶⁰ In the 1870s, however, federal judges usually convened court quarterly for two week periods. At these quarterly sessions, the judge was required to try the many civil and criminal cases on the court docket, to empanel grand juries and to attend to sundry other matters. The problem was compounded by the fact that federal court dockets expanded exponentially after the Civil War because of the passage of the civil rights statutes and federal revenue laws. Necessarily, then, judicial business unrelated to Klan prosecutions interfered with the conduct of civil rights trials, leaving federal prosecutors "harassed and annoyed."⁶¹

The circumstances of the commission of Klan crimes and the technicalities of federal civil rights statutes complicated the government's preparation for trial. The collection of evidence was difficult because the crimes often were committed late at night, under

57. CHARLESTON DAILY COURIER, Nov. 25, 1871, at 1; N.Y. TIMES, Oct. 7, 1871, at 3; N.Y. TIMES, Nov. 29, 1871, at 2.

58. *United States v. Avery*, 80 U.S. 251 (1871); Letter from Robert A. Hill, U.S. Dist. Judge, Miss., to Amos T. Akerman, U.S. Att'y Gen. (June 21, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.).

59. See KACZOROWSKI, *supra* note 3, at 59.

60. See *supra* note 39.

61. See KACZOROWSKI, *supra* note 3, at 59.

cover of disguise, by men sworn to secrecy.⁶² Lack of direct evidence led to forensic problems. A federal prosecutor in Mississippi informed Attorney General Akerman that these cases required "laborious arrangement and preparation" because the evidence "is almost wholly circumstantial and of such a nice character that if it does not receive the closest attention, the Government cannot expect to succeed in the prosecution."⁶³ The complexities of federal civil rights law further handicapped prosecutors. Federal civil rights statutes required prosecutors to prove that the defendants committed these crimes out of racial animus or with the intent to deprive the victim of some constitutional right. Intent is arguably the most difficult element of a crime to prove. In light of these legal technicalities and the circumstantial nature of available evidence, trial preparation required "the examination of many witnesses, which will have to be repeated in most of the cases," a prosecutor reported to the Attorney General.⁶⁴ He complained that the "preparation of these cases will require great and attentive care, and, in view of the wealth and influence opposed to the Government, they are in themselves more than one counsel can attend to."⁶⁵

The indictments had to be drafted very carefully because of the plenary authority federal civil rights statutes conferred on federal courts and prosecutors to secure the personal safety of American citizens. Certain provisions of federal civil rights statutes based federal punishments for civil rights violations on state penal codes for comparable crimes under state criminal law.⁶⁶ Thus, if the defendants killed a political activist, the federal indictment would charge them with violating the victim's constitutionally protected rights to life and liberty and with murder as the means by which they deprived him of these civil rights.⁶⁷ Justice Department lawyers thus prosecuted Klansmen for civil rights violations that also constituted crimes under state law, crimes such as murder, assault, assault with intent to kill, burglary, rape, etc. They agonized over the drafting of indictments that reflected the nature of these crimes

62. Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (n.d.), in *SOURCE CHRONOLOGICAL FILE*, *supra* note 14 (N.D. Miss.).

63. Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Sept. 13, 1871), in *SOURCE CHRONOLOGICAL FILE*, *supra* note 14 (N.D. Miss.).

64. *Id.*

65. *Id.*

66. *See, e.g.*, Section 7 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870).

67. *See, e.g.*, K.K.K. REPORT, *supra* note 15, vol. 12, at 934-87.

while avoiding jurisdictional problems relating to state criminal codes.⁶⁸

Significantly, federal judges uniformly upheld jurisdiction and interpreted the Fourteenth Amendment as delegating to Congress plenary authority to enforce the fundamental rights of American citizens.⁶⁹ For example, Judge Richard Busteed, United States District Judge for Alabama, declared that the Fourteenth Amendment delegated to Congress the power "to pass police laws to operate within the political limits of a State to the exclusion of the police regulations of any State, and to punish the violations of such laws."⁷⁰ He upheld federal jurisdiction in all prosecutions involving combinations of two or more persons who injured or oppressed another individual "in any matter affecting life, liberty or the pursuit of happiness."⁷¹ Despite such bold assertions of plenary authority, some federal judges fretted over the limitless scope of federal jurisdiction and potential clashes with that of the states.⁷²

The plenary nature of federal civil rights statutes thus posed troublesome questions of federal jurisdiction. Prosecutors had to draft indictments, and federal judges had to develop legal theories of jurisdiction over these crimes, that avoided federal law supplanting state criminal law and eliminating state jurisdiction over the administration of criminal justice. Justice Department lawyers

68. See, e.g., Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Aug. 4, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Aug. 7, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from E.P. Jacobson, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Feb. 17, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Mar. 5, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Apr. 2, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.); See also KACZOROWSKI, *supra* note 3, at 117-20.

69. KACZOROWSKI, *supra* note 3, at 1-25, 117-34. See, Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986) (explaining that the interpretation of Congress' authority to enforce fundamental rights expressed by federal judges essentially reflected that of the congressional framers of the Fourteenth Amendment).

70. *Charge to Grand Jury*, HUNTSVILLE ADVOCATE, Nov. 12, 1871 (enclosed in Letter from Richard Busteed, U.S. Dist. Judge, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Nov. 22, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Ala)).

71. *Id.* See also *Charge to Grand Jury*, (enclosed in Letter from William J. Promis to Amos T. Akerman, U.S. Att'y Gen. (Aug. 16, 1871) in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Ala)).

72. See, e.g., Letter from Robert A. Hill, U.S. Dist. Judge, Miss., to Benjamin Bristow, Solicitor Gen. (May 13, 1872), in BRISTOW PAPERS, Library of Congress [hereinafter BRISTOW PAPERS].

sometimes turned to President Grant's Attorney General for help in resolving these thorny jurisdictional problems. One federal prosecutor, for example, was troubled with the strategy he devised for distinguishing the federal crime of assault with intent to deprive the victim of his constitutionally protected right to life from the state crime of assault with intent to kill.⁷³ His solution was to allege racial or political prejudice as an additional motive, but he was uncertain whether this sufficiently distinguished the federal crime from the state crime.⁷⁴ Attorney General Akerman responded supportively, but not informatively. He simply encouraged the prosecutor to try it and see if it worked. "A few experiments will demonstrate where the dangers are," Akerman suggested.⁷⁵ It worked.⁷⁶

III. The Federal Judiciary

The enormous expansion of federal court dockets following the Civil War hindered the efficiency of federal judges trying Klan prosecutions.⁷⁷ One of the little known consequences of the Civil War and Reconstruction was the enormous expansion of the federal court dockets. The increase in the business of the federal courts was due to the revenue laws and the civil rights statutes.⁷⁸ By 1871, Attorney General Akerman confided to a friend: "I am on the rack from morning till night, and frequently far into the night, and yet, with all that, I can hardly keep down this pile of business."⁷⁹ He explained that, in addition to the great increase in federal jurisdiction, many litigants did not trust the state courts as they had before the Civil War and that they used the federal courts whenever they could.⁸⁰

73. Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Aug. 4, 1871), in *SOURCE CHRONOLOGICAL FILE*, *supra* note 14 (S.D. Miss.).

74. Letter from E.P. Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Aug. 7, 1871), in *SOURCE CHRONOLOGICAL FILE*, *supra* note 14 (S.D. Miss.).

75. Letter from Amos T. Akerman, U.S. Att'y Gen., to E.P. Jacobson, U.S. Att'y, Miss. (Aug. 16, 1871), Instruction Book B2, at 324, reel 2, in *INSTRUCTIONS*, *supra* note 33.

76. Letter from Robert A. Hill, U.S. Dist. Judge, Miss., to Benjamin Bristow, Solicitor Gen. (May 13, 1872), in *BRISTOW PAPERS*, *supra* note 72.

77. KACZOROWSKI, *supra* note 3, at 60.

78. *Id.*

79. Letter from Amos T. Akerman, U.S. Att'y Gen., to E.P. Jacobson, U.S. Att'y, Miss. (Aug. 21, 1871), 1 Letterbooks 47-49, in *AKERMAN PAPERS*, *supra* note 24.

80. Letter from Amos T. Akerman, U.S. Att'y Gen., to James Jackson (Nov. 20, 1871), 1 Letterbooks 149-60, in *AKERMAN PAPERS*, *supra* note 24; Letter from Amos T. Akerman, U.S. Att'y Gen., to B.D. Silliman (Nov. 9, 1871), 1 Letterbooks 90-93, in *AKERMAN PAPERS*, *supra* note 24.

The situation was no better for the federal judges who tried Klan prosecutions. Like Justice Department attorneys, federal judges struggled to perform their duties without sufficient assistance. They did not have law clerks and secretaries as federal judges do today. Even more serious than the lack of clerical help, they sometimes did not even have a legal library or copies of federal statutes.⁸¹ Understandably, docket backlogs developed that would have made Federal Judge I. Leo Glasser of the Eastern District of New York look efficient. Judge Glasser's docket backlog in 1995 of 55 civil cases recently made the front page of *The New York Times*.⁸² On his first visit to the United States Court at Memphis, Tennessee, in 1870, newly appointed Circuit Court Judge Halmer Emmons discovered that it was encumbered with a docket of some 400 cases, many of which were years in arrears. He regarded some of these cases to be "of the highest national as well as local importance."⁸³ Characterizing the situation there as "simply disgraceful," he concluded that "the administration of Federal law has been practically suspended" in Memphis.⁸⁴

Another problem faced by federal judges, as well as prosecutors, was the racial and class character of Klan prosecutions, which undermined the legitimacy of the federal courts in the South. Defendants were always white and frequently men of wealth and influence. Victims were usually black and of a lower socio-economic status. White racism and class bias undermined the credibility of government witnesses. Even when jurors were willing to convict, federal attorneys were confronted with the challenge of persuading them to credit the testimony of persons regarded as inferior more than that of highly respected leaders of the community.⁸⁵

81. Letter from Halmer H. Emmons, U.S. Cir. Judge, to Amos T. Akerman, U.S. Att'y Gen. (Nov. 28, 1870), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (W.D. Tenn.).

82. N.Y. TIMES, Apr. 17, 1995, at 1.

83. Letter from Halmer H. Emmons, U.S. Cir. Judge, to Amos T. Akerman, U.S. Att'y Gen. (Nov. 28, 1870), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (W.D. Tenn.).

84. *Id.*

85. Letter from John A. Minnis, U.S. Att'y, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Nov. 26, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from John A. Minnis, U.S. Att'y, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 1, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); MONTGOMERY STATE JOURNAL (n.d.) (clipping enclosed in Letter from John A. Minnis, U.S. Att'y, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 28, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from E.P.

Moreover, Southern Democrats condemned the federal enforcement of civil rights for sacrificing free government and personal liberty to military despotism and executive imperialism. They viewed the unprecedented intrusion of the federal government into traditionally local affairs as nothing less than a revolution in American federalism. To a large extent, it was a revolution in federalism. Nonetheless, it was the racial character of the federal government's enforcement of civil rights as much as its supplanting of state authority that Southern Democrats and white supremacists saw as destroying their personal freedom.⁸⁶ Democratic Senator Reverdy Johnson, for example, expressed these themes as defense attorney in the Ku Klux Klan trials at Columbia, South Carolina: "In the name of justice and humanity," he passionately admonished the court, "in the name of those rights for which our fathers fought, you cannot subject the white man to the absolute and unconditional dominion of an armed force of a colored race."⁸⁷

The politically partisan nature of these trials further diminished their legitimacy. Republicans enforced federal law, while Democrats challenged it. Federal civil rights statutes had been enacted by Republican controlled Congresses; they were being enforced by a Republican administration; all the prosecuting attorneys, and many of the presiding federal judges, had been appointed by Republican presidents. In contrast, the Ku Klux Klan was an instrument of the Democratic Party.⁸⁸ The Klan was dedicated to the causes of white supremacy and the destruction of the Republican Party's influence in the South. Consequently, federal prosecutions were almost always brought against white Democrats to protect Republicans, usually black Republicans.⁸⁹ This political context

Jacobson, U.S. Att'y, Miss., to Amos T. Akerman, U.S. Att'y Gen. (Sept. 13, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.).

86. CHARLESTON DAILY COURIER, Apr. 25, 1871, at 4; CHARLESTON DAILY COURIER, Sept. 6, 1871, at 2; CHARLESTON DAILY COURIER, Oct. 26, 1871, at 2; CHARLESTON DAILY COURIER, Nov. 25, 1871, at 1; CHARLESTON DAILY COURIER, Nov. 27, 1871, at 2; CHARLESTON DAILY COURIER, Dec. 13, 1871, at 4; See NEW YORK EVENING POST, NEW YORK JOURNAL OF COMMERCE, LOUISVILLE COURIER-JOURNAL, CINCINNATI ENQUIRER, AND WILMINGTON JOURNAL editorials reprinted in CHARLESTON DAILY COURIER, Apr. 25, 1871.

87. CHARLESTON DAILY COURIER, Dec. 13, 1871, at 4; see CHARLESTON DAILY COURIER, Sept. 6, 1871, at 2 (showing that Senator James Doolittle made the same argument).

88. KACZOROWSKI, *supra* note 3, at 62.

89. Letter from William J. Promis to Amos T. Akerman, U.S. Att'y Gen. (Aug. 16, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from Daniel T. Corbin, U.S. Att'y, S.C., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 3, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.C.). See e.g., Letter

led many Southerners to perceive the federal courts as agents of the Republican Party rather than neutral arbiters of justice.

The fact that jurors in federal civil rights prosecutions were selected on the basis of their race or party affiliation added to the deligitimization of the federal courts. This selection practice resulted from the bitter experience of federal prosecutors. Justice Department attorneys quickly learned that if Democrats, who were always White, served on grand juries, prosecutors would fail to gain indictments. When Democrats served on petit juries, defendants were not convicted, no matter how overwhelming the evidence of their guilt. Thus, political and racial prejudice imposed a Hobson's choice on federal authorities with regard to the appearance of impartiality in the administration of justice. On the one hand, impanelment of all eligible jurors was necessary to maintain the appearance of impartiality. On the other hand, the only possibility of obtaining indictments and convictions when the evidence warranted them was to limit juries to Republicans and blacks by excluding Democrats. Consequently, federal juries invariably consisted of white and black Republicans, with blacks sometimes outnumbering whites. Southern Democrats interpreted the racial and political composition of federal juries as incontrovertible evidence of political persecution through judicial injustice.⁹⁰

The appearance of partisanship was enhanced by the activities of federal marshalls and attorneys who openly campaigned for Republican candidates for national, state and local offices.⁹¹ Moreover, political connections, if not affiliations, were critical to obtaining and retaining federal office. Justice Department lawyers continually reassured the Attorney General of their political loy-

from Amos T. Akerman, U.S. Att'y Gen., to McWharton (Nov. 16, 1871), 1 Letterbooks 134-36, in *AKERMAN PAPERS*, *supra* note 24 (showing the partisan character of Southern violence was a recurring theme in Attorney General Akerman's personal correspondence).

90. Letter from J.H. Pierce, U.S. Marshal, to Amos T. Akerman, U.S. Att'y Gen. (Aug. 21, 1871), in *SOURCE CHRONOLOGICAL FILE*, *supra* note 14 (N.D. Miss.); Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Nov. 26, 1871), in *BOND PAPERS*, *supra* note 12; *CHARLESTON DAILY COURIER*, Sept. 27, 1871, at 4; *CHARLESTON DAILY COURIER*, Nov. 27, 1871, at 2; *CHARLESTON DAILY COURIER*, Nov. 29, 1871, at 4; *CHARLESTON DAILY COURIER*, Dec. 2, 1871, at 1; *CHARLESTON DAILY COURIER*, Dec. 4, 1871, at 1; *CHARLESTON DAILY COURIER*, Dec. 14, 1871, at 2; *NEW YORK WORLD*, Dec. 26, 1871, *reprinted in* *CHARLESTON DAILY COURIER*, Jan. 4, 1872, at 4.

91. Such campaigning was facilitated because codes of professional responsibility in the nineteenth century were much more permissive regarding the political activities of federal legal officers than they are today.

alty.⁹² Some federal lawyers were so dismayed with the extent to which politics permeated federal office that they expressed a desire to resign.⁹³

Some federal judges were blatantly political. For example, the United States District Judge for the District of Virginia, John Underwood, was notorious for his Radical Republican partisanship.⁹⁴ On the other hand, United States District Judge for the District of South Carolina, George S. Bryan, was an equally partisan Southern Democrat. United States Circuit Judge Hugh Lennox Bond was convinced that Judge Bryan was obstructing the Ku Klux Klan trials in South Carolina at the urging of Democratic leaders who apparently had promised Judge Bryan the South Carolina governorship. Judge Bond believed that the "democrats have hold of [Bryan] . . . & persuade him to be a stick between our legs at every step."⁹⁵ Bond confided to his wife that he was so fed up with Bryan that he "went to him the other day & frightened him half to death. I stormed at him," Bond informed her, "& told him, if he wanted his salary increased (you know he is always talking about that) he had just better [not] keep the court sitting doing nothing but posing about the smallest matter in the world day after day."⁹⁶ Although Bond succeeded in frightening Bryan, he added that "I am sick of him & altogether disgusted & he is with me."⁹⁷ They disagreed in their interpretations of the scope of federal civil rights enforcement authority and sent one of the first cases to the United

92. Letter from Amos T. Akerman, U.S. Att'y Gen., to Foster Blodgett (Nov. 8, 1871), 1 Letterbooks 203-05, in AKERMAN PAPERS, *supra* note 24; Letter from Amos T. Akerman, U.S. Att'y Gen., to B.D. Silliman (Nov. 9, 1871), 1 Letterbooks 90-93, in AKERMAN PAPERS, *supra* note 24; Letter from Amos T. Akerman, U.S. Att'y Gen., to James Atkins (Nov. 29, 1871), 1 Letterbooks 175-80, in AKERMAN PAPERS, *supra* note 24; Letter from Amos T. Akerman, U.S. Att'y Gen., to William Marvin (Dec. 6, 1871), 1 Letterbooks 209-12, in AKERMAN PAPERS, *supra* note 24; Letter from Robert P. Dick to William L. Scott (June 15, 1870), in WILLIAM LAFAYETTE SCOTT PAPERS, William R. Perkins Library, Duke University [hereinafter SCOTT PAPERS]; Letter from Robert P. Dick to William L. Scott (Aug. 24, 1870), in SCOTT PAPERS *supra*; Letter from Robert P. Dick to William L. Scott (July 21, 1871), in SCOTT PAPERS *supra*; Letter from Robert P. Dick to William L. Scott (July 4, 1872), in SCOTT PAPERS *supra*; Letter from Alphonse Taft to Edwards Pierrepont (Nov. 17, 1870), in EDWARDS PIERREPONT PAPERS, University of Iowa (reflecting the partisanship of federal legal officers).

93. Letter from Benjamin H. Bristow, U.S. Att'y, Ky., to his mother (Sept. 20, 1869), in BENJAMIN H. BRISTOW PAPERS, The Filson Club, Louisville, Ky.

94. KACZOROWSKI, *supra* note 3, at 66.

95. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (n.d.), in BOND PAPERS, *supra* note 12.

96. *Id.*

97. *Id.*

States Supreme Court which tested the constitutionality of the Justice Department's enforcement of civil rights.⁹⁸

Federal judges unwittingly contributed to the appearance of judicial partisanship by their conception of their role within the constitutional structure of the federal government. Federal judges did not exercise the power of judicial review in the manner of contemporary judges, who often express a restricted notion of constitutional delegation of power to Congress. Rather, they interpreted the provisions of the Constitution generally as delegations of legislative power, whether or not such power was expressly delegated. They interpreted the Constitution in a nationalistic, open-ended manner. Moreover, federal judges viewed the judiciary's institutional role as enforcing the will of Congress, nullifying a federal statute only in those exceptional cases where it was irreconcilably in conflict with the Constitution.

The federal judges who presided over Klan trials shared these views.⁹⁹ This judicial philosophy worked to the detriment of Southern Democrats and white supremacists in the early 1870s because the Republican Party dominated the legislative and executive branches of the federal government. The Republican Party's public policies in the South required the national government to exercise broad constitutional powers. Accordingly, federal judges' understanding of their insitutional role, their nationalistic, broad interpretation of the Constitution, and their corresponding acceptance of Congress' plenary authority to enforce citizens' rights, when applied to the civil rights enforcement statutes, was seen to be motivated by partisan objectives.

Naturally enough, the Democratic Party championed a different theory of judicial review and a more restricted interpretation of

98. *United States v. Avery*, 80 U.S. 251 (1871); Letter from Daniel T. Corbin, U.S. Att'y, S.C., to Amos T. Akerman, U.S. Att'y Gen. (Nov. 17, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.C.); Letter from Amos T. Akerman, U.S. Att'y Gen., to Daniel T. Corbin U.S. Att'y, S.C. (Dec. 6, 1871), 1 Letterbooks 203-05, in AKERMAN PAPERS, *supra* note 24; N.Y. TIMES, Nov. 11, 1871, at 1. The proceedings in the South Carolina Ku Klux Klan Trials were published in PROCEEDINGS IN THE KU KLUX KLAN TRIALS AT COLUMBIA, S.C. IN THE UNITED STATES CIRCUIT COURT, NOVEMBER TERM, 1871 (1872).

99. See *Charge to Grand Jury*, (enclosed in letter from Robert A. Hill, U.S. Dist. Judge, Miss., to Benjamin H. Bristow, Solicitor Gen. (July 28, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.)); Letter from Robert A. Hill, U.S. Dist. Judge, Miss., to Chief Justice Salmon P. Chase (Aug. 16, 1868) (box 7), in SALMON P. CHASE PAPERS, Historical Society of Pennsylvania; *Charge to Grand Jury*, HUNTSVILLE ADVOCATE, Nov. 12, 1871 (enclosed in letter from Richard Busted, U.S. Dist. Judge, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Nov. 22, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.)).

Congress' power to enforce rights. Democratic Party leaders, and defense attorneys, interpreted the Constitution and Congress' legislative powers under it in a restricted state-rights-centered manner. They demanded that the federal courts assert their power of judicial review to void federal civil rights enforcement statutes on the theory that these statutes exceeded the powers the Constitution delegated to Congress and usurped the sovereignty the Constitution reserved to the states. Judicial philosophy and constitutional interpretation became so partisan that judges, lawyers and the general public referred to conflicting theories either as Republican or Democratic.¹⁰⁰ The coincidence of legislative and executive power with constitutional theory and conceptions of the judiciary's role made it impossible for federal courts both to dispense, and to be perceived as dispensing, neutral justice.

Federal judges during Reconstruction experienced even greater dangers than those who presided over desegregation in the South during the 1950s and 1960s.¹⁰¹ "Sometimes the Ku Klux in the people will break out," Deputy Marshall Allen P. Huggins informed Attorney General Akerman from Mississippi in 1871, "and the Court is so completely overawed that I do not see much chance for justice to be meted out to these fiends in human shape."¹⁰² The Attorney General observed that Mississippi was "not the only district where the judiciary succumbs to the pressure of a local sentiment."¹⁰³

IV. National Politics and the Waning of Federal Civil Rights Enforcement

Opposition to federal prosecutions of Klansmen was not restricted to the South. Democrats in the North also denied that the Klan existed and complained that reports of Klan terrorism were

100. The association between party and judicial philosophy was widely noted. Letter from John A. Minnis, U.S. Att'y, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 1, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Senator James Doolittle, Speech in Charleston Daily Courier, Sept. 6, 1871, at 2; Senator Allan Thurman, Speech in Charleston Daily Courier, Sept. 11, 1871, at 2; Congressman Grosbeck, Speech in Charleston Daily Courier, Sept. 18, 1871, at 2; CHARLESTON DAILY COURIER, Sept. 19, 1871, at 2.

101. See J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971) (chronicling the dangers faced by federal judges presiding over desegregation efforts).

102. Letter from Allen P. Huggins to Amos T. Akerman, U.S. Att'y Gen. (June 28, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.).

103. Letter from Amos T. Akerman, U.S. Att'y Gen., to E.P. Jacobson, U.S. Att'y, Ala. (Aug. 18, 1871), 1 Letterbooks 44-46, in AKERMAN PAPERS, *supra* note 24.

fabricated by President Grant and the Republicans.¹⁰⁴ Thus, administration officials were forced to divert resources and energy to convince an increasingly skeptical public that the Klan did exist and that federal prosecutions of civil rights violators were not partisan persecutions of Southerners lawfully opposing Republican policies. Indeed, the Attorney General tried to use these prosecutions to expose the criminality of the Klan.¹⁰⁵

Skepticism about the Klan's existence, as well as the manner and extent of fiscal expenditures used to prosecute the Klan, exposed the Grant Administration to charges of using the coercive power of government for partisan and venal ends. Justice Department lawyers were paid by the number of cases they brought. Witnesses were given *per diem* and travel expenses. The more cases that prosecutors brought, the more income they earned. The more witnesses they called, the greater the alleged patronage. Democrats accused federal legal officers of using civil rights prosecutions as pretexts for their own political and economic self-interest.¹⁰⁶ Judge Bond estimated the costs of the month-long South Carolina Klan trials in 1871 to be the "fearful" sum of \$200 per hour. Although over 400 defendants were scheduled for trial, Judge Bond was able to try only five.¹⁰⁷

About three-quarters of the Ku Klux Klan prosecutions remained untried throughout the South at the end of 1871. The number of defendants awaiting trial in North and South Carolina alone numbered some 1,350.¹⁰⁸ Referring to the backlog of cases in South Carolina, Attorney General Akerman lamented in his an-

104. Letter from John A. Minnis, U.S. Att'y, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 1, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from John A. Minnis, U.S. Att'y, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 28, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Sept. 28, 1871), in BOND PAPERS, *supra* note 12; N.Y. TIMES, July 26, 1870, at 4; N.Y. TIMES, Oct. 6, 1871, at 4.

105. Letter from Robert A. Hill, U.S. Dist. Judge, Miss., to Benjamin H. Bristow, Solicitor Gen. (July 28, 1871), in Source Chronological File, *supra* note 14 (S.D., Miss.).

106. Letter from Amos T. Akerman, U.S. Att'y Gen., to James R. Beckwith, U.S. Att'y, La. (Jan. 5, 1872), Instruction Book C, at 137, reel 3, in INSTRUCTIONS, *supra* note 33; Letter from Amos T. Akerman, U.S. Att'y Gen., to Stephen B. Packard, U.S. Marshal, New Orleans, La. (Jan. 6, 1872), Instruction Book C, at 137-38, in INSTRUCTIONS, *supra* note 33; H.R. EXEC. DOC. NO. 6, 42d Cong., 1st Sess. 17-18 (1872); S. EXEC. DOC. NO. 32, 42d Cong., 3d Sess. 7 (1873) [hereinafter S. EXEC. DOC. NO. 32].

107. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Sept. 27, 1871), in BOND PAPERS, *supra* note 12.

108. H.R. EXEC. DOC. NO. 55, 42d Cong., 2d Sess. 4-5 [hereinafter H.R. EXEC. DOC. NO. 55]; S. EXEC. DOC. NO. 32, *supra* note 106, at 10-11.

nual report, "it is obvious that the attempt to bring to justice . . . even a small portion of the guilty . . . must fail, or the judicial machinery of the United States must be increased. If it takes a court over one month to try five offenders, how long will it take to try four hundred, already indicted, and many hundreds more who deserve to be indicted?"¹⁰⁹

It soon became apparent to federal legal officers that they would never be able to prosecute every one of the hundreds of accused criminals awaiting trial. This awareness demoralized even those federal legal officers and judges, such as Judge Bond and Attorney General Akerman, who were the most deeply committed to enforcing federal civil rights law. The Klan prosecutions that Judge Bond tried in North and South Carolina in 1871 wore him down. When these trials began in June, he boldly proclaimed to his wife that "I am going to stay here and fight Ku Klux if it takes all summer."¹¹⁰ By September he revealed the strain these cases imposed on him when he plaintively wished for some governmental policy that would merely put an end to Klan atrocities. "I am only anxious to devise a method to do so, for all I want is an acknowledgement of its existence & of its nefarious character—that it is suppressed."¹¹¹ By December, after the month-long trial of 5 defendants out of 420 awaiting trial at Columbia, South Carolina, he feared that, "if we go on this way it will take till the next Presidential election to clean them out."¹¹² Although discouraged, Judge Bond remained determined: "If all the defense try here is my patience, I shall see that it don't avail. I shall stay them out if it costs me my life."¹¹³

Under these circumstances, it was not surprising that Attorney General Akerman began to think that the Ku Klux Klan was "too much even for the United States to undertake to inflict adequate penalties through the courts."¹¹⁴ He did not expect Congress to provide the requisite funding or legal and judicial administrative staffing. "The feeling here [in Washington, D.C.]," he informed a

109. H.R. EXEC. DOC. NO. 55, *supra* note 108, at 5.

110. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (n.d.), in BOND PAPERS, *supra* note 12.

111. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Sept. 28, 1871), in BOND PAPERS, *supra* note 12.

112. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Dec. 18, 1871), in BOND PAPERS, *supra* note 12.

113. *Id.*

114. Letter from Amos T. Akerman, U.S. Att'y Gen., to James Jackson (Nov. 20, 1871), 1 Letterbooks 149-60, in AKERMAN PAPERS, *supra* note 24.

confidant, "is very strong that the Southern republicans must cease to look for special support to congressional action."¹¹⁵ Not only was this policy perceived to be an unjustly partisan administration of federal law, it also smacked of political corruption. Critics attacked the President for venal partisanship, extravagance, waste and military despotism.¹¹⁶ The President responded by making the reduction of government expenses and the public debt high priorities.¹¹⁷

Amnesty to Southerners and restoration of home rule was gaining support even among the leaders and rank-and-file members of the President's party. Akerman observed that Northerners were simply losing interest in Reconstruction: "The Northern mind being active and full of what is called progress, runs away from the past."¹¹⁸ Having suffered as a Republican in his native state of Georgia, Akerman fearfully asserted, "My apprehension is that they are not aware that the Southern people are still untaught in the elements of the Republican creed."¹¹⁹ Under these political conditions, Akerman concluded, "Congress will be indisposed to make any changes in the national courts that would secure their efficiency in suppressing this conspiracy."¹²⁰ By the end of 1871, Grant's Attorney General was forced to acknowledge the utter inadequacy of the federal courts to protect citizens from Klan violence. He mused to a friend "whether, if in 1867, I had foreseen the strength of the prejudices to be encountered, I should have had the courage to enter the field on this side, which I believed both expedient and right."¹²¹ However, "having entered," he "was not disposed to recede," though he was "hard pressed" by adversaries, "and sometimes sorely tried by those whom the necessities of the case made my comrades."¹²²

Acknowledging the impossibility of prosecuting every reported civil rights violation, the administration reluctantly reduced its expectations and cautiously changed its policy. Akerman instructed federal prosecutors to be more selective in the prosecutions they

115. Letter from Amos T. Akerman, U.S. Att'y Gen., to J.R. Parrot (Dec. 6, 1871), 1 Letterbooks 213-20, in AKERMAN PAPERS, *supra* note 24.

116. FONER, *supra* note 4, at 512-24.

117. GILLETTE, *supra* note 5, at 166-85; FONER, *supra* note 4, at 512-28.

118. Letter from Amos T. Akerman, U.S. Att'y Gen., to Benjamin Conley (Dec. 28, 1871), 1 Letterbooks 272-77, in AKERMAN PAPERS, *supra* note 24.

119. *Id.*

120. Letter from Amos T. Akerman, U.S. Att'y Gen., to James Jackson (Nov. 20, 1871), 1 Letterbooks 149-60, in AKERMAN PAPERS, *supra* note 24.

121. *Id.*

122. *Id.*

brought.¹²³ They were to go after ring leaders and those who actively participated in "acts of deep criminality." Defendants who played lesser roles or who committed less egregious offenses were to be bailed and tried later. Others who were unwilling participants in nonviolent crimes and who demonstrated "penitence for their offenses, and a determination to abstain from such crimes in the future" could be spared punishment if they confessed and were "good citizens henceforth."¹²⁴

Akerman cautiously experimented with this new policy of selective prosecution in South Carolina. He feared that any sign of a weakening commitment on the part of the administration to protect citizens in the South would be interpreted as a capitulation to terrorism that would only invite more violence. "As long as these bad men believe you are unable to protect yourselves," he confided to a federal marshal in South Carolina, "they will cherish the purpose of injuring you as soon as the hand of the Government shall be withdrawn."¹²⁵

Heeding this advice, federal prosecutors actually increased the number of prosecutions they brought and disposed of in 1872.¹²⁶ They were buoyed by the effect they were having on the Klan.¹²⁷ At the beginning of 1872, they believed they were on the verge of destroying the Klan. They were restoring peace in many Southern Klan strongholds. Klansmen spared prosecutors the time and expense of trials by confessing their crimes in return for leniency in their punishments. "They all plead guilty," Judge Bond informed his wife, "If only you won't hang them."¹²⁸ In South Carolina, Klan leaders reportedly ordered Klansmen to cease all violence in the state.¹²⁹

Notwithstanding impossible conditions in the field, insufficient financial and human resources, a penurious Congress, and the Jus-

123. Letter from Amos T. Akerman, U.S. Att'y Gen., to Daniel T. Corbin, U.S. Att'y, S.C. (Nov. 10, 1871), Instruction Book C, at 28-30, reel 3, in *INSTRUCTIONS*, *supra* note 33.

124. *Id.*

125. Letter from Amos T. Akerman, U.S. Att'y Gen., to Charles Prossner (Nov. 9, 1871), in 1 *LETTERS SENT BY DEPARTMENT OF JUSTICE: GENERAL AND MISCELLANEOUS, 1818-1904, 91 Vols.*, at 127-8, microfilm copy, reel 14, National Archives [hereinafter *MISCELLANEOUS LETTERS SENT*].

126. KACZOROWSKI, *supra* note 3, at 103.

127. KACZOROWSKI, *supra* note 3, at 93.

128. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (April 14, 1872), in *BOND PAPERS*, *supra* note 12.

129. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (April 11, 1872), in *BOND PAPERS*, *supra* note 12.

tice Department's adoption of the policy of selective prosecution, federal prosecutors were still able to report in 1872 that the Justice Department was winning its war against the Klan. The department's demonstrated determination to prosecute terrorists was "demoralizing and carrying terror to these lawless K.K.Klans," the United States attorney reported from Alabama.¹³⁰ It was the government's determination to punish wrongdoers as much as the success of selective prosecutions and convictions that struck terror in the hearts of Klansmen. "We have broken up Ku Klux in North Carolina," Judge Bond gleefully reported to his wife. "Everybody now wants to confess & we are picking out the top puppies only for trial."¹³¹ The Klan ceased operating in South Carolina as well.¹³²

Although federal legal officers successfully suppressed the Klan through federal legal process, Klan-like terrorism was not completely eradicated.¹³³ Federal attorneys believed that the Justice Department had to continue vigorously prosecuting terrorists if peace were to be made permanent. They warned the Attorney General that any weakening in the Justice Department's resolve would renew violence. Federal attorneys admonished the Attorney General that the vigorous enforcement of federal civil rights laws was essential to preserve the peace. United States Attorney G. Wiley Wells reported that the Klan in his District of Northern Mississippi was merely biding its time until the federal government eased its prosecutions.¹³⁴ United States Attorney for the District of South Carolina Daniel T. Corbin predicted an orgy of terror in his state if the government faltered in its determination to bring civil rights violators to justice.¹³⁵ The United States attorney for

130. Letter from John A. Minnis, U.S. Att'y, Ala., to George H. Williams, U.S. Att'y Gen. (June 25, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.). See also Letter from John A. Minnis, U.S. Att'y, Ala., to George H. Williams, U.S. Att'y Gen. (Apr. 1, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.).

131. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Sept. 21, 1871), in BOND PAPERS, *supra* note 12.

132. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Apr. 11, 1872), in BOND PAPERS, *supra* note 12; Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Apr. 14, 1872), in BOND PAPERS, *supra* note 12.

133. KACZOROWSKI, *supra* note 3, at 94.

134. Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Apr. 2, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (July 8, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.).

135. Letter from Daniel T. Corbin, U.S. Att'y, S.C., to George H. Williams, U.S. Att'y Gen. (July 22, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.C.).

the District of Alabama feared that the Klan would interpret a failure of the Republican Party to renominate President Grant in 1872 as a weakening of resolve to enforce civil rights that "would revive their hopes and encourage new outrages."¹³⁶ Judge Bond reported from South Carolina that, if the government curtailed its civil rights enforcement, he "would not live in this State 24 hours if I were a republican."¹³⁷

The optimism engendered by federal convictions of Klansmen thus rested on a tenuous basis. The Justice Department's success in suppressing the Klan notwithstanding, violence and intimidation driven by racism and local prejudice continued to be used as instruments of political action. Southern apologists persisted in their support of the Klan, and Southern white supremacists continued to oppose and impede federal legal officers who valiantly struggled to enforce federal laws. Rather than conceding the criminality of Ku Klux violence, Southern Democrats praised the Klan as defenders of Southern rights against the violence they claimed was caused by federal interference in local affairs, and they excoriated federal officials for martyring their heroes in judicial "persecutions."¹³⁸ The surest way to restore peace, they insisted, was to end federal interference in the South and to return the administration of criminal justice to the people of the South.¹³⁹ Even Southerners who acknowledged and condemned Klan violence expressed the belief that lawlessness was instigated by the enforcement of federal civil rights laws, and they demanded that the federal government cease its intrusions into Southern life.¹⁴⁰

136. Letter from John A. Minnis, U.S. Att'y, Ala., to Amos T. Akerman, U.S. Att'y Gen. (Dec. 28, 1871), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.). See also Letter from John A. Minnis, U.S. Att'y, Ala., to George H. Williams, U.S. Att'y Gen. (Apr. 1, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.).

137. Letter from Hugh Lennox Bond, U.S. Cir. Judge, N.C., to Anna Bond (Apr. 14, 1872), in BOND PAPERS, *supra* note 12.

138. KACZOROWSKI, *supra* note 3, at 95.

139. *Id.*

140. Letter from John A. Minnis, U.S. Att'y, Ala., to George H. Williams, U.S. Att'y Gen. (Jan. 10, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from John A. Minnis, U.S. Att'y, Ala., to George H. Williams, U.S. Att'y Gen. (Apr. 1, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from John A. Minnis, U.S. Att'y, Ala., to George H. Williams, U.S. Att'y Gen. (June 25, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from Richard Busteed, U.S. Dist. Judge, Ala., to George H. Williams, U.S. Att'y Gen. (Mar. 29, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from D. Lewis, to George H. Williams, U.S. Att'y Gen. (July 7, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from R.W. Healy, U.S. Marshall, Ala., to George H. Williams, U.S. Att'y Gen.

At the end of 1871, President Grant replaced Attorney General Akerman with George H. Williams for reasons unrelated to the administration's civil rights enforcement policies.¹⁴¹ Williams continued Akerman's policies through the spring of 1873. From this time onward, however, inadequate appropriations rendered effective enforcement of federal civil rights laws impossible. Unable to squeeze sufficient funds from Congress, the Administration was forced to curtail its civil rights enforcement policy.¹⁴² Attorney General Williams signalled a policy change in September 1872 in response to a request for clemency by Alexander H. Stephens, the former Vice-President of the Confederate States of America: "When the President is satisfied that the danger from Ku Klux violence has ceased and that such unlawful associations have been abandoned, he will be ready to exercise executive clemency in all cases in the most liberal manner."¹⁴³

The most peaceful national election during the Reconstruction era occurred in 1872.¹⁴⁴ President Grant responded by having Attorney General Williams instruct federal prosecutors in June 1873 "to suspend these prosecutions except in some of the worst cases."¹⁴⁵ It was his hope that this policy would "produce obedi-

(Feb. 26, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from Robert A. Hill, U.S. Dist. Judge, Miss., to George H. Williams, U.S. Att'y Gen. (Jan. 10, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Jan. 16, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Feb. 21, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Mar. 4, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Mar. 9, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.); Letter from G. Wiley Wells, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (July 8, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.).

141. FONER, *supra* note 4, at 458.

142. KACZOROWSKI, *supra* note 3, at 101-08.

143. Letter from Major Lewis Merrill to George H. Williams, U.S. Att'y Gen. (Sept. 30, 1872), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.C.) (upon hearing of Stephen's clemency request: the Army officer in charge of peacekeeping in South Carolina urged the Attorney General to reject it out of fear that extending clemency to terrorists would simply encourage them to embark on a rampage of terror).

144. Letter from John A. Minnis, U.S. Att'y, Ala., to George H. Williams, U.S. Att'y Gen. (July 18, 1873), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (N. & M.D. Ala.); Letter from E.P. Jacobson, U.S. Att'y, Miss., to George H. Williams, U.S. Att'y Gen. (Jan. 17, 1873), in SOURCE CHRONOLOGICAL FILE, *supra* note 14 (S.D. Miss.).

145. Letter from George H. Williams, U.S. Att'y Gen., to Virgil Lusk (June 21, 1873), Instruction Book D, at 91, reel 4, in INSTRUCTIONS, *supra* note 33.

ence to the law, and quiet and peace among the people."¹⁴⁶ A delegation of Southern leaders, with a letter of introduction from Federal Judge George F. Bryan of South Carolina, visited the President one month later at his summer house in Long Branch, New Jersey. They requested clemency for Klansmen who had been convicted of violating federal civil rights laws. President Grant acceded to their request in return for assurances that the Klan had been broken up, that Klansmen and their sympathizers had "come to see the folly, wickedness and danger of such organizations" and that peace would be preserved.¹⁴⁷

In the summer of 1873, therefore, Attorney General Williams informed Justice Department lawyers that they were not to prosecute violators of federal civil rights laws.¹⁴⁸ The President and his Attorney General apparently accepted the arguments of Southerners who insisted that law enforcement bred crime and that the failure to enforce the law would produce peace, law and order. The Grant administration thus abandoned civil rights enforcement despite the warnings of federal legal officers that leniency would invite a resumption of crime and violence.¹⁴⁹ Political opposition within their own party and the economic crisis that began in 1873 made the President and his Attorney General more susceptible to the entreaties of Southerners than to the warnings of their legal officers. The administration felt compelled to cut expenses.¹⁵⁰ Even Northern opinion opposed federal interference in Southern affairs and regarded it as evidence of the administration's despotic, corrupt, and wasteful policies. The new civil rights policy of non-enforcement was an effective way to rebut these charges, to alleviate financial crisis and to satisfy shifting political sentiment. It enabled the administration to give up power, to curtail government operations, and to reduce government spending. Moreover, it contributed to a restoration of peace with the South.

Although the Grant Administration had succeeded in subduing the first organized uprising by the Ku Klux Klan, violence soon re-erupted. However, when federal prosecutors tried to bring terrorists to justice in 1874, federal judges ruled that they did not have

146. *Id.*

147. Letter from George S. Bryan, U.S. Dist. Judge, S.C., to George H. Williams, U.S. Att'y Gen. (n.d.) (enclosed in Letter from W. Porter, J. Kershaw, and R. Sims, to George H. Williams, U.S. Att'y Gen. (July 31, 1873), in MISCELLANEOUS LETTERS SENT, *supra* note 125, vol. K, at 40-41).

148. KACZOROWSKI, *supra* note 3, at 111.

149. See *supra* notes 111-14.

150. KACZOROWSKI, *supra* note 3, at 108.

the constitutional authority to try them. An 1873 decision by the United States Supreme Court in the *Slaughter-House Cases* indirectly had cast doubt on the constitutionality of federal criminal civil rights statutes.¹⁵¹ In the *Slaughter-House Cases*, the Court narrowly construed the protection afforded by the Fourteenth Amendment. It ruled that the Privileges or Immunities Clause protected only rights derived from national citizenship, such as the right to petition Congress, use of the nation's navigable water and the right to interstate travel. Moreover, the Court found that the Due Process Clause simply ensured that state laws would be enacted in accordance with lawfully established procedures. In addition, the Court concluded that the Equal Protection Clause was intended solely to protect blacks from racially discriminatory state action.

Then, in 1874, several federal judges ruled that federal civil rights statutes were unconstitutional.¹⁵² Federal legal officers suspended civil rights enforcement until the Supreme Court explicitly decided the scope of the federal government's authority over civil rights.¹⁵³ The Court effectively resolved the issue in 1875 in *United States v. Cruikshank* and *United States v. Reese*, where it declared certain sections of the acts to be unconstitutional.¹⁵⁴ In *Cruikshank*, the Court held that federal criminal indictments obtained under the Act of May 31, 1870 (the Enforcement Act) for killing blacks was unconstitutional because the accused persons were not state actors and were not violating rights derived from national citizenship. In contrast, in *Reese* the Court ruled that indictments obtained against registrars of election under the Act of May 31, 1870 for denying a black man the right to vote in a municipal election were unconstitutional. The Court reasoned that, while the Fifteenth Amendment authorized Congress to enact legislation protecting the voting rights of blacks against racially discriminatory state action, the Act's broad wording was not limited to state action. It could be construed as applying also to the actions of private individuals. The Court refused to place a limiting construction

151. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

152. *United States v. Cruikshank*, 25 F.Cas. 707 (C.C. La. 1874) (No. 14,897); *Texas v. Gaines*, 23 F.Cas. 869 (C.C.W.D. Tex. 1874) (No. 13,847).

153. Letter from George H. Williams, U.S. Att'y Gen., to James R. Beckwith, U.S. Att'y, La. (Oct. 14, 1874), Instruction Book D, at 629, reel 4, in INSTRUCTIONS, *supra* note 33; Letter from George H. Williams, U.S. Att'y Gen., to G. Murray (May 4, 1875), Instruction Book E, at 443-44, reel 5, in INSTRUCTIONS, *supra* note 33.

154. *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875).

on the statute, reasoning that judicial redrafting would invade Congress' legislative prerogative.

The Court's decisions severely curtailed federal jurisdiction over civil rights. Political developments in the 1870s complemented these developments in the law as northerners consented to remove the national government from the process of racial adjustment. By the end of the nineteenth century, white supremacists in the South succeeded in subjugating black Americans and they kept black Americans in subjugation through much of the twentieth century.

Conclusion

There were enormous difficulties involved in enforcing federal civil rights during the First Reconstruction. The problems faced by the federal executive branch included (1) the inadequate manpower and fiscal resources suffered by the Justice Department; (2) the legal difficulty of translating novel grants of criminal jurisdiction contained in civil rights statutes into lawful indictments; (3) the moral and financial support, and legal talent, which came to the aid of Klansmen who were brought to justice; (4) the local pariah status of the victims of civil rights violations and the locally exalted status of many of the violators; and (5) the general obstructionism practiced by localities against the federal government's civil rights enforcement effort.

The problems faced by the federal judiciary included (1) a rapid and dramatic increase in case-load without a commensurate increase in human or material resources; (2) the intimidation of federal judges by local activism and (3) the illegitimate appearance of the administration of justice by the federal judiciary which resulted from (i) the domination of the federal legislative and executive branches by the Republicans, (ii) the practice of excluding white Southern Democrats from juries selected to indict and try federal civil rights prosecutions; and (iii) the exhibition of partisan sympathies by the federal judiciary.

The problems posed by the practicalities of national politics included (1) the very success of the prosecution policy during the years 1870-73; (2) widening distrust of President Grant's intentions for the South and capacity to govern competently and honestly; (3) the North's desire for final reconciliation with the white South; (4) a national movement toward reducing government expenditures; and (5) United States Supreme Court decisions that invalidated statutes which were critical to the enforcement of federal civil rights at the same time that the nation lost the political will to enact

constitutionally tailored replacement statutes. The federal government achieved great success for a brief period in protecting the fundamental civil rights of blacks and Republicans. After 1875, however, the Justice Department and the federal courts lacked adequate authority to protect and enforce the fundamental rights of American citizens. National political will was lacking to continue the federal government's enforcement effort. Consequently, white supremacists destroyed the power of the Republican Party in the South and reduced Southern blacks to their control through organized violence. Later, emancipation's promise of equal rights for blacks was crushed by a legal system of racial discrimination known as Jim Crow. Another eighty years passed before the federal government resumed the civil rights enforcement policies initiated during the Presidency of Ulysses S. Grant.