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A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law

David Achtenberg[*]

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The author was an attorney for the petitioner in one case mentioned in this article, *Owen v. City of Independence*, 445 U.S. 622 (1980).

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I. INTRODUCTION

The principal statutory vehicle used to remedy violations of constitutional rights, 42 U.S.C. § 1983, was originally enacted in 1871 as section 1 of the Ku Klux Act.[1] Not surprisingly, the history of the Ku Klux Act has played an important role in the interpretation of 42 U.S.C. § 1983.[2] Unfortunately, the generally accepted history[3] of the Ku Klux Act is incomplete, distorted, and, in some respects, demonstrably wrong.

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[1]*See* Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 [hereinafter Ku Klux Act]. The Ku Klux Act is also sometimes called the Civil Rights Act of 1871.

[2]*See* Monroe v. Pape, 365 U.S. 167, 171–87 (1961) (using legislative history to decide meaning of "under color of" law); Monell v. Department of Soc. Servs., 436 U.S. 658, 665–89 (1978) (using legislative history to decide whether municipalities should be permissible defendants); Owen v. City of Independence, 445 U.S. 622, 635–38 (1980) (using legislative history to determine whether cities should receive qualified immunity); Allen v. McCurry, 449 U.S. 90, 98–101 (1980) (using legislative history to decide whether ordinary rules of preclusion should apply).

[3]This article will use the phrases "generally accepted history," "traditional history," or "conventional history" to refer to the story of the enactment of the Ku Klux Act that emerges from the Supreme Court's cases interpreting 42 U.S.C. § 1983 and the scholarly literature discussing that statute.

The conventional history of the Ku Klux Act is flawed in three major respects. First, it simply omits the first several chapters of the story. The conventional history begins with Grant's March 23, 1871, message to the Forty-second Congress[4] and completely overlooks the political and legislative maneuvering—in the Republican Caucuses,[5] in the Morton-Butler Committee,[6] in the House and Senate,[7] and in the White House[8]—that preceded Grant's message.[9]

Second, the conventional history overstates Grant's role in the enactment of the Ku Klux Act. It treats Grant as the instigator of the effort to pass the legislation[10] when he was, at most, a hesitant supporter of a struggle begun

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[4]*See* Ngiraingas v. Sanchez, 495 U.S. 182, 187 n.7 (1990); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 722 (1989); Briscoe v. LaHue, 460 U.S. 325, 337 (1983); *Monroe*, 365 U.S. at 172–73; Jeffrey Baddeley, *Parens Patriae Suits by a State Under 42 U.S.C. § 1983*, 33 CASE W. RES. L. REV. 431, 433 (1983); Susanah Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 16 n.86; *cf. Monell*, 436 U.S. at 665–69 (beginning with introduction of H.R. 320 on March 28, 1871). For the text of Grant's message, see *infra* note 341.

[5]*See infra* Part II.C, II.F.

[6]*See infra* Part II.D.

[7]*See infra* Part II.B, II.E.

[8]*See infra* Part II.

[9]Of course, Justices of the Supreme Court and some commentators have recognized that the Thirty-ninth Congress adopted legislation to deal with a similar problem, the Civil Rights Act of 1866, ch. 31, 14 Stat. 37, and that the history of that act is quite relevant to the interpretation of the Ku Klux Act. *See* Briscoe v. LaHue, 460 U.S. 325, 356–63 (1983) (Marshall, J., dissenting); Don B. Kates, Jr., *Immunity of State Judges Under the Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 NW. U. L. REV. 615, 621–24 (1970); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 766–67 (1987); Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 540–48 (1985).

[10]*See Ngiraingas*, 495 U.S. at 188 n.7; *Monroe*, 365 U.S. at 172–73; Dona L. Halden, *Just Don't Got No Class: The Supreme Court, the Question of Class Definition under 42 U.S.C. § 1985(3) and the Operation Rescue Cases*, 3 GEO. MASON U. CIV. RTS. L.J. 157, 159–60 (1992); Randolph M. Scott-McLaughlin, Bray v. Alexandria Women's Health Clinic*: The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1362 (1992) ("The impetus for the Ku Klux Klan Act of 1871 was a request by President Grant . . . ."); Steven H. Steinglass, *Section 1983 Litigation in Ohio Courts: An Introduction for Ohio Lawyers and Judges*, 41 CLEV. ST. L. REV. 407, 417 (1993) (stating that bill was introduced "at the request of the Grant Administration"); Leanne B. De Vos, Comment, *Claim Preclusion and Section 1983 Civil Rights Actions:* Migra v. Warren City School District Board of Education, 70 IOWA L. REV. 287, 295–96 & n.73 (1984); Scott C. Arakaki & Robert E. Badger, Jr., Note, Wyatt v. Cole *and Qualified Immunity for Private Parties in Section 1983 Suits*, 69 NOTRE DAME L. REV. 735, 735 (1994) (describing enactment of 1871 Act as response to Grant's request); Brian J. Gaj, Note, *Section 1985(2) Clause One and Its Scope*, 70 CORNELL L. REV. 756, 759 (1985) (also describing introduction of act as "response to the President's request"); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1153 (1977) (same).

and waged by the congressional Radicals—a supporter who refused to take any public position on the issue until persuaded to do so by a persistent lobbying effort.[11]

Third, the conventional history has failed to disclose that there was, in essence, a rough draft of the section of the Ku Klux Act that became 42 U.S.C. § 1983.[12] In its least accurate version, the conventional history states that the Ku Klux Act was drafted by the Morton-Butler Committee[13]—a committee that actually drafted a completely different bill (the "Morton-Butler Committee Bill") that was immediately rejected by the House and was never introduced in the Senate.[14] In its more accurate version, the conventional history treats the Ku Klux Act as having sprung entirely from the mind of Samuel Shellabarger.[15] However, this version fails to mention that

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Of course, Grant's message was itself a response to Klan violence in the South, and a few sources recognize in passing that Congress was concerned about that violence. *See* District of Columbia v. Carter, 409 U.S. 418, 425–26 (1973); Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 647 & n.509 (1985); Marilyn R. Walter, *The Ku Klux Klan Act and the State Action Requirement of the Fourteenth Amendment*, 58 TEMPLE L.Q. 3, 8–12 (1985). However, these sources do not discuss the efforts to enact outrage legislation before Grant's message, and at most simply mention that Congress was considering proposals for such legislation. *See* Steinglass, *supra*, at 647 & n.509 (mentioning but not describing Morton-Butler Committee Bill); Walter, *supra*, at 12 n.54 (mentioning Morton-Butler Committee Bill but not describing it and incorrectly identifying it as Butler's Bill).

Unlike the legal scholars, a few historians have made an effort to describe briefly the congressional maneuvering that led up to Grant's message and the introduction of House Bill 320. *See, e.g.*, EVERETTE SWINNEY, SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870–1877, at 138–47 (1987); ALLEN W. TRELEASE, WHITE TERROR 387–88 (1971); WILLIAM HESSELTINE, ULYSSES S. GRANT: POLITICIAN 238–45 (1937).

[11]*See infra* Part III.

[12]The author has been unable to discover a single reference to a bill written by Senator Frederick Frelinghuysen, the original source for 42 U.S.C. § 1983, anywhere in the legal or historical literature on the Ku Klux Act.

[13]*See Jett*, 491 U.S. at 722; Zagrans, *supra* note 9, at 548 n.268.

[14]*See infra* Part II.D–E.

[15]*See, e.g.*, *Owen*, 445 U.S. at 636 (describing Shellabarger as author of bill); *Briscoe*, 460 U.S. at 360 (Marshall, J., dissenting) (same); TRELEASE, *supra* note 10, at 388 (same); Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 240 (1996) (same). *But see* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TULANE L. REV. 2113, 2141 n.100 (1993) (describing Shellabarger as "primary author" but without identifying any secondary authors).

At times, the conventional history describes Shellabarger as simply the chair of the committee that drafted the bill. *See* Mitchum v. Foster, 407 U.S. 225, 238 n.27 (1972); Lynch v. Household Fin. Corp., 405 U.S. 538, 545 n.9 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144, 162 (1970). At other times, the conventional history describes Shellabarger as the bill's sponsor. *See* Griffin v. Breckenridge, 403 U.S. 88, 100 (1971); *Monell*, 436 U.S. at 669.

Shellabarger took section 1 from a bill written by Senator Frederick Frelinghuysen ("Frelinghuysen's Bill")[16] and never recognizes that Shellabarger's revisions of that section shed important light on the meaning of 42 U.S.C. § 1983.[17]

Why should anyone care about the details of the history of a 125-year-old statute, even one as important as 42 U.S.C. § 1983? There is, of course, much to be said for historical accuracy for its own sake. If nothing else, it is simply embarrassing for the Supreme Court to state that the Morton-Butler Committee drafted the Ku Klux Act when it did not, or that the Morton-Butler Committee was formed in response to Grant's message when the committee went out of existence more than a week before Grant's message was written.[18]

But there is a more significant reason: complete and accurate history leads to more faithful interpretation.[19] Discovery of the way Shellabarger modified the Frelinghuysen Bill to create section 1 of the Ku Klux Act[20] reveals much about what the Forty-second Congress intended that section to mean.[21] As discussed in Part IV, this history should dispel the remarkably persistent myth that the Forty-second Congress never intended the provision to cover constitutional wrongs unless those wrongs were actually authorized by state law—a myth that Justices Scalia and Thomas have recently

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[16]*See infra* Part IV.A–IV.B. Frelinghuysen's Bill is reprinted in Appendix A.

[17]*See infra* Part IV.D.

[18]*Compare Jett*, 491 U.S. at 722 (stating that Morton-Butler Committee drafted Ku Klux Act), *with* sources cited *infra* Part II.A. The apparent source of these errors is an article by Eric Zagrans. *See* Zagrans, *supra* note 9, at 548 n.268.

[19]Some commentators have argued that fidelity to congressional intent should be abandoned and that the Court should interpret the statute to accomplish its own views of sound public policy in current societal conditions. *See, e.g.*, Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 84–101 (1989); *see also id.* at 56–57 & nn.36–41 (collecting sources). The author has previously argued that such an approach could be justified only if the Forty-second Congress intended to delegate such lawmaking authority to the Court and that the "history of the relationship between Congress and the Court during Reconstruction makes it exceptionally unlikely that the 42d Congress would have given the Court such unchecked power." David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. L. REV. 497, 531–35 (1992). Even if one believes that the Court often uses statements about 42 U.S.C. § 1983's legislative history as a mask for its own policy decisions, a more accurate understanding of that history should make such a subterfuge more difficult.

[20]*See infra* notes 390–95 and accompanying text.

[21]*See infra* notes 417–51 and accompanying text.

attempted to use as a license to restrict the scope of 42 U.S.C. § 1983 in ways that they admit would otherwise be unjustifiable.[22]

This Article will attempt to complete and correct the historical record. Part II will correct the first flaw in the conventional history by describing the congressional Radicals' early efforts to enact what was then known as outrage legislation.[23] First, it will describe Benjamin Butler's nearly successful bid to enact such legislation at the end of the Forty-first Congress.[24] Second, it will explain the Democrats' temporarily successful effort to derail outrage legislation by tying it to tariff reduction.[25] Third, it will describe how the Republican Caucuses and the Morton-Butler Committee attempted to draft an outrage bill that would break the congressional deadlock.[26] Fourth, it will discuss the House's rejection of the Morton-Butler Committee Bill and the viciously divisive political fight that followed that rejection.[27] Finally, it will outline the strategy adopted by the Republican Senate Caucus to try to reunify the fractured party and enact an outrage bill.[28]

Part III corrects the second flaw in the conventional history by delineating Grant's equivocal role in the effort to enact outrage legislation. After describing and attempting to explain his initial unwillingness to make any public request for such legislation,[29] Part III details the Radicals' successful campaign to convince Grant to issue his well known March 23 message.[30]

Part IV corrects the third flaw in the conventional history and demonstrates that Justice Scalia is wrong to believe that 42 U.S.C.§ 1983 was not intended to cover constitutional wrongs unless they were committed with *actual* state authority.[31] It first discusses the work of a select committee that drafted the Ku Klux Act[32] and identifies the textual source of each section of

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[22]*See* Crawford-El v. Britton, 118 S. Ct. 1584, 1603 (1998) (Scalia, J., dissenting) (asserting that Supreme Court, rather than Congress, extended 42 U.S.C. § 1983 to cover constitutional violations committed without authority of law); *see also infra* Part IV.C.

[23]"Outrage" was a generic term used to describe violence, ranging from threats to whippings to murders, directed toward blacks and their Republican supporters in the South. Proposals to deal with this violence were frequently called "outrage legislation" or, in recognition of the Ku Klux Klan's role in such violence, "Ku Klux legislation."

[24]*See infra* Part II.A.

[25]*See infra* Part II.B.

[26]*See infra* Part II.C–II.D.

[27]*See infra* Part II.E.

[28]*See infra* Part II.F.

[29]*See infra* text accompanying notes 294–326.

[30]*See infra* text accompanying notes 317–40.

[31]*See infra* Part IV.C–IV.D.

[32]*See infra* Part IV.A.

the act.[33] It establishes that Shellabarger took section 1 from Senator Frederick Frelinghuysen's Senate Bill 243[34] and details the changes he made in Frelinghuysen's language.[35] Finally, it demonstrates that one of those changes—replacing "under *pretense* of" law with "under *color* of" law—was not intended to change the meaning of Frelinghuysen's Bill, thus establishing that section 1 was intended to cover constitutional violations committed with either actual or pretended state authority.[36] Readers principally interested in the appropriate interpretation of "under color of" law may wish to begin with Part IV.

II. GESTATION OF A STATUTE: THE UNDISCOVERED EARLY HISTORY OF THE KU KLUX ACT

A. Preparing the Ground: Butler's Bill in the Forty-First Congress (February 13 to February 28)

Contrary to the conventional history, the story of the Ku Klux Act did not begin with Grant's March 23 message or even with the convening of the Forty-second Congress. Rather, it began in the waning days of the Forty-first Congress. The Radical Republican members of that Congress had become increasingly concerned that outrages—the phrase then used to describe murders, whippings, and similar Klan-inspired violence in the South—were preventing southern blacks from voting.[37] Two months after the ratification of the Fifteenth Amendment, they had passed the Enforcement Act[38] to ensure equal access to the polls and to deter those who would intimidate potential black voters.[39] However, the extensive violence surrounding the 1870 elections convinced the Radicals that the Enforcement Act had been inadequate.[40] When Congress reconvened in its lame duck third session, the Radicals took two steps to deal with that violence. First, to fill some of the gaps in the Enforcement Act, Congress passed the new Force Act which created independent federal machinery intended to insure the right to vote in

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[33]*See infra* Part IV.B.

[34]*See infra* text accompanying notes 375–89.

[35]*See infra* text accompanying notes 390–95.

[36]*See infra* text accompanying notes 417–49.

[37]*See* United States v. Price, 383 U.S. 787, 803–04 (1966); 1 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 443 (1970).

[38]Act of May 31, 1870, ch. 114, 16 Stat. 140.

[39]*See* SWINNEY, *supra* note 10, at 57–63. For a discussion of the debates on the Enforcement Act, see SCHWARTZ, *supra* note 37, at 443–45, 454–56.

[40]*See* SWINNEY, *supra* note 10, at 93.

all congressional elections.[41] Second, in order to assess the extent of the violence, the Senate created a Select Committee on Southern Outrages and directed it to investigate the violence in the South.[42]

Yet, for Benjamin F. Butler, one of the most Radical of the Republican leaders in the House, further investigation was unnecessary and the time to enact even more forceful legislation had arrived. On February 13, 1871, he arranged to have an ally, Clinton L. Cobb of North Carolina, introduce House Bill 3011[43] which was generally called "Butler's Bill."[44] Over the objections of the Democrats,[45] the bill was promptly referred to the Committee on Reconstruction of which Butler was the chair.[46] Three days later, Butler

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[41]*See* Act of February 28, 1871, ch. 99, 16 Stat. 433. For a discussion of the hurried passage of this act, see *infra* note 61. For a less benign interpretation of its purposes, see *Bayonet Elections*, N.Y. WORLD, Feb. 25, 1871, at 1 (summarizing Democratic opposition to Force Act, including Senator Vicker's motion, which was defeated, to amend its title to read: "An act to prevent free and intelligent voters of the United States from exercising the right of suffrage"); *An Affront to Decency*, N.Y. WORLD, Mar. 4, 1871, at 4 ("The supplementary bayonet election bill is an affront to every decent man in the country.").

[42]*See* CONG. GLOBE, 41st Cong., 3d Sess. 598 (1871). On at least one occasion, the Supreme Court has confused this committee with the House Judiciary Committee. *See* Patsy v. Board of Regents, 457 U.S. 496, 505 n.8 (1982).

[43]*See* H.R. 3011, 41st Cong. (1871).

[44]CONG. GLOBE, 41st Cong., 3d Sess. 1185–86 (1871); *Measures for Relief*, N.Y. TRIB., Mar. 11, 1871, at 4. Butler's authorship of the bill was widely and publicly recognized. *See Washington*, N.Y. DAILY TRIB., Feb. 15, 1871, at 1; *Southern Outrages*, N.Y. TIMES, Feb. 16, 1871, at 1; *Washington*, N.Y. TIMES, Feb. 25, 1871, at 1. House Bill 3011 was loquaciously titled "A Bill to protect loyal and peaceable citizens of the United States in the full enjoyment of their rights, persons, liberty and property, and to enable such citizens to preserve and perpetuate the evidence of losses claimed to have been sustained by them in the war in the states lately in rebellion." The text of Butler's Bill is reprinted in Appendix B.

In an otherwise excellent work, Everette Swinney mistakenly states that the text of the bill was printed in the *Globe* on March 20, 1871. *See* SWINNEY, *supra* note 10, at 41. As discussed below, the bill read on March 20 was not Butler's original bill but rather the Morton-Butler Committee Bill, H.R. 189. *See* Part II.D below. While the Morton-Butler Committee Bill did contain some sections derived from Butler's bill, it also included sections derived from Representative Shellabarger's House Bill 7 and Representative Mercur's House Bill 194. *See infra* text accompanying notes 162–72. The text of the Morton-Butler Committee Bill, Shellabarger's House Bill 7, and Mercur's House Bill 194 are reprinted in Appendices C, D, and E, respectively.

[45]The Democrats first moved that it be read and then unsuccessfully moved to reject the bill. *See* CONG. GLOBE, 41st Cong., 3d Sess. 1185–86 (1871). These dilatory tactics may have been intended to obstruct an unrelated bill. *See 41st Congress*, N.Y. WORLD, Feb. 14, 1871, at 1.

[46]*See* CONG. GLOBE, 41st Cong., 3d Sess. 1185–86 (1871).

reported out an amendment making minor formal changes.[47] Four days after that, he presented his committee's favorable report on the bill.[48]

Butler and other Radical Congressmen strove to bring the bill to the floor before the impending end of the session so that it could be voted on by the Forty-first Congress rather than by the somewhat more conservative Forty-second Congress.[49] Butler had unsuccessfully tried to bring his bill to a vote on February 16, 1871,[50] but under House rules, appropriations bills took precedence over other business.[51] Butler asked Representative Henry Dawes, chair of the Appropriations Committee, to waive that priority in order to permit Butler to present his bill.[52] He assured Dawes that he would promptly call the question and that the bill could be passed in three hours,[53] but Dawes refused to yield. As a result, appropriations bills occupied the House until February 28, 1871.[54]

On that date, with only three days left in the lame duck session, Butler made a final effort to pass his bill. He again brought the bill to the floor of the House,[55] but the Democrats attempted to delay its consideration. First, they interrupted the required reading of the bill by making a motion to reject it.[56] When that failed, they again interrupted the reading of the bill, this time to move to suspend the rules to consider a proposal to repeal the import duty on

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[47]*See id.* at 1321. Butler subsequently claimed that he wanted to have the bill considered at this time but was prevented by Representative Dawes. *See* BENJAMIN F. BUTLER, CONTROVERSY BETWEEN SPEAKER BLAINE AND GENERAL BUTLER GROWING OUT OF HIS ENDEAVOR TO GET LEGISLATION FOR THE PROTECTION OF THE LIBERTY, PROPERTY, AND LIVES OF LOYAL MEN THROUGHOUT THE SOUTH 1 (1871) [hereinafter BUTLER, CONTROVERSY]. Neither the author nor date of this pamphlet is explicitly identified in the pamphlet itself. However, its content makes clear that Butler was the author, and a contemporaneous newspaper account states that it was published by Butler in March of 1871. *See General Butler Explains*, N.Y. TIMES, Apr. 1, 1871, at 8.

[48]*See* CONG. GLOBE, 41st Cong., 3d Sess. 1457 (1871). The bill had been discussed within the committee for several days. *See From Washington*, N.Y. WORLD, Feb. 15, 1871, at 1; *Washington*, N.Y. WORLD, Feb. 17, 1871, at 8.

[49]*See Washington*, N.Y. TIMES, Feb. 25, 1871, at 1. In the House of the Forty-second Congress, the Republicans would no longer have the two-thirds majority required to suspend the rules to push through legislation. *See Exit the Two-Thirds*, N.Y. WORLD, Mar. 4, 1871, at 4.

[50]*See* BUTLER, CONTROVERSY, *supra note* 47, at 1.

[51]*See id. But see Forty-First Congress*, N.Y. WORLD, Feb. 22, 1871, at 2 (stating that resolution giving priority to appropriations matters was not passed until February 21).

[52]*See* BUTLER, CONTROVERSY, *supra* note 47, at 1.

[53]*See id.*

[54]*See id.*

[55]*See* CONG. GLOBE, 41st Cong., 3d Sess. 1761 (1871).

[56]*See id.* at 1762.

coal.[57] After several further dilatory motions, both the motion to suspend the rules and the coal tariff repeal resolution passed.[58] To avoid further Democratic delay tactics, Butler took the initiative and himself moved to suspend the rules of the house to require that his bill be given priority over all other business of the House until disposed of by final vote.[59] That motion, which required a two-thirds majority, failed, 128 to 66,[60] with only three Republicans voting against it—Representatives Farnsworth, Fitch, and Wilkinson.[61] If even two Representatives had changed their votes, the motion (and, Butler believed, the bill itself) would have passed.[62] A furious Butler "slammed down his desk lid, threw the bill under his table," and stalked out of the hall.[63]

Thus, Butler's Bill died in the Forty-first Congress, to be revived in the Forty-second.

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[57]*See id.* A tactical error by Butler may have enabled them to do so. Butler permitted his one hour to expire while the bill was being read, thus making it possible for the Democrats to obtain the floor. *See Fuel for the Poor*, N.Y. WORLD, Mar. 1, 1871, at 1.

Even more than most tax cut proposals, the repeal of coal duties was extremely popular politically since the country was then suffering from a drastic increase in coal prices. *See The Great Coal Swindle*, N.Y. WORLD, Feb. 18, 1871, at 1; *The Coal Famine*, N.Y. WORLD, Feb. 24, 1871, at 1.

[58]*See* CONG. GLOBE, 41st Cong., 3d Sess. 1762 (1871).

[59]*See id.* The motion contained exceptions for bills reported back by conference committees and appropriation bills, and sharply restricted dilatory motions. *See id.*

[60]*See id.* The initial vote on the motion was 97 to 54. The vote reported in the text was the final vote after Butler demanded the "Yeas and Nays," demanding that each Congressman's vote be individually identified and recorded. *Id.*

[61]*See Forty-First Congress*, N.Y. TIMES, Mar. 1, 1871, at 5. Whether the bill could have passed the Senate in the short time remaining is a difficult question. In the Senate, it was not possible to cut off debate by calling the previous question. Thus, a Democratic filibuster was almost inevitable. *See id.*

Butler may nonetheless have been hoping to duplicate a recent successful Republican effort to enact legislation quickly despite Democratic opposition. After the Force Bill passed the House with just four hours of debate, *see Bayonet Election Laws*, N.Y. WORLD, Feb. 14, 1871, at 1; *Bayonet Elections*, N.Y. WORLD, Feb. 16, 1871, at 1, the Senate Republicans introduced the bill at half past eleven at night on February 23, and managed to pass it at about half past one in the morning on February 25 despite a Democratic filibuster. The Republicans simply wore the Democrats out by forcing the Senate to remain in continuous, 24-hour session and by refusing to participate in the debate themselves. *See Bayonet Elections*, N.Y. WORLD, Feb. 25, 1871, at 1; *Congress Yesterday*, N.Y. WORLD, Feb. 24, 1871, at 8; *Washington*, N.Y. TIMES, Feb. 26, 1871, at 4.

[62]Butler blamed the defeat on Speaker James G. Blaine and Blaine's Maine ally, Representative John Peters, both of whom were present but did not vote. *See* BUTLER, CONTROVERSY, *supra* note 47, at 1. Peters was known as a close ally of Blaine who often served as his agent on the House floor. *See John Andrew Peters*, *in* 14 DICTIONARY OF AMERICAN BIOGRAPHY 504, 505 (Allen Johnson & Dumas Malone eds., 1934).

[63]*Washington*, N.Y. WORLD, Mar. 1, 1871, at 5.

B. Division, Delay, and Deadlock (March 2 to March 9)

1. Obstacles to Outrage Legislation

Butler's Bill and its supporters faced substantial obstacles in the Forty-second Congress, particularly in the House. The Democrats, of course, opposed all efforts to deal with Klan violence and would attempt to defeat any outrage legislation.[64] Some Republicans favored immediate passage of an outrage bill but opposed Butler's Bill, either because they believed that it had serious constitutional or practical flaws,[65] or simply because they detested Butler and would seize any opportunity to frustrate his efforts.[66] Finally, a significant number of Republicans believed that outrage legislation was necessary but gave higher priority to other objectives—particularly avoiding the repeal of protective tariffs—and were willing to scuttle outrage legislation to accomplish those objectives.[67] The maneuvers of these factions would dominate the early days of the Forty-second Congress.

Many Republicans, while favoring immediate action to stop Klan violence, saw serious practical and constitutional problems with Butler's Bill. The bill created a system of powerful quasi-judicial commissioners to deal with outrage perpetrators.[68] Some Republicans complained that the system, modeled after the Freedmen's Bureau, would become an unwieldy bureaucracy and noted that it would require appointment of more than 950 commissioners throughout the southern and border states.[69] They feared that, since these commissioners were to be paid on a fee-for-service basis, they would have a strong incentive to arrest persons on even the slightest evidence of Klan activities or sympathies.[70] They worried that the bill, which created

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[64]*See infra* text accompanying notes 100–03. A few Republicans were also reported to believe that no action was needed. *See Washington*, N.Y. TRIB., Mar. 14, 1871, at 1.

[65]*See infra* text accompanying notes 68–76.

[66]*See infra* text accompanying notes 81–87.

[67]*See infra* text accompanying notes 88–100.

[68]*See* H.R. 3011, 41st Cong. §§ 1–3 (1871). Commissioners were to be appointed in every county and city in the South (including Kentucky) and could order the arrest, examination, and jailing of persons suspected of violating the act or of committing other outrages. Commissioners could also confine witnesses to insure that they would appear to testify. They had the authority to requisition military assistance. *See id.*

[69]*See Measures for Relief*, N.Y. TRIB., Mar. 11, 1871, at 4; *Washington*, N.Y. TRIB., Feb. 18, 1871, at 1. In fact, the bill authorized but did not require the appointment of that many. *See* H.R. 3011, 41st Cong. § 1 (1871).

[70]*See Washington*, N.Y. TRIB., Feb. 18, 1871, at 1. The commissioners would also receive fees for preserving evidence of loyal citizens' claims against the federal government. *See* H.R. 3011, 41st Cong. § 13 (1871). As a result, some Republicans were concerned that commission-

a broad array of new federal crimes,[71] would unduly burden the federal courts with criminal cases that could just as well be heard in the state courts.[72] Some believed such an elaborate bill was unnecessary because the President already had sufficient authority to use the military to quell outrages.[73] Some thought the bill was unconstitutional,[74] particularly since it represented sectional legislation that made certain conduct criminal in the South while leaving it legal in the North.[75] Many of the Congressmen who opposed Butler's bill for these reasons would later rally behind a more simple and direct measure modeled after Representative Samuel Shellabarger's House Bill 7.[76]

While some Republicans opposed Butler's Bill on substantive grounds, others resisted it because they simply detested Butler himself. Even in the bare-fisted politics of the late nineteenth century, few politicians aroused as much personal venom as Butler. As one might expect, the Democrats hated him. Before the session would end, they would publicly call him—on the

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ers would have an incentive to drum up questionable claims. *See Washington*, N.Y. TRIB., Feb. 18, 1871, at 1.

[71]*See* H.R. 3011, 41st Cong. §§ 4–10, 12 (1871). The bill penalized conduct that was typical of the Klan. For example, it penalized efforts to intimidate citizens by the gathering of disguised mobs, by physical violence against individuals, by arson or shooting into dwellings, or by firing or refusing to hire employees. *See id.* §§ 4–5, 7. It also criminalized membership in organizations that required oaths to commit such wrongs or to shield or conceal their perpetrators. *See id.* § 9.

Section 12 of Butler's bill also attempted to insure the effectiveness of the indictment and trial process by requiring that grand and petit jurors take an oath that they had never supported the rebellion. *See id.* § 12. As finally enacted, the Ku Klux Act repealed the "Ironclad Oath" for all jurors (even in cases brought under the common law or other statutes) but required that the potential jurors in cases under the Ku Klux Act swear that they had never aided or abetted the Klan or similar conspiracies. *See* Act of April 20, 1871, ch. 22, § 5, 17 Stat. 13, *repealing* Act of June 17, 1862, ch. 103, 12 Stat. 430.

[72]*See Washington*, N.Y. TRIB., Feb. 18, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 14, 1871, at 1.

[73]*See Measures for Relief*, N.Y. TRIB., Mar. 11, 1871 at 4.

[74]*See id.*

[75]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8; *The Peril of the Hour*, N.Y. TRIB., Mar. 17, 1871, at 4. *See also* CONG. GLOBE, 42d Cong., 1st Sess. 221 (1871) (Sen. Frelinghuysen expressing opposition to "any measure which did not apply equally to every State in this Union").

[76]*See* H.R. 7, 42d Cong. (1871); CONG. GLOBE, 42d Cong., 1st Sess. 181 (1871) (Rep. Dawes); *Measures for Relief*, N.Y. TRIB., Mar. 11, 1871, at 4; *Washington*, N.Y. TRIB., Mar. 14, 1871, at 1.

floor of Congress—a "G—d d——d scoundrel,"[77] a "d——d villain,"[78] a "military plunderer,"[79] and a "universally recognized blackguard, coward, and scoundrel."[80]

More surprising—and more damaging to the prospects for Butler's Bill—was the fact that many Republicans also clearly despised him and steadfastly opposed his personal political ambitions. Butler's most powerful Republican antagonist was Speaker Blaine. Before the Forty-second Congress convened, Blaine discovered that Butler was attempting to depose him as Speaker by calling a special caucus of low-tariff members of both parties.[81] While Blaine was able to circumvent that attempt, it clearly infuriated him.[82] Throughout the session, he would repeatedly use his power as Speaker to frustrate Butler's efforts.[83]

Many Republicans shared Blaine's hostility toward Butler. For example, one took to the floor of the House to accuse Butler of embezzling millions of dollars from a home for crippled veterans;[84] and, when Butler quite properly

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[77]*XLIId Congress—1st Session*, N.Y. TRIB., Mar. 31, 1871, at 4 (quoting Senator Garrett Davis) (omission in original). *See also Capitol Gossip*, N.Y. WORLD, Mar. 31, 1871, at 1 (quoting Davis as calling Butler "damned scoundrel").

[78]*Washington*, N.Y. TIMES, Mar. 31, 1871, at 2 (quoting Senator Davis) (omission in original). For Senator Davis's version of his interchange with Butler, see CONG. GLOBE, 42d Cong., 1st Sess. 493 (1871). For Butler's version, see *id.* at 836. The insults quoted in the text accompanying this and the previous note are not printed in the *Globe* because they allegedly were made out of the hearing of the chair. *See id.* at 493 (statement of Vice President).

[79]CONG. GLOBE, 42d Cong., 1st Sess. 493 (1871).

[80]*Id.*; *see also id.* at 840–41 (expressing similar views); *id.* at 245 (facetiously repeating traditional phrase "the honorable gentleman from Massachusetts" to imply that it could not apply to Butler).

[81]*See* HESSELTINE, *supra* note 10, at 241; 1 GEORGE FISBIE HOAR, AUTOBIOGRAPHY OF FORTY YEARS 202 (1903); *see also Washington*, N.Y. WORLD, Mar. 3, 1871, at 5 (alluding to failed scheme to reorganize House on basis of coalition of low tariff members).

[82]*See* CONG. GLOBE, 42d Cong., 1st Sess. 125 (1871). On the House floor, Blaine referred bitterly to Butler's aborted coup attempt as a violation of the longstanding rule that Republican members must support the speaker candidate chosen by their party's caucus. *See id.* (claiming that Butler was prepared to lead defectors "over to the despised Nazarenes on the opposite side").

[83]*See infra* text accompanying notes 234–52. Blaine may also have helped block Butler's bill in the 41st Congress by failing to vote for it, by failing to muster additional Republican votes for it, and by permitting the Democrats to interrupt the reading of the bill by a motion to suspend the rules. *See supra* text accompanying notes 57–58; BUTLER, CONTROVERSY, *supra* note 47, at 1 (blaming Blaine).

[84]*See* CONG. GLOBE, 42d Cong., 1st Sess. 840 (1871). For similar Republican attacks on Butler, see *infra* notes 86–87 and accompanying text.

objected that such an attack was out of order, the House Republicans voted almost unanimously to let the attack continue.[85]

Many of Butler's fellow Republicans, including ones who favored outrage legislation, were willing to go to extraordinary lengths to thwart his political advancement.[86] They believed, as one influential Massachusetts Radical would put it, that political success for Butler would be a disaster that would lead inevitably to "the corruption of [our] youth, [and] the destruction of everything valuable in [the nation's] character."[87] As a result, while they might favor vigorous action against the Klan, they would be careful to take that action in a way that minimized the political benefit to Butler.

While Butler's Bill faced particular hurdles, there was one obstacle that any outrage measure would have to overcome—the fear that, if Congress remained in session, it would be stampeded into lowering tariffs.[88] Support for protective tariffs, an issue that dominated much of late-nineteenth-century politics,[89] was a fundamental economic principle for many powerful Republican members of the Forty-second Congress.[90] However, proposals to reduce the tariff were extremely popular.[91] If brought to a floor vote, such proposals were likely both to pass and to damage the Republican party's political prospects.[92] Some pro-tariff House Republicans were willing to

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[85]*See Washington*, N.Y. TIMES, April 21, 1871, at 5. Not more than three Representatives voted to cut off the attacks. *See id.*

[86]*See, e.g.*, HANS L. TREFOUSSE, BEN BUTLER: THE SOUTH CALLED HIM BEAST! 221–24 (1957) (describing party's horror at rumors that Butler might be appointed to cabinet or run for President and party's efforts to thwart Butler's bid to be nominated for governor).

[87]1 HOAR, *supra* note 81, at 348; *see also id.* at 329–30 (comparing Butler to Robespierre and Benedict Arnold); *id.* at 344 (accusing Butler of embezzling funds from crippled veterans' home); *id.* at 335 (describing Butler's military career as "disgraceful"). While Hoar loathed Butler, he was a firm supporter of outrage legislation and would play a crucial role in the enactment of the Ku Klux Act. *See infra* text accompanying notes 324–50.

[88]*See Washington*, N.Y. TIMES, Mar. 7, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 14, 1871, at 1. From the perspective of a late twentieth-century student of the history of civil rights legislation, it is easy to forget that civil rights were not the only thing on the Forty-second Congress's mind.

[89]*See* SIDNEY RATNER, THE TARIFF IN AMERICAN HISTORY 28–41, 112–38 (1972); JOANNE REITANO, THE TARIFF QUESTION IN THE GILDED AGE *passim* (1994); 2 EDWARD STANWOOD, AMERICAN TARIFF CONTROVERSIES IN THE NINETEENTH CENTURY 139–394 (1903) (reissued 1967); F. W. TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES 155–360 (8th ed. 1931).

[90]*See infra* text accompanying note 271.

[91]*See, e.g.*, TAUSSIG, *supra* note 89, at 180–81 (stating that in early 1870s virtually all Representatives from West, regardless of party, favored major tariff reduction).

[92]*See Washington*, N.Y. WORLD, Mar. 7, 1871, at 1 (stating that "the protectionists are afraid of the new House on the Tariff question"); *Washington*, N.Y. TRIB., Mar. 9, 1871, at 1 (describing Republican fears that bringing up tariff issue would "seriously cripple[]" Republican party in next election).

subordinate all other goals to avoid or delay such votes, while the Democrats used the threat of tariff reduction to convince them to vote to adjourn even before any action was taken to deal with Klan violence.[93]

Henry Dawes, the Republican Representative whose tactics had frustrated Butler at the end of the Forty-first Congress, provides a good example of how the politics of the tariff influenced efforts to enact outrage legislation.[94] Dawes was a Congressman from the abolitionist state of Massachusetts. He had voted for Butler's Bill in the Forty-first Congress[95] and would consistently vote for the Ku Klux Act in the Forty-second Congress.[96] Nevertheless, Dawes was also a committed believer in high protective tariffs and was recognized as the champion of New England textile manufacturers on tariff issues.[97] To avoid the risk of tariff reduction, Dawes would lead the movement for prompt final adjournment of Congress, even though such an adjournment would sacrifice the chance to take action against the Klan.[98] For Dawes and others who shared his views, that sacrifice was seen as an unfortunate—but necessary—tradeoff.[99]

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[93]*See Washington*, N.Y. WORLD, Mar. 6, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 7, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 9, 1871, at 1.

[94]*See* TAUSSIG, *supra* note 89, at 185. The protectionists also had a powerful ally in Speaker Blaine. *See infra* text accompanying notes 234–52.

[95]*See* CONG. GLOBE, 41st Cong., 3d Sess. 1762 (1871).

[96]*See* CONG. GLOBE, 42d Cong., 1st Sess. 522, 800, 808 (1871). Like most of the House Republicans, including Shellabarger, Dawes voted against the first version of the so-called "Sherman Amendment." *See id.* at 725.

[97]*See Henry Laurens Dawes, in* 5 DICTIONARY OF AMERICAN BIOGRAPHY 149 (Allen Johnson & Dumas Malone eds., 1930); TAUSSIG, *supra* note 89, at 185 (recognizing Dawes as one of leaders of protectionist wing of Republican party); *Washington*, N.Y. WORLD, Mar. 3, 1871, at 5 (mentioning Dawes as possible protectionist prospect for chair of Ways and Means Committee).

[98]*See infra* text accompanying notes 105–07. Dawes's efforts, near the end of the Forty-first Congress, to occupy the entire remaining time of the House with appropriations measures (thus thwarting Butler's initial efforts to introduce his bill) may have been similarly motivated. *See supra* text accompanying notes 52–54. If they were, Dawes was prescient. When he finally yielded the floor, it was a tariff reduction bill, rather than Butler's Bill, that promptly passed the House under a suspension of the rules. *See* BUTLER, CONTROVERSY, *supra* note 47, at 1.

[99]*See Washington*, N.Y. TIMES, Mar. 7, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 9, 1871, at 1. Butler described the trade-off less impartially as a willingness "to permit the slaughter and extermination of their political friends in the South if the tariff could be saved even for nine months by an early adjournment." Letter from Benjamin F. Butler to the Republicans of the House of Representatives 1 (March 15, 1871), *reprinted in Letter from Gen. Butler*, N.Y. TRIB., Mar. 16, 1871, at 1.

2. The Democrats' Adjournment Strategy

Two days before the Forty-second Congress convened, the Democrats developed a plan intended to capitalize on the internal divisions within the Republican party. On March 2, the incoming Democratic House members met in their initial organizational caucus and unanimously adopted the strategy that would bedevil the Radical Republicans for the first weeks of the upcoming session.[100] They resolved to move for final adjournment of the upcoming session ("adjournment *sine die*") as soon as possible and to repeat that motion as often as necessary.[101] If this strategy succeeded, the Democrats would delay outrage legislation until at least December,[102] by which time they hoped that support for such measures would have dwindled.

The Radicals thought that the Democrats had an even more sinister reason to delay legislation against Klan violence. They claimed that the Democrats were trying to give the Klan a nine-month reign of terror to murder, intimidate, and silence freed slaves, and to drive loyal whites from the southern states, thereby restoring Democratic control of those states.[103]

The Democrats correctly believed that their adjournment strategy would win support among pro-tariff Republicans. The Forty-second Congress convened on Saturday, March 4, and reelected Blaine as Speaker.[104] Blaine immediately recognized Butler's Republican nemesis, Henry Dawes, who

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[100]*See The Next Congress*, N.Y. WORLD, Mar. 3, 1871, at 5; *The Next Congress*, N.Y. TIMES, Mar. 3, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 3, 1871, at 1.

[101]*See* N.Y. WORLD, Mar. 7, 1871, at 1; *The Next Congress*, N.Y. WORLD, Mar. 3, 1871, at 5 (quoting resolution as providing that "the Forty-second Congress ought to adjourn the first session at the earliest practicable time, and that those now present [at the caucus] would continually vote to that end").

[102]The Constitution only required Congress to meet once each year, beginning on the first Monday in December. *See* U.S. CONST. art. I, § 4, cl. 2. However, in 1867, in the midst of its power struggles with President Johnson, Congress had added an additional session to be held beginning March 4 after each congressional election. *See* Act of January 22, 1867, ch. 10, 14 Stat. 378 (1867), *repealed by* Act of April 20, 1871, ch. 21, § 30, 17 Stat. 13 (1871). The additional session was added shortly after the Radical Republicans had routed President Johnson's candidates in the 1866 congressional elections. The immediate purpose of the bill was to be certain that the Thirty-ninth Congress would convene as soon as the Thirty-eighth adjourned so that there would be no interregnum in the Radicals' efforts to wrest control of reconstruction from Johnson. *See* KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, at 146–47 (1965).

[103]*See* Letter from Benjamin F. Butler to the Republicans of the House of Representatives (March 15, 1871), *reprinted in Letter from Gen. Butler*, N.Y. TRIB., Mar. 16, 1871, at 1; *Peril of the Hour*, N.Y. TRIB., Mar. 17, 1871, at 4.

[104]*See* CONG. GLOBE, 42d Cong., 1st Sess. 6 (1871). The Forty-second Congress convened literally minutes after the final adjournment of the Forty-first. *See Congress*, N.Y. TRIB., Mar. 6, 1871, at 5; *Washington*, N.Y. TIMES, Mar. 5, 1871, at 1.

offered a concurrent resolution to adjourn *sine die* at noon on March 8, that is, in just two congressional working days.[105] Despite the Republican majority in the House,[106] the resolution passed overwhelmingly, 147 to 23,[107] and was sent to the Senate. (Senate concurrence was required because the Constitution forbids either house to adjourn for more than three days without the consent of the other.)[108]

Butler was so angry at the vote that he stalked out of the House.[109] This anger was understandable. While the 1870 elections had loosened the Republican stranglehold on the House,[110] the party still held a 131 to 96 majority.[111] Four days earlier, only three Republicans had defected from Butler's motion to suspend the rules to pass his bill.[112] Now, more than fifty deserted him and voted to adjourn *sine die*—an adjournment which would have delayed action on his bill for at least nine months.[113]

President Grant also had reason to be angry. Just minutes before its adjournment vote, the House had appointed its members of the customary joint congressional delegation to the White House.[114] By tradition, this

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[105]*See* CONG. GLOBE, 42d Cong., 1st Sess. 11 (1871). Neither the House nor the Senate held sessions on Monday, March 6, so Dawes's proposed resolution would have left only Tuesday and a very brief period on Wednesday available for legislative action. *See id.* at 12.

[106]*See infra* text accompanying notes 110–11.

[107]*See* CONG. GLOBE, 42d Cong., 1st Sess. 11 (1871). The votes of individual members were not recorded. *See id.*

[108]*See* U.S. CONST. art. I, § 5, cl. 4.

[109]*See Congress*, N.Y. TRIB., Mar. 6, 1871, at 5. By doing so, Butler literally—but not practically—lost his seat in Congress. By walking out before the traditional lottery to determine seat locations, Butler was left with "not even a foot of the House to call his own." *Washington*, N.Y. TIMES, Mar. 5, at 1; *see Congress*, N.Y. TRIB., Mar. 6, 1871, at 5. A few days later, Josiah Wall, a newly elected black Representative from Florida who had obtained a choice seat location close to the Speaker, gave that seat to Butler. *See Washington*, N.Y. TRIB., Mar. 9, 1871, at 1.

[110]In the Forty-first Congress, Republicans held a two-thirds majority (171 of 243 members), making it possible for the party to suspend the rules and cut off debate. *See Exit the Two-Thirds*, N.Y. WORLD, Mar. 4, 1871, at 4; *Forty-Second Congress*, N.Y. TIMES, Mar. 2, 1871, at 2. At eight o'clock on the morning of the last day of that Congress, Representative James Garfield attempted to slip through a change in House rules to give a *simple majority* in the Forty-second Congress much the same power that a two-thirds majority had held in the Forty-first; this effort was narrowly defeated. *See Congress*, N.Y. TRIB., Mar. 6, 1871, at 5; *Washington*, N.Y. TIMES, March 5, 1871, at 1.

[111]*See Forty-Second Congress*, N.Y. TIMES, Mar. 2, 1871, at 2. Sixteen seats were vacant (most due to the fact that some states held their elections later in the year) and there were a number of contested seats. *See id.*; *see also* CONG. GLOBE, 42d Cong., 1st Sess. 6–12 (1871); *Congress*, N.Y. TRIB., Mar. 6, 1871, at 5; *Washington*, NEW YORK Times, Mar. 5, 1871, at 1.

[112]*See supra* text accompanying notes 59–61.

[113]*See supra* text accompanying notes 105–07.

[114]*See* CONG. GLOBE, 42d Cong., 1st Sess. 11 (1871). The Senate had already appointed its two members. *See id.* at 4.

delegation was supposed to meet with the President, notify him formally that both Houses had assembled, and ask if he wished to submit proposals for legislation or other messages to Congress.[115] Adjournment *sine die* would make it effectively impossible to act on any of Grant's proposals, and several Representatives opposed the adjournment on the ground that the House should wait to hear from the President.[116]

As discussed in Part III, President Grant promptly notified Congress that he was not ready for it to go home.[117] He met with the customary delegation on the morning of Monday, March 6,[118] and told it that Congress should not yet set a date for final adjournment since he expected to send it a message during the next week.[119] While he did not formally identify the topic of the proposed message,[120] many sources publicly reported that it would recommend prompt enactment of outrage legislation.[121]

Unlike the House, the Senate (firmly Republican and dominated by Radicals)[122] had no intention of adjourning without dealing with the outrages in the South. On Tuesday, March 7, the Senate tabled the House's adjournment *sine die* resolution, effectively killing it.[123] Unlike the House Republicans, the Senate Republicans were unified and unanimously voted to remain in session.[124]

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[115]*See id.* at 11.

[116]*See id.*

[117]*See* CONG. GLOBE, 42d Cong., 1st Sess. 13, 17 (1871). Grant also indicated that he would have an executive message for the Senate. *See id.* at 16.

[118]*See Washington*, N.Y. WORLD, Mar. 7, 1871, at 1. The evening of March 6, he attended a diplomatic reception with, among others, Butler, and it is possible that Butler took the opportunity to urge the President to help keep Congress in session. *See id.*; *Washington*, N.Y. TIMES, Mar. 7, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 7, 1871, at 1.

[119]*See* CONG. GLOBE, 42d Cong., 1st Sess. 13, 17 (1871).

[120]*See id.*

[121]*See id.* at 18; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 8, 1871, at 1; *The Radical Quandary*, N.Y. WORLD, Mar. 8, 1871 at 1; *Washington*, N.Y. WORLD, Mar. 7, 1871 at 1.

[122]The 1870 elections had not significantly diminished Radical Republican control of the Senate where the party continued to hold more than three-fourths of the seats (57 Republicans to 15 Democrats with two vacancies). *See Forty-Second Congress*, N.Y. TIMES, Mar. 2, 1871, at 2.

[123]*See* CONG. GLOBE, 42d Cong., 1st Sess. 16 (1871). Even before learning Grant's position on adjournment, the consensus in the Republican Senate Caucus had been to stay in session. *See Washington*, N.Y. TIMES, Mar. 8, 1871, at 1; *Washington*, N.Y. WORLD, Mar. 7, 1871, at 1.

[124]*See Washington*, N.Y. TIMES, Mar. 8, 1871, at 1.

The two houses of Congress had reached an impasse: The House could not adjourn without the Senate's concurrence,[125] but the Senate could not enact outrage legislation without the House's support.[126]

C. The Radicals Caucus: Creation of the Morton-Butler Committee (March 9 to March 11)

With the two houses of Congress deadlocked over adjournment, the struggle shifted to the Republican party caucuses. On Thursday, March 9, Butler called a caucus of House Republicans to try to come up with a solution to the stalemate.[127] The caucus, attended by roughly one-half of the House Republicans,[128] met for almost three hours.[129]

For Butler, the caucus had mixed results. Speaker Blaine read a private letter from President Grant in which Grant made it clear that he wanted Congress to enact legislation to deal with Southern outrages—but no other legislation—before it adjourned.[130] Armed with this endorsement, Butler tried to convince the caucus to bind House Republicans to act only on outrage legislation.[131] However, a group of westerners refused to accept such a limitation, probably in the hope of enacting tariff reduction.[132] Butler did succeed in convincing the caucus to appoint a committee of five (with himself

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[125]*See infra* text accompanying note 265–68. This did not mean that the House would stop trying. Before the end of the month, the House voted to adjourn *sine die* five separate times. *See* CONG. GLOBE, 42d Cong., 1st Sess. 11 (1871) (to adjourn *sine die* effective March 8); *id.* at 81 (to adjourn *sine die* effective March 15); *id.* at 117 (to adjourn *sine die* effective March 20); *id.* at 188 (to adjourn *sine die* effective March 23); *id.* at 241 (to adjourn *sine die* effective March 27). Each resolution would be rejected by the Senate. *See id.* at 16, 86, 118, 217, 249.

[126]*See* U.S. CONST. art. I, § 7, cl. 2.

[127]*See Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1; *The Southern Outrages*, N.Y. TRIB., Mar. 10, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 10, 1871, at 1.

[128]*See The Southern Outrages*, N.Y. TRIB., Mar. 10, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 10, 1871, at 1.

[129]*See Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1; *The Southern Outrages*, N.Y. TRIB., Mar. 10, 1871, at 1.

[130]*See Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1.

[131]*See The Southern Outrages*, N.Y. TRIB., Mar. 10, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 10, 1871, at 1.

[132]*See The Southern Outrages*, N.Y. TRIB., Mar. 10, 1871, at 1. William D. Kelley and other high tariff supporters attacked these dissidents for frustrating the will of the party majority. *See id.* William D. Kelley was known by his colleagues as "Pig Iron" because, "[t]hough he had no iron or steel holdings, he labored . . . assiduously for high duties, especially on iron and steel." *William Darrah Kelley*, *in* 10 DICTIONARY OF AMERICAN BIOGRAPHY 299, 300 (Allen Johnson & Dumas Malone eds., 1933).

as chair) to draft and report an outrage bill.[133] However, he failed to convince the caucus to adopt a resolution binding House Republicans in advance to vote, sight unseen, for whatever bill Butler's committee recommended.[134] The caucus adjourned at eleven o'clock,[135] intending to reconvene the next day to receive a report from the Butler-headed Committee of Five.[136]

The House Republican Caucus reconvened the next evening, Friday, March 10, but the Committee of Five made no report.[137] Instead, the caucus members discussed various proposals for outrage legislation[138] and referred those proposals back to the Committee of Five.[139] The Committee was instructed to report its recommendations at another meeting of the caucus—one to be convened by the more neutral caucus chair, Austin Blair of Michigan,[140] rather than one called by Butler.[141]

The Senate Republican Caucus also met on March 10.[142] Senator Oliver Morton of Ohio argued for a bill similar to Butler's, but no consensus was reached.[143] Before it adjourned for the day, the Senate Caucus appointed its own Committee of Five, chaired by Morton.[144]

The next day, Saturday, March 11, the Senate Caucus adopted a two-part resolution that seemed well calculated to accommodate the divergent interests

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[133]*See Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 10, 1871, at 1. *But see The Southern Outrages*, N.Y. TRIB., Mar. 10, 1871, at 1 (erroneously stating that Rep. Shellabarger was to be chair of caucus committee).

[134]*See Washington*, N.Y. TIMES, Mar. 10, 1871, at 1.

[135]*See The Southern Outrages*, N.Y. TRIB., Mar. 10, 1871, at 1.

[136]*See id.*; *Washington*, N.Y. TIMES, Mar. 10, 1871, at 1.

[137]*See Measures for Relief*, N.Y. TRIB., Mar. 11, 1871, at 4.

[138]These appear to have included both Butler's Bill from the 41st Congress and Shellabarger's House Bill 7 which had been introduced just the previous day. *See* CONG. GLOBE, 42d Cong., 1st Sess. 32 (1871); *Measures for Relief*, N.Y. TRIB., Mar. 11, 1871, at 4.

[139]*See Measures for Relief*, N.Y. TRIB., Mar. 11, 1871, at 4.

[140]*See The Next Congress*, N.Y. TIMES, Mar. 3, 1871, at 1.

[141]*See Measures for Relief*, N.Y. TRIB., Mar. 11, 1871, at 4.

[142]*See id.* Until March 10, the Senate Caucus had been almost entirely focused on a bitter fight over the composition and chairmanship of committees, particularly the successful effort to depose Charles Sumner as chair of the foreign affairs committee. *See Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1 (describing caucus adoption of subcommittee recommendation to depose Sumner); *Radical Quandary*, N.Y. WORLD, Mar. 8, 1871, at 1 (describing Senate Republican Caucus's decision to appoint subcommittee to recommend composition of committees); *Sumner Sacrificed*, N.Y. WORLD, Mar. 9, 1871, at 1 (describing caucus subcommittee's recommendation to depose Sumner).

[143]*See Measures for Relief*, N.Y. TRIB., Mar. 11, 1871, at 4.

[144]*See Washington*, N.Y. TIMES, Mar. 11, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 12, 1871, at 1 (referring to Committee in news story datelined March 10). *But see Southern Outrages*, N.Y. TRIB., Mar. 13, 1871, at 1 (ambiguous but possibly suggesting—erroneously—that Senate Committee of Five was not appointed until March 12).

of the principal factions of the Republican party.[145] On the one hand, to satisfy the Radicals, the caucus agreed that Congress should remain in session until it passed legislation to deal with outrages in the South.[146] On the other hand, to satisfy the pro-tariff faction, the caucus resolved that the Senate should consider outrage legislation only, thus preempting any effort to reduce the tariff.[147]

However, the Senate Caucus was not able to agree on what sort of outrage legislation it should endorse.[148] Some favored something similar to Butler's Bill while others favored Shellabarger's much less complex House Bill 7, which simply authorized the President to use the military to suppress the Klan and other outrage perpetrators.[149] As a result, the Senate directed its Committee of Five (headed by Morton) to meet jointly with the House Republican Caucus's Committee of Five (headed by Butler) and to develop a single bill around which the party could coalesce.[150]

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[145]*See Southern Outrages*, N.Y. TRIB., Mar. 13, 1871, at 1.

[146]*See id.*; *Washington*, N.Y. TIMES, Mar. 12, 1871, at 1. The Republican Senators were successful in this effort and repeatedly rejected House efforts to adjourn *sine die*. *See* CONG. GLOBE, 42d Cong., 1st Sess. 86 (1871) (tabling resolution to adjourn *sine die* on March 15); *id.* at 118 (tabling resolution to adjourn *sine die* on March 20); *id.* at 217 (tabling resolution to adjourn *sine die* on March 23); *id.* at 249 (tabling resolution to adjourn *sine die* on March 27).

[147]*See Grant's Reelection Scheme*, N.Y. WORLD, Mar. 13, 1871, at 4; *Southern Outrages*, N.Y. TRIB., Mar. 13, 1871, at 1; *see also Washington*, N.Y. TIMES, Mar. 12, 1871, at 1 (stating that House Caucus had also decided to limit legislation to anti-Klan bills).

The Republicans began to implement this resolution the next Monday (March 13) when Senator Anthony introduced the following resolution: "*Resolved*, That the Senate will consider at the present session no general legislation, except such as relates to the suppression of disorder and the protection of life and property in the several States." CONG. GLOBE, 42d Cong., 1st Sess. 69 (1871).

[148]*See Southern Outrages*, N.Y. TRIB., Mar. 13, 1871, at 1.

[149]*See id.*

[150]*See id.*; *Washington*, N.Y. TIMES, Mar. 12, 1871, at 1; *see also Grant's Game*, N.Y. WORLD, Mar. 13, 1871, at 1 (describing purpose of Morton-Butler Committee); *Grant's Reelection Scheme*, N.Y. WORLD, Mar. 13, 1871, at 4 (same).

D. The Radicals Draft: The Morton-Butler Committee and Its Bill (March 11 to March 14)

Thus was created the Morton-Butler Committee of Ten.[151] Contrary to the conventional history,[152] it could not have been created as a response to Grant's message on outrages in the South, since that message was not drafted or delivered until March 23—twelve days later.[153] In fact, the committee would *finish* its work and cease to exist on March 14—nine days before Grant's message.[154]

The Morton-Butler Committee met twice on Monday, March 13,[155] and again on Tuesday, March 14.[156] Butler and Morton urged adoption of Butler's Bill,[157] arguing that what was needed was a measure that would, in their words, "make the fur fly."[158] But more moderate voices[159] argued for a simpler measure, modeled after Shellabarger's House Bill 7.[160]

In the end, unable to reach consensus, the Morton-Butler Committee cobbled together a bill that took sections from Butler's Bill, Shellabarger's

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[151]The Senate members were Oliver Morton, John Pool, John Scott, George Edmunds, and Frederick Frelinghuysen. *See Southern Outrages*, N.Y. TRIB., Mar. 13, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 13, 1871, at 3. The House members of the committee were Benjamin Butler, Samuel Shellabarger, Ulysses Mercur, Charles Thomas, and probably John Coburn. *See Washington*, N.Y. TIMES, Mar. 13, 1871, at 3. The *Times* erroneously identifies the last House member as Representative "*Coleman* of Indiana." *Id.* (emphasis added); *see also* Zagrans, *supra* note 9, at 548 n.268 (repeating same error). There was no member of the Forty-second Congress named "Coleman" and it seems most likely that the *Times* was referring to Indiana Representative John Coburn. The *Times* could not have been referring to Indiana Representative William Holman because Holman was a Democrat. *See* CONG. GLOBE, 42d Cong., 1st Sess. v–xii (1871); *Forty Second Congress*, N.Y. TIMES, Mar. 2, 1871, at 2.

[152]*See supra* text accompanying notes 1–17.

[153]*See infra* text accompanying notes 317–47.

[154]*See infra* text accompanying notes 155–56, 339–41.

[155]The committee met at ten o'clock in the morning, *see Washington*, N.Y. TIMES, Mar. 13, 1871, at 3, and again in the evening, *see Washington*, N.Y. TIMES, Mar. 14, 1871, at 5.

[156]*See Revenue Reform*, N.Y. WORLD, Mar. 14, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 14, 1871, at 5; *Washington*, N.Y. TIMES, Mar. 15, 1871, at 5; *Washington*, N.Y. TRIB., Mar. 14, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 15, 1871, at 1. Only nine members were present at the March 14 meeting. *See Washington*, N.Y. TRIB., Mar. 15, 1871, at 1.

[157]*See Revenue Reform*, N.Y. WORLD, Mar. 14, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 14, 1871, at 1.

[158]*See Revenue Reform*, N.Y. WORLD, Mar. 14, 1871, at 1.

[159]Moderates arguing for Shellabarger's approach included Senators Edmunds, Frelinghuysen, and Scott. *See Revenue Reform*, N.Y. WORLD, Mar. 14, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 15, 1871, at 1. Presumably, Shellabarger, hardly a moderate, also argued for his bill.

[160]*See Washington*, N.Y. TRIB., Mar. 14, 1871, at 1. A majority of the committee favored Shellabarger's approach. *See id.*

House Bill 7, and a bill that had been proposed by a third member of the committee, Ulysses Mercur.[161] The Morton-Butler Committee Bill consisted of eighteen sections.[162] The first twelve sections were taken, with minor changes, from Butler's Bill, House Bill 3011, as introduced in the previous Congress.[163] These sections criminalized a wide range of outrages and other conduct typical of the Klan,[164] created a complex system of commissioners with broad authority to deal with outrages,[165] gave those commissioners the power to requisition military assistance,[166] and imposed collective no-fault liability on citizens of counties where outrages occurred.[167] Section 13 of the Morton-Butler Committee Bill was new and created certain evidentiary presumptions.[168] Section 14 of the Morton-Butler Committee Bill was copied almost verbatim from Shellabarger's House Bill 7.[169] It authorized the President to use militarily force to suppress outrages and enforce the equal protection of the laws whenever a state failed or refused to do so.[170] Finally, sections 15 through 18 of the Morton-Butler Committee Bill were functionally identical to a bill already drafted[171] and subsequently introduced by

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[161]*See Washington*, N.Y. TIMES, Mar. 15, 1871, at 5. *But see The National Capitol*, N.Y. WORLD, Mar. 15, 1871, at 1 (claiming that bill combined elements from four previously introduced bills). While the author has not been able to find a source for section 13 of the Morton-Butler Committee Bill, it is possible that it came from an as yet unidentified fourth source.

[162]*See* CONG. GLOBE, 42d Cong., 1st Sess. 173–75. The Morton-Butler Committee Bill was subsequently designated House Bill 189 and was introduced and read into the *Globe* on March 20, 1871, by Rep. Butler. *See id.*

[163]*Compare* H.R. 189, 42d Cong. §§ 1–12 (1871), *with* H.R. 3011, 41st Cong. §§ 1–12 (1871). Besides some formal changes, the Morton-Butler Committee Bill eliminated the requirement that jurors take the much maligned "Iron Clad Oath" that they had never supported the rebellion. *See* H.R. 3011, *supra*, § 12 at lines 34–40. It also eliminated sections 13 and 14 of Butler's Bill that had authorized the commissioners to deal with claims by loyal citizens that they had suffered losses due to the war.

[164]*Compare* H.R. 189, 42d Cong. §§ 4–10, 12 (1871), *with* H.R. 3011, 41st Cong. §§ 4–10, 12 (1871).

[165]*Compare* H.R. 189, 42d Cong. §§ 1–3 (1871), *with* H.R. 3011, 41st Cong. §§ 1–3 (1871). *See supra* notes 68–70 and accompanying text.

[166]*Compare* H.R. 189, 42d Cong. § 3, at *ll.*40–57 (1871), *with* H.R. 3011, 41st Cong. § 3, at *ll.*40–57 (1871).

[167]*Compare* H.R. 189, 42d Cong. § 11 (1871), *with* H.R. 3011, 41st Cong. § 11 (1871).

[168]*See* H.R. 189, 42d Cong. § 13 (1871).

[169]*Compare* H.R. 189, 42d Cong. § 14 (1871), *with* H.R. 7, 42d Cong. (1871). Except for a few formal changes, the only change was the addition of a clause to make it clear that the powers granted to the President were in addition to any powers he might otherwise have. *See* H.R. 189, *supra*, § 14 at *ll.*8–9.

[170]*See* H.R. 189, 42d Cong. § 14 (1871).

[171]Although Mercur's House Bill 194 was not introduced until March 20, *see* GLOBE, *supra* note 75, at 175, it was fully described in newspaper accounts as early as March 15; *see Washington*, N.Y. TIMES, Mar. 15, 1871, at 5.

Representative Mercur as House Bill 194.[172] Those sections established certain procedures designed to insure that jurors would be fairly selected.[173]

For modern purposes, it is important to note two facts about the Morton-Butler Committee and its bill. First, contrary to the conventional history,[174] the Morton-Butler Committee drafted neither the Ku Klux Act[175] nor the Select Committee Bill[176] from which that act was derived. The Morton-Butler Committee Bill, House Bill 189, was a quite different measure[177] which Congress unequivocally rejected.[178]

Second, one thing was notably absent from the Morton-Butler Committee Bill: The bill contained no provision even vaguely comparable to section 1 of the Ku Klux Act, the predecessor to modern 42 U.S.C. § 1983.[179] In other words, the bill simply did not create a cause of action for violations of federal rights by officials or other persons acting under color of state law.[180]

E. The Party Splinters: The Morton-Butler Bill in the House (March 14 to March 16)

The Morton-Butler Committee Bill immediately ran into determined opposition. Morton presented the bill to the Senate Republican Caucus on the afternoon of Tuesday, March 14, with his strong personal endorsement.[181] However, influential Senators denounced it as too radical and warned that it

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[172]*Compare* H.R. 189, 42d Cong. §§ 15–18 (1871), *with* H.R. 194, 42d Cong. §§ 1–4 (1871). Except for formal changes, the modifications resulted from the decision to assign certain administrative duties to court clerks instead of judges and to draw the names of prospective jurors from a box instead of a wheel. The text of Mercur's H.R. 194 is reprinted in Appendix E.

[173]H.R. 189, 42d Cong. §§ 15–18 (1871). Opponents of the measure attacked these sections as an effort to permit juries to be packed with persons predisposed to convict. *See General Butler's Ku-Klux Bill*, N.Y. WORLD, Mar. 16, 1871, at 4.

[174]*See supra* text accompanying notes 1–17.

[175]Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

[176]H.R. 320, 42d Cong. (1871). This article uses the phrase "Select Committee Bill" to refer to House Bill 320 as reported by the House Select Committee of Nine (the "Select Committee") on March 28, 1871. *See* CONG. GLOBE, 42d Cong., 1st Sess. 317 (1871).

[177]Of the eighteen sections of the Morton-Butler Committee Bill, only section 14 (in a substantially modified form) became part of the Select Committee Bill, and that section was drafted by Shellabarger (as House Bill 7) rather than by the Morton-Butler Committee. *Compare* H.R. 189, 42d Cong. § 14 (1871), *with* H.R. 320, 42d Cong. § 3 (1871), *and* H.R. 7, 42d Cong. (1871).

[178]*See infra* text accompanying notes 200–22.

[179]*Compare* H.R. 189, 42d Cong. (1871), *with* H.R. 320, 42d Cong. § 1 (1871).

[180]*See* H.R. 189, 42d Cong. (1871).

[181]*See The National Capital*, N.Y. WORLD, Mar. 15, 1871, at 1.

would damage the party.[182] The chair of the Judiciary Committee, Lyman Trumbull, claimed that the bill was unconstitutional.[183] Even the two Senators from South Carolina, one of the states most affected by Klan violence, opposed it as too extreme.[184] From the other end of the spectrum, Senators Oakes Ames and John Pool thought it was not strong enough.[185] After two to three hours of fruitless debate, the Senate Republican Caucus adjourned until the next day without taking any action.[186]

The same evening, Butler presented the bill to the House Republican Caucus where it received a mixed reception.[187] It was debated fiercely until eleven o'clock that night with several Congressmen attacking the bill on grounds similar to those expressed in the Senate Caucus.[188] In the end, the House Republican Caucus nearly unanimously adopted[189] a resolution regarding the bill,[190] but the nature of that resolution was unclear at the time and would be hotly contested on the House floor. Some caucus members, including Butler, believed that the resolution endorsed the Morton-Butler Committee Bill and bound caucus members to support it exactly as written.[191] But the vast majority believed that, while the resolution endorsed the general idea of the bill (and its introduction in the House), it left caucus members free to seek to amend it, reject it, or propose a substitute for it.[192]

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[182]*See id.*

[183]*See id.*

[184]*See id.*; *Washington*, N.Y. TRIB., Mar. 15, 1871 (indicating that both South Carolina Senators vigorously attacked that state government's inadequate response to violence but not indicating their position on bill).

[185]*See The National Capital*, N.Y. WORLD, Mar. 15, 1871, at 1.

[186]*See id.*

[187]*See id.*; *Washington*, N.Y. TIMES, Mar. 15, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 15, 1871, at 5.

[188]*See The National Capital*, N.Y. WORLD, Mar. 15, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 15, 1871, at 5. Opponents included John Farnsworth (whose personal antagonism toward Butler was legend) and John Bingham. *See The National Capital*, N.Y. WORLD, Mar. 15, 1871, at 1.

[189]According to one account, the vote was 82 to 2. *See Washington*, N.Y. TRIB., Mar. 15, 1871, at 1.

[190]*See The National Capital*, N.Y. WORLD, Mar. 15, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 15, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 15, 1871, at 5.

[191]*See* CONG. GLOBE, 42d Cong., 1st Sess. 124 (1871) (statement of Rep. Butler); *Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 15, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 17, 1871, at 1.

[192]*See The National Capital*, N.Y. WORLD, Mar. 15, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 15, 1871, at 5; *Washington*, N.Y. TIMES, Mar. 17, 1871, at 1. The most definitive statement of that position was the subsequent statement of Representative Blair of Michigan, the chair of the caucus. *See* CONG. GLOBE, 42d Cong., 1st Sess. 128–29 (1871); *see also id.* at 124 (statement of Rep. Peters); *id.* (statement of Rep. Ambler).

If Butler thought that House Republican Caucus members had unequivocally committed themselves to the Morton-Butler Committee Bill, the next day's events in the House proved him wrong. The House met at noon, and not surprisingly[193] the Democrats began making repeated dilatory motions.[194] Butler was able to gain the floor and gave notice that he intended to introduce the Morton-Butler Committee Bill.[195] He then made the traditionally uncontroversial request for unanimous consent that the bill simply be printed so that the House could see its text.[196] The Democrats objected even to the printing of the bill[197] and expanded their delay tactics by announcing that they would object to the transaction of any business until the Speaker appointed the House standing committees[198]—something that Speaker Blaine had already refused to do.[199]

After further Democratic delay tactics, there was a call for the regular order of business under which Maine's Representative Lynch was able to gain the floor.[200] Lynch, to whom Butler had entrusted the Morton-Butler

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[193]In addition to its previously discussed policy of seeking to adjourn *sine die* at every opportunity, *see supra* text accompanying notes 101–03, the Democratic Caucus had also decided to use parliamentary filibustering devices to delay and obstruct introduction of anti-Klan legislation. *See Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1.

For a Democratic newspaper's scathing editorial attack on the bill, see *General Butler's Ku-Klux Bill*, N.Y. WORLD, Mar. 16, 1871, at 4 (stating that, if bill passed, "we will spurn and spit upon it, and counsel a resolute opposition to its enforcement" and predicting that passage of bill would lead to a conflagration that would only be extinguished by "rivers of blood").

[194]The Democrats took advantage of the fact that motions to adjourn are privileged and that the Constitution requires that either House record the individual votes of its members (the "yeas and nays") if one-fifth of those present request it. *See* U.S. CONST. art. I, §5, cl. 3. The Democrats would move to adjourn, lose on a voice vote, and then demand the yeas and nays. The time-consuming polling of members would, of course, confirm that the motion to adjourn had failed, but the Democrats would then file a slightly different privileged motion: a motion that, when the House adjourned, the adjournment would be to a particular date. They would again lose on the voice vote, demand the "yeas and nays," and lose on the recorded vote. After a few moments of other business, the Democrats would begin the cycle again. *See* CONG. GLOBE, 42d Cong., 1st Sess. 113–15 (1871); *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 1.

[195]*See* CONG. GLOBE, 42d Cong., 1st Sess. 115–16 (1871).

[196]*See id.* at 116.

[197]*See id.*

[198]*See id.*

[199]*See id.* at 17; *see also Washington*, N.Y. TIMES, Mar. 6, 1871, at 1 (discussing Blaine's reluctance to appoint committees until December and discussing involvement of tariff politics); *Washington*, N.Y. TRIB., Mar. 7, 1871, at 1 (same).

[200]*See* CONG. GLOBE, 42d Cong., 1st Sess. 116 (1871). Under the House rules, since no committees had been appointed, the regular order of business was the so-called "call of the States and Territories." *Id.* (statement of Mr. Beck); *see also XLIID Congress—1st Session*, N.Y. TRIB., Mar. 8, 1871, at 1; *Forty Second Congress*, N.Y. WORLD, Mar. 16, 1871, at 2.

Committee Bill,[201] then attempted to introduce it.[202] The Democrats objected on the basis that the bill could not be introduced without giving a full day's notice, and the Speaker sustained the objection.[203] By this point, the Democrats' filibuster had lasted for almost two hours.[204]

Butler may have anticipated the Democrats' tactics, but what happened next apparently shocked him.[205] During the roll call on one of the Democrats' dilatory motions, the Speaker and some other Republican leaders huddled at the chair to discuss strategy.[206] The Speaker quickly drafted a resolution calling for the appointment of a special thirteen-member committee to investigate conditions in the South and to report back to the House in December, that is, at the beginning of the next session of Congress.[207] He then pigeonholed various Republicans, including Butler,[208] as well as the Democratic leaders in an effort to marshal support.[209] The Speaker then recognized one of his close allies,[210] John Peters, who introduced the resolution.[211] If passed, the resolution would implicitly give the Democrats

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Under such a call, the Speaker called on Congressmen from each state for the purpose of introducing legislation or resolutions. Since the House rules required the Speaker to begin with Maine and proceed down through New England, this procedure gave those states, and their heavily Republican House delegations, considerable control over the business of the House. *See* CONG. GLOBE, 42d Cong., 1st Sess. 116 (1871).

Lynch's ability to obtain the floor without Democratic interference may have resulted from an agreement between Democrats and certain Republicans. *See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 1.

[201]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 1.

[202]*See* CONG. GLOBE, 42d Cong., 1st Sess. 116 (1871).

[203]*See id.* Butler subsequently claimed that this objection was orchestrated by the Speaker during his discussions with the Democrats. *See id.* at 123–26.

[204]*See Washington*, N.Y. TIMES, Mar. 16, 1871, at 1.

[205]Whether this shock was real or feigned would be a matter of considerable debate the next day. *See infra* text accompanying notes 229–58.

[206]*See Washington*, N.Y. TIMES, Mar. 16, 1871, at 1.

[207]*See* CONG. GLOBE, 42d Cong., 1st Sess. 116, 124 (1871) (statement of Rep. Peters); *id.* (statement of Speaker Blaine); *Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1.

[208]Butler claimed that he immediately said that he would oppose the resolution. *See* CONG. GLOBE, 42d Cong., 1st Sess. 125 (1871) (statement of Rep. Butler); *id.* at 124 (colloquy between Rep. Peters and Rep. Butler). *But see id.* (colloquy between Speaker Blaine and Rep. Butler in which Blaine claimed that Butler had objected only to serving as chair of investigative committee).

[209]*See id.* at 116–17, 125–26.

[210]*See id.* at 124.

[211]*See id.* at 116. Peters was able to introduce the resolution without Democratic interference because of an agreement between the Democrats and the Speaker. *See Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8; The Speaker may also have convinced them that it would be politically unwise to filibuster a resolution that seemed to be designed to authorize an impartial investigation of the facts. *See* CONG. GLOBE, 42d Cong., 1st Sess. 125 (1871) (statement of Speaker Blaine).

what they had sought—nine months delay before any anti-Klan legislation could be enacted.[212]

Butler immediately objected to the introduction of Peters's resolution, but the Speaker overruled the objection on the basis that such a resolution—unlike the Morton-Butler Committee Bill—did not require prior notice.[213] Peters refused to yield for any amendments and called the question, that is, moved to cut off debate.[214] Butler shouted that he opposed the resolution and called on all those who had attended the caucus to vote against it "as they are in honor bound to do."[215] But many of the Republicans viewed their duty differently.[216] Despite Butler's plea, a majority of the Republicans voted to cut off debate and to approve Peters's resolution;[217] and, with that support, the resolution passed.[218] Then, to hammer another nail in the coffin of the Morton-Butler Committee Bill, Republican Representative Wheeler moved to adjourn *sine die* on March 20, that is, to end the current session in just five days.[219] That motion also received substantial Republican support and passed.[220] As if to add insult to injury, and despite Butler's public declaration that "under no circumstances" would he serve on the Committee of Thirteen,[221] the Speaker attempted to appoint him chairman of the Committee.[222]

Butler was infuriated by the House's adoption of the Peters Resolution which he denounced "us[ing] forcible adjectives."[223] That night, he drafted and released to the newspapers a scathing letter attacking the measure and

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[212]*See supra* text accompanying notes 100–03.

[213]*See* CONG. GLOBE, 42d Cong., 1st Sess. 116 (1871); *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8.

[214]*See* CONG. GLOBE, 42d Cong., 1st Sess. 116 (1871).

[215]*Id.* at 116–17; *see also XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8 (describing bitter complaints by supporters of Morton-Butler Committee Bill); *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1 (stating that Butler angrily denounced Republican supporters of Peters's resolution as turncoats).

[216]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8. Some may simply have believed that the obstacles to enacting strong legislation were simply too great and that authorizing an investigation was better than doing nothing. *See id.*

[217]*See id.*; *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1.

[218]*See* CONG. GLOBE, 42d Cong., 1st Sess. 117 (1871).

[219]*See id.*

[220]*See id.*; *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1. Butler had privately told the Speaker that he would "be damned" if he would serve as chairman of the committee. CONG. GLOBE, 42d Cong., 1st Sess. 125–26 (1871).

[221]CONG. GLOBE, 42d Cong., 1st Sess. 117 (1871).

[222]*See id.* at 117–18. Blaine subsequently claimed that he appointed Butler chair so that Butler could not claim that the committee was insufficiently radical. *See id.* at 124–25.

[223]*XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8.

those of his colleagues who supported it.[224] The Peters Resolution was, he said, adopted only because pro-tariff Republicans, in defiance of the Republican Caucus, had conspired with the Democrats to engage in a "legislative trick."[225] The pro-tariff Republicans were "willing to permit the slaughter and extermination of their political friends in the South if the tariff could be saved even for nine months by an early adjournment of Congress."[226] The Democrats favored the Peters Resolution as part of a "deliberate plan, carefully concerted" to kill and intimidate enough Southern Republicans to carry the southern states in the next presidential election.[227] The investigative committee would accomplish nothing and learn nothing, and he would have nothing to do with it.[228]

Before the House convened the next morning, Butler placed a copy of his letter on every Republican's desk, as if "to call them personally to account for their votes."[229] The response was as swift and angry as it was foreseeable. Almost as soon as the House was called to order, William "Pig Iron" Kelley of Pennsylvania denounced Butler's "false and unfounded accusation" that pro-tariff Republicans had conspired to pass the Peters Resolution in order to prevent tariff reduction.[230] Peters himself rose to point out that a majority of the Republicans had supported his resolution,[231] but Butler claimed that they had done so only because a legislative "trick" had led them to believe that no other outrage legislation could be passed.[232] When the resolution was

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[224]*See Letter from Gen. Butler*, N.Y. TRIB., Mar. 16, 1871, at 1; *see also Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1 (reprinting portion of letter). Butler telegraphed the letter to newspapers throughout the country. *See* CONG. GLOBE, 42d Cong., 1st Sess. 125 (1871). The letter also appears in a pamphlet Butler had printed later in the month. *See* BUTLER, CONTROVERSY, *supra* note 47, at 1; *General Butler Explains*, N.Y. TIMES, Apr. 1, 1871, at 8.

[225]*Letter from Gen. Butler*, N.Y. TRIB., Mar. 16, 1871, at 1; BUTLER, CONTROVERSY, *supra* note 47, at 1.

[226]*Letter from Gen. Butler*, N.Y. TRIB., Mar. 16, 1871, at 1; BUTLER, CONTROVERSY, *supra* note 47, at 1.

[227]*Letter from Gen. Butler*, N.Y. TRIB., Mar. 16, 1871, at 1; BUTLER, CONTROVERSY, *supra* note 47, at 1.

[228]*See Letter from Gen. Butler*, N.Y. TRIB., Mar. 16, 1871, at 1; BUTLER, CONTROVERSY, *supra* note 47, at 1.

[229]*XLIID Congress—1st Session*, N.Y. TRIB., Mar. 17, 1871, at 8; *see also Washington*, N.Y. TIMES, Mar. 17, 1871, at 1.

[230]CONG. GLOBE, 42d Cong., 1st Sess. 123 (1871). Kelley could safely deny Butler's allegation. Unlike many other protectionist Republicans, he was so committed to outrage legislation that he voted against every motion to adjourn *sine die*. *See id.* at 81, 117, 188, 242. Kelley even supported the first version of the Sherman Amendment. *See id.* at 755. Butler acknowledged that Kelley was an exception, but when he publicly challenged the rest of the protectionists to deny being part of the cabal, not one responded. *See id.* at 123.

[231]*See id.*

[232]*Id.*

"sprung upon the House," they feared that a vote against it would be misinterpreted by their constituents as a vote against taking any action to stop southern outrages.[233]

But all this was just a prelude to the amazingly vicious verbal battle between Butler and Speaker Blaine. Blaine, stung by the implicit attack on his own integrity, took the almost unprecedented step of relinquishing the speaker's chair to respond.[234] He accused Butler of duplicity and claimed that Butler's letter was filled with "unfounded calumnies."[235] Butler compared Blaine to the Devil.[236] Blaine accused Butler of lying about what happened in the caucus.[237] Butler accused Blaine of having a guilty conscience.[238] Blaine declared that he "despise[d] and denounce[d Butler's] insolence."[239] Concluding his onslaught, Blaine charged that Butler's letter was intended as a personal insult:[240]

> As such I resent it. I denounce the letter in all its essential statements, and in all its misstatements, and in all its mean inferences and meaner innuendoes. I denounce the letter as groundless, without justification; and the gentleman himself, I trust, will live to see the day when he will be ashamed of having written it.[241]

Butler responded in kind. He accused Blaine of having orchestrated the Democrats' objections to the Morton-Butler Committee Bill.[242] He blamed Blaine for the defeat of Butler's own outrage bill in the last Congress.[243] In a final blistering indictment, he charged that, if Blaine were as interested in protecting the lives of southerners as he was in passing pork barrel legislation, an outrage bill would have long since been enacted.[244]

Such a quarrel was almost unprecedented.[245] One newspaper claimed that nothing like it had been seen "since the days of [Andrew Johnson's]

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[233]*Id.*
[234]*See id.* at 124.
[235]*Id.* at 124–25
[236]*See id.* at 125.
[237]*See id.*
[238]*See id.*
[239]*Id.*
[240]*See id.*
[241]*Id.*
[242]*See id.* at 126. The Democrats denied this charge. *See id.*
[243]*See id.*
[244]*See id.*
[245]*See Used Up*, N.Y. WORLD, Mar. 17, 1871, at 1 (describing incident as "one of the most extraordinary and remarkable scenes" in House history).

impeachment."[246] Another stated that such a scathing attack had not been seen in the House in many years.[247] When Blaine launched his attack, "[m]embers left their seats, the [spectator] galleries grew turbulent, and the House got beyond control."[248] The spectators—not to mention the Democrats—applauded Blaine as he "flayed" Butler.[249] Editorials castigated Butler both for his letter[250] and for his conduct on the floor of the House.[251] Newspapers predicted that the battle between Blaine and Butler doomed any prospect of enacting outrage legislation before adjournment.[252]

F. The Radicals Seek Results: The Senate Caucus Strategy (March 14 to March 16)

However, while the House Republicans were savaging each other, the Radicals in the Senate Republican Caucus were diligently searching for an outrage measure that could be passed before adjournment.[253] During the afternoon of March 15, while Blaine and his allies were effectively killing the Morton-Butler Committee Bill in the House, the Senate Republican Caucus was meeting in the Senate chamber to continue its discussion of that bill.[254]

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[246]*Washington*, N.Y. TIMES, Mar. 17, 1871, at 1.

[247]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 17, 1871, at 8.

[248]*Washington*, N.Y. TIMES, Mar. 17, 1871, at 1.

[249]*Id.*; *see XLIID Congress—1st Session*, N.Y. TRIB., Mar. 17, 1871, at 8; *Used Up*, N.Y. WORLD, Mar. 17, 1871, at 1.

[250]*See, e.g.*, *A Breeze at Washington*, N.Y. TIMES, Mar. 17, 1871, at 4 (describing letter's language as "monstrous" and stating that it "reflect[ed] the greatest possible discredit" on Butler); *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 17, 1871, at 8 (describing letter as containing "gross mistakes—to use the mildest possible term"); *Used Up*, N.Y. WORLD, Mar. 17, 1871, at 1 (describing letter as containing "misrepresentation and falsehoods").

[251]*See, e.g.*, *A Breeze at Washington*, N.Y. TIMES, Mar. 17, 1871, at 4 (describing "coarseness" of his conduct); *Butler in Hot Water*, N.Y. WORLD, Mar. 17, 1871, at 4; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 17, 1871, at 8; *Used Up*, N.Y. WORLD, Mar. 17, 1871, at 1; *see also Untitled Editorial*, N.Y. TRIB., Mar. 17, 1871, at 4 (criticizing both Butler and Blaine for engaging in destructive debates over trivial personal disputes).

[252]*See Butler in Hot Water*, N.Y. WORLD, Mar. 17, 1871, at 4; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 17, 1871, at 8; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 18, 1871, at 8; *Untitled Editorial*, N.Y. TRIB., Mar 17, 1871, at 4; *Used Up*, N.Y. WORLD, Mar. 17, 1871, at 1.

[253]*See Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8; *The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1; *The Senatorial Caucus*, N.Y. WORLD, Mar. 17, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 17, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1.

[254]*See Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8; *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1.

The debate continued for three hours[255] and showed a wide divergence of opinion.[256]

At the height of this debate, the caucus learned the stunning news that the House had effectively rejected the Morton-Butler Committee Bill and had voted to adjourn *sine die*.[257] The caucus immediately shifted its attention to determining the most appropriate reaction to this development.[258] Some argued that the Senate should accede to the House's approach by adding seven Senators to the newly created, thirteen-member House committee, and then defer outrage legislation until December.[259] Others, notably Charles Sumner, argued vigorously that the Senate should refuse to adjourn—thus keeping the House in session as well—until stringent and effective outrage legislation could be enacted.[260] The caucus could reach no consensus[261] and adjourned until the next morning.[262]

But when it reconvened the next morning (Thursday, March 16), the Senate Republican Caucus methodically developed a set of procedural measures designed to insure that outrage legislation would be enacted.[263] Meeting for over six hours,[264] the caucus endorsed four resolutions. First, the

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[255]*See Washington*, N.Y. TIMES, Mar. 16, 1871, at 1.

[256]*See id.*; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8. Even some who favored strong action feared that the introduction of the Morton-Butler Committee Bill might lead to the politically embarrassing sight of Republican Senators giving speeches attacking a Republican endorsed bill. *See Washington*, N.Y. TIMES, Mar. 16, 1871, at 1; *see also Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1 (stating that Simon Cameron saw "breakers ahead" and feared that introducing bill would simply invite problems).

[257]*See Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 16, 1871, at 8.

[258]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8.

[259]*See Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1; *see also XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8 (stating that some wanted to instruct Senate's already existing investigative committee to work jointly with House committee); *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1 (stating that Senate would continue preexisting investigative committee and then adjourn).

[260]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8.

[261]*See Butler Bolts*, N.Y. WORLD, Mar 16, 1871, at 1; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8; *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1.

[262]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8.

[263]*See The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1; *The Senatorial Caucus*, N.Y. WORLD, Mar. 17, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 17, 1871, at 1. This is not to say that the caucus was entirely harmonious. Significant Republican Senators strongly advocated adjourning without enacting outrage legislation. *See The Senatorial Caucus*, N.Y. WORLD, Mar. 17, 1871, at 1.

[264]*See The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1. The caucus met for two hours in the morning and then for more than four hours after the Senate adjourned for the day. *See id.*; *The Senatorial Caucus*, N.Y. WORLD, Mar. 17, 1871, at 1.

caucus voted to reject the House's effort to adjourn *sine die*.[265] Because neither house of Congress could adjourn for more than three days without the consent of the other, this would insure that both houses would remain in session.[266] Second, the caucus endorsed a resolution, introduced earlier in the day by Senator Sherman,[267] that described the conditions in the South and instructed the Senate Judiciary Committee to prepare and report a bill to deal with Southern outrages.[268] By directing the Judiciary Committee to report "forthwith," the resolution was intended to insure that outrage legislation would be introduced promptly.[269] Third, the caucus voted to support a slightly modified version of Senator Anthony's resolution[270] requiring the Senate to

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[265]*See The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1; *The Senatorial Caucus*, N.Y. WORLD, Mar. 17, 1871, at 1.

[266]*See* U.S. CONST. art. I, § 5, cl. 4.

[267]*See* CONG. GLOBE, 42d Cong., 1st Sess. 122 (1871).

[268]*See The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1; *The Senatorial Caucus*, N.Y. WORLD, Mar. 17, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 17, 1871, at 1.

[269]*The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1. The caucus endorsed Sherman's resolution by a vote of 25 to 18. *See id.* Senator Conkling then unsuccessfully attempted to postpone consideration of outrage legislation by moving to direct the judiciary committee to report back at the next (December) session. After this was defeated, 25 to 16, Senator Sumner's proposal to direct the committee to report back forthwith was adopted, 31 to 19. *See id.* When the Senate itself finally adopted the resolution, it instructed the Committee to report "as soon as practicable." CONG. GLOBE, 42d Cong., 1st Sess. 468 (1871).

Sherman's resolution was necessary apparently because Senator Lyman Trumbull, the Judiciary Committee's chairman, opposed passing any outrage bill. *See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 16, 1871, at 8; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 18, 1871, at 8; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 20, 1871, at 8. Privately, Trumbull wrote to his brother-in-law that the Ku Klux Act was "a great humbug got up by Butler [and] Morton for political purposes to enable them to carry the South." Letter from Lyman Trumbull to William Jayne 1 (Apr. 9, 1871), *quoted in* MARK KRUG, LYMAN TRUMBULL 298 (1965).

Trumbull's adamant opposition to outrage legislation explains why it was George Edmunds, rather than Trumbull, who reported the Ku Klux Act for the judiciary committee and managed it in the Senate. *See* CONG. GLOBE, 42d Cong., 1st Sess. 538 (1871). Edmunds's pivotal role has, on several occasions, led Supreme Court Justices to erroneously assert that Edmunds, rather than Trumbull, was chair of the judiciary committee. *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 725 (1989); Oklahoma City v. Tuttle, 471 U.S. 808, 838 n.14 (1985) (Stevens, J., dissenting); Adickes v. S.H. Kress & Co., 398 U.S. 144, 164 (1970); Monroe v. Pape, 365 U.S. 167, 171 (1961).

[270]*See* CONG. GLOBE, 42d Cong., 1st Sess. 69 (1871). Senator Anthony's resolution was originally introduced on March 13. *See id.* It was an effort to implement the caucus's March 11 decision that the Senate should deal exclusively with the issue of southern outrages. *See supra* text accompanying notes 127–50.

On March 16, the caucus voted to modify Anthony's original resolution to permit consideration of the proposed resolution creating a joint investigative committee, any necessary appropriation bills, and Sherman's resolution (instructing the judiciary committee to report an outrage bill). *See The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1.

consider no bills except those dealing with Southern outrages.[271] This was intended to limit the Democrats' opportunities to filibuster and to protect the Republicans from a potentially divisive fight over tariff reduction.[272] Finally, as an olive branch to the House, the caucus voted to propose a joint committee, consisting of seven Representatives and five Senators, to investigate southern outrages and to report its findings.[273] Thus, the Senate Republicans seemed committed to passing outrage legislation before adjournment even though one Senator predicted that Congress might need to remain in session "until the snowflakes of December fall."[274]

This prediction may have been intended as hyperbole, but given the Senate's liberal rules permitting filibusters and the Republican party's factional disputes, it may have been simple realism. The Senate easily resisted the House's efforts to adjourn *sine die*,[275] but implementation of the remaining three caucus resolutions would prove much more time-consuming. The Democrats filibustered against Anthony's business-limiting resolution,[276] delaying its passage until March 30. Sherman's resolution, which instructed the judiciary committee to report an outrage bill, also generated extended

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[271]*See The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1; *The Senatorial Caucus*, N.Y. WORLD, Mar. 17, 1871, at 1. Senator Trumbull attempted to expand the permissible subjects to include reduction of certain tariffs, but his proposal was rejected. *See The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1. From the other end of the spectrum, Senator Sumner proposed permitting debate on his civil rights bill dealing with private discrimination, but the caucus rejected that proposal as well. *See id.*

[272]*See supra* text accompanying notes 88–93.

[273]*See The Senatorial Caucus*, N.Y. WORLD, Mar. 17, 1871, at 1. Two sources suggest that the caucus had decided that the joint investigative committee should not report back until December. *See The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 17, 1871, at 1. While this is possible, it seems unlikely in light of the explicit vote to require the judiciary committee to report a bill forthwith. *See supra* text accompanying notes 267–69. In any event, the resolution actually introduced pursuant to the caucus decision did not specify when the committee should report. *See* CONG. GLOBE, 42d Cong., 1st Sess. 134 (1871).

[274]*The Senate Caucus*, N.Y. TRIB., Mar. 17, 1871, at 1 (quoting unidentified New England Senator).

[275]*See* CONG. GLOBE, 42d Cong., 1st Sess. 118 (1871) (tabling resolution to adjourn *sine die* on March 20); *id.* at 217 (tabling resolution to adjourn *sine die* on March 23); *id.* at 249 (tabling resolution to adjourn *sine die* on March 27).

[276]The debate was almost continuous from March 17 through March 22 and again from March 24 through March 30. *See* CONG. GLOBE, 42d Cong., 1st Sess. 144–45, 161–69, 173, 194–211, 220–27, 271, 310–14, 343–45 (1871). It was interrupted by a day of debate occasioned by Sumner's attack on Grant's proposal to annex Santo Domingo and the responses to that attack. *See id.* at 294–307. The Republicans were able to end the filibuster only by threatening to exhaust the Democrats by holding the Senate in session continuously, 24 hours a day. *See General Washington Topics*, N.Y. TRIB., Mar. 22, 1871, at 1; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 21, at 8.

debate[277] and was not passed until April 5.[278] The Senate Caucus's final resolution—a proposal for a joint investigative committee—was not passed until April 7, more than three weeks after the caucus had endorsed it.[279]

By that time, both Grant's March 23 message and the House's response to that message had made all four Senate Caucus resolutions irrelevant.[280]

III. ENLISTING A RELUCTANT GENERAL: THE EQUIVOCAL ROLE OF PRESIDENT GRANT (MARCH 6 TO MARCH 23)

After the vicious battle between Blaine and Butler,[281] the Radicals were understandably pessimistic.[282] While the Senate Republican Caucus resolutions were constructive, they were only hesitant first steps on what promised to be a long and treacherous road. The caucus resolutions were certain to face opposition and filibuster on the Senate floor.[283] Even if the Senate adopted them and thus instructed the Judiciary Committee to draft outrage legislation, there was no guarantee that the committee could agree on

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[277]*See* CONG. GLOBE, 42d Cong., 1st Sess. 152–54, 227, 236–40, 346–49, 358–59, 406, 432–36, 464–68; app. at 27–40, 100–10, 117–34, 247–54 (1871). To end the debate, the Republicans once again threatened to "resort[] to the only previous question we have here [in the Senate], physical endurance." *Id.* at 433.

[278]*See id.* at 468.

[279]*See id.* at 134–35. It first passed the Senate on March 17. *See id.* The House amended it and sent it back to the Senate on March 20. *See id.* at 180–82. The Senate, after briefly debating the amended resolution on March 21, *see id.* at 189–92, put it aside for several weeks until returning to it on April 5, *see id.* at 468–69, 498–506, and passing it on April 7, *see id.* at 522–37.

[280]This does not mean, however, that the debates on these resolutions are irrelevant to the interpretation of 42 U.S.C. § 1983. The Senators used these debates (particularly after Grant's March 23 message) as an opportunity to discuss the merits of various outrage bills, especially the Select Committee Bill (House Bill 320), which became the Ku Klux Act. Senator Anthony made this clear on April 7, when the Select Committee Bill was introduced in the Senate:

> I am willing to have the discussion [on House Bill 320] continue for any reasonable length of time that Senators on the other side may desire; but there can be no injury to anybody in having it commence as soon as possible. *In fact, we have been discussing it for the last fortnight.*

Id. at 523 (emphasis added). *But see* Zagrans, *supra* note 9, at 528 & n.150 (claiming that *Monroe v. Pape* took various Senators' statements "flatly out of context" because the statements were made before House Bill 320 was introduced in the Senate); *id.* at 534 & n.189 (same, referring to statement of Senator Pratt).

[281]*See supra* Part II.E.

[282]*See* TRELEASE, *supra* note 10, at 387–88.

[283]*See supra* Part II.F.

a bill.[284] And even if the Senate passed such a bill, it would face seemingly insuperable obstacles in the bitterly divided House of Representatives.[285] On Monday, March 20, as if to emphasize its commitment to inaction, the House—for the fourth time in sixteen days—voted to adjourn *sine die* without enacting any outrage legislation.[286] Newspapers widely predicted that

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[284]*Compare* CONG. GLOBE, 42d Cong., 1st Sess. 220 (1871) (statement of Senator Trumbull that Judiciary Committee would be unlikely to be able to agree), *and XLIID Congress—1st Session*, N.Y. TRIB., Mar. 18, 1871, at 8 (expressing fear that Judiciary Committee would not be able to agree), *and The Radical Wrangle*, N.Y. WORLD, Mar. 18, 1871, at 1 (same), *and Suppression of Disorders in the South*, N.Y. TIMES, Mar. 20, 1871, at 5 (same), *and Washington*, N.Y. TIMES, Mar. 18, 1871, at 5 (same), *with* CONG. GLOBE, 42d Cong., 1st Sess. 221 (1871) (statement of Sen. Frelinghuysen indicating that committee would be able to draft acceptable bill), *and id.* at 220 (statement of Sen. Pool to same effect), *and id.* at 220–21 (statement of Sen. Morton that, if committee reported no bill, Senate could amend report), *and XLIID Congress—1st Session*, N.Y. TRIB., Mar. 20, 1871, at 8 (stating that some Senators believe that committee would have bill ready before Anthony's resolution was passed). *See also XLIID Congress—1st Session*, N.Y. TRIB., Mar. 23, 1871, at 4 (describing disagreement between Trumbull and other committee members over probability of committee drafting bill).

Chairman Trumbull, Senator Conkling, and Democratic Senator Thurman were believed to oppose any legislation. *See Radical Wrangle*, N.Y. WORLD, Mar. 18, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 18, 1871, at 5. *But see XLIID Congress—1st Session*, N.Y. TRIB., Mar. 18, 1871, at 8 (stating that Conkling favored mild bill). At the other end of the spectrum, Senator Pool was reported to favor Radical legislation like Butler's Bill or the Morton-Butler Committee Bill. *See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 18, 1871, at 8; *Radical Wrangle*, N.Y. WORLD, Mar. 18, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 18, 1871, at 5. In the middle were Senators Edmunds, Carpenter, and Frelinghuysen, who were reported to favor less extreme legislation based on Shellabarger's House Bill 7. *See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 18, 1871, at 8 (statement of Sens. Edmunds, Conkling, Frelinghuysen, and Carpenter); *Radical Wrangle*, N.Y. WORLD, Mar. 18, 1871, at 1 (statement of Sen. Frelinghuysen); *Washington*, N.Y. TIMES, Mar. 18, 1871, at 5 (Frelinghuysen voicing support for such bill).

[285]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 23, 1871 (stating that any outrage legislation would be defeated in House).

[286]*See* CONG. GLOBE, 42d Cong., 1st Sess. 188 (1871).

the deadlock could not be resolved,[287] that no outrage bill could be passed,[288] and that both Houses would adjourn without taking action.[289]

Faced with these bleak prospects, the Radicals concluded that they needed President Grant's help. They needed to finally convince him to issue a formal public message calling for immediate passage of an outrage bill.[290] Such a message would force the House Republicans to put aside their differences.[291] It would respond to the conservatives' argument that, because the President had not asked for a bill, none was needed.[292] And it would put the President's prestige—not to mention his control over federal patronage—firmly behind those who favored immediate legislation.[293]

The Radicals knew that it would not be easy to convince Grant to act. While the conventional history of 42 U.S.C. § 1983 often describes Grant as

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[287]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 18, 1871, at 8 (stating that many Senators believed that it would be impossible to pass any outrage legislation given divided condition of House); *XLIID* Congress—1st Session, N.Y. TRIB., Mar. 23, 1871 (stating that legislation would be impossible since House had rejected every proposed outrage bill and was intent on adjourning).

[288]*See Butler in Hot Water*, N.Y. WORLD, Mar. 17, 1871, at 4 (stating that no outrage legislation would be enacted due to Republicans' defeat in New Hampshire elections); *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 23, 1871 (relating assertions by several Senators that "[n]ot a single Senator" would claim that any outrage bill could pass both houses); *Untitled Editorial*, N.Y. TRIB., Mar. 21, 1871, at 4 (stating that nothing would be passed except resolution for investigation); *Washington*, N.Y. TIMES, Mar. 21, 1871, at 1 (stating that "the certainty is almost completely established" that Congress would do nothing but create investigative committee). *But see XLIID Congress—1st* Session, N.Y. TRIB., Mar. 18, 1871, at 1 (stating that no bill could pass either House except one modeled after Shellabarger's House Bill 7).

[289]*See XLIID Congress—1st* Session, N.Y. TRIB., Mar. 18, 1871, at 18 (predicting that Senate would consent to adjournment on March 22 or 23); *Radical Wrangle*, N.Y. WORLD, Mar. 18, 1871, at 1 (predicting that Senate would agree to adjourn soon without passing outrage legislation); *Washington*, N.Y. TIMES, Mar. 18, 1871, at 5 (predicting Senate consent to adjournment by March 25); *Washington*, N.Y. TIMES, Mar. 20, 1871, at 5 (predicting final adjournment of both houses during next week); *Washington*, N.Y. TIMES, Mar. 21, 1871, at 1 (describing probability of extending session past March 25 as "very slight").

[290]*See* Letter from Samuel Shellabarger to George Frisbie Hoar 2 (Sept. 11, 1871) (original on file with George Frisbie Hoar Papers at Massachusetts Historical Society) [hereinafter Shellabarger Letter]; TRELEASE, *supra* note 10, at 388.

[291]*See* 1 HOAR, *supra* note 81, at 206 (stating that message from Grant overcame Republican opposition to bill in House); *General Washington Topics*, N.Y. TRIB., Mar. 22, 1871, at 1 (describing belief that message from Grant would "greatly tend to harmonize the party"); *The House Caves*, N.Y. WORLD, Mar. 24, 1871, at 1 (stating that President was told that his message would end divisions among Radicals).

[292]*See* CONG. GLOBE, 42d Cong., 1st Sess. 129–30 (1871).

[293]*See General Butler the Leader of the Republican Party*, N.Y. WORLD, Apr. 10, 1871, at 2 (ascribing influence of message to fact that Grant was "the fount of power and patronage").

the initiator of the Ku Klux Act,[294] he was at most a cautious and vacillating supporter of a struggle begun and waged by the congressional Radicals.[295] Personally, Grant was torn between his genuine concern about the southern outrages and his tremendous reluctance to publicly support anything that might seem to make him a military dictator.[296] Politically, he was torn between his need to please Republican Radicals, who urged immediate action, and his need to please Republican tariff supporters, who urged immediate adjournment.[297] As a result, while the Radicals struggled to keep Congress from adjourning and fought for outrage legislation in the caucuses and on the floor of Congress, Grant equivocated. Consciously or unconsciously, he implemented a two-pronged strategy: Publicly and formally, he refused to take any position, while privately and informally, he let members of Congress know that he would welcome outrage legislation.

Thus, during the Forty-first Congress, Grant had privately favored Butler's Bill but had issued no public statement of support and had expended no political capital on its behalf.[298] Two days after the opening of the Forty-second Congress (Monday, March 6), when the traditional delegation from the House and Senate "waited" on the President to ask if he wished to communicate any message to Congress,[299] Grant's response was similarly two-pronged. Publicly and officially, Grant merely asked Congress to remain in session, stating vaguely that he expected to send it a message—on an unspecified subject—within the next week.[300] But privately and unofficially,

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[294]*See supra* text accompanying notes 4–11.

[295]*See* HANS L. TREFOUSSE, THE RADICAL REPUBLICANS 434 (1968).

[296]*See The Condition of the South*, N.Y. TIMES, Mar. 8, 1871, at 4; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 20, 1871, at 4; *see also infra* text accompanying notes 333–34. Grant's fear of being seen as a potential military dictator was longstanding. In December, 1866, he had lobbied actively against a bill that would have given him, as General of the Army, the authority to appoint military governors for Southern states. *See* HESSELTINE, *supra* note 10, at 81–82. In the spring or early summer of the next year, the Radicals proposed to introduce a bill that would have given Grant "complete control of the South," but Grant convinced them not to do so. *Id.* at 86.

[297]*See infra* text accompanying note 306.

[298]*See* WILLIAM S. MCFEELY, GRANT: A BIOGRAPHY 369 (1981).

[299]CONG. GLOBE, 42d Cong., 1st Sess. 4, 11 (1871). The House and Senate had appointed their respective members of the delegation on March 4, 1871. *See id.* The President met with them the morning of March 6. *See Washington*, N.Y. WORLD, Mar. 7, 1871 at 1. Ironically, the House effectively expressed its lack of interest in any message the President might send by voting to adjourn *sine die* before the delegates had even met with the President. *See* CONG. GLOBE, 42d Cong., 1st Sess. 11 (1871).

[300]*See* CONG. GLOBE, 42d Cong., 1st Sess. 13 (1871). The delegation reported that "[t]he President said he had no communication to make at present to Congress, but that he may have some communication to make within the course of a week, and he expressed a desire that during this week no day should be fixed for the final adjournment of the two Houses." *Id.*

he told the delegation that the "the conditions of affairs in the South, in his opinion, demanded prompt legislation."[301] He went on to express (again only privately) his fury about reports that eleven Republican activists had been murdered in one state in a single day and that Klan-inspired attacks on a black mail agent had forced the Postmaster General to suspend mail service to Lexington, Kentucky.[302]

If the Radicals thought this anger would prompt Grant to ask for outrage legislation, they were disappointed.[303] By March 9, Grant had again decided to remain publicly silent.[304] He had been peppered with contradictory political advice. On the one hand, the Radicals warned him that, without vigorous anti-Klan legislation, Southern Republicans and their allies were doomed to physical violence and political defeat.[305] On the other hand, pro-tariff Republicans warned him that keeping Congress in session would lead to a politically disastrous fight over tariff reduction.[306]

Convinced that he should, at least publicly, leave the decision to Congress,[307] Grant met with Speaker Blaine on Thursday, March 9.[308] He advised Blaine that he would let Congress take the responsibility of dealing with the outrage problem and would not send any message to Congress on the

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Grant also indicated that he would have an executive message for the Senate. *See id.* at 16.

[301]*The Radical Quandary*, N.Y. WORLD, Mar. 8, 1871, at 1; *see also* CONG. GLOBE, 42d Cong., 1st Sess. 18 (1871) (statement of Rep. Butler that message would speak out against southern violence); *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 8, 1871, at 1 (discussing reports that message would deal with southern violence); *Washington*, N.Y. WORLD, Mar. 7, 1871, at 1 (same).

[302]*See The Radical Quandary*, N.Y. WORLD, Mar. 8, 1871, at 1.

[303]These outrages may have been enough to prompt Grant to prepare—but not to send—the promised message. According to one source, Grant spent all of March 8, 1871, meeting with Attorney General Ackerman, other cabinet secretaries, and possibly Representative Butler to draft such a message. *See The Harem and the Ku Klux*, N.Y. WORLD, March 9, 1871, at 1; *Sumner Sacrificed*, N.Y. WORLD, Mar. 9, 1871, at 1. The message, which "threaten[ed] the South with the severest punishment" was to be issued no later than Monday, March 13, and was being delayed only to provide time for federal troops to arrive in the South. *The Harem and the Ku Klux*, N.Y. WORLD, March 9, 1871, at 1; *see also Sumner Sacrificed*, N.Y. WORLD, Mar. 9, 1871, at 1. *But see Washington*, N.Y. TIMES, Mar. 9, 1871, at 5 (stating that President Grant had decided not to issue any message and to let Congress decide for itself what action to take); *Washington*, N.Y. TRIB., Mar. 9, 1871, at 1 (same).

[304]*See Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1; *Washington*, N.Y. TRIB., Mar. 9, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 9, 1871, at 5.

[305]*See Washington*, N.Y. TRIB., Mar. 9, 1871, at 1.

[306]*See id.*; HESSELTINE, *supra* note 10, at 242–43.

[307]*See Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 9, 1871, at 5; *Washington*, N.Y. TRIB., Mar. 9, 1871, at 1.

[308]*See Washington*, N.Y. TIMES, Mar. 10, 1871, at 1.

subject.[309] Instead, Grant gave Blaine a private, "unofficial" letter that Blaine could read to the Republican Caucus.[310]

That private letter was a triumph of political caution and showed the Radicals how hard it would be to persuade Grant to issue a public appeal for an outrage bill. Grant first expressed concern that his previous private comments to various members of Congress might have been "wrongly interpreted."[311] To avoid such misinterpretation, he wrote "unofficially to express exactly what [he thought]."[312] He then squarely identified the need for legislation: "In the first place there is a deplorable state of affairs existing in some portions of the South demanding the immediate attention of Congress."[313] But then, instead of simply calling for appropriate legislation, Grant attempted to appease both the Radicals and the pro-tariff faction:

> If the attention of Congress can be confined to the single subject of providing means for the protection of life and property in those Sections of the Country where the present civil authority fails to secure that end, I feel that we should have such legislation. But if Committees are to be appointed and general legislation entered upon, then I fear the object of continuing the present session will be lost. . . . If it can be agreed upon to take up no other subject but that of passing a single Act of the sort alluded to, I would think it wise in Congress to remain for that purpose.[314]

Grant closed the private letter by disclaiming any desire to "dictate" Congress's actions—thus signaling that there would be no reprisals for

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[309]*See Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 10, 1871, at 1.

[310]*Grant's Victory*, N.Y. WORLD, Mar. 10, 1871, at 1; *The Southern Outrages*, N.Y. TRIB., Mar. 10, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 14, 1871, at 5; Letter from Ulysses S. Grant, President of the United States, to James G. Blaine, Speaker of the House of Representatives 1 (Mar. 9, 1871) [hereinafter March 9 Letter], *reprinted in* ULYSSES S. GRANT PAPERS 302–03 (Series No. 2, Letterbook No. 1 1964). For a discussion of the caucus's reaction to the March 9 Letter, see *supra* Part II.C.

[311]March 9 Letter, *supra* note 310, at 1. The letter later implicitly admits that these "misinterpretations" may actually have been the result of Grant's own shifting position. "These are *about* the views I have endeavored to express and *are* the exact views which I entertain." *Id.* (emphasis added).

[312]*Id.*

[313]*Id.*

[314]*Id.* In a similar private letter, Grant wrote that he had decided not to recommend any specific legislation for two reasons: because he doubted that Congress could agree on a bill on Southern violence and because he feared that Congress would instead enact "other legislation." Letter from Ulysses S. Grant, President of the United States, to A.G. Cattell 1 (Mar. 21, 1871) [hereinafter March 21 Letter], *reprinted in* ULYSSES S. GRANT PAPERS 312 (Series No. 2, Letterbook No. 1 1964).

inaction—and by reiterating that his sole goal was to avoid any misinterpretation of his previous private statements on the issue.[315]

By giving this private letter to Blaine, Grant had abdicated leadership on the issue. For almost two weeks (March 9 through March 23), while the struggle was joined in the Republican Caucus and on the floor of both Houses of Congress, Grant remained silent.[316]

The Radicals' successful campaign to force Grant to break his silence began on March 21, 1871, with a conversation in the House cloakroom between Samuel Shellabarger and Representative Legrand Winfield Perce of Mississippi.[317] Perce expressed his dismay at the failure of the Morton-Butler Committee Bill and the increasingly likely prospect that Congress would adjourn without taking any action.[318] Shellabarger told Perce that the only way to break the log jam would be to convince Grant to issue a message to Congress saying publicly something that Grant had told Shellabarger privately—that he needed additional legislation to give him the power to stop the violence in the South.[319] Shellabarger suggested that they gather a group of congressional Republicans to meet with the President and present a

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[315]March 9 Letter, *supra* note 310, at 1.

[316]During this period, there were widespread rumors that Grant actually wanted Congress to remain in session to deal with his proposed annexation of the Dominican Republic. *See Washington*, N.Y. TIMES, Mar. 14, 1871, at 5. In private correspondence, Grant denied any such motivation and reiterated that he only wanted Congress to deal with the problem of violence in the South. *See* March 21 Letter, *supra* note 314, at 1. His editorial allies also denied the rumor. *See Washington*, N.Y. TIMES, Mar. 14, 1871, at 5. During this period, Grant may also have given his private approval to a bill (probably a draft of Senate Bill 276, S. 276, 42d Cong. (1871)) to create a national revenue police force to help collect liquor taxes in the South. *See Southern Outlawry*, N.Y. TIMES, Mar. 16, 1871, at 1.

[317]*See* Shellabarger Letter, *supra* note 290, at 2. The previous day, Perce had used an ingenious tactic to try to force the House to consider an outrage bill. In the midst of an unrelated debate, Perce made a privileged motion to suspend the rules to consider a newly drafted bill. Perce's proposal placed the Democrats in an awkward position. Section 1 of the bill would have removed political disabilities from almost all former Confederates—a goal long sought by Democrats. But Sections 2 through 4 of the bill were modeled after Senator Wilson's outrage bill, Senate Bill 226, and thus were anathema to the Democrats. The Democrats desperately wanted to avoid going on record as opposing any bill that would remove disabilities. However, they feared that, once the bill was before the House, the Radicals would amend it by deleting Section 1 and then pass the remainder. To avoid publicly opposing the bill, they first unsuccessfully moved to adjourn; when that failed, they successfully opposed the motion to suspend the rules. *See* CONG. GLOBE, 42d Cong., 1st Sess. 187–88 (1871); *see also XLIID Congress—1st Session*, N.Y. TRIB., Mar. 21, 1871, at 8 (describing incident but incorrectly stating that Perce's proposal included Shellabarger's, rather than Wilson's, outrage bill); *Washington*, N.Y. TIMES, Mar. 21, 1871, at 1 (same).

[318]*See* Shellabarger Letter, *supra* note 290, at 2.

[319]*See id.*

"respectful and courteous request" for such a message.[320] Within thirty minutes, Perce had assembled the delegation.[321]

The next afternoon (Wednesday, March 22),[322] the group met with Grant at the White House.[323] Shellabarger, Representative George Frisbie Hoar, and Representative Horace Maynard each urged the President to break his official silence and to send a message formally requesting legislation.[324] By the end of the meeting, the President agreed that he would do so the next day.[325]

That night at a gathering at Speaker Blaine's home, Shellabarger, Hoar, and several other Congressmen plotted the strategy for handling Grant's message once it was delivered to the House of Representatives.[326] They

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[320]*Id.* at 2–3; *see also General Washington Topics*, N.Y. TRIB., Mar. 22, 1871, at 1 (stating that Congressmen intended to meet with Grant to find out whether he favored outrage legislation and, if he did, to urge him to send message suggesting such law).

[321]Shellabarger Letter, *supra* note 290, at 3. The delegation included (besides Shellabarger and Perce) George Frisbie Hoar of Massachusetts, and Horace Maynard of Tennessee. *See id.* One *New York Tribune* article claimed that the delegation also included Representatives Charles Buckley of Alabama, Samuel Burdett of Iowa, and John Farnsworth of Illinois. *See General Washington Topics*, N.Y. TRIB., Mar. 22, 1871, at 1. While Buckley and Burdett may have been members of the delegation, it seems extremely unlikely that Farnsworth would have been included. He had consistently opposed any outrage legislation and publicly argued that the President had no reason to send a message asking for such legislation. *See* CONG. GLOBE, 42d Cong., 1st Sess. 248 (1871). In addition, it appears that he was unaware of the results of the delegation's meeting with the President. At noon on March 23, Farnsworth—apparently oblivious to the fact that Grant was about to issue a message requesting outrage legislation—moved that the House adjourn *sine die. See id.* at 241. The *Tribune* article was inaccurate in at least one other respect: It claimed that the delegation abandoned its efforts and never actually saw the President. *See General Washington Topics*, N.Y. TRIB., Mar. 22, 1871, at 1.

[322]The group that Perce had assembled had gone to the White House in the morning but were unable to meet with Grant because he was in a tent on Pennsylvania Avenue taking lessons on how to deal with vicious horses. Shellabarger Letter, *supra* note 290, at 3; *Washington*, N.Y. WORLD, Mar. 23, 1871, at 5. Even a president is entitled to some recreation.

[323]*See* Shellabarger Letter, *supra* note 290, at 3; *Washington*, N.Y. WORLD, Mar. 23, 1871, at 5. *But see General Washington Topics*, N.Y. TRIB., Mar. 22, 1871, at 1 (erroneously claiming that delegation had abandoned its effort to see Grant on March 21, after hearing that he was firmly opposed to sending any message).

[324]*See* Shellabarger Letter, *supra* note 290, at 3.

[325]*See id.*; *Washington*, N.Y. WORLD, Mar. 23, 1871, at 5. *See also* 2 GEORGES S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 252 (Greenwood Press 1968) (1902) (stating that Grant had caused certain "members of Congress to understand that he would send [such] a message"); *Washington*, N.Y. WORLD, Mar. 23, 1871, at 5 (stating that Grant indicated that his message might not explicitly request new legislation but would expressly state that Grant needed and did not currently have enough authority to deal with outrages).

[326]*See* Shellabarger Letter, *supra* note 290, at 3.

agreed that the message would be referred immediately to a select committee and may have decided the composition of that committee.[327]

However, by the next morning (Thursday, March 23), Grant had once again changed his mind. At noon, accompanied by Treasury Secretary Boutwell and Navy Secretary Robeson,[328] the President took a carriage to the Capitol intending to inform the Radicals that he had decided not to issue the message after all.[329] When he arrived, he summoned a number of the leading congressional Republicans[330] to the President's signing room, and announced that no message would be forthcoming.[331] Grant told Shellabarger that, while he had promised to issue such a message, he was now unwilling to do so since it might seem inappropriate for him to ask for legislation that would increase his own power.[332] He was particularly concerned that, by requesting authority to suspend habeas corpus, he would give the impression that he, a former general, favored military rule over civilian government.[333] Shellabarger begged Grant to put aside his personal reluctance (in Shellabarger's words, "to sink the man in the 'first magistrate'") and to do what he knew was needed for the safety of the country.[334]

Others expressed similar views but the President seemed unpersuaded.[335] Finally, at the suggestion of Shellabarger, Representative Hoar made what

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[327]*See id.*

[328]*See* 2 BOUTWELL, *supra* note 325, at 252; MCFEELY, *supra* note 298, at 369; *Summary of the News*, N.Y. WORLD, Mar. 24, 1871, at 4; *Washington*, N.Y. TRIB., Mar. 24, 1871, at 1. Grant may have also been accompanied by Secretary of State Hamilton Fish. *See* 2 BOUTWELL, *supra* note 325, at 252 (suggesting that Fish made minor changes in Grant's message before he sent it to floor); MCFEELY, *supra* note 298, at 369 (same).

[329]*See* 2 BOUTWELL, *supra* note 325, at 252; Letter from Unidentified Secretary for U.S. Grant, President of the United States, to George S. Boutwell, Secretary of the Treasury (Mar. 23, 1871), *reprinted in* ULYSSES S. GRANT PAPERS 311 (Series No. 2, Letterbook No. 1 1964). *But see Washington*, N.Y. TIMES, Mar. 24, 1871, at 1 (indicating that President went to Senate to hear speech by Senator Scott). During the carriage ride, Boutwell may have unsuccessfully urged Grant to return to his position of the previous afternoon and issue the requested message. *See* MCFEELY, *supra* note 298, at 369.

[330]Representatives present included Shellabarger, Hoar, and Maynard, as well as Ulysses Mercur of Pennsylvania; Senators present included Roscoe Conkling of New York, Timothy Howe of Wisconsin, Henry Wilson of Massachusetts, Samuel Pomeroy of Kansas, Oliver Morton of Indiana, Zachariah Chandler of Michigan, and probably George Edmunds of Maine. *See* 1 HOAR, *supra* note 81, at 205; *Summary of the News*, N.Y. WORLD, March 24, 1871, at 4; Shellabarger Letter, *supra* note 290, at 3.

[331]*See* 2 BOUTWELL, *supra* note 325, at 252; 1 HOAR, *supra* note 81, at 205; Shellabarger Letter, *supra* note 290, at 3.

[332]*See* 1 HOAR, *supra* note 81, at 205; Shellabarger Letter, *supra* note 290, at 3.

[333]*See* 1 HOAR, *supra* note 81, at 205; Shellabarger Letter, *supra* note 290, at 3.

[334]Shellabarger Letter, *supra* note 290, at 3.

[335]*See* 2 BOUTWELL, *supra* note 325, at 252; 1 HOAR, *supra* note 81, at 205.

seems to have been the crucial argument.[336] He pointed out that, given the current level of violence in the South and the high probability that it would increase as the elections approached, Grant would eventually have no choice but to use military force—with or without express congressional authorization.[337] When that time came, Hoar argued, Grant would seem less like a military dictator if he could point to express legislative authorization for his intervention and did not have to rely solely on his implied power as commander in chief.[338]

This argument seems to have turned the tide. Grant immediately handwrote the message, read it to those present, and sent it, unchanged,[339] to the floor of each house of Congress.[340]

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[336]*See* HESSELTINE, *supra* note 310, at 244–45 (indicating that Shellabarger was joined by Senator Howe in suggesting argument); 1 HOAR, *supra* note 81, at 205 (same); Shellabarger Letter, *supra* note 290, at 3.

[337]*See* 1 HOAR, *supra* note 81, at 205–06.

[338]*See id.* at 206.

[339]Shellabarger and Hoar each state that the message was sent to Congress exactly as Grant first wrote it in the signing room. *See* 1 HOAR, *supra* note 81, at 206; Shellabarger Letter, *supra* note 290, at 4. *But see* 2 BOUTWELL, *supra* note 331, at 252 (suggesting that "one or two verbal changes" may have been suggested by Secretary of State Hamilton Fish or Navy Secretary George Robeson); MCFEELY, *supra* note 298, at 369 (suggesting that Fish and Robeson were able to modify tone of message).

[340]*See* 1 HOAR, *supra* note 81, at 206; Shellabarger Letter, *supra* note 290, at 3–4. For a quite different version of the events leading up to the issuance of the message, see *The House Caves*, N.Y. WORLD, Mar. 24, 1871, at 1. This article states that Grant and Oliver Morton drafted a message in the White House on the morning of March 23, and that Grant took it to the Capitol and presented it to a group of Senators as *fait accompli*. The author believes that this alternative version is unlikely to be accurate since it is inconsistent with all first-hand accounts of the events. *See supra notes* 337–39 and accompanying text. It is also inconsistent with another article in the same issue of the same newspaper. *Compare The House Caves*, N.Y. WORLD, Mar. 24, 1871, at 1, *with Summary of the News*, N.Y. WORLD, Mar. 24, 1871 at 4.

Grant's message was brief, diplomatic, and effective.[341] It first referred to the general level of violence and disruption in the South "rendering life and property insecure."[342] Then, in order to provide an appropriate federal nexus, the message alluded to two widely discussed ways in which that violence was currently interfering with federal functions: disruption of the United States mails[343] and violent resistance to collection of federal taxes.[344] To provide further practical justification for the use of the military, the message stated the President's firm conviction that the violence was too great for the state authorities to control—without suggesting the possibility that some state officials might be in league with the conspirators.[345] The message carefully avoided stating that current law did not give the President power to use troops to quell the violence—after all, President Grant had already sent troops to South Carolina—but instead stated that the President's authority

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[341]The full text of the message provided:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session.

CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871).

[342]*Id.*

[343]*See id.* The most notorious example was a January 1871, armed attack on a train carrying an African-American mail agent providing service between Louisville and Lexington, Kentucky. After the first assault, the government first placed a guard of ten soldiers on the train, then doubled the guard, and finally concluded that the danger was still so great that it suspended mail service between the two cities. This incident was widely discussed in Congress both before and after Grant's message. *See* CONG. GLOBE, 42d Cong., 1st Sess. 156–57, 163–67, 199, 237–40, 346–47 (1871). Another incident involved the Klan's killing of an African-American mail agent serving Alabama and Mississippi. *See id.* at 165, 248. For a discussion of a similar 1866 incident involving attacks by former Confederate soldiers on a Kentucky mail agent, see David Achtenberg, *With Malice Toward Some:* United States v. Kirby, *Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273 *passim* (1995).

[344]*See* CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871). This violence included the murders of at least three revenue officials and threats to others that they should leave the state or face a similar fate. *See id.* at 225. Other revenue officials had been whipped. *See id.* at 247–48. The Commissioner of Internal Revenue estimated that this resistance cost the government between $15,000,000 and $20,000,000. *See id.* at 225.

[345]*See id.* at 244.

was "not clear" and should be clarified.[346] Finally, to preempt any congressional effort to reduce tariffs, President Grant explicitly stated that he recommended legislation on "no other subject."[347]

Shellabarger had the public presidential message he needed.

IV. A "MILDER MEASURE OF VILLAINY": THE SOURCE OF 42 U.S.C. § 1983

A. The Select Committee Drafts a Bill (March 23 to March 28)

When Grant's message arrived on the floor of the House, Shellabarger was prepared to act.[348] The previous night (Wednesday, March 22), Shellabarger, Hoar, and several other Representatives had met with Speaker Blaine at his home and agreed that the President's message would be referred to a select committee.[349] Such a reference would assure prompt House consideration of an outrage bill since, under the rules of the House, the committee's report would have priority over other business.[350]

As soon as the President's message was read, Speaker Blaine recognized Shellabarger, who immediately moved that the message be referred "to a select committee of this House of nine members, to be appointed by the Chair."[351] After one hour of parliamentary skirmishing,[352] Shellabarger's motion was passed, and the Speaker appointed the committee.[353] It consisted of six Republicans (Shellabarger, Benjamin Butler, Henry Dawes, Austin

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[346]*Id.*

[347]*Id.*; *see* HESSELTINE, *supra* note 10, at 245. *But see Washington*, N.Y. TRIB., Mar. 24, 1871, at 1 (suggesting that final sentence was intended to avoid charge that Grant was keeping Congress in session so that it would approve his proposed annexation of Santo Domingo).

[348]*See* CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871).

[349]*See* Shellabarger Letter, *supra* note 290, at 3. The meeting may also have determined the membership of the committee and decided that Shellabarger would be chair. *See id.*

[350]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 8, 1871, at 1; *XLIID Congress—1st Session*, N.Y. TRIB., Mar. 24, 1871, at 8. Because the regular standing committees of the House had not been appointed, the select committee would be the only one that could report. *See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 24, 1871, at 8. Committee reports had priority over other business including the call of the states. *See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 8, 1871, at 1.

[351]CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871).

[352]The Democrats initially began to filibuster the motion to refer the message; however, after being assured that the Republicans would permit full debate on any bill reported by the committee, the Democrats relented. *See* CONG. GLOBE, 42d Cong., 1st Sess. 244–49 (1871); *Forty-Second Congress*, N.Y. WORLD, Mar. 24, 1871, at 2.

[353]*See* CONG. GLOBE, 42d Cong., 1st Sess. 249 (1871).

Blair, Glenn Scofield, and Charles Thomas)[354] and three Democrats (George Morgan, Michael Kerr, and Washington Whitthorne).[355]

From Shellabarger's standpoint, the members were well chosen. Dawes, while vigorously opposing the Morton-Butler Committee Bill, had explicitly announced that he would "readily" and "heartily" support Shellabarger's measure.[356] Similarly, Austin Blair preferred Shellabarger's approach to Butler's and had publicly stated that many members of the House Republican Caucus favored the provisions of Shellabarger's House Bill 7.[357] Representative Scofield was also viewed as preferring a moderate bill.[358] Finally, while Butler and Charles Thomas of North Carolina favored Butler's more extreme provisions,[359] they could be expected to support Shellabarger—at least in the committee—so that an outrage bill could be brought to the House floor while Shellabarger was in control.[360]

The Select Committee held a brief organizational meeting that evening (Thursday, March 23) at Representative Scofield's Washington residence.[361] Since Butler and his nemesis Dawes were both out of town, no business could be done until Monday (March 27) and the committee adjourned until ten o'clock that morning.[362]

Shellabarger took full advantage of Butler's absence. The Committee—or at least its available Republican members—met informally several

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[354]*See id.*

[355]*See id.* Blaine had selected prominent Democrats for the committee: Morgan was the current Minority Leader and Kerr was a future Speaker of the House. All three Democrats opposed any outrage legislation, *Washington*, N.Y. TIMES, Mar. 24, 1871, at 1, and each debated forcefully against the Select Committee Bill, *see* CONG. GLOBE, 42d Cong., 1st Sess. 329–32 (1871) (statement of Rep. Morgan); CONG. GLOBE, 42d Cong., 1st Sess. 335–38 (1871) (statement of Rep. Whitthorne); CONG. GLOBE, 42d Cong., 1st Sess. app. at 46–50 (1871) (statement of Rep. Kerr).

[356]CONG. GLOBE, 42d Cong., 1st Sess. 181 (1871).

[357]*See id.* at 128–29 (statement of Rep. Blair describing caucus members' desire to amend Morton-Butler Committee Bill to delete Butler's sections and leave Shellabarger's); *Washington*, N.Y. TIMES, Mar. 24, 1871, at 1.

[358]*See Appeal to Arms*, N.Y. TRIB., Mar. 24, 1871, at 4; *Washington*, N.Y. TIMES, Mar. 24, 1871, at 1.

[359]*See Washington*, N.Y. TIMES, Mar. 24, 1871, at 1.

[360]*See XLIID Congress—1st Session*, N.Y. TRIB., Mar. 24, 1871, at 8 (stating that Shellabarger would be "recognized leader of the Republicans" for remainder of session).

[361]*See The House Committee on the President's Message*, N.Y. TRIB., Mar. 25, 1871, at 1. *But see Washington*, N.Y. TIMES, Mar. 25, 1871, at 5 (suggesting that Select Committee meeting took place on morning of Friday, March 24); *Washington*, N.Y. WORLD, Mar. 25, 1871, at 1 (suggesting that meeting took place sometime on March 24).

[362]*See The House Committee on the President's Message*, N.Y. TRIB., Mar. 25, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 25, 1871, at 1; *Washington*, N.Y. WORLD, Mar. 25, 1871, at 5.

times over the weekend and instructed Shellabarger to put together a proposed bill.[363] By Sunday, March 26, Shellabarger had done so.[364]

The Select Committee met formally for several hours on Monday, March 27.[365] (Butler had returned but Dawes and Representative Thomas were out of town.)[366] After making some "verbal amendments," the committee endorsed Shellabarger's proposal.[367] The next day Shellabarger introduced the Select Committee Bill as House Bill 320.[368]

B. The Sources of the Select Committee Bill

Shellabarger can fairly be described as the author of three of the five sections of the Select Committee Bill. He created section 2, criminalizing certain conspiracies to violate constitutional rights, by combining two portions of his own previously introduced House Bill 224.[369] He patterned

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[363]*See Southern Outrages*, N.Y. TRIB., Mar. 27, 1871, at 5.

[364]*See id.*; *Untitled Editorial*, N.Y. TRIB., Mar. 27, 1871, at 4.

[365]*See Action of the House Special Committee*, N.Y. TRIB., Mar. 28, 1871, at 1; *Summary of the News*, N.Y. WORLD, Mar. 28, 1871, at 4; *Washington*, N.Y. TIMES, Mar. 28, 1871, at 1.

[366]*See Action of the House Special Committee*, N.Y. TRIB., Mar. 28, 1871, at 1.

[367]*Id.*; *see also Summary of the News*, N.Y. WORLD, Mar. 28, 1871, at 4 (briefly describing bill); *Washington*, N.Y. TIMES, Mar. 28, 1871, at 1 (briefly describing provisions of bill that it expects committee to approve). The extent to which Shellabarger's proposal was modified by the Select Committee is somewhat unclear. The first *Tribune* article's discussion of Shellabarger's proposal describes quite accurately every substantive provision of the bill that was finally approved by the Select Committee. *Compare Southern Outrages*, N.Y. TRIB., Mar. 27, 1871, at 5, *with* H.R. 320, 42d Cong. (1871) (as introduced Mar. 28, 1871) (reprinted in Appendix F) [hereinafter Select Committee Bill]. However, the *Tribune* article identifies the proposal as having only three sections (instead of five) and describes section 3 as including provisions that were actually included in sections 3 and 4 of the committee's bill. (The article also describes section 3 as including a proviso that eventually became lines 23 through 26 of section 2. Additionally, the article describes the bill as being limited to section 1 of the Fourteenth Amendment, whereas the bill, by its language, is not so limited.) Thus, if this first *Tribune* article is correct, the Select Committee divided and reorganized the third section of Shellabarger's proposal but did not make any substantive changes.

The *Tribune* subsequently printed the full text of what it described as the "Bill Agreed on by the Republican Members." *Action of the House Special Committee*, N.Y. TRIB., Mar. 28, 1871, at 1. However, this text varies in a number of respects from House Bill 320 as actually approved by the Committee. *Compare id. with* Select Committee Bill, *supra*. It seems likely that the text printed in the *Tribune* is actually the text of Shellabarger's proposal before the verbal amendments. If not, a few additional verbal amendments must have been made after the Select Committee met and before its bill was introduced.

[368]*See* CONG. GLOBE, 42d Cong., 1st Sess. 317 (1871).

[369]*Compare* Select Committee Bill, *supra* note 367, § 2, *with* H.R. 224, 42d Cong., §§ 1–2 (1871). Lines 1 through 22 of section 2 of the Select Committee Bill were based on section 1 of House Bill 224 and lines 23 through 26 were based on section 2. *See* Select Committee Bill, *supra* note 367, § 2; H.R. 224, 42d Cong., §§ 1–2 (1871). The only significant new

section 3 of the Select Committee Bill, authorizing the President to use military force, after his original bill, House Bill 7.[370] Section 4, permitting the President to declare martial law and suspend habeas corpus, appears to have been drafted from scratch.[371]

Contrary to the conventional history, however, Shellabarger cannot fairly be described as the author of section 1 of the Select Committee Bill[372]—the section that became 42 U.S.C. § 1983:[373] Rather, Shellabarger took section 1 from New Jersey Senator Frederick Frelinghuysen's Senate Bill 243.[374]

Frelinghuysen had been a moderate member of the Morton-Butler Committee.[375] Within the committee, he had opposed Butler's approach on

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material was the addition of a list of specific crimes that could serve as predicate offenses for the conspiracy charge. That list was added to respond to complaints that the Enforcement Act of 1870—which was similar to Shellabarger's House Bill 224—was too vague. *See Southern Outrages*, N.Y. TRIB., Mar. 27, 1871, at 5. Shellabarger had introduced House Bill 224 on March 20, 1871. *See* CONG. GLOBE, 42d Cong., 1st Sess. 176 (1871). House Bill 224 is reprinted in Appendix G.

[370]*Compare* Select Committee Bill, *supra* note 367, § 3, *with* H.R. 7, 42d Cong. (1871). Shellabarger's House Bill 7 had also been incorporated as section 3 of Shellabarger's House Bill 224. *Compare* H.R. 224, 42d Cong., § 3, *with* H.R. 7, 42d Cong. (1871).

[371]There are two conceivable—but unlikely—sources for section 4. On March 23, Massachusetts Senator Zachariah Chandler had attempted to introduce a slightly amended version of Shellabarger's House Bill 224. *See* CONG. GLOBE, 42d Cong., 1st Sess. 232 (1871). Chandler's proposed bill would have added, at the end of section 3, a clause permitting the President to suspend habeas corpus. *See id.* On the same day, Michigan Senator Samuel Pomeroy introduced Senate Bill 303, which contained a provision permitting the President to declare martial law. *See id.* at 231; S. 303, 42d Cong., at *ll.*27–29 (1871). However, there is no external evidence that Shellabarger referred to either bill, and the language of the two bills bears little resemblance to the language of section 4 of the Select Committee Bill.

[372]*Compare supra* text accompanying notes 15–17, *with Southern Outrages*, N.Y. TRIBUNE, Mar. 27, 1871, at 5 (stating that "[t]he first section [of the Select Committee Bill] is in the main taken from a bill prepared by Senator Frelinghuysen"), *and Washington*, N.Y. TIMES, Mar. 28, 1871, at 1 (stating that Select Committee Bill would be based on Shellabarger's previous bills and would include features taken from Frelinghuysen's Bill), *and* Shellabarger Letter, *supra* note 290, at 4 ("The fact is I wrote and reported to the Committee of Nine of the House the bill as reported to [the] house, substantially as it was reported. But one sect[ion] of it I took from Frelinghuysen.").

[373]Section 1 of the Select Committee Bill was never amended and was included verbatim in the Ku Klux Act as enacted. *Compare* Select Committee Bill, *supra* note 367, § 1, *with* Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

[374]*Compare* Select Committee Bill, *supra* note 367, § 1, *with* S. 243, 42d Cong., §1 (1871). Shellabarger slightly understated his debt to Frelinghuysen: in addition to section 1, he also took a "savings clause" (section 5 of the Select Committee Bill) from Frelinghuysen. *Compare* Select Committee Bill, *supra* note 367, § 5, *with* S. 243, 42d Cong., § 4 (1871). Frelinghuysen's Bill is reprinted in Appendix A.

[375]*See Revenue Reform*, N.Y. WORLD, Mar. 14, 1871, at 1; *Southern Outrages*, N.Y. TRIB., Mar. 13, 1871, at 1; *Washington*, N.Y. TIMES, Mar. 13, 1871, at 3.

the basis that it was too radical, would place the South under military rule, and would interfere with the judicial processes.[376] However, Frelinghuysen waited until March 16—after the Morton-Butler Committee Bill had effectively been defeated on the House floor—to introduce a bill that embodied his own views, Senate Bill 243.[377]

Frelinghuysen's Bill was widely discussed and warmly praised.[378] It was described as "[t]he most practicable [outrage] measure yet proposed"[379] and as "so fair in its provisions that the South ought to find no difficulty in accepting it."[380] A "large majority" of congressional Republicans were willing to support it,[381] and it was seen as a solid alternative to Butler's increasingly unpopular proposals.[382] Even the rabidly Democratic *New York World* described it as a "milder measure of villainy."[383]

Frelinghuysen's Bill had four sections. Section 1, which will be discussed in more detail in Part IV.D below, dealt with officials' misconduct. It created a civil cause of action for anyone who was deprived of constitutional rights by a person acting "under pretense of" state law.[384] Section 2 was a two-pronged attack on private outrages. First, it authorized the President to use military force whenever state authorities failed to suppress violence or conspiracies that interfered with federal rights.[385] Second, it made it a felony to engage in such violence or to participate in such conspiracies.[386] Section 3 of Frelinghuysen's Bill insured that defendants seized by the military under section 2 would receive civilian trials by requiring that they be turned over to the marshal for trial in the federal courts.[387] Finally, section 4 was a simple

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[376]*See Revenue Reform*, N.Y. WORLD, Mar. 14, 1871, at 1.

[377]*See* CONG. GLOBE, 42d Cong., 1st Sess. 121 (1871). Frelinghuysen later introduced a second bill to deal with another aspect of violence in the South—violent resistance to the collection of taxes. *See* S. 276, 42d Cong., § 4 (1871); CONG. GLOBE, 42d Cong., 1st Sess. 171 (1871). This bill would have created a national police force to enforce the internal revenue laws and may have been introduced at the administration's suggestion. *See supra* note 322.

[378]*See Suppression of Disorders in the South—Frelinghuysen's Bill*, N.Y. TIMES, Mar. 20, 1871, at 5; *Untitled Editorial*, N.Y. TIMES, Mar. 20, 1871, at 4.

[379]*Suppression of Disorders in the South—Frelinghuysen's Bill*, N.Y. TIMES, Mar. 20, 1871, at 5.

[380]*Untitled Editorial*, N.Y. TIMES, Mar. 20, 1871, at 4.

[381]*Id.*

[382]*See Suppression of Disorders in the South—Frelinghuysen's Bill*, N.Y. TIMES, Mar. 20, 1871, at 5; *Untitled Editorial*, N.Y. TIMES, Mar. 20, 1871, at 4.

[383]*The Radical Wrangle*, N.Y. WORLD, Mar. 18, 1871, at 1.

[384]H.R. 243, 42d Cong., § 1 (1871).

[385]*See id.* § 2 at *ll.*1–15.

[386]*See id.* at *ll.*15–33.

[387]*See id.* § 3. Frelinghuysen explained that this was to avoid the possibility of "trial under martial law." CONG. GLOBE, 42d Cong., 1st Sess. 501–02 (1871).

savings clause intended to insure that the bill would not be interpreted to repeal existing laws or to interfere with pending prosecutions.[388]

Shellabarger based section 1 of the Select Committee Bill on section 1 of Frelinghuysen's Bill. Of the twelve outrage bills presented to the Forty-second Congress,[389] that section was the first—and until the Select Committee Bill, the only—to provide a civil cause of action for plaintiffs whose rights were violated by persons acting under the authority or apparent authority of state law.

Shellabarger restructured Frelinghuysen's section 1 in a number of grammatical respects that are of interest only to students of bad writing.[390] Suffice it to say that Shellabarger took an unnecessarily baroque and convoluted complex sentence and turned it into a new—but equally baroque and convoluted—complex sentence.

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[388]*See* H.R. 243, 42d Cong., § 4 (1871). This section was included in the Select Committee Bill as section 5 of that bill. *See* Select Committee Bill, *supra* note 367, § 5.

[389]*See* H.R. 7, 42d Cong. (1871) (Shellabarger's original bill); H.R. 46, 42d Cong. (1871) (Rep. Porter's bill providing for removal of certain cases due to denial of equal protection); H.R. 189, 42d Cong. (1871) (Morton-Butler Committee Bill); H.R. 194, 42d Cong. (1871) (Rep. Mercur's bill providing method for selecting jury panels intended to assure exclusion of disloyal jurors); H.R. 224, 42d Cong. (1871) (Shellabarger's second bill); H.R. 320, 42d Cong. (1871) (Select Committee Bill); S. 226, 42d Cong. (1871) (Wilson's outrage bill); S. 243, 42d Cong. (1871) (Frelinghuysen's Bill); S. 276, 42d Cong. (1871) (Frelinghuysen's revenue police bill); S. 303, 42d Cong. (1871) (Pomeroy's martial law bill); CONG. GLOBE, 42d Cong., 1st Sess. 232 (1871) (Chandler's bill, slightly modified version of Shellabarger's H.R. 224 that was given to judiciary committee but never formally introduced or given bill number); *id.* at 187 (Perce's bill, combining removal of disabilities with outrage legislation, that was read to House but never formally introduced or given any bill number because Perce's motion to suspend rules was defeated).

Two related bills that have not been listed should also be mentioned: Charles Sumner once again unsuccessfully introduced his well-known civil rights bill, S. 99, 42d Cong. (1871), providing for nondiscrimination in public accommodations. *See* CONG. GLOBE, 42d Cong., 1st Sess. 21 (1871). Finally, in a nineteenth-century version of late-twentieth-century, anti-affirmative-action proposals, Democratic Representative Philadelph Van Trump sarcastically introduced a bill to prevent the enslavement of white people and guaranteeing them, "as a special act of grace and favor," the same rights as the "dominant colored or Ethiopian race." H.R. 228, 42d Cong. (1871); CONG. GLOBE, 42d Cong., 1st Sess. 176 (1871).

[390]For example, he changed the subject of the sentence from the plaintiff ("the party thereby injured") to the defendant ("any person who . . . shall subject"), thus changing the sentence from active to passive voice. *Compare* S. 243, 42d Cong., § 1, at *ll.*7–8 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *ll.*3–5. He changed the subordinate clause (describing the defendant's misconduct) from an introductory adverb clause to an adjective clause modifying the main subject. *Compare* S. 243, 42d Cong., § 1, at *ll.*3–7 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *ll.*3–8. He changed the subject of the subordinate clause itself (from "rights, privileges," etc., to "who"), thus changing that clause from passive to active voice. *Compare* S. 243, 42d Cong., § 1, at *ll.*4–6 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *l.*3.

He also made three changes that could be considered substantive. These revisions are illustrated below:

Illustration of Select Committee Revisions to S. 243[391]

color *statute, ordinance, regulation,*
. . . under ~~pretense~~ of any law, ^ custom, or usage of any state, any of the rights, privileges, or immunities ~~intended to be~~ secured by ~~the first section of article fourteen of the amendments to~~ the Constitution of the United States . . .

First, whenever Frelinghuysen used the phrase "law, custom or usage," Shellabarger used the more inclusive phrase "law, statute, ordinance, regulation, custom, or usage."[392] Second, while Frelinghuysen's Bill protected only those rights secured by section 1 of the Fourteenth Amendment,[393] the Select Committee Bill protected rights secured by *any* part of the Constitution.[394]

It is, however, the third change that is most significant for modern purposes: While Frelinghuysen's Bill created a cause of action for deprivations committed "under pretense of" state law, Shellabarger changed the phrase to read "under color of" state law.[395] The significance of that change is discussed in Parts IV.C and IV.D below.

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[391]The figure in the text is illustrative only and is not intended to suggest that there currently exists a copy of Senate Bill 243 with Shellabarger's changes marked in this fashion.

[392]*Compare* S. 243, 42d Cong., § 1, at *ll.*3–4, 11–12 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *ll.*3–4, 8–9.

[393]Shellabarger deleted the redundant qualifier "intended to be" from Frelinghuysen's phrase "intended to be secured by the . . . Constitution." *Compare* S. 243, 42d Cong., § 1, at *ll.*4–5 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *l.*7. It was, of course, the failure of the Fourteenth Amendment alone to effectively secure equal rights that made enforcement legislation necessary.

[394]*Compare* S. 243, 42d Cong., § 1, at *ll.*5–6 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *ll.*7–8. This change was made some time after Shellabarger submitted his draft to the Select Committee. The draft of the Select Committee Bill reprinted in the *Tribune* still contained Frelinghuysen's language. *See Action of the House Special Committee*, N.Y. TRIB., Mar. 28, 1871, at 1. If, as seems likely, that draft was Shellabarger's proposal to the Committee, the Committee made the change in its March 27 meeting. If, on the other hand, that draft was the final version approved at the March 27 Committee meeting, the change (along with a number of other changes) must have been made by someone after that meeting had adjourned but before the bill was introduced. *See supra* note 367.

[395]*Compare* S. 243, 42d Cong., § 1, at *l.*3 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *l.*3.

C. The Current Controversy over "Color of Law"

In its modern form, 42 U.S.C. § 1983 provides a civil action for those whose rights have been violated by persons acting "under color of" state law. More than a third of a century ago in *Monroe v. Pape*,[396] the Supreme Court held that this phrase included constitutional violations committed by officials under pretended authority of state law even if their actions were clear violations of state law.[397] In doing so, the Court was not breaking new ground. Twenty years earlier in *United States v. Screws*, the Court had explicitly held, "It is clear that under 'color' of law means under 'pretense' of law."[398]

But this interpretation was not uncontroversial. Justice Roberts (joined by Justices Frankfurter and Jackson) wrote a blistering dissent in *United States v. Screws* describing the court's interpretation as a "distortion [that] . . . never entered the minds of the proponents of the legislation."[399] In *Monroe* itself, Justice Frankfurter filed an equally vigorous dissent arguing that the legislative history of the statute demonstrated that "under color of" law was never intended to include conduct committed under the mere "pretense of [state] authority."[400] Many academic commentators have sharply criticized the *Monroe* majority's interpretation,[401] with one describing it as "flatly wrong."[402]

Thus, the lines are clearly drawn: Was the *Monroe* majority wrong or right? Was the phrase "under color of" law intended to cover only those actions committed with actual state authority or was it also intended to include actions committed under pretense of such authority? The answers to these questions are not just matters of historical curiosity. They have a crucial

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[396]365 U.S. 167 (1961).

[397]*See id.* at 172, *overruled in unrelated respects by* Monell v. Department of Soc. Servs., 436 U.S. 658, 663 (1978) (overruling *Monroe* to extent that it held that municipalities could not be sued under 42 U.S.C. § 1983).

[398]United States v. Screws, 325 U.S. 91, 111 (1941) (interpreting "under color of" law as used in section 20 of Criminal Code, now codified as 18 U.S.C. § 242).

[399]*Screws*, 325 U.S. at 142 (Roberts, J., dissenting).

[400]*Monroe*, 365 U.S. at 238–39 (Frankfurter, J., dissenting).

[401]*See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and Empirical Study*, 67 CORNELL L. REV. 482, 507 (1982) (stating that *Monroe*'s interpretation was not supported by evidence it cited); Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 296 (1965) (describing Justice Frankfurter's dissent as "complete answer" to majority's position); Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 60–62 (1986) (stating that *Monroe* majority "ignore[d] traditional rules of statutory construction and distort[ed] legislative history" to reach its result). *But see* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 *passim* (1992) (persuasively defending *Monroe*'s interpretation).

[402]Zagrans, *supra* note 9, at 502.

effect on the current judicial interpretation of one of our most important civil rights statutes.

Influential conservative judges—including at least two sitting Justices of the Supreme Court—believe that *Monroe* was wrong, and they use that belief as a license to restrict the scope of 42 U.S.C. § 1983 in ways that they admit would otherwise be unjustifiable. Last term's decision in *Crawford-El v. Britton*[403] provides the clearest example of this effect.[404]

In *Crawford-El*, the Supreme Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit[405] that had required certain 42 U.S.C. § 1983 plaintiffs to prove some elements of their case by clear and convincing evidence—a requirement that had no basis in the text of the statute, its legislative history, or its common law background.[406] For purposes of this Article, the details of the case are less important than the reasoning of Judge Silberman's concurring opinion in the Court of Appeals and Justice Scalia's dissenting opinion in the Supreme Court.

Judge Silberman candidly acknowledged that the Court of Appeals' newly created requirement involved an otherwise unwarranted level of judicial policymaking.[407] But Judge Silberman stated that, in interpreting 42 U.S.C. § 1983, such policymaking was permissible—so long as it restricted the scope of the statute—because *Monroe* had been wrongly decided.[408] Relying on a deeply flawed law review article,[409] Judge Silberman asserted that *Monroe*, by holding that 42 U.S.C. § 1983 covered conduct committed under mere pretense of state authority, had "turned Section 1983 into a provision that the post-civil war Congress could not possibly have visualized."[410] Because the courts had, in Judge Silberman's view, unjustifiably

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[403]118 S. Ct. 1584 (1998).

[404]*See id.* at 1603 (Scalia, J., dissenting).

[405]Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996).

[406]*See Crawford-El*, 118 S. Ct. at 1589. The lower court had also created certain other procedural hurdles for such plaintiffs. *See id.*

[407]*See Crawford-El*, 93 F.3d at 829 (Silberman, J., concurring).

[408]*See id.* at 829–30.

[409]Zagrans, *supra* note 9. Zagrans's failure to understand the common law background of the phrase "under color of" law has been fully detailed in Steven Winter's article. *See* Winter, *supra* note 401, *passim*. Zagrans's analysis of the legislative history is filled with factual errors ranging from the serious and inexcusable to the merely slipshod. *See* Zagrans, *supra* note 9, at 548 n.268 (erroneously claiming that Ku Klux Act was drafted by Morton-Butler Committee); *id.* at 548 (erroneously claiming that Morton-Butler Committee was created in response to Grant's March 23 message); *id.* at 558 (erroneously claiming that Frelinghuysen was member of "drafting committee" of Ku Klux Act); *id.* at 559 n.321 (erroneously claiming that Frelinghuysen's April 6 speech referred to section 1 of Ku Klux Act rather than section 1 of Frelinghuysen's own S. 243); *id.* at 548 n.268 (erroneously identifying one member of Morton-Butler Committee and misspelling another's name).

[410]*Crawford-El*, 93 F.3d at 830 (Silberman, J., concurring).

expanded the cause of action, the courts should feel free to make the policy decision to restrict that cause of action in any way they could.[411]

In the Supreme Court, Justices Scalia and Thomas fully adopted Judge Silberman's reasoning.[412] Justice Scalia (joined by Justice Thomas) candidly admitted that he did not feel bound to apply normal interpretive rules to 42 U.S.C. § 1983: "As I have observed earlier, our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when 42 U.S.C. § 1983 was enacted, and that the statute presumably intended to subsume. *That is perhaps just as well.*"[413] Justice Scalia went on to explain that he felt justified in engaging in the essentially legislative activity of restricting the 42 U.S.C. § 1983 cause of action because *Monroe* had unjustifiably expanded that cause of action:

> The § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. I refer, of course, to the holding of *Monroe v. Pape*, which converted an 1871 statute covering constitutional violations committed "*under color of* any statute, ordinance, regulation, custom, or usage of any State," (emphasis added), into a statute covering constitutional violations committed *without* the authority of any statute, ordinance, regulation, custom, or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law. . . . Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted.[414]

Thus, for Justices Scalia and Thomas,[415] the belief that *Monroe* was wrong provides a license to constrict the 42 U.S.C. § 1983 cause of action even if doing so is inconsistent with ordinary principles of statutory interpretation.[416]

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[411]*See id.* at 832. Judge Silberman would have preferred for the Supreme Court to overrule *Monroe*, but thought such overruling unlikely. *See id.*

[412]*See Crawford-El*, 118 S. Ct. at 1603 (Scalia, J., dissenting).

[413]*Id.* (emphasis added; internal citations omitted).

[414]*Id.* (internal citations omitted).

[415]Justices Scalia and Thomas may not be alone. Justice Powell's restrictive interpretations of 42 U.S.C. § 1983 may also have been affected by his belief that *Monroe* was wrong. *See* Parratt v. Taylor, 451 U.S. 527, 554 (1981) (Powell, J., concurring) (describing 42 U.S.C. § 1983 as "a statute that already has burst its historical bounds").

[416]*See Crawford-El*, 118 S. Ct. at 1603 (Scalia, J., dissenting) (stating that he was engaged in "essentially legislative activity of crafting a sensible scheme" of immunities rather than applying ordinary interpretive criteria).

D. Frelinghuysen's Bill, Shellabarger's Changes, and the Meaning of "Under Color of" State Law

The current controversy makes it crucial to determine the meaning of Shellabarger's decision to replace Frelinghuysen's phrase, "under pretense of" state law, with the now familiar phrase, "under color of" state law. Without more information, this change could, of course, be interpreted in either of two ways: On the one hand, it could be a substantive change, indicating that Shellabarger had rejected the idea of covering conduct under pretended authority of state law and decided to limit section 1 to conduct under actual state authority.[417] On the other hand, the change could be stylistic, indicating that Shellabarger believed that "under color of" state law was just a better way of expressing the intention to cover both types of conduct.[418] If there were no additional evidence, there would be no inherent reason to choose one interpretation over the other.

However, there is additional evidence, and that evidence makes it extremely unlikely that Shellabarger intended to restrict the scope of Frelinghuysen's original language. First, Shellabarger was far more radical than Frelinghuysen and had no reason to make Frelinghuysen's "mild measure" any milder.[419] Second, when Shellabarger did make substantive changes in Frelinghuysen's Bill, those changes consistently expanded, rather than contracted, the scope of the bill.[420] Third, "under color of" law was a phrase commonly used in statutes and cases to describe conduct that was committed under mere pretense of legal authority.[421] Fourth, Frelinghuysen himself used "under color of" law and "under pretense of" law interchangeably.[422]

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[417] *See, e.g.*, WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 134 (1990) (suggesting that change in draft of Judiciary Act may have demonstrated "a preference for the substance of one form rather than the other").

[418] *See id.* (suggesting that change from earlier draft "probably exhibited nothing more than the choice of the more felicitous of two forms of expression"); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84–88 (1923) (suggesting that revised language in later draft was merely shorthand expression for phrase used in earlier draft). *But see* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389 (1964) (treating change as stylistic but drawing different conclusions from that fact). Justice Brandeis's opinion in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), is, of course, the preeminent judicial example of treating a drafting change as stylistic rather than substantive.

[419] *See infra* text accompanying notes 423–35.

[420] *See infra* text accompanying notes 436–39.

[421] *See infra* text accompanying notes 440–45.

[422] *See infra* text accompanying notes 446–51.

Because Shellabarger was more radical than Frelinghuysen, it would have been anomalous for Shellabarger to have revised Frelinghuysen's Bill to make it less radical. Shellabarger was a recognized leader of the Republican Radicals.[423] Frelinghuysen, on the other hand, was consistently described as one of the more moderate Republicans: The *New York Times* recognized him as a Senator "whose moderation is well-known."[424] Even the stridently Democratic *New York World* acknowledged that Frelinghuysen was an excellent lawyer who opposed all extreme legislation.[425] On issues involving outrage legislation, Shellabarger consistently took more radical positions than Frelinghuysen. Frelinghuysen opposed making municipalities strictly liable for private outrages committed within their borders;[426] Shellabarger supported such liability.[427] Frelinghuysen wanted to avoid authorizing trials under martial law;[428] Shellabarger drafted and introduced a bill expressly authorizing such trials.[429] Frelinghuysen protested enactment of any bill that created a broad class of new federal crimes;[430] Shellabarger introduced two bills that did so.[431] Frelinghuysen "strenuously opposed" Butler's Bill within the Morton-Butler Committee;[432] Shellabarger, though favoring his own bill, found Butler's acceptable.[433]

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[423]*See Untitled Editorial*, N.Y. TRIB., Mar. 10, 1871, at 4 (describing Shellabarger's House Bill 7 as "[o]ne of the most radical" of the outrage bills yet introduced); *Washington*, N.Y. TIMES, Mar. 16, 1871, at 1. David Donald classified Shellabarger as a "[Thaddeus] Stevens Radical[]," the second-most extreme of his seven categories. DAVID DONALD, THE POLITICS OF RECONSTRUCTION: 1863–1867, at 100–05 (1965); *see also* TREFOUSSE, *supra* note 295, at 339 (describing Shellabarger as among "practical radicals").

[424]*Untitled Editorial*, N.Y. TIMES, Mar. 20, 1871, at 4.

[425]*See Revenue Reform*, N.Y. WORLD, Mar. 14, 1871, at 1.

[426]*See* CONG. GLOBE, 42d Cong., 1st Sess. 776–77 (1871) (opposing second version of Sherman Amendment which imposed such liability); *Washington*, N.Y. TIMES, Apr. 19, 1871, at 5. Frelinghuysen spoke against the Sherman Amendment both in the Senate Judiciary Committee and on the floor of the Senate but was absent during the vote. *See* CONG. GLOBE, 42d Cong., 1st Sess. 776–77, 800 (1871).

[427]*See* CONG. GLOBE, 42d Cong., 1st Sess. 751–52 (1871) (advocating adoption of second version of Sherman Amendment which imposed such liability); *id.* at 800 (voting for that Amendment).

[428]*See id.* at 502.

[429]*See* Select Committee Bill, *supra* note 367, § 4. House Bills 7 and 224 may also have implicitly permitted military trials. *See* H.R. 7, 42d Cong. (1871) (authorizing President to use military to "cause the laws to be duly executed" when outrages could not be suppressed "by the ordinary course of judicial proceedings"); H.R. 224, 42d Cong., § 3 (1871) (same).

[430]*See* CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871).

[431]*See* H.R. 224, 42d Cong., § 1 (1871); Select Committee Bill, *supra* note 367, § 2.

[432]*Revenue Reform*, N.Y. WORLD, Mar. 14, 1871, at 1.

[433]*See* CONG. GLOBE, 42d Cong., 1st Sess. 127–28 (1871). By defending Butler's Bill, Shellabarger was taking a more radical position than Frelinghuysen in another respect: Frelinghuysen firmly opposed any sectional legislation, that is, legislation that treated the South

Moreover, Shellabarger had no political motive to weaken Frelinghuysen's Bill. The bill already had the support of a "large majority of the Republican Party," and those who opposed it favored more extreme measures rather than more moderate ones.[434] A Radical like Shellabarger simply had no reason to change Frelinghuysen's already "mild measure"[435] into one even less radical.

The two substantive changes that Shellabarger did make to Frelinghuysen's Bill confirm this view: Both expanded rather than contracted the scope of Frelinghuysen's section 1. First, Shellabarger changed Frelinghuysen's phrase "law, custom or usage" to the broader "law, statute, ordinance, regulation, custom, or usage."[436] By doing so he assured that the statute would cover conduct under color of any form of state or local law: statewide "statute[s]," local "ordinance[s]," and less authoritatively enacted "regulation[s]."[437] Second, Shellabarger[438] expanded Frelinghuysen's Bill to encompass all constitutional rights rather than just those protected by section 1 of the Fourteenth Amendment.[439]

It was natural for a nineteenth-century lawyer such as Shellabarger to use "under color of" law to describe misconduct committed under the pretense of official authority.[440] As Steven Winter has exhaustively estab

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more harshly than the North. *See id.* at 221.

[434]*Untitled Editorial*, N.Y. TIMES, Mar. 20, 1871, at 4.

[435]*Washington*, N.Y. TIMES, Mar. 18, 1871, at 5; *see also Untitled Editorial*, N.Y. TIMES, Mar. 20, 1871, at 4 (describing bill as being "so fair in its provisions that the South ought to find no difficulty in accepting it").

[436]*Compare* S. 243, 42d Cong., § 1, at *ll.*3–4, 11–12 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *ll.*3–4, 8–9.

[437]Select Committee Bill, *supra* note 367, § 1, at *ll.*3–4, 8–9. Whether Frelinghuysen's shorter phrase would have accomplished the same result is an open question. However, it is evident that Shellabarger's purpose in making the change was to be certain that the statute would be given the broader interpretation.

[438]It is possible that this change was made by the Select Committee as a whole rather than by Shellabarger individually. *See supra* notes 367, 394.

[439]*Compare* S. 243, 42d Cong., § 1, at *ll.*5–6 (1871), *with* Select Committee Bill, *supra* note 367, § 1, at *ll.*7–8.

[440]This usage was not limited to legal matters. A member of the Forty-second Congress looking in a standard dictionary of the era would have found "color" defined, *inter alia*, as an "[e]xternal appearance; false show; pretense; guise." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1854) 225 (definition 6); *see also* 1 COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 470 (1971) (definition 12) (defining phrase "under colour of" as meaning "under pretext or pretense of, under the mask or alleged authority of" and citing examples dating to 1340). For a similar late-eighteenth-century use of "color" to mean "false appearance," see Letter from John Quincy Adams to John Adams, President of the United States 1 (July 22, 1797) (original on file with Adams Papers at Massachusetts Historical Society) (complaining that, by appointing him to ambassadorship, his father gave "a colour of reason to those who would represent me [John Quincy Adams] as a creature of

lished, for six centuries Anglo-American jurisprudence had used the phrases "under color of law" and "under color of office" to describe conduct by officials who exceeded their official power and violated the law.[441] The two phrases had been given this meaning in numerous federal statutes[442] as well as in a long line of English and American cases.[443]

The members of the Forty-second Congress, many of whom were lawyers, were certainly well aware of these cases. At least one of these cases was quoted during the debates on the Ku Klux Act itself. During those debates, Kentucky Senator John Stevenson read a passage from *Prather v. Lexington*[444] that clearly recognized that an official could act "under color of" his office even though his conduct violated state law: "[A]s a general rule a [municipal] corporation is not responsible for the *unauthorized and unlawful acts of its officers, although done under color of their office.*"[445] Thus, Congress was well aware that "under color of" law was commonly used to describe those acts contrary to law but committed with the pretended authority of law.

Finally, Frelinghuysen himself used "under color of" state law and "under pretense of" state law interchangeably, confirming that the choice of one phrase rather than the other was stylistic rather than substantive. On April 6, 1871, Frelinghuysen addressed the Senate, arguing that his bill should be

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favour" (quoted in PAUL L. NAGEL, JOHN QUINCY ADAMS: PUBLIC LIFE, A PRIVATE LIFE 108 (1997)).

[441]Winter, *supra* note 401, at 327 n.17, 341–61 (emphasis omitted). Winter mentions one way in which "under color of" law may be a more precise phrase than "under pretense of" law. He notes that "under color of" law suggests action by someone who has some legal authority but is acting outside that authority or contrary to it, whereas "under pretense of law" might be interpreted to include someone who had no legal authority at all but pretended to have such authority. Winter's analysis suggests that a rapist who lured his victims to the scene by pretending to be a police officer could be described as acting under pretense of law but not under color of law. *See id.* at 328 n.23, 401–02.

[442]*See id.* at 326 n.16.

[443]*See id.* at 341–61.

[444]52 Ky. (13 B. Mon.) 559, 560 (1852).

[445]CONG. GLOBE, 42d Cong., 1st Sess. 762 (1871) (quoting *Prather*, 52 Ky. (13 B. Mon.) at 560 (emphasis added). Stevenson quoted the case as part of a speech in which he opposed the Sherman Amendment's imposition of municipal liability for damages done by mobs. *See id.*

Stevenson's speech also mentioned the well-known case of *Thayer v. Boston*, 36 Mass. (19 Pick.) 511 (1837). *See* CONG. GLOBE, 42d Cong., 1st Sess. 762 (1871). *Thayer* is one of Professor Winter's principal examples of using the phrase "under color of" law to describe misconduct committed under the pretense of official authority. *See* Winter, *supra* note 401, at 347. For the significance of Stevenson's speech, *Prather*, and *Thayer* for municipal liability under 42 U.S.C. § 1983, see Owen v. City of Independence, 445 U.S. 622, 641–43, 654–55 (1980).

enacted.[446] After explaining the Constitutional basis and the practical need for outrage legislation, he described the first remedy provided by his bill: "[T]he injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who *under color of such law* is guilty of infringing his rights."[447] Thus, for Frelinghuysen, the phrases "under color of" law and "under pretense of" law were synonymous: He used the former to describe a section of his bill that used the latter.[448] There is no reason to believe that his congressional colleagues did not share Frelinghuysen's understanding that the two phrases were functional equivalents.[449]

Thus, for Frelinghuysen, for Shellabarger, and for the members of Congress who enacted the Ku Klux Act, "under color of" law meant "under pretense of" law. By recognizing that fact, *Monroe* did not, as Justice Scalia claims, create a new statute "bear[ing] scant resemblance to" that act.[450] Rather, it is Justices Scalia and Thomas who, by ignoring that fact, would "carry us further and further from what [the Forty-second Congress] enacted."[451]

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[446]*See* CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871). Frelinghuysen was not discussing the Select Committee Bill which was not yet before the Senate. Instead, his speech was a careful explanation of why his own bill, S. 243, should be adopted. His speech carefully tracks the provisions of S. 243: It discusses the civil remedy created by Section 1 and explains why Frelinghuysen (unlike the Select Committee) decided not to create a broad new class of federal criminal offenses. *See id.* It then describes precisely the authority to use military force given by section 2 of his bill and the manner in which section 3 of his bill (again unlike the Select Committee Bill) would avoid the necessity of martial law. *See id.* at 501–02. Eric Zagrans's unsupported conclusion that Frelinghuysen "was clearly referring to § 1" of the Select Committee Bill is simply wrong. Zagrans, *supra* note 9, at 559 n.321.

[447]CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871) (emphasis added).

[448]*Compare id. with* S. 243, 42d Cong., § 1 (1871).

[449]This is not to argue that Frelinghuysen's speech somehow convinced the Senators that the phrases were synonymous. In fact, it is unlikely that many Senators even heard the speech since it was given when "the Senate was thin and the galleries deserted." *Washington*, N.Y. TIMES, Apr. 7, 1871, at 8. Frelinghuysen's speech is simply a vivid example of the fact that educated lawyers in 1871 used the two phrases interchangeably. As such, it is powerful evidence that Shellabarger's decision to replace one with the other was not intended to change the meaning of Frelinghuysen's Bill.

[450]Crawford-El v. Britton, 118 S. Ct. 1584, 1603 (1998) (Scalia, J., dissenting).

[451]*Id.*

APPENDIX A: FRELINGHUYSEN'S BILL

42D CONGRESS, 1ST SESSION

S. 243.

IN THE SENATE OF THE UNITED STATES.

MARCH 16, 1871.

Mr. FRELINGHUYSEN asked and, by unanimous consent, obtained leave to bring in the following bill; which was read twice, referred to the Committee on the Judiciary; and ordered to be printed.

A BILL

More fully to enforce the fourteenth amendment to the Constitution of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, under pretense of any law, custom, or usage of any State, any of the rights, privileges, or immunities intended to be secured by the first section of article fourteen of the amendments to the Constitution of the United States, shall be in any manner infringed or withheld, the party thereby injured shall and may have an action at law, or suit in equity, or other proper process or proceeding for obtaining redress against the party guilty of such infringement or withholding, any act of any State legislature, custom, usage, or law to the contrary notwithstanding; and the several district and circuit courts of the United States shall have cognizance of all such actions, suits, and proceedings, with power to issue injunctions and other proper process for enforcing such jurisdiction; but all final judgments and decrees of any district court herein, shall be subject to appeal or writ of error to the proper circuit court; and all judgments and decrees of any circuit court, or district court exercising the powers of a circuit court, shall be subject to appeal or writ of error to the supreme

court; and all actions, suits, and proceedings now pending in said courts instituted by reason of any such infringement or withholding, committed since the ratification of said amendment, shall be as valid as if this act had been passed before the institution thereof.

SEC. 2. That if it shall at any time appear to the President of the United States that by insurrection or domestic violence in any State, or by combinations made to violate the laws therein, citizens of the United States are denied the equal protection of the laws, or are not protected in the exercise and enjoyment of their privileges and immunities as citizens of the United States, intended to be secured to them by the said first section of the said amendment, and the State authorities are not competent or shall fail or refuse to extend such protection, and shall fail to apply to the President for aid in that behalf, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of military force or otherwise, as he may deem necessary and proper, for the suppression of such insurrection, domestic violence, or combinations; and all persons engaged either as principals or accessories in any such insurrection, domestic violence, or combinations, raised, committed, or made for the purposes aforesaid, shall be deemed guilty of felony against the United States, and on conviction thereof, shall be subject to fine not exceeding five thousand dollars or imprisonment not exceeding five years, or both, at the discretion of the court; and the several district and circuit courts of the United States shall have jurisdiction of such offenses in their respective districts; and may certify to the Supreme Court for its adjudication and direction any question of doubt or difficulty arising upon the trial and conviction of any person accused, subject to such rules and regulations as the Supreme Court may prescribe; but it shall be in the discretion of the court making such certificate whether to suspend the sentence or the execution thereof, pending the hearing on such certificate; but if the same shall be decided in favor of the accused, he shall thereupon be discharged, and the judgment against him reversed.

SEC. 3. That any persons found or suspected to be engaged or concerned either as principals or accessories in any such insurrection, domestic violence, or combination, who may be arrested or taken by the said military force, or other agency so employed by the President for the purpose mentioned in the second section of this act, shall be delivered to the custody of the marshal of the district in which the supposed crime was committed, to be prosecuted according to law, as provided in the preceding section.

SEC. 4. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offenses heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

APPENDIX B: BUTLER'S BILL

42D CONGRESS, 3D SESSION

H.R. 3011.

IN THE HOUSE OF REPRESENTATIVES.

FEBRUARY 16, 1871.

Ordered to be printed and recommitted to the Committee on Reconstruction.

AMENDMENT

In the nature of a substitute, reported by Mr. B.F. BUTLER from the Committee on Reconstruction, to the bill (H.R. 3011) to protect loyal and peaceable citizens of the United States in the full enjoyment of their rights, persons, liberty, and property, and to enable such citizens to preserve and perpetuate the evidence of losses claimed to have been sustained by them in the war in the States lately in rebellion.

Whereas large numbers of lawless and evil-disposed persons, especially in the States lately in rebellion, having conspired together and bound themselves to each other by unlawful oaths, have formed secret organizations, some of which are commonly known as the Ku-Klux Klan, having for their main object to defeat certain classes of citizens of the United States in the liberty, rights, and equal protection of the laws guaranteed by the Constitution; and whereas, by the use of disguises worn upon their persons, by perjury, violence, threats, overawing the local authorities, and otherwise, such persons and organizations, their aiders and abettors, have evaded and set at defiance the power of the States wherein they exist, and thus with impunity have deprived, and still do deprive, peaceable citizens of the enjoyment of life, liberty, and property without due process of law, and have taken from them, and do still take from them, the equal protection of the laws, by which means such peaceable citizens have been made to do acts against their will, and forego their just rights and freedom of action, as their only means of escape from death or great bodily harm at the hands of such persons and organizations; and whereas the States have failed and still fail to prevent

or suppress such violations of law and denial of the liberty, rights, and protection guaranteed by the Constitution of the United States to persons within their respective jurisdictions: and whereas it has been thus rendered imperative on Congress to enforce all constitutional guarantees by appropriate legislation: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several circuit courts of the United States in the States of Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, and Kentucky, when the circuit judge is sitting therein, are authorized, and it is made their duty, to appoint commissioners in their respective circuits to a number not exceeding one for each county therein, and one for each city exceeding the number of twenty thousand inhabitants, and in the State of Louisiana for each parish therein, and two for the city of New Orleans; which commissioners shall have the rights, powers, and jurisdiction conferred by any act of Congress upon commissioners appointed by the circuit court of the United States, so far as they may be applicable, to perform, exercise, discharge, and carry out all the authorities, powers, and duties imposed upon them by this act. Said commissioners shall be learned and discreet persons, and have the same compensation for their services under this act as are now provided by law for duties and services of like character, when performed by such commissioners, to be audited and paid in like manner as other like accounts are paid; and said commissioners shall hold their offices upon the same tenure as other commissioners appointed by said circuit courts; and after their appointment, each of them shall reside in the county for which he is appointed, so long as he shall hold his commission.

SEC. 2. *And be it further enacted,* That in addition to the duties which now are, or which have been, or may hereafter be, prescribed by law for said commissioners, it shall be the duty of each said commissioners, upon information of any outrage committed or wrong done against the liberty, property, or person of a citizen of the United States within his precinct, with intent to hinder, impair, or deprive such citizen of the full enjoyment of any right guaranteed to him under the

Constitution of the United States, or of any violation of any of the provisions of this act, to issue a warrant, or other proper process, under his hand and seal, forthwith to bring the offender or offenders before said commissioner, and after due examination whether there is probable cause to believe such offense has been committed, if the commissioner shall be satisfied of such probable cause, and that the accused persons are probably guilty, the commissioner shall bind the offender or offenders by recognizances with good and sufficient sureties, each having sufficient estate within the district, in a penal sum not less than one thousand nor more than ten thousand dollars, (if the offense is bailable under the laws of the United States,) with condition that the accused party shall appear and answer to the offenses charged at the term of the circuit court of the United States next to be held in and for the district where the offense is committed, and so from time to time until the final order of the court thereon, or of any court to which appeals may be taken, and in the mean time to keep the peace and be of good behavior toward all citizens of the United States; and said commissioners shall have power to bind by recognizance any person in such sum, with or without surety or sureties, as he may deem best for the purposes of justice, as a witness to appear before such court to give testimony at said term in that behalf, and so from term to term until he be discharged thereof; but if the offense be not bailable by the laws of the United States, or if the accused shall not furnish such sufficient sureties, then the commissioners by a mittimus, or other proper process, shall commit the offender or offenders to the custody of the marshal, to be brought before the circuit court at its next term, there to abide the order of the court, and such mittimus or other process so issued shall be conclusive to prevent all molestation or hinderance of the marshal or his deputy having the accused in charge, from holding him by any process issued by any court, judge, magistrate, or any person whatsoever: *Provided, however*, That the commissioner may at any time before the session of such court admit to bail any person by him committed to the custody of the marshal for want of sufficient sureties; and each of said commissioners shall transmit to the clerk of said circuit court, on or before the first day of said term of said court, attested copies of all the proceedings had by him in this behalf, and also attested copies of all depositions, affi-

davits, or testimony taken by him in the hearing as to probable cause to believe such offenses have been committed, and of the probable guilt of the accused; and it shall be the duty of the clerk of said circuit court to place such copies so transmitted to him in the hands of the district attorney for the district wherein the offense was committed, who is required diligently to prosecute all the offenses therein set forth, and to see to it that the party or parties and the witnesses perform the obligations of their several recognizances, and in case of default by the witnesses, or either of them, to have them arrested by the proper process and brought before the grand jury to testify, and their recognizances estreated; and if the accused, being on bail, shall have made default, to cause his or their recognizances estreated; and to cause judgment to be entered up thereon, and speedily to enforce the same, and to cause the accused to be arrested wherever he may be found and brought to trial; and said commissioners are also hereby empowered to do all and other such acts as are requisite and necessary for the full presentation of the offenders and the evidence before the grand jury of said circuit court. It shall also be the duty of each commissioner to transmit duplicate copies of all his proceedings, together with the evidence taken by him, affidavits, and depositions, and other documentary evidence, to the Department of Justice at Washington to be therein filed of record. And in case of the death, sickness, absence, refusal, or neglect to act, or other disability of the commissioner in any county, all his power and duties may be exercised by either commissioner of an adjacent county.

SEC. 3. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant, or other process, when tendered, or use all proper means diligently to execute the same, he shall, on conviction thereof, be find [sic] in the sum of one thousand dollars, to the use of the informant, on the motion of such informant, by the circuit court for the district of such marshal; and after arrest of any person by such marshal or his deputy, or while in his custody, under the provisions of this act, should such person escape, whether with

or without the assent of such marshal or his deputy, such marshal shall be liable on his official bond, to be prosecuted for the benefit of any person injured, for the full damages done to any injured person by the escaped person or his confederates, in the State or district where the offense was committed; and, the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States, and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties, with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders or posse comitatus of the proper county when necessary to ensure a faithful observance of the several clauses of the Constitution referred to, in conformity with the provisions of this act; and the marshal and his deputies, and the persons so appointed, shall be paid for their services the like fees as may be allowed to such officers for similar services; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required as aforesaid for that purpose, under the pains and penalties hereinafter provided; and said warrants shall run, and be executed by said officers, anywhere in the State within which they are issued; and said commissioners may call upon the President of the United States, or upon such person as may be in command of the nearest land or naval forces of the United States, or of the militia, or such part thereof as he may deem necessary, to enforce the complete execution of this act and the lawful orders and process of said commissioners, and with such forces may cause to be pursued, arrested, and held for examination and trial all persons charged with a violation of the same, and enforce the attendance of witnesses on such examination and trial, and with such forces may cause to be disbanded and dispersed all combinations of persons conspiring and banding together for the purpose of violating any provision of this act; and said call for aid upon the military or naval forces or militia shall be promptly answered by the commander thereof until he shall be otherwise ordered by

the President, under penalty of being punished for such neglect of duty and the requirements of this act as for a high misdemeanor, as hereinafter provided.

SEC. 4. *And be it further enacted*, That whoever shall be found on the public highway, or on the land or near the dwelling occupied by another, in any disguise, whether armed or unarmed, alone or in combination with others, with intent to do any injury to the person or property of another, or in numbers, either armed or unarmed, with intent to terrify, frighten, or overawe any person or persons, so as to hinder or prevent them from the peaceful enjoyment of their legal rights or privileges, shall be deemed guilty of a high misdemeanor if the offense is committed in the day-time, or of a felony if the same shall be committed in the night-time, and shall, upon conviction, be punished for such misdemeanor or felony as hereinafter provided.

SEC. 5. *And be it further enacted*, That whoever, being disguised with the intent set forth in the preceding section shall break or enter any building of another, or shall shoot at such building with any fire-arm, or shall set fire to, or threaten to set fire to, any building of another, or shall as[-]sault, or threaten to assault, or shall beat, wound, bruise, or ill-treat any person, shall, if done in the night-time, he or his associates, or either of them, being armed, be deemed guilty of a felony; and if such offense is committed by numbers combined together, each and every person so combining, whatever part may have been taken by each, shall be deemed and held to be principal therein; and if any homicide shall ensue, or arson of a dwelling-house shall by either of the persons so combining be done, each and every offender shall be deemed to be guilty of a capital felony at common law, and upon arrest and finding by the commissioners of probable cause, shall be committed to close custody of the marshal for trial, without bail or mainprise, and on conviction shall be punished as hereinafter provided.

SEC. 6. *And be it further enacted*, That whoever shall confederate, combine, or conspire together to coerce, hinder, or compel any person or persons, citizens of the United States, by any means whatsoever, to do any act, or to refrain from

doing any act, which such person has a lawful right to do or refrain from doing, or to injure any citizen of the United States in his person or property or rights of property because he has done or refrained from doing any act that he has a right to do, or refrain from doing, shall be deemed to be guilty of a high misdemeanor, and, on conviction, be punished therefor in the manner hereinafter provided. And whoever shall come from one State or district of the United States into another State or district of the United States for the purpose of doing any act or thing inhibited by the provisions of this act, may be arrested in any district of the United States where he may be found, and sent for trial to the district where he shall have committed said act; and upon the allegation in the indictment for such offense that the person so offending came from one State or district for the purpose of doing any of the acts herein inhibited being found by the jury on trial, he shall be deemed and held guilty of a felony, and, on conviction, be punished as hereinafter provided; but if such allegation shall not be found by the jury, then he shall be punished in the same manner as is provided herein in case of the State where the offense was committed.

SEC. 7. *And be it further enacted*, That whoever shall intimidate, treat with violence, refuse to employ, discharge from employment, threaten with personal harm or injury in property any citizen of the United States, with intent to hinder or restrain such citizen of the free exercise of any right as such citizen, or who shall do either of the acts last above mentioned to any citizen of the United States because of his having freely exercised any of his rights as such citizen, shall be deemed to have been guilty of a misdemeanor, and, in addition to the other punishment hereinafter provided, shall be liable, at the suit of the party injured, for all damages by him sustained in consequence thereof, to be recovered by suit in the circuit court of the United States for the district where such offense was committed.

SEC. 8. *And be it further enacted*, That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall

be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.

SEC. 9. *And be it further enacted*, That whoever shall join or become a member of any secret organization wherein an oath as hereinafter described is required to be taken, or shall, as a member thereof, administer or take any oath or affirmation or other obligation, or be present when such oath, affirmation, or other obligation shall be administered or taken, binding any person to commit or conceal, or aid in committing or concealing, any of the offenses described in this act, or restraining any person from disclosing any act or offense made penal by this act, or binding any person to shield or aid in any manner any offender against the provisions of this act, he shall be deemed guilty of a felony, and upon conviction punished as provided in this act for such offense.

SEC. 10. *And be it further enacted*, That whoever shall counsel, aid, or abet the commission of any offense set forth in this act, or who shall knowingly conceal, or aid in concealing the same, or aid in concealing the offender or offenders, or shall hinder or obstruct any officer in causing accused persons to be arrested, or being arrested shall rescue or aid in rescuing any accused party, or who shall instigate or counsel such rescue, shall, upon conviction thereof, be punished in the same manner and to the same extent as a principal in the offense so aided, abetted, counseled, concealed, or attempted to be concealed, or with which the party rescued or attempted to be rescued stood charged, and may be tried, convicted, and punished therefor, whether the principal offender has been arrested or tried and convicted or otherwise.

SEC. 11. *And be it further enacted*, That whenever, in either of said States, any citizen of the United States shall suffer loss, damage, or injury in his person or property because of any of the offenses declared in this act, when committed by any combination or number of men, whether disguised or otherwise, armed or unarmed, acting in concert, the person so suffering loss, damage, or injury may bring a suit in the circuit court of the United States against the inhabitants of the county, city, or parish, if in the State of Louisiana, in which the unlawful acts of which he complains may have

been done, as if the inhabitants were a corporation, and in case of the death of the party injured his wife or next of kin may bring such suit, to whom also the action shall survive if death happens after suit brought, and shall recover against said defendant in the suit the full amount of said loss, damage, or injury, to be assessed by a jury in said court, and judgment shall be entered upon the verdict, unless the same is set aside for good cause, with cost of suit, and execution issue thereupon, which shall run against and may be levied upon and satisfied out of the goods and estate of any individual inhabitant of the defendant county, city, or parish, at the election of the plaintiff; and the person whose property shall be so taken or levied upon shall have remedy for reimbursement over and above his just share, against one or more of his co-inhabitants, by bill in equity for contribution, to which, upon the motion of any person interested, the city, county, or parish may be made a party. If, upon the trial, it shall appear that the perpetrators of the offenses from which the injury, loss, or damage happened have not been brought before the State courts and tried and punished for such offense, it shall be the duty of the judge of said circuit court to enter judgment for double the amount of damages found by the jury, and issue execution therefor, with costs of suit.

SEC. 12. *And be it further enacted*, That whoever shall be convicted of any offense named and deemed in this act as a misdemeanor shall be punished by a fine not less than five hundred dollars nor more than one thousand dollars, and imprisonment not less than six months nor more than one year, at the discretion of the court. Whoever shall be convicted of any offense named and deemed a high misdemeanor in this act shall be punished by a fine not less than one thousand nor more than five thousand dollars, and by imprisonment not less than one year nor more than five years, at the discretion of the court. Whoever shall be convicted of any offense named or deemed a felony in this act shall be punished by a fine not less than five thousand dollars nor more than ten thousand dollars, and imprisonment at hard labor not less than five years nor more than twenty years, at the discretion of the court. Whoever shall be convicted of any offense named and deemed a capital felony in this act shall be punished by hanging by the neck until he be dead, at such time as the court

shall order. And the circuit court of the United States shall have exclusive jurisdiction of all the offenses, recognizances, suits, and proceedings named and described in this act, to be exercised when sitting in or for any district in which such offense may have been committed, or of any cause in which plaintiff or complainant in any suit or proceeding resides, or in case of recognizance in the district wherein the same was taken and returned, and all proceedings upon such recognizance and judgments thereon shall be according to the course of the common law. And the commissioners above named shall have concurrent jurisdiction with judges of the circuit and district courts of the United States within their respective circuits and districts, in term time as well as vacation, to cause to be arrested and stayed all violators of of [sic] any of the provisions of this act, and to receive petitions for claims as provided in this act. And before examination and trial of any of the offenses declared, or suits provided for in this act, each grand juror and each petit juror, as well in such civil suits, shall take in open court, as part of his oath of office, the oath set forth in the act entitled "An act to prescribe an oath of office, and for other purposes," passed July two, eighteen hundred and sixty-two. And all costs, fees, and expenses of commissioners, of officers, clerks, witnesses, and parties under this act, shall be certified by said circuit courts as in other civil and criminal cases in such courts.

SEC. 13. *And be it further enacted*, That every citizen of the United States resident in the before-mentioned States during the late rebellion, who was well-disposed and loyal to the Government of the United States, and so remained during said rebellion, who claims to have suffered loss in his property or person because of or growing out of the war of the rebellion other than for loss of slaves, may at any time before the first day of May, in the year of our Lord eighteen hundred and seventy-three, apply to a commissioner of the United States hereinbefore provided for the county where he resides, by petition setting forth the nature and extent of his claim in a summary manner, and that he has been and remained, and still remains, such well-disposed and loyal citizen. Whereupon said commissioner, upon the reception of such petition, shall administer an oath to the claimant, to be signed

by him, to the truth of all the facts set forth in such petition, and shall file the same as of record, and shall examine any persons well disposed and loyal to the Government of the United States, who shall be produced as witnesses in aid of such claim, reduce their testimony to writing, and cross-examine, so far as he may deem it necessary to elicit the truth in that behalf, and protect the United States against any fraudulent claim, which testimony shall be signed by the witnesses, and filed with the other papers in the case, together with any documentary evidence in support thereof, that may be presented, and transmitted to the Department of Justice, at Washington; and an official copy of said petition, and all the testimony in support thereof, shall be entered in a book kept for that purpose by the commissioner, and retained by him. It shall also be the duty of the commissioner to file a brief memorandum with the other papers in the case, giving his own opinion as to the loyalty and good character of the claimant, and of the witnesses in support of said claim, which shall be recorded and transmitted with the other papers in the case.

SEC. 14. *And be it further enacted*, That it shall be the duty of the Attorney General to cause the petition and all the other papers in each claim to be filed as of record in the Department of Justice, and to be carefully indexed for easy reference thereto, and to cause the same to be reported in print to Congress at the next session after their reception, which printed copies shall be used as evidence so far as they may avail before any committee of either House of Congress in the presentation and examination of such claim. And all claims not so presented before said first day of May, eighteen hundred and seventy-three, shall be forever barred.

APPENDIX C: THE MORTON-BUTLER COMMITTEE BILL

42D CONGRESS, 1ST SESSION

H.R. 189.

IN THE HOUSE OF REPRESENTATIVES.

MARCH 20, 1871.

Read twice and referred to the Committee on the Judiciary.

MARCH 21, 1871.

Ordered to be printed.

Mr. B. F. BUTLER, on leave, introduced the following bill:

A BILL

To protect loyal and peaceable citizens of the United States in the full enjoyment of their rights, persons, liberty, and property.

Whereas large numbers of lawless and evil-disposed persons, especially in the States lately in rebellion, having conspired together and bound themselves to each other by unlawful oaths, have formed secret organizations, some of which are commonly known as the Ku-Klux Klan, having for their main object to defeat certain classes of citizens of the United States in the liberty, rights, and equal protection of the laws guaranteed by the Constitution; and whereas, by the use of disguises worn upon their persons, by perjury, violence, threats, overawing the local authorities, and otherwise, such persons and organizations, their aiders and abettors, have evaded and set at defiance the power of the States wherein they exist, and thus with impunity have deprived, and still do deprive, peaceable citizens of the enjoyment of life, liberty, and property without due process of law, and have taken from them, and do still take from them, the equal protection of the laws, by which means such peaceable citizens have been made to do acts against their will, and forego their just rights and freedom of action, as their only means of escape from death or great bodily harm at the hands of such persons and

organizations; and whereas the States have failed and still fail to prevent or suppress such violations of law and denial of the liberty, rights, and protection guaranteed by the Constitution of the United States to persons within their respective jurisdictions; and whereas it has been thus rendered imperative on Congress to enforce all constitutional guarantees by appropriate legislation: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several circuit courts of the United States in the States of Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, and Kentucky, when the circuit judge is sitting therein, and for this purpose the circuit judge shall sit alone, are authorized, and it is made their duty, to appoint commissioners in their respective circuits to a number not exceeding one for each county therein, and one for each city exceeding the number of twenty thousand inhabitants, and in the State of Louisiana for each parish therein, and two for the city of New Orleans; which commissioners shall have all the rights, powers, and jurisdiction conferred by any act of Congress upon commissioners appointed by the circuit court of the United States, so far as they may be applicable, to perform, exercise, discharge, and carry out all the authorities, powers, and duties imposed upon them by this act. Said commissioners shall be learned and discreet persons, and have the same compensation for their services under this act as are now provided by law for duties and services of like character, when performed by such commissioners, to be audited and paid in like manner as other like accounts are paid, and said commissioners shall hold their offices upon the same tenure as other commissioners appointed by said circuit courts; and after their appointment each of them shall reside in the county for which he is appointed, so long as he shall hold his commission.

SEC. 2. That in addition to the duties which now are, or which have been, or may hereafter be, prescribed by law for said commissioners, it shall be the duty of each of said commissioners, upon information of any outrage committed or wrong done against the liberty, property, or person of a citizen of the United States within his precinct, with intent to hinder,

impair, or deprive such citizen of the full enjoyment of any right guaranteed to him under the Constitution of the United States, or of any violation of any of the provisions of this act, to issue a warrant, or other proper process, under his hand and seal, forthwith to bring the offender or offenders before said commissioner; and after due examination whether there is probable cause to believe such offense has been committed, if the commissioner shall be satisfied of such probable cause, and that the accused persons are probably guilty, the commissioner shall bind the offender or offenders by recognizances with good and sufficient sureties, each having sufficient estate within the judicial district, in a penal sum not less than one thousand nor more than ten thousand dollars, (if the offense is bailable under the laws of the United States,) with condition that the accused party shall appear and answer to the offenses charged at the term of the circuit court of the United States next to be held in or for the judicial district where the offense is committed, and so from time to time until the final order of the court thereon, or of any court to which appeals may be taken, and in the mean time to keep the peace and be of good behavior toward all citizens of the United States; and said commissioner shall have power to bind by recognizance any person in such sum, with or without surety or sureties, as he may deem best for the purposes of justice, as a witness to appear before such court to give testimony at said term in that behalf, and so from term to term until he be discharged thereof; but if the offense be not bailable by the laws of the United States, or if the accused shall not furnish such sufficient sureties, then the commissioner, by a mittimus or other proper process, shall commit the offender or offenders to the custody of the marshal, to be brought before the circuit court at its next term, there to abide the order of the court, and such mittimus or other process so issued shall be conclusive to prevent all molestation or hinderance of the marshal or his deputy having the accused in charge from holding him by any process issued by any court, judge, magistrate, or any person whatsoever, except the circuit judge for such circuit: *Provided, however*, That the commissioner may at any time before the session of such court admit to bail any person by him committed to the custody of the marshal for want of sufficient sureties; and each of said commissioners shall transmit to the clerk of

said circuit court, on or before the first day of said term of said court, attested copies of all the proceedings had by him in this behalf, and also attested copies of all depositions, affidavits, or testimony taken by him in the hearing as to probable cause to believe such offenses have been committed, and of the probable guilt of the accused; and it shall be the duty of the clerk of said circuit court to place such copies so transmitted to him in the hands of the district attorney for the district wherein the offense was committed, who is required diligently to prosecute all the offenses therein set forth, and to see to it that the party or parties and the witnesses perform the obligations of their several recognizances, and in case of default by the witnesses, or either of them, to have them arrested by proper process and brought before the grand jury to testify, and their recognizances estreated; and if the accused, being on bail, shall have made default, to cause his or their recognizances to be estreated, and to cause judgment to be entered up thereon, and speedily to enforce the same, and to cause the accused to be arrested wherever he may be found, and brought to trial; and said commissioners are also hereby empowered to do all and such other acts as are requisite and necessary for the full presentation of the offenders and the evidence before the grand jury of said circuit court. It shall also be the duty of each commissioner to transmit duplicate copies of all his proceedings, together with the evidence taken by him, affidavits, and depositions, and other documentary evidence, to the Department of Justice at Washington, to be therein filed of record. And in case of the death, sickness, absence, refusal, or neglect to act, or other disability of the commissioner in any county, all his power and duties may be exercised by either commissioner of an adjacent county.

SEC. 3. That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the informant, on the motion of such informant, by the circuit court for the district of such mar-

shal; and after arrest of any person by such marshal or his deputy, or while in his custody, under the provisions of this act, should such person escape, whether with or without the assent of such marshal or his deputy, such marshal shall be liable on his official bond, to be prosecuted for the benefit of any person injured, for the full damages done to any injured person by the escaped person or his confederates, in the State or district where the offense was committed; and, the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and of this act, they are hereby authorized and empowered, within their counties, respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties, with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders or posse comitatus of the proper county when necessary to ensure a faithful observance of the several clauses of the Constitution referred to, in conformity with the provisions of this act; and the marshal and his deputies, and the persons so appointed, shall be paid for their services the like fees as may be allowed to such officers for similar services; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required as aforesaid for that purpose, under the pains and penalties hereinafter provided; and said warrants shall run and be executed by said officers anywhere in the State within which they are issued; and said commissioners may call upon the President of the United States, or upon such person as may be in command of the nearest land or naval forces of the United States, or of the militia, or such part thereof as he may deem necessary, to enforce the complete execution of this act and the lawful orders and process of said commissioners, and with such forces may cause to be pursued, arrested, and held for examination and trial all persons charged with a violation of the same, and enforce the attendance of witnesses on such examination and trial, and with such forces may cause to be disbanded and dispersed all combinations of persons conspiring and banding together for the purpose of violating any

provision of this act; and said call for aid upon the military or naval forces or militia shall be promptly answered by the commander thereof until he shall be otherwise ordered by the President, under penalty of being punished for such neglect of duty and the requirements of this act as for a high misdemeanor, as hereinafter provided.

SEC. 4. That whoever shall be found on the public highway, or on the land, or near the dwelling occupied by another, in any disguise, whether armed or unarmed, alone or in combination with others, with intent to do any injury to the person or property of another, or in numbers, either armed or unarmed, with intent to terrify, frighten, or overawe any person or persons, so as to hinder or prevent them from the peaceful enjoyment of their legal rights, privileges, or immunities under the laws and Constitution of the United States, shall be deemed guilty of a high misdemeanor if the offense is committed in the day-time, or of a felony if the same shall be committed in the night-time, and shall, upon conviction, be punished for such misdemeanor or felony as hereinafter provided.

SEC. 5. That whoever, being disguised or armed, shall, with the intent set forth in the preceding section, break or enter any building of another, or shall shoot at such building with any fire-arm, or shall set fire to, or threaten to set fire to, any building of another, or shall assault, or threaten to assault, or shall beat, wound, bruise, or ill-treat any person, shall, if done in the night-time, he or his associates, or either of them, being armed, be deemed guilty of a felony; and if such offense is committed by numbers combined together, each and every person so combining, whatever part may have been taken by each, shall be deemed and held to be principal therein; and if any homicide shall ensue, or arson of a swelling-house shall be either of the persons so combining be done, each and every offender shall be deemed to be guilty of a capital felony at common law, and, upon arrest and finding by the commissioners of probable cause, shall be committed to close custody of the marshal for trial, without bail or mainprise, and on conviction shall be punished as hereinafter provided.

SEC. 6. That whoever shall confederate, combine, or conspire together to coerce, hinder, or compel any person or persons, citizens of the United States, by any means whatsoever, to do any act, or to refrain from doing any act, which such person has a lawful right to do or refrain from doing, or to injure any citizen of the United States in his person or property or rights of property under the laws and Constitution of the United States, because he has done or refrained from doing any act that he has a right to do, or refrain from doing, shall be deemed to be guilty of a high misdemeanor, and, on conviction, be punished therefor in the manner hereinafter provided. And whoever shall come from one State or judicial district of the United States into another State or judicial district of the United States for the purpose of doing any act or thing inhibited by the provisions of this act, may be arrested in any district of the United States where he may be found, and sent for trial to the district where he shall have committed said act; and upon the allegation in the indictment for such offense that the person so offending came from any other State or judicial district for the purpose of doing any of the acts herein inhibited being found by the jury on trial, he shall be deemed and held guilty of a felony, and, on conviction, be punished as hereinafter provided; but if such allegation shall not be found by the jury, then he shall be punished in the same manner as is provided herein in case of a citizen of the State or judicial district where the offense was committed.

SEC. 7. That whoever shall intimidate, treat with violence, refuse to employ, discharge from employment, threaten with personal harm or injury in property any citizen of the United States with intent to hinder or restrain such citizen of the free exercise of any right as such citizen under the laws and Constitution of the United States, or who shall do either of the acts last above mentioned to any citizen of the United States because of his having freely exercised any of his said rights as such citizen, shall be deemed to have been guilty of a misdemeanor, and, in addition to the other punisment hereinafter provided, shall b liable, at the suit of the party injured, for all damages by him sustained in consequence thereof, to be recovered by suit in the circuit court

of the United States for the district where such offense was committed.

SEC. 8. That whoever shall without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.

SEC. 9. That whoever shall join or become a member of any secret organization wherein an oath as hereinafter described is required to be taken, or shall, as a member thereof, administer or take any oath or affirmation or other obligation, or as such member be present when such oath, affirmation, or other obligation shall be administered or taken binding or requiring any person to commit or conceal, or aid in committing or concealing, any of the offenses described in this act, or restraining any person from disclosing any act or offense made penal by this act, or binding or requiring any person to shield or aid in any manner any offender against the provisions of this act, he shall be deemed guilty of a felony, and upon conviction punished as provided in this act for such offense.

SEC. 10. That whoever shall counsel, aid, or abet the commission of any offense set forth in this act, or who shall knowingly conceal, or aid in concealing the same, or aid in concealing the offender or offenders, or shall hinder or obstruct any officer in causing accused persons to be arrested, or being arrested shall rescue or aid in rescuing any accused party, or who shall instigate or counsel such rescue, shall, upon conviction thereof, be punished in the same manner and to the same extent as a principal in the offense so aided, abetted, counseled, concealed, or attempted to be concealed, or with which the party rescued or attempted to be rescued stood charged, and may be tried, convicted, and punished therefor, whether the principal offender has been arrested or tried and convicted or otherwise.

SEC. 11. That whenever, in either of said States, any citizen of the United States shall suffer loss, damage, or in-

jury in his person or property because of any of the offenses declared in this act, when committed by any combination or number of men, whether disguised or otherwise, armed or unarmed, acting in concert, the person so suffering loss, damage, or injury may bring a suit in the circuit court of the United States against the inhabitants of the county, city, or parish if in the State of Louisiana, in which the unlawful acts of which he complains may have been done, as if the inhabitants were a corporation, and in case of the death of the party injured, his wife or next of kin may bring such suit, to whom also the action shall survive if death happens after suit brought, and shall recover against said defendant in the suit the full amount of said loss, damage, or injury, to be assessed by a jury in said court, and judgment shall be entered upon the verdict, unless the same is set aside for good cause, with cost of suit, and execution be issued thereupon, which shall run against and may be levied upon and satisfied out of the goods and estate of any individual inhabitant of the defendant county, city, or parish, at the election of the plaintiff; and the person whose property shall be so taken or levied upon shall have remedy for reimbursement over and above just his share, against one or more of his co-inhabitants, by bill in equity for contribution, to which, upon the motion of any person interested, the city, county, or parish may be made a party. If, upon the trial, it shall appear that the perpetrators of the offenses from which the injury, loss, or damage happened have not been brought before the State courts and tried and punished for such offense, it shall be the duty of the judge of said circuit court to enter judgment for double the amount of damages found by the jury, and issue execution therefor, with costs of suit.

SEC. 12. That whoever shall be convicted of any offense named and deemed in this act as a misdemeanor shall be punished by a fine not less than five hundred dollars nor more than one thousand dollars, and imprisonment not less than six months nor more than one year, at the discretion of the court. Whoever shall be convicted of any offense named and deemed a high misdemeanor in this act shall be punished by a fine not less than one thousand dollars nor more than five thousand dollars, and by imprisonment not less than one year nor more than five years, at the discretion of the court. Who-

ever shall be convicted of any offense named or deemed a felony in this act shall be punished by a fine not less than five thousand dollars nor more than ten thousand dollars, and imprisonment at hard labor not less than five years nor more than twenty years, at the discretion of the court. Whoever shall be convicted of any offense named and deemed a capital felony in this act shall be punished by hanging by the neck until he be dead, at such time as the court shall order. And the circuit court of the United States shall have exclusive jurisdiction of all the offenses, recognizances, suits, and proceedings named and described in this act, to be exercised when sitting in or for any district in which such offense may have been committed, or of any cause in which plaintiff or complainant in any suit or proceeding resides, or in case of recognizance in the district wherein the same was taken and returned, and all proceedings upon such recognizance and judgments thereon shall be according to the course of the common law. And the commissioners above named shall have concurrent jurisdiction with judges of the circuit and district courts of the United States within their respective circuits and districts, in term times as well as vacation, to cause to be arrested and stayed all violators of any of the provisions of this act. And all costs, fees, and expenses of commissioners, of officers, clerks, witnesses, and parties under this act, shall be certified by said circuit courts as in other civil and criminal cases in such courts.

SEC. 13. That if, upon any examination or trial of any person for either of the offenses set forth in the fourth, fifth, sixth, and seventh sections of this act, under any provision of the same, it shall appear in evidence that the accused was disguised or acting in concert with others, either armed or disguised, or that actual violence and injury was done to the person or property of a citizen of the United States without previous provocation thereto by any unlawful act by the party injured toward the accused, the fact of such acting in concert with others, being disguised or armed, or of such violence done, shall be deemed and taken to be prima facie evidence of the guilty intent set out in either of said sections, as charged in the complaint or indictment.

SEC. 14. That in all cases of insurrection or obstruction to the laws, either of the United States or of any individual State or Territory, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, and in all cases where the constituted authorities of any such State or Territory shall fail or refuse to so execute the laws thereof as to secure to all persons the equal protection of the laws, it shall be lawful for the President of the United States, in addition to the powers now vested in him by law, to employ such part of the land and naval forces of the United States as shall be judged necessary to suppress such combinations and to cause the laws to be duly executed; and this, although the legislature and executive of any such States may omit or refuse to call for such forces.

SEC. 15. That the clerks of the circuit and district courts, respectively, in each judicial district in the States named in the first section of this act, together with, the marshal of the proper district, shall constitute a jury-board, whose duty it shall be, in one of the autumn months of each year, to determine as nearly as may be the number of jurors who are likely to be required to serve as grand and petit jurors of each of said courts for said district, respectively, for the ensuing year; and thereupon they shall proceed to select from the citizens of the several counties in said district, who shall be sober and judicious men, not disqualified under existing laws, a number of names equal to five times the number of jurors agreed upon and fixed on for the year, and they shall cause said names to be plainly written, with the residence of each juror, upon separate slips of paper, and place the same in the box hereinafter described, as the body of citizens from whom all jurors for both circuit and district courts, respectively, sitting in that district for the ensuing year shall be drawn.

SEC. 16. That the marshal of each district, upon receiving from the circuit or district court a writ of venire facias or other legal authority to summon jurors for either of said courts, shall, in the presence of the clerk of the district and circuit courts respectively, after thoroughly mixing said slips, open said box and draw therefrom in succession, without seeing said slips, as many names as he shall be authorized to summon to serve for each court respectively, a list of which

names shall be taken by the clerk of the district and circuit courts respectively, and by him be posted in some conspicuous place in his office. When the marshal shall have completed the drawing of the requisite number of jurors he shall carefully lock the lid of said box, and, keeping the key in his own possession, shall leave the box in the possession of the clerk of the district court, and shall proceed to summon the jurors whose names have been drawn, by written notices served personally, or by a copy left at the residence of each juror, at least twenty days before the return-day of his writ, and any of said jurors who, having been duly served with said notice, shall neglect to appear, and unless excused by the court to serve as a juror, shall be liable to a fine as for contempt of court. In case the panel of jurors in attendance upon any of said courts shall be exhausted by reason of challenges or otherwise, so that the court is obliged to order talesmen to be summoned, the marshal, instead of summoning by-standers, shall cause said box to be brought into court, and in open court-shall draw therefrom not less than five names for each talesman that is wanted, of which names the clerk shall preserve a list, and the marshal may bring in any one of the men most convenient, so drawn to serve as the talesman. And the name of no juryman who has been summoned, and who has served at one term of court, shall be replaced in said box for a period of two years; and no juryman shall be summoned or permitted to serve in any of said courts whose name has not been duly drawn from said box; but the names of all jurors who have been drawn and served, but have not attended, may be replaced in said box.

SEC. 17. That said jury-box shall have an aperture large enough to admit a man's hand to draw out-slips, one at a time; and said aperture shall be covered by a closely-fitting lid, with hinges at one end thereof, and a lock at the other. And said boxes shall be kept at all times, except when produced in court or before the jury-board as aforesaid, in the custody of the clerks of the circuit courts, but the keys of the locks of said boxes shall at all times be in the exclusive custody of the marshals of the several districts.

SEC. 18. That any person who shall insert names into any such box, or abstract them therefrom, except as herein-

before provided, or who shall break or injure any such box, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before either the circuit or district court in the district in which such offense shall be committed, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years, either or both, at the discretion of the court in which the conviction shall take place.

APPENDIX D: SHELLABARGER'S BILL (FIRST VERSION)

42D CONGRESS, 1ST SESSION

H.R. 7.

IN THE HOUSE OF REPRESENTATIVES.

MARCH 7, 1871.

Read twice, referred to the Committee on the Judiciary, and ordered to be printed.

MR. SHELLABARGER, on leave, introduced the following bill:

A BILL

Authorizing the employment of the land and naval forces of the United States in the enforcement of the laws, and to secure the protection thereof to all persons within the jurisdiction of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases of insurrection or obstruction to the laws, either of the United States or of any individual State or Territory, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, and in all cases where the constituted authorities of any such State or Territory shall fail or refuse to so execute the laws thereof as to secure to all persons the equal protection of the laws, it shall be lawful for the President of the United States to employ such part of the land and naval forces of the United States as shall be judged necessary to suppress such combinations and to cause the laws to be duly executed; and this, although the legislature and executive of any such States may omit or refuse to call for such forces.

APPENDIX E: MERCUR'S BILL

42D CONGRESS, 1ST SESSION

H.R. 194.

IN THE HOUSE OF REPRESENTATIVES.

MARCH 20, 1871.

Read twice, referred to the Committee on the Judiciary, and ordered to be printed

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MR. MERCUR, on leave, introduced the following bill:

A BILL

To regulate the drawing and summoning of jurors in the district and circuit courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the judges of the circuit and district courts in each judicial district in the United States, together with the marshal of the proper district, shall constitute a jury board, a majority of whom shall form a quorum, and whose duty it shall be to convene in one of the autumn months in each year, to determine, as nearly as may be, the number of jurors who are likely to be required to serve as grand and petit jurors or [sic] each court of said district for the ensuing year; and thereupon they shall proceed to select from the taxable citizens of the several counties in said district, who shall be sober, judicious, and intelligent men, not disqualified by existing laws, a number of names equal to five times the number of jurors agreed upon and fixed for the year, and they shall cause said names to be plainly written, with the residence of each juror, upon separate slips of paper, and place the same in the wheel hereinafter described, as the body of citizens from whom all jurors for both circuit and district courts sitting in that district for the ensuing year shall be drawn.

SEC. 2. That the marshal of each district, upon receiving from the circuit or district court a writ of venire facias or other legal authority to summon jurors, shall, in the presence of one of the judges of said courts and of the clerk of the district court, open said wheel, after at least two revolutions of the wheel upon its axis, and draw therefrom in succession as many names he shall be authorized to summon, a list of which names shall be taken by the clerk of the district court, and by him be posted in some conspicuous place of his office, and he shall furnish a copy of said list to the clerk of the circuit court, to be in like manner posted in his office. When the marshal shall have completed the drawing of the requisite number of jurors, he shall carefully lock the lid of said wheel, and, keeping the key in his own possession, shall leave the wheel in the possession of the clerk of the district court, and shall proceed to summon the jurors whose names have been drawn, by written notices, served personally, or by a copy left at the residence of each juror, at least twenty days before the return-day of his writ, and any of said jurors who, having been duly served with said notice, shall neglect to appear, and unless excused by the court to serve as a juror, shall be liable to a fine as for contempt of court. In case the panel of jurors in attendance upon any of said courts shall be exhausted by reason of challenges, so that the court is obliged to order talesmen to be summoned, the marshal, instead of summoning bystanders, shall cause said wheel to be brought into court, and in open court shall draw therefrom not less than five names for each talesman that is wanted, of which names the clerk shall preserve a list, and the marshal may bring in any one most convenient of the men so drawn to serve as the talesman. And the name of no juryman who has been summoned, and who has served at one term of court, shall be replaced in said wheel for a period of two years; and no juryman shall be summoned or permitted to serve in any of said courts whose name has not been duly drawn from said wheel, but the names of all jurors who have been drawn and have not attended may be replaced in said wheel.

SEC. 3. That the jury-wheel shall be a hollow wheel, made of tin or copper, with an aperture in the periphery large enough to admit a man's hand to draw out slips, one at

a time; and said aperture shall be covered by a closely fitting lid, with hinges at one end thereof, and a lock at the other. The wheel shall be supported by axis pins resting on two upright posts, in such manner as to admit of easy revolution of the wheel, in order that the slips of paper containing the names of jurors may be the more effectually mixed. Said wheels shall be furnished by the Department of Justice, at the expense of the United States, and shall be kept at all times, except when produced in court, or before the jury board, as aforesaid, in the custody of the clerks of the district courts, but the keys of the locks of said wheels shall at all times be in the exclusive custody of the marshals of the several districts.

SEC. 4. That any person who shall insert names into any such wheel, or abstract them therefrom, except as hereinbefore provided, or who shall break or injure any such wheel, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before either the circuit or district court in the district in which such offense shall be committed, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years, either or both, at the discretion of the court in which the conviction shall take place.

APPENDIX F: THE SELECT COMMITTEE BILL

42D CONGRESS, 1ST SESSION

H.R. 320.

IN THE HOUSE OF REPRESENTATIVES.

MARCH 28, 1871.

Read twice, motion to recommit pending, and ordered to be printed.

MR. SHELLABARGER, from the Select Committee on the President's Message, reported the following bill:

A BILL

To enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication," and the other remedial laws of the United States which are in their nature applicable in such cases.

SEC. 2. That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and, upon conviction thereof, shall be liable to a penalty of not exceeding ten thousand dollars, or to imprisonment not exceeding ten years, or both, at the discretion of the court: *Provided*, That if any party or parties to such conspiracy or combination shall, in furtherance of such common design, commit the crime of murder, such party or parties so guilty shall, upon conviction thereof; suffer death. *And provided also*, That any offense punishable under this act, begun in one judicial district of the United States and completed in another, may be dealt with, inquired of, tried, determined, and punished in either district.

SEC. 3. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so far obstruct or hinder the execution of the laws thereof as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities named in and secured by this act, and the constituted authorities of such State shall either be unable to, or shall, from any cause, fail in or refuse protection of the people in such rights, and shall fail or neglect, through the proper authorities, to apply to the President of the United States for aid in that behalf, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the fourteenth article of amendments to the Constitution of the United States; and in all such cases it shall be lawful for the President, and it shall be his duty, to

take such measures, by the employment of the militia or the land, and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district to be dealt with according to law.

SEC. 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the Government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, and to declare and enforce, subject to the rules and articles of war and other laws of the United States now in force applicable in case of rebellion, martial law, to the end that such rebellion may be overthrown: *Provided*, That the President shall first have made proclamation, as now provided by law, commanding such insurgents to disperse: *And provided also*, That the provisions of this section shall not be in force after the first day of June, anno Domini eighteen hundred and seventy-two.

SEC. 5. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offenses heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as

the provisions of this act may go to sustain and validate such proceedings.

APPENDIX G: SHELLABARGER'S BILL (SECOND VERSION)

42D CONGRESS, 1ST SESSION

H.R. 224.

IN THE HOUSE OF REPRESENTATIVES.

MARCH 20, 1871.

Read twice, referred to the Committee on the Judiciary, and ordered to be printed.

MR. SHELLABARGER, on leave, introduced the following bill:

A BILL

To secure to all persons within the jurisdiction of the United States the equal protection of the laws within the several States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if two or more persons shall, within the limits of any State of the Union, conspire together to do any act against the person, property, or rights of another, which act, being committed within the limits of a State, would not be punishable as a crime against any law of the United States, but which, if committed in any place or district under the sole and exclusive jurisdiction of the United States, would be punishable as a crime under the laws thereof in force at the time of such conspiracy, and if one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a felony, and, on conviction, shall be liable to a penalty of not less than five hundred dollars and to imprisonment not exceeding ten years: *Provided,* That if any party or parties to such conspiracy shall, in furtherance of such common design, commit murder, such party or parties so guilty shall, upon conviction thereof, suffer death.

SEC. 2 That when any offense punishable under this act shall be begun in one judicial district of the United States and completed in another, every such offense shall be deemed to have been committed in either of said districts, and may be dealt with, inquired of, tried, determined, and punished in either of said districts in the same manner as if it had been wholly committed therein.

SEC. 3. That in all cases of insurrection or obstruction to the laws, either of the United States or of any individual State or Territory, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, and in all cases where the constituted authorities of any such State or Territory shall so fail or refuse to execute the laws thereof as to secure to all persons the equal protection of the laws, it shall be lawful for the President of the United States to employ such part of the land and naval forces of the United States as shall be judged necessary to suppress such combinations, and to cause the laws to be duly executed, and this although the legislature and executive of any such State may omit or refuse to call for such forces.