



THE DEPARTMENT OF JUSTICE IS BORN – A REPLY

Stephen R. McAllister

I HUMBLY TAKE A *MEA CULPA* on points Chuck Lane makes,¹ and I hope my current employer will update and correct its website.² I also take to heart Chuck’s implicit reminder that historical research should not overlook 19th-century newspapers, which I did in some respects here, relying instead on biographers and historians who were less precise than the contemporary news sources Chuck found (and others I subsequently have uncovered).

Judge Hoar was the first Attorney General of the Department; he appears to have held that position for a grand total of seven days, although it seems he was absent from Washington almost all of those days. It was reported Hoar missed the Cabinet meeting on June 24, because he was “now in Massachusetts.”³ Thus, on July 1, “Assistant Attorney General Field [was] busy systematizing the new Department of Justice,”⁴ not AG Hoar. We

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¹ Charles Lane, *The Department of Justice Is Born – A Response*, 23 *Green Bag* 2d 277 (2020).

² The Department’s website erroneously states: “President Grant appointed him [Amos Akerman] Attorney General on June 23, 1870” See www.justice.gov/ag/bio/akerman-amos-tappan.

³ *Daily National Republican* (Washington, DC), p. 1, June 25, 1870.

⁴ *The Evening Star* (Washington, DC), p. 1, July 1, 1870.

next know Hoar was in Washington on July 7 when, “in company with his successor, Mr. A[k]erman, [they] had a long interview with the President.”⁵

Akerman, in contrast, arrived in DC the day of his confirmation, June 23, and remained, but he did not take his oath until July 8. More than one paper reports that, even though confirmed, Akerman “will not *qualify* as Attorney General until the return of Judge Hoar,” and “it is not probable that Mr. Akerman will qualify inside of two weeks or a month.”⁶ This raises the curious question of what was required to “qualify” for the office, and why it depended on the return of AG Hoar.⁷

An aspect of Chuck’s response I find particularly interesting is Akerman’s directive to the U.S. Attorneys to prioritize prosecuting cases under the new Enforcement Act. That law – which like DOJ celebrates its 150th anniversary this year – included what is now 18 U.S.C. § 241,⁸ which prohibits any conspiracy to violate federal rights. Section 241 is a powerful tool for the DOJ and the U.S. Attorneys, and we continue use it to prosecute a wide range of conspiracies to violate civil rights.⁹ Akerman’s first directive lives on.



⁵ The Evening Star, p. 1, July 7, 1870.

⁶ Daily National Republican, p. 1, June 25, 1870 (emphasis added); see also The Evening Star, p. 1, June 24, 1870.

⁷ *United States v. Le Baron*, 60 U.S. 73, 78 (1856), identifies four steps to make an appointment complete: “When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete.” Perhaps President Grant had a reason he wanted Hoar to return to Washington, and he would not sign the Commission nor see that Secretary of State Hamilton Fish affixed the seal until Hoar returned? In any event, Judge Hoar seems to have wanted out of Washington. Akerman took his oath the morning of July 8, received well-wishers and visitors until around noon, and “Judge Hoar, ex-Attorney General, left here for Boston in the 2:45 p.m. train today.” The Evening Star, p. 1, July 8, 1870.

⁸ See Vol. 16, Statutes at Large, Sess. II, Ch. 114, p. 141, Section 6 (May 31, 1870).

⁹ See, e.g., www.justice.gov/opa/pr/three-southwest-kansas-men-sentenced-prison-plotting-bomb-somali-immigrants-garden-city; www.kcur.org/2019-01-25/kansas-men-sentenced-to-prison-in-garden-city-bomb-plot (convictions for 241 conspiracy to deprive Somali immigrants of civil rights by planning to bomb apartment complex that included a mosque).